SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 2, 2018

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

1058

KA 15-00214

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANTE TAYLOR, DEFENDANT-APPELLANT.

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

DANTE TAYLOR, DEFENDANT-APPELLANT PRO SE.

CHRISTOPHER BOKELMAN, ACTING DISTRICT ATTORNEY, LYONS (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered November 20, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the first degree (four counts), burglary in the first degree (two counts) and arson in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of arson in the second degree (Penal Law § 150.15) to arson in the third degree (§ 150.10 [1]) and vacating the sentence imposed on that count and as modified the judgment is affirmed, and the matter is remitted to Wayne County Court for sentencing on the conviction of arson in the third degree.

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of four counts of murder in the first degree (Penal Law § 125.27 [1] [a] [vii], [viii]; [b]), two counts of burglary in the first degree (§ 140.30 [2], [3]) and one count of arson in the second degree (§ 150.15). On July 14, 2013, the bodies of a mother and daughter were found in a residence in Sodus, New York. They had gone to the residence to take care of an animal while the owner was away. Items from the residence as well as items belonging to the victims were missing, and several small fires had been set inside the residence. Using cell site location information (CSLI), police officers were able to locate the victims' cell phones in a bag in Rochester, New York. In the same bag was a receipt for a purchase made with an electronic benefits card belonging to defendant's girlfriend, with whom defendant resided. Eyewitnesses recalled seeing a "dark-colored Mercury Mountaineer" in the driveway of the Sodus residence shortly before the victims had gone to the residence, and a

dark-colored Mercury Mountaineer was registered to defendant. Police officers thereafter filed an "Exigent Circumstances Form" with defendant's cell phone company, seeking historical CSLI for a four-day period encompassing the date of the crime. Upon learning that defendant's cell phone had been located in Sodus at the time of the crime, police officers were able to obtain search warrants for defendant's vehicle and residence. Inside defendant's residence were items taken from the Sodus residence, and blood found on those objects matched the DNA profile of one of the two victims. Additionally, blood found on a laundry basket inside defendant's residence as well as blood found inside defendant's vehicle matched the DNA profiles of the victims.

Initially, defendant contends that the indictment was jurisdictionally defective because the four counts charging him with murder in the first degree failed to allege that he "was more than eighteen years old at the time of the commission of the crime," as required by Penal Law § 125.27 (b). That contention lacks merit. "By alleging that defendant committed ['Murder in the First Degree,'] those counts 'adopted the title of' the first-degree murder statute and incorporated all of the elements of that crime, including the age element, thereby affording defendant fair notice of the charges against him' " (*People v VanGorden*, 147 AD3d 1436, 1437 [4th Dept 2017], *lv denied* 29 NY3d 1037 [2017], quoting *People v Ray*, 71 NY2d 849, 850 [1988]).

Defendant further contends, in his pro se supplemental brief, that his responses to pedigree questions from police officers, wherein he admitted his age, should have been precluded at trial because the People failed to provide him with a CPL 710.30 notice of those statements. We reject that contention. "Because routine administrative questioning by the police presumptively avoids any grounds for challenging the voluntariness of statements given in response to those questions, notice of such statements is not required" (*People v Rodney*, 85 NY2d 289, 293 [1995]).

Relying on *Riley v California* (— US —, —, 134 S Ct 2473, 2493-2494 [2014]), *United States v Jones* (565 US 400, 404-405 [2012]), and *People v Weaver* (12 NY3d 433, 445 [2009]), defendant contends that County Court erred in refusing to suppress the historical CSLI related to his cell phone because that information was obtained in violation of the Federal and New York State Constitutions as well as the Stored Communications Act ([SCA] 18 USC § 2701 *et seq.*). We reject that contention and conclude that the court properly refused to suppress such evidence. As we noted in *People v Jiles*, historical CSLI is information "contained in the business records of defendant's service provider" (— AD3d —, —, 2017 Slip Op 08944, *3 [4th Dept 2017]). We thus conclude that defendant's reliance on *Riley*, which concerned a warrantless search of "digital information on a cell phone seized from an individual who ha[d] been arrested," is misplaced (— US at —, 134 S Ct at 2480), and that his reliance on *Jones* and *Weaver*, which involved the physical installation of a device to track the defendant's movements (*see Jones*, 565 US at 404-405; *Weaver*, 12 NY3d at 445), is

likewise misplaced. The United States Supreme Court has held that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by [that party] to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed" (*United States v Miller*, 425 US 435, 443 [1976]). Moreover, that analysis "is not changed" by the mandatory nature of such record keeping (*id.*).

We thus conclude that defendant did not have a reasonable expectation of privacy in information that he revealed to his service provider (*see Jiles*, — AD3d at —, 2017 Slip Op 08944 at *3; *People v Sorrentino*, 93 AD3d 450, 451 [1st Dept 2012], *lv denied* 19 NY3d 977 [2012]; *People v Hall*, 86 AD3d 450, 451-452 [1st Dept 2011], *lv denied* 19 NY3d 961 [2012], *cert denied* 568 US 1163 [2013]; *see also United States v Davis*, 785 F3d 498, 513 [11th Cir 2015], *cert denied* — US —, 136 S Ct 479 [2015]; *In re Application of U.S. for Historical Cell Site Data*, 724 F3d 600, 615 [5th Cir 2013]; *In re Application of U.S. for an Order Directing a Provider of Elec. Communication Serv. to Disclose Records to Govt.*, 620 F3d 304, 313-317 [3d Cir 2010]; *cf. United States v Skinner*, 690 F3d 772, 777 [6th Cir 2012], *cert denied* — US —, 133 S Ct 2851 [2013]). We note that defendant does not contend that the relevant CSLI data included passively-generated data, i.e, data that was not generated by the subscriber's proactive use of his or her cell phone.

As the Fifth Circuit Court of Appeals has written, "[w]e understand that cell phone users may reasonably want their location information to remain private, just as they may want their trash, placed curbside in opaque bags . . . or the view of their property from 400 feet above the ground . . . to remain so. But the recourse for these desires is in the market or the political process: in demanding that service providers do away with such records (or anonymize them) or in lobbying elected representatives to enact statutory protections. The Fourth Amendment, safeguarded by the courts, protects only reasonable *expectations* of privacy" (*Application of U.S. for Historical Cell Site Data*, 724 F3d at 615).

With respect to defendant's state constitutional challenge, we conclude that "there is 'no sufficient reason' to afford cell site location information at issue here greater protection under the state constitution than it is afforded under the federal constitution" (*Jiles*, — AD3d at —, 2017 Slip Op 08944 at *3; *see People v Guerra*, 65 NY2d 60, 63-64 [1985]; *People v Di Raffaele*, 55 NY2d 234, 241-242 [1982]; *see also Sorrentino*, 93 AD3d at 451; *Hall*, 86 AD3d at 451-452; *cf. New Jersey v Earls*, 214 NJ 564, 588-589, 70 A3d 630, 644 [2013]).

Defendant further contends that there was a violation of the SCA and, as a result, suppression was warranted. We need not address the merits of the alleged violation because, even if there had been such a violation, defendant would not be entitled to suppression of the evidence (*see United States v Stegemann*, 40 F Supp 3d 249, 270 [ND NY 2014], *affd in part* — Fed Appx — [2d Cir 2017]; *United States v*

Guerrero, 768 F3d 351, 358 [5th Cir 2014], *cert denied* — US —, 135 S Ct 1548 [2015]; *United States v Corbitt*, 588 Fed Appx 594, 595 [9th Cir 2014]; *United States v Zodhiates*, 166 F Supp 3d 328, 335 [WD NY 2016]; *United States v Scully*, 108 F Supp 3d 59, 87 [ED NY 2015]; *see also People v Thompson*, 51 Misc 3d 693, 714 [Sup Ct, NY County 2016]). "The availability of the suppression remedy for . . . statutory, as opposed to constitutional, violations . . . turns on the provisions of [the statute] rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights" (*United States v Donovan*, 429 US 413, 432 n 22 [1977]). Here, the statute provides that a violation of the SCA may be punishable by criminal or civil penalties or administrative discipline (18 USC §§ 2701 [b]; 2707; *see Zodhiates*, 166 F Supp 3d at 335; *Scully*, 108 F Supp 3d at 88).

Before trial, the court conducted a *Sandoval* hearing, after which the court determined that the People would be permitted to question defendant, should he testify, concerning certain prior convictions, but would be precluded from questioning him on other convictions or adjudications. Defendant now contends that the court abused its discretion in permitting the People to question him concerning 1998 and 2004 convictions of attempted robbery in the second degree. He contends that both convictions are too similar to the charged crimes and are too remote in time to be probative. Inasmuch as defendant failed to challenge the 2004 conviction as being too remote, he failed to preserve that contention for our review (*see People v Major*, 61 AD3d 1417, 1417 [4th Dept 2009], *lv denied* 12 NY3d 927 [2009]). Moreover, defendant failed to object to the court's ultimate *Sandoval* ruling and thus failed to preserve for our review his challenge to the ultimate ruling (*see People v Huitt*, 149 AD3d 1481, 1482 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]; *People v Taylor*, 148 AD3d 1607, 1608 [4th Dept 2017]). We nevertheless exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We conclude that the court did not abuse its discretion in permitting the prosecutor to question defendant about the two prior convictions. " 'Convictions involving theft, such as robbery, are highly relevant to the issue of credibility because they demonstrate the defendant's willingness to deliberately further his [or her] self-interest at the expense of society' . . . Moreover, the mere fact that the prior crimes were similar . . . in nature to the instant offenses [does] not warrant their preclusion" (*People v Harris*, 74 AD3d 984, 984-985 [2d Dept 2010], *lv denied* 15 NY3d 920 [2010]; *see People v Davey*, 134 AD3d 1448, 1450-1451 [4th Dept 2015]; *People v Arguinzoni*, 48 AD3d 1239, 1240-1241 [4th Dept 2008], *lv denied* 10 NY3d 859 [2008]).

Defendant raises numerous challenges to the sufficiency of the evidence supporting the conviction of various counts. First, he contends that the evidence is legally insufficient to establish his identity as the perpetrator because the People proved the element of identity through the impermissible stacking of inferences. Even assuming, arguendo, that defendant's contention is preserved for our review based on his general challenge to the proof of identity in his

motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19 [1995]), we conclude that it lacks merit. Although the Court of Appeals has stated that "[a]n inference may not be based on another inference" (*People v Volpe*, 20 NY2d 9, 13 [1967]), and that " 'the facts from which the inferences are to be drawn must be established by direct proof [instead of] conjecture, supposition, suggestion, speculation or upon other inferences' " (*People v Leyra*, 1 NY2d 199, 206 [1956]), "commentators have noted that the prohibition against basing an inference upon an inference, found in the case law, is merely a restatement in different terms of the principle that a jury cannot be allowed to 'make inferences which are based not on the evidence presented, but rather on unsupported assumptions drawn from evidence equivocal at best' " (*People v Seifert*, 152 AD2d 433, 441 [4th Dept 1989], *lv denied* 75 NY2d 924 [1990], quoting *People v Kennedy*, 47 NY2d 196, 202 [1979], *rearg dismissed* 48 NY2d 635, 656 [1979]). Here, the jury did not make any inferences based on unsupported assumptions drawn from equivocal evidence. Defendant's vehicle or one strikingly similar was seen in the driveway of the Sodus residence shortly before the women went to that residence. The victims' blood was found in defendant's car and on items found inside defendant's residence. The victims' cell phones were located in a bag with a receipt linked to defendant's girlfriend. We thus conclude, after viewing the facts in the light most favorable to the People, that " 'there is a valid line of reasoning and *permissible inferences* from which a rational jury could have found [defendant's identity] proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349 [2007] [emphasis added]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that the evidence is not legally sufficient to support the conviction of two counts of murder in the first degree under Penal Law § 125.27 (1) (a) (vii) because there is insufficient evidence that the homicides were committed in the course of committing or in furtherance of the burglary. As defendant correctly concedes, his contention is not preserved for our review (*see Gray*, 86 NY2d at 19), and we reject his related contention that preservation is not required here because the proof at trial is legally sufficient to support a conviction of a lesser included offense (*see People v Whited*, 78 AD3d 1628, 1629 [4th Dept 2010], *lv denied* 17 NY3d 810 [2011]). Nevertheless, we exercise our power to reach the merits of defendant's challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we conclude that it lacks merit. Defendant specifically contends that, inasmuch as the crime of burglary is complete once a defendant enters the building with the requisite criminal intent (*see People v Frazier*, 16 NY3d 36, 41 [2010]), the murders of the women, who arrived at the residence after the burglary was complete, could not have been in the course of or in furtherance of the completed burglary.

Contrary to defendant's contention, the burglary in this case was not complete at the time he entered the property. Defendant was convicted of burglary in the first degree under Penal Law § 140.30 (2) and (3), which required the People to establish the additional

elements of either physical injury to the victims or the use or threatened use of a dangerous instrument. Thus, the crimes of burglary were not complete until the additional elements were established. Moreover, the Court of Appeals has made it clear that a burglar "may be said to be engaged in the commission of the crime until he [or she] leaves the building with his [or her] plunder" (*Dolan v People*, 64 NY 485, 497 [1876]; *cf. People v Cavagnaro*, 99 AD2d 534, 534 [2d Dept 1984]).

Contrary to defendant's additional contention, the People were not required to establish that the murders were necessary to advance the purpose of the burglary (*see People v Henderson*, 25 NY3d 534, 541 [2015]). Rather, "[t]he 'in furtherance of' element requires 'a logical nexus between a murder and a felony' " (*id.*). Here, the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to establish such a nexus and support the conviction of two counts of murder in the first degree under Penal Law § 125.27 (1) (a) (vii) (*see Bleakley*, 69 NY2d at 495) and, upon viewing the evidence in light of the elements of the crime of murder in the first degree as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict on those counts is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

Defendant further contends that the evidence is not legally sufficient to support the conviction of arson in the second degree because there is no evidence that the victims were still alive at the time the fires were set and, therefore, the fires were not set while "another person who [was] not a participant in the crime [was] present" (Penal Law § 150.15). We agree with defendant and reject the People's contention that section 150.15 does not require that the person be alive when the fire is started.

Although there are cases in which defendants have been convicted of arson in the second degree where the evidence established that the victim was already dead at the time the fire was started (*see People v Douglas*, 36 AD2d 994, 994-995 [3d Dept 1971], *affd* 30 NY2d 592 [1972]; *see also People v Pierre*, 37 AD3d 1172, 1173 [4th Dept 2007], *lv denied* 8 NY3d 989 [2007]), it appears that the defendants in those cases did not challenge the sufficiency of the evidence on the ground that the victims were no longer alive when the fires were started. We thus conclude that those cases lack any precedential value in determining the issue before this Court.

Penal Law article 150 does not contain any definition of "person." We thus rely on the definition of person found in section 10.00 (7), which provides that " '[p]erson' means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality." Although article 125 defines a person as "a human being who has been born and is alive" (§ 125.05 [1]), that definition is applicable only to article 125 and "was inserted merely to insure that the death of a 'person' would not include the abortional killing of an unborn child" (*People v Ebasco Servs. Inc.*, 77 Misc 2d 784, 787

[Sup Ct, Queens County 1974]).

Where, as here, the Penal Law article does not contain a different definition of person, we rely on cases interpreting the Penal Law § 10.00 (7) definition of person as applied to other crimes. Those cases establish that the definition of person contemplates a living human being. For example, under article 130, which deals with sex offenses, the crime of "rape" cannot be committed where the "person" is dead at the time of the offense. In such a situation, the defendant could be charged with attempted rape if the defendant believed that the "person" was alive at the time of the crime (*see People v Gorman*, 150 AD2d 797, 797 [2d Dept 1989], *lv denied* 74 NY2d 847 [1989], *reconsideration denied* 75 NY2d 770 [1989]), or sexual misconduct under section 130.20 (3), which prohibits "sexual conduct with . . . a dead human body." If article 130, relying on the definition of person in section 10.00 (7), draws a distinction between a living human being and a "dead human body," then we see no reason that article 150 should not do so as well. Indeed, the distinguishing factor that elevates arson in the third degree to arson in the second degree is the danger to human life; if there is no living person in the building, then there is no danger to human life.

According to the testimony of the Deputy Medical Examiner, the evidence "all indicate[d] that [the mother] was already dead at the time the fire was started." The evidence also established that the daughter would have died within a minute of suffering one particular stab wound to her chest. Viewing the evidence in the light most favorable to the People (*see Contes*, 60 NY2d at 621), we thus conclude that the evidence is legally insufficient to establish that either of the victims was still alive at the time the fires were started (*see generally Bleakley*, 69 NY2d at 495). Inasmuch as the evidence is legally sufficient to establish the lesser included offense of arson in the third degree (Penal Law § 150.10 [1]), which requires only that a person "intentionally damages a building or motor vehicle by starting a fire or causing an explosion," we modify the judgment by reducing the conviction of arson in the second degree to arson in the third degree (*see* CPL 470.15 [2] [a]) and vacating the sentence imposed on that count, and we remit the matter to County Court for sentencing thereon.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1059

KA 14-01861

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHARIFF JONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 10, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the second degree and attempted petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a forged instrument in the second degree (Penal Law § 170.25) arising from his attempt to cash a counterfeit travelers check at a bank. Preliminarily, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the jury's verdict with respect to the crime of criminal possession of a forged instrument is against the weight of the evidence (*see People v Rice*, 105 AD3d 1443, 1444 [4th Dept 2013], *lv denied* 21 NY3d 1076 [2013]; *see generally People v Dean*, 177 AD2d 792, 794 [3d Dept 1991], *lv denied* 79 NY2d 855 [1992]). We nevertheless reverse the judgment and grant a new trial on counts one and three of the indictment because Supreme Court improperly admitted two categories of hearsay evidence.

First, the court "erred in admitting in evidence a printout of electronic data that was displayed on a computer screen [after] defendant presented a check, the allegedly forged instrument, to a bank teller. The People failed to establish that the printout falls within the business records exception to the hearsay rule . . . [because they] presented no evidence that the data displayed on the computer screen, resulting in the printout, was entered in the regular course of business" (*People v Manges*, 67 AD3d 1328, 1329 [4th Dept

2009]; *see generally* CPLR 4518 [a]; CPL 60.10). Moreover, although the printout was initially admitted only for the limited purpose of establishing "that the statement [reflected therein] was made," the court thereafter instructed the jury that the printout was permitted to show that the person with the Social Security number tendered by defendant was already a customer at the bank, thereby allowing the jury to consider the printout for the truth of the matter asserted therein. As such, the People were still obligated to establish that the " 'entrant was under a business duty to obtain and record the statement [reflected in the printout]' " (*People v Patterson*, 28 NY3d 544, 550 [2016], quoting *Hayes v State of New York*, 50 AD2d 693, 693-694 [3d Dept 1975], *affd* 40 NY2d 1044 [1976]; *see Matter of Leon RR*, 48 NY2d 117, 122 [1979]; *People v McKinley*, 72 AD2d 470, 476-477 [4th Dept 1980]). The People failed to fulfill that foundational requirement here (*see Manges*, 67 AD3d at 1329; *compare Patterson*, 28 NY3d at 547-548; *People v Ferone*, 136 AD2d 282, 289-290 [2d Dept 1988], *lv denied* 72 NY2d 859 [1988]).

Second, the court improperly admitted an investigator's testimony about the results of a search he ran in a credit bureau's commercial database for email addresses and a telephone number contained in a cover letter that enclosed the counterfeit check defendant tried to cash. The People failed to establish the requisite foundation for this testimony inasmuch as the investigator did not testify that he "is familiar with the practices of [the] company that produced the records at issue" and that he "generally relies upon such records" (*People v Brown*, 13 NY3d 332, 341 [2009]; *see People v Cratsley*, 86 NY2d 81, 89 [1995]).

Contrary to the People's contention, defendant's challenges to the admissibility of the printout and database testimony were preserved for our review by his timely and specific objections at trial (*see* CPL 470.05 [2]; *People v Ayala*, 142 AD2d 147, 166 [2d Dept 1988], *affd* 75 NY2d 422 [1990], *rearg denied* 76 NY2d 773 [1990]). Contrary to the People's further contention, the court's errors in admitting the hearsay are not harmless inasmuch as the proof of defendant's guilt, "without reference to the error[s]," is not overwhelming (*People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant's challenge to the severity of his sentence is academic in light of our determination herein.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1063

KA 13-00303

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PRESTON CARTER, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 (Frank P. Geraci, Jr., J.), rendered November 28, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the facts, the indictment is dismissed, and the matter is remitted to Monroe County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him after a jury trial of murder in the second degree (Penal Law § 125.25 [1]), defendant contends, inter alia, that the verdict is against the weight of the evidence. We agree. Although the People may have proved that defendant is probably guilty, the burden of proof in a criminal action is, of course, much higher than probable cause; the prosecution is required to prove a defendant's guilt beyond a reasonable doubt, and the evidence in this case does not meet that high standard. For the reasons that follow, we have doubts whether defendant is the person who killed the victim and, in our view, those doubts are reasonable. We therefore reverse the judgment of conviction and dismiss the indictment.

The victim was a middle-aged Caucasian man who lived in the Town of Brighton and frequently engaged in what his friends described as "high-risk" behavior, i.e., "hooking up" with men he met online and engaging in consensual sexual acts with them. According to the victim's closest friend, a woman named Michele, the victim was "addicted" to sex, sometimes meeting up with more than one partner on the same day. Michele testified that the victim preferred his sexual partners to be "young black males who looked thuggy or street-like, kind of a danger and edge to them—that was his type." There was also testimony that the victim would "cruise" certain parts of the City of

Rochester looking for black men with whom to meet.

On November 16, 2008, the victim checked into a hotel in Henrietta at 6:59 p.m. According to Michele, the victim liked to use this hotel for sexual trysts because its security was "lax." An African-American man entered the hotel with the victim, but did not approach the front desk with him. Instead, the man walked toward the elevator. The hotel employee working at the front desk recognized the victim from prior visits and, during the check-in process, the victim said that there would be two guests in the room. The employee gave the victim two keys to Room 333, located on the third floor. The victim took the keys and walked to the elevator.

The employee who dealt with the victim left work at 11:00 p.m. and did not see him or the other man leave the hotel, and neither did the front desk employee who replaced her and worked the overnight shift. Aside from the front entrance, there were four other ways to enter and exit the hotel, and one could come and go through those doors without passing by the front desk. There was a surveillance camera that covered the registration desk, but there were no other cameras at the hotel or in the parking lot.

At 9:19 that night, the victim called his teenage son from his cell phone and said that he did not know where he was. According to the son, the victim sounded "very confused" and was "panicking" before hanging up abruptly. The son called the victim back several times, but the victim initially did not answer. At 9:21 the victim finally answered a call from his son and said that everything was fine and that he had just been joking. The victim hung up before the son could seek clarification.

At approximately 10:00 the following morning, a hotel employee entered the victim's room and observed blood on the walls and floor. The police were called to the scene, and the victim's dead body was found on the floor next to the bed under a blanket. His skull had been crushed in several places by what the Medical Examiner believed to have been a blunt instrument of some sort. The victim also had bruises all over his body and multiple cuts on his face. There was tape that had been wrapped around the victim's left hand, suggesting that someone had tried to restrain him, and ligature marks around his neck, as if he had been strangled. No murder weapon was recovered, although the police found the hand grip of a pellet gun on the floor in the hotel room. The grip had apparently broken off the handle of the gun.

A murder investigation commenced, resulting approximately three years later in defendant's arrest. At the time of his arrest, defendant was 28 years old and had no criminal record.

The evidence at trial established beyond a reasonable doubt that defendant was the person who entered the hotel with the victim at 6:59 p.m., and that defendant lied to the police by repeatedly denying that he knew the victim or had contact with him. The police found in the hotel room a receipt from a convenience store that was given to

someone who purchased an item with an Electronic Benefit Transfer Card issued to defendant by the New York State Office of Temporary and Disability Assistance. The receipt was on the floor next to the victim's body.

In addition, phone records established that the victim had made several calls to the landline telephone at defendant's residence on November 16, 2008. Shortly after the last call, the victim used his home computer to reserve the hotel room. After discovering the victim's body in the hotel room, the police searched for his vehicle, which was not in the hotel parking lot. The vehicle was found later that day parked on a city street approximately six-tenths of a mile from defendant's residence. Inside the vehicle, the police found printed Mapquest directions to a residence located at 23 Roxborough Road. No such address exists, but defendant resided at 203 Roxborough Road, and the directions were printed moments after the victim reserved the hotel room.

Finally, a hair found on the sink in the bathroom of the hotel room was linked to defendant. Mitochondrial DNA testing showed that the DNA of the hair matched defendant's DNA, and that, unlike defendant, 99.91% of the population could be excluded as a source. It is thus clear that the victim picked up defendant at his residence and drove him to the hotel, and that the two entered the room together.

Nevertheless, under the circumstances of this case, the mere fact that defendant was in the hotel room with the victim, and most likely engaged in sexual acts with him, does not establish beyond a reasonable doubt that defendant is the person who killed him. As the People acknowledge, the Medical Examiner did not determine the time of death. Thus, as far as we know, the victim could have been killed at any time between 9:21 p.m. on November 16, 2008, when he spoke to his son on the phone, and 10:00 the next morning, when his body was found. Moreover, the evidence at trial suggests that someone other than defendant may have been in the hotel room with the victim that night, and that the victim may have left the hotel room at some time after he checked in with defendant.

With respect to whether there were other people in the hotel room with the victim other than defendant, we note that DNA from two males was obtained from a plastic drinking cup in the hotel room, and testing excluded defendant as a contributor. Defendant was also excluded as the source of a second strand of hair found on the bathroom sink, and the victim was excluded as well. A blond strand of hair was found on the victim's abdomen and, although DNA testing could not be done on the hair, the victim did not have blond hair and the People's expert testified that she would not expect the hair to have come from an African-American. A blond strand of hair was also found in the victim's vehicle after it was recovered by the police, and a pair of women's underwear was found in the bathroom of the hotel room.

There is also evidence that the victim may have left the hotel before he was murdered. To begin with, the phone call the victim made to his son at 9:19 p.m.—the one during which the victim sounded

confused and said that he did not know where he was—was processed through an AT&T cell tower located at 350 Buell Road in the Town of Gates. The same is true of the call received by the victim from his son two minutes later. The hotel is in the Town of Henrietta, which is not contiguous to the Town of Gates. The AT&T representative who testified at trial did not know which of its cell towers serviced calls made and received at the hotel. It thus cannot be said with any degree of certainty that the victim was at the hotel when he spoke with his son.

The victim's phone was also used at 10:21 p.m. to call a number in the 315 area code; the call was not connected, meaning that the other person did not answer. No evidence was offered at trial as to whom that call was made. The People suggested at trial that defendant made that call on the victim's phone after committing the murder, but we are not so sure. The record does not reveal whether the police tracked down the intended recipient of the call to determine if he or she knew defendant or the victim.

The evidence further showed that someone used the computer in the victim's bedroom at his home at 10:49 that same night. The victim's bedroom was on the first floor of a condominium he shared with his son and an adult female friend, both of whom had computers in their rooms and testified that they did not use the victim's computer that night.

It is also curious that a key to the hotel room was found in the center console of the victim's vehicle. The People's theory is that defendant, after committing the murder, drove the victim's car to within a mile of his home and then left it on the side of the street. But why would defendant take a hotel key with him after killing the victim? One did not need a key to exit the hotel. And why would defendant place the key in the center console, as if he intended to return to the hotel? It seems more likely that the victim placed the room key in the center console. We note that, although the murderer left bloody footprints on the carpet in the hotel room, and blood was splattered on the walls, ceiling, and floor of the room, no blood was found in the victim's vehicle, not even on the brake or gas pedals.

A review of the victim's emails from the day in question reveal that he engaged in communications with several men other than defendant and discussed with them meeting for sexual activity. It appears undisputed that the victim met up with one such man earlier in the day at a different location. The victim exchanged multiple emails with another man who expressed interest in meeting. The victim informed this man, whose first name was Waki, that he had a hotel room and inquired whether Waki needed a ride. Waki instructed the victim to call him to discuss things further, and provided the victim with a number to call. That was the last email between the two.

The People posit that the victim never called Waki because his cell phone records do not reflect a call to Waki's number. As the defense pointed out at trial, however, the People did not offer into evidence the records from the victim's landline telephone at home or from the telephone in the hotel room. The fact that the victim did

not call Waki from his cell phone does not establish, ipso facto, that the two did not meet that night. Although the police located Waki and questioned him about the homicide, they did not obtain a DNA sample from him. We therefore do not know whether Waki is a match for any of the DNA samples obtained from the hotel room and the victim's vehicle.

Nor did the police obtain a DNA sample from a man named Shaft, the victim's ex-boyfriend. According to Michele, the victim's closest friend, Shaft had been abusive and unfaithful to the victim, and that is why the relationship ended. Several witnesses testified at trial that the victim planned to reconnect with Shaft on the weekend of his murder, and two of the victim's coworkers testified that the victim said a day or two before his death that he had plans that weekend to meet a new person and an old boyfriend. When talking to one coworker about the old boyfriend, the victim "seemed really nervous" and his lips were quivering. The coworker had never seen the victim act like that, and said that perhaps it was not a good idea for him to see the ex-boyfriend. Although obviously nervous, the victim did not change his mind, saying that "everything is dangerous."

Shaft worked at a restaurant in Henrietta, less than a mile from the hotel in which the victim was murdered. When questioned by the police, Shaft said that he was at his mother's house on the night in question, but the police did not check with Shaft's mother to verify his alibi, nor did they obtain a DNA sample from him.

We note that Shaft's sister, the woman who resided with the victim and his son, called the hotel on the morning that the victim's body was found and asked the person at the front desk to check the victim's room to make sure he was okay. She knew that the victim frequently used that hotel to meet people, and she was concerned because he rarely, if ever, stayed overnight at the hotel. The front desk employee testified at trial that Shaft's sister identified herself as the victim's wife and said that she had called the victim's room directly but got no answer, and that she was concerned because the victim had a heart condition. If Shaft's sister did, in fact, call the victim's room directly, the obvious question is how she knew which room to call.

The People assert on appeal that defendant could not be excluded as a contributor to the DNA collected from the victim's fingernail clippings, as if that were evidence of his guilt. The dissent relies on this evidence as well. The People's expert testified, however, that the tests conducted of the DNA from the victim's fingernails were "inconclusive," i.e., defendant could not be included or excluded as a contributor. In other words, the fingernail DNA evidence was neither inculpatory nor exculpatory, and thus was of little, if any, probative value. The trial prosecutor, to his credit, did not even mention the fingernail DNA evidence during his summation. Although DNA tests were conducted on more than 50 items found in the hotel room and in the victim's vehicle, the only item that was linked to defendant was a hair found on the bathroom sink, the same sink on which the police found another hair that did not belong to either defendant or the victim.

The People at trial relied in part on the bloody footprints that were left on the carpet of the hotel room. The footprint impressions looked similar to impressions made by a pair of Nike boots found by the police in the home of defendant's girlfriend, with whom he lived at the time with their infant daughter. The People's expert acknowledged, however, that there were differences in the arch area of the bloody footprints and the impression made by the Nike boots, and that she could not make a "definitive determination" whether the Nike boots had left the bloody footprints. The expert also acknowledged that the FBI conducted forensic tests on the boots looking for traces of blood and found none, and that blood could remain on boots for decades.

The People's case thus rested on three pillars of circumstantial evidence: (1) the fact that defendant entered the hotel with the victim at approximately 7:00 p.m., some 15 hours before his dead body was found in the hotel room; (2) the fact that defendant repeatedly lied to the police when he said that he did not know the victim and had never met him; and (3) the fact that the victim's vehicle was found abandoned on a city street approximately six-tenths of a mile from defendant's residence.

As noted above, defendant's presence in the room, although incriminating, is by no means conclusive considering that other people may have been in the room with the victim and that the Medical Examiner could not determine the time of death. As for defendant's lies to the police, it appears that he may not have been living as an openly gay man—he had a girlfriend and children from different women—and he may have said that he did not know the victim so as not to reveal his sexual orientation. Finally, although the presence of the vehicle so close to defendant's residence is suspicious, the victim was known to drive around the city looking for sexual partners, and the record does not disclose where Shaft or Waki resided.

The People did not suggest at trial a motive for the brutal killing, which evidently was committed with great malice, and we cannot conceive of a possible motive from our review of the record. "Although motive is not an element of the crime, it nonetheless cannot be ignored" (*People v Richardson*, 55 AD3d 934, 937 [3d Dept 2008], *lv dismissed* 11 NY3d 857 [2008]). Indeed, where, as here, the People's case is based entirely on circumstantial evidence, " 'motive often becomes not only material but controlling' " (*People v Moore*, 42 NY2d 421, 428 [1977], *cert denied* 434 US 987 [1977], quoting *People v Fitzgerald*, 156 NY 253, 258 [1898]; *see People v Mixon*, 203 AD2d 909, 910 [4th Dept 1994], *lv denied* 84 NY2d 830 [1994], *reconsideration denied* 84 NY2d 909 [1994]).

Concerned "about the incidence of wrongful convictions and the prevalence with which they have been discovered in recent years," the Court of Appeals has stressed the importance of the role of the Appellate Division in serving, "in effect, as a second jury," to "affirmatively review the record; independently assess all of the proof; substitute its own credibility determinations for those made by the jury in an appropriate case; determine whether the verdict was

factually correct; and acquit a defendant if the court is not *convinced* that the jury was justified in finding that guilt was proven beyond a reasonable doubt" (*People v Delamota*, 18 NY3d 107, 116-117 [2011] [emphasis added]; *see People v Oberlander*, 94 AD3d 1459, 1459 [4th Dept 2012]).

We agree with the dissent that an appellate court must give great deference to a jury's credibility determinations inasmuch as the jury is in a far superior position to assess the veracity of witnesses (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). Here, however, the jury was not called upon to make credibility determinations, as almost all of the relevant facts adduced at trial were undisputed. Instead, the jury was asked to make inferences based on the evidence, a task that we are no less qualified to undertake.

Quoting *People v Cahill* (2 NY3d 14, 58 [2003]), the dissent also asserts that our authority to review the weight of the evidence in a criminal case is not an " 'open invitation' " to substitute our judgment for that of the jury. "Of course that is true," the *Cahill* Court went on to say in a portion of the decision not quoted by the dissent. "But on the other hand, weight of the evidence review does not connote an invitation to abdicate our responsibility" to independently weigh the evidence (*id.*) and "to serve, in effect, as a second jury" (*Delamota*, 18 NY3d at 117). The mere fact that the jury rendered a guilty verdict is only the beginning of our analysis.

In sum, based on our independent review of the evidence, and viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is against the weight of the evidence and cannot stand (*see generally Bleakley*, 69 NY2d at 495). Although the police cannot be faulted for arresting defendant, nor the People for prosecuting him, the evidence at trial simply failed to prove defendant's guilt beyond a reasonable doubt. There are too many unanswered questions for us to be comfortable that the right person is serving a life sentence for the victim's murder.

All concur except CARNI, J.P., and CURRAN, J., who dissent and vote to affirm in the following memorandum: We agree with the implicit determination of our colleagues that there is sufficient evidence to support the jury's verdict of murder in the second degree (Penal Law
§ 125.25 [1]), but we respectfully disagree with their conclusion that the verdict is against the weight of the evidence. We therefore would affirm the judgment of conviction.

The standard for weight of evidence review is well settled and set out by the Court of Appeals in *People v Bleakley* (69 NY2d 490, 495 [1987]): "If based on all the credible evidence a different finding would not have been unreasonable, then the appellate court must, like the trier of fact below, 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' . . . If it appears that the trier of fact has failed to give the evidence the weight it

should be accorded, then the appellate court may set aside the verdict."

This, of course, is not an "open invitation" for an appellate court to substitute its judgment for that of the jury (*People v Cahill*, 2 NY3d 14, 58 [2003] [internal quotation marks omitted]). Rather, an appellate court must give "[g]reat deference" to the jury's resolution of factual issues (*Bleakley*, 69 NY2d at 495). It is the "fact-finder[]" that has the "opportunity to view the witnesses, hear the testimony and observe demeanor" (*id.*), and the Court of Appeals has emphasized that "those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record" (*People v Lane*, 7 NY3d 888, 890 [2006]).

Bearing those principles in mind, we conclude that the jury was justified in finding defendant guilty of murder in the second degree beyond a reasonable doubt. The majority recognizes that the People presented overwhelming evidence that defendant was in the hotel room the night before the victim's body was discovered. While that evidence does not necessarily establish that defendant killed the victim, there is ample circumstantial evidence supporting that conclusion reached by the jury. Specifically, the evidence established that the victim's car was seen outside the Chili Mini Mart at 6:30 p.m. The victim checked into the hotel at 6:59 p.m. with a black male, whom, as the majority concedes, the evidence established beyond a reasonable doubt was defendant. While the victim spoke with his son by telephone a couple of times at approximately 9:20 p.m., no one was able to contact the victim after those telephone calls. A receipt from the Chili Mini Mart with defendant's welfare benefit number was found on the floor near the victim's feet, and it had the victim's blood on it. The victim's car was found the following day only six-tenths of a mile from defendant's residence, with a keycard for the hotel where the victim was found in the car's center console. Using a known sample of defendant's DNA as a basis for comparison, defendant could not be excluded as the source of DNA from various pieces of evidence, including fingernail scrapings on the victim's right hand, a crease of tape used to bind the victim's hands, and a swab taken from the steering wheel of the victim's car. Further, the right boot from a pair of defendant's boots looked similar in shape and pattern to the bloody footprints found at the scene.

The majority goes to great pains to identify some evidence that possibly suggests that someone other than defendant may have been in the hotel room with the victim that night, and that the victim may have left the hotel room at some time after he checked in with defendant. In our view, however, that amounts to no more than impermissible speculation and, notably, there was no real evidence of any meeting between the victim and anyone else that night. In light of the above evidence establishing defendant's guilt, we cannot conclude that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1170

CA 17-00732

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

DAVID M. BONCZAR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AMERICAN MULTI-CINEMA, INC., DOING BUSINESS AS AMC THEATRES WEBSTER 12, AS SUCCESSOR IN INTEREST TO LOEWS BOULEVARD CINEMAS, INC., FORMERLY KNOWN AS LOEW'S BOULEVARD CORP. AND/OR LOEWS THEATER MANAGEMENT CORP., DEFENDANT-APPELLANT.

RUSSO & TONER LLP, NEW YORK CITY (JOSH H. KARDISCH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered March 1, 2017. The order granted the motion of plaintiff for partial summary judgment on the issue of liability under Labor Law § 240 (1).

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he fell from a ladder in the lobby of a movie theater owned by defendant. At the time of the accident, plaintiff was updating a fire alarm system on behalf of his employer, which was subcontracted by the company hired by defendant to renovate the theater. We agree with defendant that Supreme Court erred in granting plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240 (1). "In order to establish his entitlement to judgment on liability as a matter of law, plaintiff was required to 'show that the statute was violated and the violation proximately caused his injury' " (*Miller v Spall Dev. Corp.,* 45 AD3d 1297, 1297 [4th Dept 2007], quoting *Cahill v Triborough Bridge & Tunnel Auth.,* 4 NY3d 35, 39 [2004]). Plaintiff did not know why the ladder wobbled or shifted, and he acknowledged that he might not have checked the positioning of the ladder or the locking mechanism, despite having been aware of the need to do so. We thus conclude that plaintiff failed to meet his initial burden on the motion. "[T]here is a plausible view of the evidence—enough to raise a fact question—that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident" (*Blake v*

Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 289 n 8 [2003]; *see generally Cullen v AT&T, Inc.,* 140 AD3d 1588, 1591 [4th Dept 2016]).

All concur except WHALEN, P.J., and LINDLEY, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent and would affirm. We conclude that plaintiff met his initial burden of establishing his entitlement to partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1) by presenting evidence that the A-frame ladder from which he fell wobbled or shifted and therefore failed to provide him with proper protection, and that this violation of section 240 (1) was a proximate cause of his injuries (*see Arnold v Baldwin Real Estate Corp.*, 63 AD3d 1621, 1621 [4th Dept 2009]; *see also Kirbis v LPCiminelli, Inc.*, 90 AD3d 1581, 1582 [4th Dept 2011]). We further conclude that, in opposition to plaintiff's motion, defendant submitted no evidence that had not already been submitted by plaintiff and thus, contrary to defendant's contention in opposition to the motion, failed to raise a triable issue of fact with respect to whether plaintiff's own actions were the sole proximate cause of his injuries (*see Siedlecki v City of Buffalo*, 61 AD3d 1414, 1415 [4th Dept 2009]; *Burke v APV Crepaco*, 2 AD3d 1279, 1279 [4th Dept 2003]). The fact that plaintiff could not identify why the ladder shifted does not undermine his entitlement to partial summary judgment because a plaintiff who falls from a ladder that "malfunction[s] for no apparent reason" is entitled to "a presumption that the ladder . . . was not good enough to afford proper protection" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 [2003]; *see O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017]). Although plaintiff testified at his deposition that he did not recall whether he checked the positioning of the ladder or checked that it was "locked into place," he also testified that the ladder was upright and "fully open" near the middle of a small room, and we conclude that it would be unduly speculative for a jury to infer from plaintiff's testimony that the sole proximate cause of the accident was his alleged failure to check its positioning or its locking mechanism (*see Pichardo v Urban Renaissance Collaboration Ltd. Partnership*, 51 AD3d 472, 473 [1st Dept 2008]; *Handley v White Assoc.*, 288 AD2d 855, 856 [4th Dept 2001]). A party moving for summary judgment "need not specifically disprove every remotely possible state of facts on which its opponent might win the case[, and plaintiff's] showing here was adequate to shift the burden to [defendant] 'to produce evidentiary proof . . . sufficient to establish the existence of material issues of fact,' " which defendant failed to do (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]).

The majority's reliance on *Blake* is misplaced. The injured worker in that case sustained his injuries when the upper portion of his extension ladder retracted, and he testified at trial that he was not sure whether he had locked the extension clips, i.e., equipment meant to hold the upper portion of the ladder in place (*id.* at 283-284). Based on the injured worker's uncertainty and the fact that the accident occurred in the very manner that the extension clips were meant to prevent, it was logical for the jury to infer both that he had failed to lock the clips and that his negligence in that regard

was the sole proximate cause of his injuries (*see id.* at 291; *see generally Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744 [1986]). Here, given that an A-frame ladder can wobble or shift for various reasons unrelated to its positioning or locking mechanism, and even for no apparent reason (*see Alvarez v Vingsan L.P.*, 150 AD3d 1177, 1179 [2d Dept 2017]), we conclude that plaintiff's deposition testimony does not support a nonspeculative inference that the sole proximate cause of his injuries was his alleged failure to check the positioning of the ladder or whether it was locked into place (*see generally Bombard v Christian Missionary Alliance of Syracuse*, 292 AD2d 830, 831 [4th Dept 2002]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1196

CA 17-00575

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

DOROTHY REAMES, AS EXECUTRIX OF THE ESTATE OF
H. CARLTON REAMES, DECEASED, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE THRUWAY
AUTHORITY AND NEW YORK STATE CANAL CORPORATION,
DEFENDANTS-RESPONDENTS.
(CLAIM NO. 120260.)

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

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

Appeal from a judgment of the Court of Claims (Glen T. Bruening, J.), entered June 14, 2016. The judgment dismissed the claim.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the claim insofar as it alleges that defendants created a dangerous condition that constituted a proximate cause of the injuries of H. Carlton Reames, and as modified the judgment is affirmed without costs, and the matter is remitted to the Court of Claims for further proceedings in accordance with the following memorandum: On June 19, 2011, H. Carlton Reames (decedent) sustained fatal injuries when the vehicle in which he was riding as a passenger crashed into an out-of-commission bridge in Verona, New York. The driver of the vehicle turned onto Stoney Creek Road, and the first of four warning signs indicating that the Stoney Creek Road Bridge (Bridge) was closed was situated on the right-hand side of Stoney Creek Road immediately after Greenway Road. That first sign was a five-foot-high, white, rectangular sign, with one orange square affixed to each of the top two corners, and black lettering stating: "BRIDGE CLOSED 3/4 MILES AHEAD LOCAL TRAFFIC ONLY." The second sign was also on the right-hand side of the same road, further north, about 460 feet before the Bridge, and it was a diamond-shaped orange sign with black lettering stating: "BRIDGE CLOSED 500FT." The third sign was still further north, about 89 feet before the Bridge, and it entirely crossed both lanes of the road. That sign consisted of one white rectangle with black lettering stating: "BRIDGE CLOSED" in the center of the two lanes, flanked on either side by a "Type 3 barricade," which is a five-foot-high by four-foot-wide barricade affixed to the pavement, consisting of three horizontal, orange and

white diagonally striped panels, stacked vertically. The fourth and last sign was located further north at the southern entrance to the Bridge. It was a six-inch square hollow steel box beam with a small strip of orange and white diagonal reflective stripes across the middle, and it was long enough to be welded across the entire two-lane road. The driver of the vehicle drove past the first two signs, directly through the center of the third sign and, finally, into and under the fourth sign, i.e., the southern entrance steel box beam. Because of the height at which the steel box beam was situated, the vehicle underrode the beam, and the driver was killed instantly. The vehicle continued forward, traveling across the Bridge and then striking a second steel box beam that was welded to the other entrance of the Bridge. Decedent died the following day from severe head injuries.

As executrix of decedent's estate, claimant commenced this wrongful death action alleging, inter alia, that defendants were negligent in the operation and maintenance of the Bridge first, by creating a dangerous condition on the Bridge, i.e., the steel box beam, and second, by failing to sign the Bridge adequately for closure. Because it is a matter of particular importance on appeal, we note that claimant presented evidence during trial that defendants' creation of the above alleged dangerous condition was a proximate cause of decedent's injuries and death.

After a two-day, nonjury trial, the Court of Claims determined that claimant failed to establish by a preponderance of the evidence her theory that defendants acted negligently when placing warning signs and barricades leading up to the closed Bridge, or that such negligence, if established, was a proximate cause of the accident. The court did not explicitly address claimant's other theory of negligence regarding defendants' creation of the alleged dangerous condition.

" 'According considerable deference to the findings of the [court herein], as is appropriate' " (*Wilson v State of New York*, 269 AD2d 854, 855 [4th Dept 2000], *affd* 95 NY2d 455 [2000]), we conclude that the court properly determined that "the signs and barricades leading north to the . . . Bridge on Stoney Creek Road were sufficient on the date of the accident for their intended purpose—to warn drivers that the [B]ridge was closed." In addition, "[t]he question of causation was one of fact for the court to determine on all the proof" and, here, the court's conclusion that inadequate signage was not a proximate cause of the accident is supported by the record (*Frost v State of New York*, 53 AD2d 936, 937 [3d Dept 1976]).

We agree with claimant, however, that the court erred in dismissing the claim insofar as it alleges that defendants created a dangerous condition that constituted a proximate cause of decedent's injuries. We therefore modify the judgment accordingly. Although defendant State of New York is not an insurer of its roads and highways (*see Kissinger v State of New York*, 126 AD2d 139, 141 [3d Dept 1987]), it "has an obligation to provide and maintain adequate and proper barriers along its highways" (*Gomez v New York State*

Thruway Auth., 73 NY2d 724, 725 [1988]). Here, we conclude that defendants' decision to weld a steel box beam across the front of the Bridge, at a height that allowed a motor vehicle to proceed under the beam, constituted the creation of a dangerous condition as a matter of law (*see generally Lattanzi v State of New York*, 74 AD2d 378, 379-380 [3d Dept 1980], *affd* 53 NY2d 1045 [1981]; *Grevelding v State of New York*, 91 AD3d 1309, 1310 [4th Dept 2012]).

A further issue to be determined is whether that dangerous condition constituted a proximate cause of decedent's fatal injuries, and we therefore remit the matter to the Court of Claims to make that determination. We note that, with respect to the claim that defendants created the dangerous condition, claimant proceeded under a "second-impact theory whereby she contended, not that [defendants] caused the *accident*, but that [their] negligence . . . was [a] proximate cause of . . . decedent's *injury*" (*Matter of Kirisits v State of New York*, 107 AD2d 156, 158 [4th Dept 1985]). The fact that no negligent act of defendants caused the vehicle to collide with the steel box beam is irrelevant. The point to be addressed is whether the steel box beam was a substantial factor in aggravating decedent's injuries and causing his death (*see id.*; *see also Gutelle v City of New York*, 55 NY2d 794, 796 [1981]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1205

KA 11-00995

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWNDELL EVERSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

SHAWNDELL EVERSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered March 2, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (three counts), criminal possession of a weapon in the third degree (five counts), criminal sale of a firearm in the third degree (four counts), criminal possession of a controlled substance in the fifth degree (two counts), criminal sale of a controlled substance in the fifth degree (two counts), robbery in the first degree (two counts), burglary in the first degree and conspiracy 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 a jury verdict of two counts of robbery in the first degree (Penal Law § 160.15 [4]), one count each of burglary in the first degree (§ 140.30 [4]) and conspiracy in the fourth degree (§ 105.10 [1]), and various other charges arising from the possession or sale of drugs and weapons. In appeal No. 2, defendant appeals from an order denying his motion to vacate the judgment of conviction pursuant to CPL 440.10.

Addressing appeal No. 1 first, we note that defendant was originally charged in three indictments that were later consolidated with crimes arising from eight separate incidents that occurred between November 2008 and April 2010.

We reject defendant’s contention in his main brief that County

Court lacked jurisdiction with respect to counts one through three of the consolidated indictment, charging crimes arising from defendant's possession and sale of a pistol that he acquired in the State of Ohio. The People established territorial jurisdiction within New York (*see* CPL 20.20 [1] [a], [c]). To the extent that defendant challenges venue in Onondaga County with respect to counts one through three, we also reject that challenge. Although defendant and his companions were stopped on the Thruway before they returned to Onondaga County from Ohio, defendant was properly tried in Onondaga County, inasmuch as "[c]onduct occurred in such county sufficient to establish . . . [a]n attempt or conspiracy to commit such offense[s]" (CPL 20.40 [1] [b]), i.e., the People established that, while in Onondaga County, defendant conspired with others to traffic weapons (*see People v MacDonald*, 63 AD3d 1520, 1521 [4th Dept 2009], *lv denied* 13 NY3d 746 [2009]).

The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support defendant's conviction of counts one through six (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict on those counts and the remaining counts is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention in his main brief that the conspiracy count was defective on the grounds that it alleged that defendant participated in multiple conspiracies (*see generally People v Alfonso*, 35 AD3d 269, 269 [1st Dept 2006], *lv denied* 8 NY3d 878 [2007]), and it failed to specify the underlying crimes that were the objects of the alleged conspiracies (*see generally People v Wong*, 133 AD2d 184, 185 [2d Dept 1987], *lv denied* 70 NY2d 878 [1987]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention in his main brief, the court properly concluded that a CPL 710.30 notice was not required with respect to statements that defendant made to an accomplice concerning the commission of a robbery. Those statements were made during a private conversation between defendant and the accomplice, and there was no evidence that, at the time of that conversation, the accomplice "was acting at the instigation or under the supervision of the police" (*People v Jean*, 13 AD3d 466, 467 [2d Dept 2004], *lv denied* 5 NY3d 764 [2005], *reconsideration denied* 5 NY3d 807 [2005]).

The record does not support defendant's contention in his main brief that the court refused to rule on his midtrial severance motion. Rather, the record establishes that the court's willingness to consider severance was contingent upon defendant's decision whether to testify, and when defendant elected not to testify, the motion was "implicitly but conclusively denied" (*People v Gates*, 152 AD3d 1222, 1223 [4th Dept 2017]; *see People v Hampton*, 113 AD3d 1131, 1132 [4th

Dept 2014], *lv denied* 22 NY3d 1199 [2014], *reconsideration denied* 23 NY3d 1062 [2014], *cert denied* — US —, 135 S Ct 2389 [2015]). The court, moreover, properly denied the motion, inasmuch as it was untimely (*see* CPL 255.20 [1], [3]; *People* v *Wilburn*, 50 AD3d 1617, 1618 [4th Dept 2008], *lv denied* 11 NY3d 742 [2008]), and defendant failed to demonstrate the requisite good cause for a discretionary severance (*see People v Vickers*, 148 AD3d 1535, 1536-1537 [4th Dept 2017], *lv denied* 29 NY3d 1088 [2017]).

Contrary to defendant's contention in his main brief, we conclude that the court's instructions to the jury with respect to counts 9 and 19, each charging criminal sale of a firearm in the third degree under Penal Law § 265.11 (1), did not alter the theory of the prosecution with respect to those counts (*see People v Rivera*, 133 AD3d 1255, 1256 [4th Dept 2015], *lv denied* 27 NY3d 1154 [2016]).

The evidence at trial is legally sufficient to establish the predicate conviction supporting the conviction of five counts of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]; *see generally Bleakley*, 69 NY2d at 495). Thus, defendant's challenge in his main brief to those charges based upon the presentation of erroneous information to the grand jury concerning the predicate conviction is not reviewable on appeal (*see* CPL 210.30 [6]; *People v Highsmith*, 124 AD3d 1363, 1365 [4th Dept 2015], *lv denied* 25 NY3d 1202 [2015]). The presentation of such erroneous information, moreover, was "not of such magnitude" as to have impaired the integrity of the grand jury and rendered its proceedings defective (*People v Carey*, 241 AD2d 748, 751 [3d Dept 1997], *lv denied* 90 NY2d 1010 [1997]; *see People v Sheltray*, 244 AD2d 854, 855 [4th Dept 1997], *lv denied* 91 NY2d 987 [1998]).

Defendant failed to preserve for our review his challenge in his main brief to all but one of several allegedly improper comments made by the prosecutor during summation (*see* CPL 470.05 [2]). In any event, we conclude that "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Cox*, 21 AD3d 1361, 1364 [4th Dept 2005], *lv denied* 6 NY3d 753 [2005] [internal quotation marks omitted]).

Contrary to the final contention in defendant's main brief in appeal No. 1, the sentence is not unduly harsh or severe.

Contrary to the contentions in defendant's main and pro se supplemental briefs in both appeal Nos. 1 and 2, we conclude that defendant was provided meaningful representation at trial (*see People v Baldi*, 54 NY2d 137, 147 [1981]). Defendant failed to meet his burden of demonstrating the absence of a strategic or other legitimate explanation for defense counsel's alleged shortcomings (*see People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Reed*, 151 AD3d 1821, 1822 [4th Dept 2017], *lv denied* 30 NY3d 952 [2017]), including those that were alleged in defendant's CPL article 440 motion.

Addressing the remaining contentions in defendant's pro se

supplemental brief in appeal No. 1, we conclude that the record does not support his contention that the court improperly deprived him of counsel of his choice when it relieved his first assigned attorney (*cf. People v Griffin*, 92 AD3d 1, 5-7 [1st Dept 2011], *affd* 20 NY3d 626 [2013]; *see generally People v Childs*, 247 AD2d 319, 325 [1st Dept 1998], *lv denied* 92 NY2d 849 [1998]). Nor does the record support defendant's contention that he was deprived of a fair trial as the result of the court's alleged bias against him (*cf. People v Reynolds*, 90 AD3d 956, 957 [2d Dept 2011]). We have examined defendant's remaining contention in his pro se supplemental brief and conclude that it is without merit.

In appeal No. 2, defendant contends in his main brief that his right to a public trial was violated when his family members and friends were excluded or removed from the courtroom. At the outset, we note that, while the right to a public trial is fundamental (*see People v Martin*, 16 NY3d 607, 611 [2011]), a claim that such right was violated requires preservation (*see People v Alvarez*, 20 NY3d 75, 81 [2012], *cert denied* 569 US 947 [2013]). Here, none of the alleged violations of defendant's right to a public trial was brought to the court's attention at a time when the court could have taken remedial action, and thus defendant's contention is not preserved for our review (*see id.*). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1206

KA 15-01899

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWNDELL EVERSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Thomas J. Miller, J.), dated September 28, 2015. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Same memorandum as in *People v Everson* ([appeal No. 1] — AD3d — [Feb. 2, 2018] [4th Dept 2018]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1209

KA 14-01697

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONDRE CANNON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 5, 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 modified as a matter of discretion in the interest of justice by reducing the sentence to a determinate term of incarceration of 20 years and as modified the judgment is 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]). Defendant contends that Supreme Court erred in imposing what defendant characterizes as an "enhanced" sentence based on his post-plea conduct. The record, however, reflects that the parties agreed to amend the plea agreement to include the imposition of a greater term of incarceration after the court presented defendant with the option of a higher sentence on the manslaughter charge or trial on the murder charge. Thus, "the higher sentence was not an 'enhancement,' but rather [was] the product of a renegotiated agreement to which all parties consented" (*People v Moore,* 149 AD3d 1349, 1350 [3d Dept 2017], *lv denied* 29 NY3d 1131 [2017]; *see People v Dunsmore*, 275 AD2d 861, 863 [3d Dept 2000], *lv denied* 95 NY2d 934 [2000]).

Defendant waived his right to appeal as a condition of the original plea agreement, but he did not subsequently reaffirm his waiver of his right to appeal with respect to the amended plea agreement (*cf. Dunsmore*, 275 AD2d at 862). Thus, defendant's waiver of the right to appeal made upon the original plea agreement is invalid with respect to any contentions arising out of the amended plea agreement (*see People v Johnson*, 14 NY3d 483, 487 [2010]), and

this Court is therefore not precluded from reviewing the substance of defendant's claims.

Defendant contends that the court was collaterally estopped from determining that defendant breached the original plea agreement by refusing to testify at his codefendant's trial inasmuch as the court had previously determined that the codefendant's conduct had prevented defendant from providing such testimony, and that the court therefore improperly imposed a longer sentence based on defendant's refusal to testify. "Collateral estoppel applies in a criminal case to prevent one party from 'relitigat[ing] issues which have already been decided against' that party" (*People v Fisher*, 28 NY3d 717, 724-725 [2017]). Defendant's original plea agreement required that he provide accurate testimony at his codefendant's trial but, at the codefendant's trial, defendant refused to testify about the details of the victim's death. The People argued that defendant had been coerced into refusing to testify and, after conducting a *Sirois* hearing, the court determined that defendant was unavailable to testify because of the codefendant's conduct and that defendant's prior statements would thus be admissible at the codefendant's trial. Contrary to defendant's contention, after the *Sirois* hearing, the court did not determine that defendant could not perform his end of the plea bargain because of impossibility, and we therefore conclude that defendant has not met his burden of establishing that collateral estoppel was applicable inasmuch as defendant failed to establish that the issue decided in the *Sirois* hearing and the issue whether he breached the plea agreement were identical (*see generally City of New York v College Point Sports Assn., Inc.*, 61 AD3d 33, 42 [2d Dept 2009]).

We agree with defendant, however, that the sentence of a determinate term of 23 years with 2½ years of postrelease supervision is unduly harsh and severe under the circumstances of this case. This Court "has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range," and may exercise this power, "if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783 [1992]; *see* CPL 470.15 [6] [b]; *People v Rapone*, 71 AD3d 1563, 1564-1565 [4th Dept 2010]). We conclude that a reduction of the sentence imposed is appropriate under the circumstances here and, as a matter of discretion in the interest of justice, we therefore modify the judgment by reducing the sentence imposed to a determinate term of incarceration of 20 years, to be followed by the 2½ years of postrelease supervision that was imposed by the court.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1211

KA 15-00600

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARKALL WRIGHT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered January 9, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). We conclude that Supreme Court properly refused to suppress the crack cocaine and marihuana recovered from the vehicle in which defendant had been sitting. Contrary to defendant's contention, the record establishes that the police officers had a reasonable suspicion that defendant was involved in criminal activity or that he posed some danger to them. The police officers encountered defendant in a parking lot located in the 300 block of South Avenue in the City of Syracuse, which was a high-crime area that was known to the officers for gang activity and was frequently used to conduct drug transactions. When the officers arrived at the scene in their marked patrol vehicle, they observed three vehicles in the otherwise empty lot. Two of the vehicles, a Jeep Compass that was occupied by defendant and a Nissan Maxima, were positioned with the driver's side doors facing each other. When defendant noticed the officers, he reacted in a startled manner and made a furtive movement toward the center console of the Jeep. The driver of the Nissan Maxima then drove away and defendant exited the Jeep, at which time he was recognized by the officers as a gang member with an extensive criminal history. On this record, we conclude that the officers had a "reasonable suspicion that [defendant was] involved in criminal acts or pose[d] some danger to [them]" (*People v Harrison*, 57 NY2d 470, 476

[1982]; *see People v Clay*, 147 AD3d 1499, 1500 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]; *People v Mack*, 49 AD3d 1291, 1292 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008]). Contrary to defendant's further contention, the officers were justified in forcibly stopping defendant by approaching him with their weapons drawn (*see generally Harrison*, 57 NY2d at 476), inasmuch as they "had a reasonable basis for fearing for their safety and [were] not required to await the glint of steel" (*People v Bracy*, 91 AD3d 1296, 1298 [4th Dept 2012], *lv denied* 20 NY3d 1060 [2013] [internal quotation marks omitted]).

We further conclude that the officers had probable cause to search the Jeep. When the officers approached defendant, he slammed the door of the Jeep, which caused the odor of unburnt marihuana to emanate from the area of defendant and the vehicle. It is well established that the odor of marihuana "emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause to search [the] vehicle and its occupants" (*People v Walker*, 128 AD3d 1499, 1500 [4th Dept 2015], *lv denied* 26 NY3d 936 [2015] [internal quotation marks omitted]; *see People v Ricks*, 145 AD3d 1610, 1611 [4th Dept 2016], *lv denied* 29 NY3d 1000 [2017]).

Contrary to defendant's further contention, the sentence is not unduly harsh or severe. Finally, in light of our determination, we do not address defendant's remaining contention.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1215

CA 17-00775

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

JEFFREY D. PRESTON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NORTHSIDE COLLISION-DEWITT, LLC,
NORTHSIDE COLLISION-CICERO, LLC,
NORTHSIDE COLLISION-ENTERPRISES, INC.,
NORTHSIDE COLLISION, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

WALTER D. KOGUT, P.C., FAYETTEVILLE (WALTER D. KOGUT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Onondaga County (Spencer J. Ludington, A.J.), entered September 19, 2016. The order, inter alia, denied the motion of defendants Northside Collision-Dewitt, LLC, Northside Collision-Cicero, LLC, Northside Collision-Enterprises, Inc., and Northside Collision, Inc. insofar as it sought summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion for summary judgment dismissing the second through sixth causes of action against defendants Northside Collision-Dewitt, LLC, Northside Collision-Cicero, LLC, Northside Collision-Enterprises, Inc., and Northside Collision, Inc., and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action by asserting causes of action for, inter alia, breach of contract, negligence, fraudulent misrepresentation, and violations of General Business Law § 349 against, among others, defendants-appellants (defendants), arising from their allegedly defective repair of plaintiff's vehicle after it was damaged in a collision. Defendants moved for summary judgment dismissing the complaint against them or, in the alternative, an order striking the note of issue and compelling discovery. Supreme Court denied the motion insofar as it sought summary judgment and granted the alternative relief sought by defendants.

At the outset, we note that plaintiff opposed defendants' motion with only an attorney's affirmation with no attachments, rendering it "without evidentiary value and thus unavailing" (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). When a defendant has met its

burden for summary judgment, "[m]ere assertions in an attorney's affidavit that sufficient proof exists to create a factual issue fail to satisfy plaintiff's burden" in opposition to the motion (*Waterman v Yamaha Motor Corp.*, 184 AD2d 1029, 1029 [4th Dept 1992]). Thus, to the extent that defendants established their entitlement to judgment as a matter of law, plaintiff failed to raise any triable issues of fact (*see generally Zuckerman*, 49 NY2d at 562).

Contrary to defendants' contention, the court properly denied that part of their motion seeking summary judgment dismissing the first cause of action, for breach of contract. We conclude that, based on defendants' submissions, "[q]uestions of fact and credibility exist with respect to the existence of a binding . . . agreement between plaintiff and defendants, and the terms thereof, rendering summary judgment in favor of [defendants] on the first cause of action, for breach of . . . contract, inappropriate" (*Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 436 [1st Dept 2012]).

With respect to the second cause of action, for negligence, we agree with defendants that "[t]he gravamen of the plaintiff's complaint is that the work 'performed under the contract was performed in a less than skillful and workmanlike manner. This states a cause of action to recover damages for breach of contract, not negligence' " (*Gordon v Teramo & Co.*, 308 AD2d 432, 433 [2d Dept 2003]; *see Panasuk v Viola Park Realty, LLC*, 41 AD3d 804, 805 [2d Dept 2007]). Thus, the negligence cause of action against defendants must be dismissed, and we modify the order accordingly.

We also agree with defendants that they are entitled to summary judgment dismissing the third cause of action, for fraudulent misrepresentation, against them. " 'It is well settled that a cause of action for fraud does not arise where the only fraud alleged merely relates to a party's alleged intent to breach a contractual obligation' " (*Williams v Coppola*, 23 AD3d 1012, 1012 [4th Dept 2005], *lv dismissed* 7 NY3d 741 [2006]; *see Logan-Baldwin v L.S.M. Gen. Contrs., Inc.*, 48 AD3d 1220, 1221 [4th Dept 2008]). On this record, "far from being collateral to the contract, the purported misrepresentation was directly related to a specific provision of the contract" (*Williams*, 23 AD3d at 1012-1013 [internal quotation marks omitted]). Consequently, plaintiff's fourth cause of action, for punitive damages based upon fraud, must be dismissed against defendants as well, inasmuch as "[a] demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action such as fraud" (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616 [1994]). We therefore further modify the order accordingly.

We conclude that the court erred in determining that defendants did not meet their initial burden on the motion with respect to the fifth and sixth causes of action, alleging the violation of General Business Law § 349, and we further modify the order accordingly. Defendants, as the movants, "met [their] initial burden by establishing, as a matter of law, that [their] conduct was not

consumer-oriented" (*Electrical Waste Recycling Group, Ltd. v Andela Tool & Mach., Inc.*, 107 AD3d 1627, 1630 [4th Dept 2013], *lv dismissed* 22 NY3d 1111 [2014]). As noted above, the gravamen of plaintiff's complaint is that defendants breached a contract to repair plaintiff's vehicle, and "[p]rivate contract disputes, unique to the parties, . . . [do] not fall within the ambit of the statute" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1221

CA 17-00602

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

CLAUDE BUSH, JR., AND REBECCA BUSH,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

INDEPENDENT FOOD EQUIPMENT, INC.,
DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, SYRACUSE (LISA M. ROBINSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOTTAR LEONE, PLLC, SYRACUSE (ADAM P. MASTROLEO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered December 5, 2016. The order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the negligence cause of action to the extent that it is based on the doctrine of res ipsa loquitur and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this negligence action seeking damages for injuries sustained by Claude Bush, Jr. (plaintiff) after he suffered an electric shock when he pushed the start button on a meat grinder while working as a meat cutter at a grocery store. Defendant had repaired the grinder for the grocery store several times in the weeks and months prior to the incident, and plaintiffs allege that the accident was caused by defendant's negligent repair of the grinder. Defendant appeals from an order that denied its motion for summary judgment dismissing the complaint.

Defendant contends that Supreme Court erred in denying its motion inasmuch as it did not owe plaintiff a duty of care. We reject that contention. It is well settled that, "[b]ecause 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 [2002]). The general rule is that "[a] contractual obligation, standing alone, will . . . not give rise to tort liability in favor of a third party" (*Cooper v Time Warner Entertainment-Advance/Newhouse*

Partnership, 16 AD3d 1037, 1038 [4th Dept 2005] [internal quotation marks omitted]). There is an exception to that general rule, however, "where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, 'launche[s] a force or instrument of harm' " (*Espinal*, 98 NY2d at 140), thereby "creat[ing] an unreasonable risk of harm to others, or increas[ing] that risk" (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]). Here, defendant established as a matter of law that it repaired the grinder pursuant to an agreement with the grocery store and thus did not owe any duty to plaintiff, who was not a party to that agreement. We conclude, however, that plaintiffs raised a triable issue of fact by submitting the affidavit of an expert, who opined that the lack of proper grounding for the grinder caused plaintiff to suffer an electric shock, and that defendant's failure to make sure the grinder was properly grounded was a deviation from good and accepted standards of care. Thus, plaintiffs' expert raised a question of fact whether defendant assumed a duty of care to plaintiff by creating a dangerous condition (*see generally id.*; *Espinal*, 98 NY2d at 140).

We also reject defendant's contention that the affidavit of plaintiffs' expert is insufficient to raise a triable issue of fact inasmuch as the expert's conclusions are based on "assumptions, speculation and inadmissible evidence." When an expert's affidavit is offered in opposition to a summary judgment motion, it " 'must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor' " (*Ramos v Howard Indus., Inc.*, 10 NY3d 218, 224 [2008], quoting *Adamy v Ziriakus*, 92 NY2d 396, 402 [1998]). "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Although we agree with defendant that the portion of the expert's affidavit that was based on the expert's inspection of the grinder more than three years after the incident is speculative and conclusory inasmuch as there was no evidence that the grinder was in the same condition at the time of the inspection as it was at the time of the incident (*see Ferrington v Dudkowski*, 49 AD3d 1267, 1268 [4th Dept 2008]; *Ciccarelli v Cotira, Inc.*, 14 AD3d 1276, 1277 [4th Dept 2005]), the expert's opinion was not based solely on his inspection of the grinder. Rather, the expert also based his opinion on written materials provided by the grinder's manufacturer, the grocery store and defendant, as well as all relevant discovery material and deposition testimony. Most importantly, the expert relied upon the deposition testimony of the employee of defendant who repaired the grinder and, based on that testimony, the expert concluded that the negligence of defendant's employee during the repair of the grinder exacerbated a dangerous condition and thereby caused plaintiff's injuries. Thus, the expert's affidavit is sufficient to raise a question of material fact because it contains sufficient allegations to demonstrate that the expert's conclusions are not mere speculation (*see generally Ramos*, 10 NY3d at 224).

Finally, we agree with defendant that the doctrine of res ipsa

loquitur is inapplicable because plaintiff's injuries were not " 'caused by an agency or instrumentality within the exclusive control of the defendant' " (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]). Indeed, the record establishes that defendant did not own the grinder, did not have daily access to the grinder, and did not have an exclusive maintenance contract with the grocery store with respect to the grinder, and that the grocery store's employees disassembled the grinder nightly and reassembled the grinder each morning prior to its use. Thus, defendant established as a matter of law that it did not have control of the grinder that was "sufficiently exclusive to fairly rule out the chance that the defect . . . was caused by" the actions of the grocery store's employees (*Warren v Ellis*, 61 AD3d 1351, 1353 [4th Dept 2009] [internal quotation marks omitted]), and plaintiffs failed to raise an issue of fact. We therefore modify the order by granting defendant's motion in part and dismissing the negligence cause of action to the extent that it is based on the doctrine of res ipsa loquitur.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1272

KA 16-00562

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER SWICK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 January 21, 2016. The judgment convicted defendant upon a jury verdict of, inter alia, grand larceny in the fourth degree (three counts).

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

Memorandum: Defendant appeals from two judgments convicting him following a consolidated jury trial of, inter alia, three counts of grand larceny in the fourth degree (Penal Law § 155.30 [8]), two counts of criminal possession of stolen property in the fourth degree (§ 165.45 [5]), and two counts of unauthorized use of a vehicle in the third degree (§ 165.05 [1]). Defendant contends in both appeals that County Court erred in its handling of three jury notes in violation of *People v O'Rama* (78 NY2d 270 [1991]). With respect to the first jury note, defendant does not take issue with the response given by the court to the jury, but claims instead that the court erred in failing to read the note verbatim into the record to counsel and the jury. "While a reading of the notes into the record is the better practice, it is not required where, as here, the record reflects that defendant received meaningful notice regarding the content of [the subject] note . . . and [that] he was able to meaningfully participate in formulating the responses to the note[]" (*People v Powell*, 115 AD3d 998, 1000-1001 [3d Dept 2014]; *see generally People v Barnes*, 139 AD3d 1371, 1372 [4th Dept 2016], *lv denied* 28 NY3d 926 [2016]). Thus, we conclude that there was no *O'Rama* violation with respect to the first jury note.

We conclude that the second and third jury notes required only ministerial responses from the court, i.e., providing the jury with

requested items that were in evidence. "[T]he *O'Rama* procedure is not implicated when the jury's request is ministerial in nature and therefore requires only a ministerial response" (*People v Nealon*, 26 NY3d 152, 161 [2015]), and defendant has not established that the second and third jury notes at issue contained any substantive inquiries. Thus, we reject defendant's contentions with respect to those jury notes (*see People v Williams*, 142 AD3d 1360, 1362 [4th Dept 2016], *lv denied* 28 NY3d 1128 [2016]).

Finally, because it is impossible to commit the crime of grand larceny in the fourth degree under Penal Law § 155.30 (8) without concomitantly committing the crime of unauthorized use of a vehicle in the third degree under section 165.05 (1), we agree with defendant that counts three and four of indictment No. 256, charging the latter crime, must be dismissed because they are lesser inclusory concurrent counts of counts seven and nine of indictment No. 112, charging the former crime (*see generally People v Miller*, 6 NY3d 295, 302 [2006]). We therefore modify the judgment accordingly.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1273

KA 16-00563

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER SWICK, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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 January 21, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of stolen property in the fourth degree (two counts) and unauthorized use of a vehicle in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of two counts of unauthorized use of a vehicle in the third degree and dismissing counts three and four of indictment No. 256, and as modified the judgment is affirmed.

Same memorandum as in *People v Swick* ([appeal No. 1] — AD3d — [Feb. 2, 2018] [4th Dept 2018]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1285

CA 17-00210

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

ROGER D. ELWELL AND KATHLEEN J. ELWELL,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ROBERT SHUMAKER AND MARJORIE SHUMAKER,
DEFENDANTS-RESPONDENTS.

MICHAEL J. WRONA, BUFFALO, FOR PLAINTIFFS-APPELLANTS.

Appeal from a judgment of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered March 17, 2016. The judgment, inter alia, dismissed the amended complaint.

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

Memorandum: Plaintiffs commenced this RPAPL article 15 action seeking to establish, inter alia, their ownership of a disputed strip of land that is located at the boundary between their property and that of defendants, their neighbors. Plaintiffs appeal from a judgment that, inter alia, dismissed the amended complaint after a bench trial. We affirm.

We reject plaintiffs' contention that they established their title to the disputed strip of land. The record from the bench trial establishes that plaintiffs relied upon their deed and that of defendants, which apparently place the mutual property line in two different locations that are about 40 feet apart at the widest point. Plaintiffs failed, however, to introduce a chain of title for either property. It is well settled that, "in an RPAPL article 15 action, the burden is on the plaintiff to establish by a preponderance of the evidence that the disputed property is within its chain of title . . . Accordingly, a plaintiff must demonstrate that it has good title and may not rely on any infirmities in its opponent's title" (*State of New York v Moore*, 298 AD2d 814, 815 [3d Dept 2002]; *see generally Adamec v Mueller*, 94 AD3d 1212, 1213 [3d Dept 2012], *lv denied* 20 NY3d 856 [2013]). In order to determine whether plaintiffs met that burden, Supreme Court was required to "examine the chains of title of deeds and interpret the language of said deeds. The sufficiency of record title depends upon the construction of the deeds, which is generally a question of law for the court" (*Koepp v Holland*, 688 F Supp 2d 65, 79 [ND NY 2010], *affd* 593 Fed Appx 20 [2d Cir 2014]). Furthermore, "[b]efore the [c]ourt may rule, as a matter of law, with regard to the

parties[’] property interests in [the disputed strip of land], the [c]ourt must determine the extent of [the] property interests [of the predecessors of the parties] prior to their conveyances” to the parties (*id.* at 80). Inasmuch as plaintiffs failed to introduce any evidence establishing the chains of title for the boundary line in either deed, the court properly concluded that plaintiffs failed to establish that they have record title to the disputed strip of land (*cf. Crain v Mannise*, 125 AD3d 1422, 1424-1425 [4th Dept 2015]). Consequently, the court properly dismissed the first cause of action, seeking a determination that plaintiffs have title to the disputed strip of land.

Plaintiffs do not address in their brief the propriety of the dismissal of their third cause of action, which is based on allegations that defendants “recognized and acquiesced” that plaintiffs were correct with respect to the location of the boundary line between the properties, and thus plaintiffs have abandoned any issue with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We are unable to review plaintiffs’ contentions concerning the second and fourth causes of action, for adverse possession and prescriptive easement. The evidence at trial apparently included a survey map of the disputed boundary line, on which the surveyor marked the boundary lines according to the call of each of the deeds. That survey map was marked in different colors depicting plaintiffs’ and defendants’ respective proposed boundary line, and all witnesses referred to that exhibit when testifying. The court settled the record, apparently upon motion of plaintiffs, and the settled record does not include that, or any other, exhibit. Thus, plaintiffs, “as the [parties] raising this issue on [their] appeal, ‘submitted this appeal on an incomplete record and must suffer the consequences’ ” (*Resetarits Constr. Corp. v City of Niagara Falls*, 133 AD3d 1229, 1229 [4th Dept 2015]; *see Matter of Santoshia L.*, 202 AD2d 1027, 1028 [4th Dept 1994]; *see also Killian v Heiman*, 105 AD3d 1459, 1459-1460 [4th Dept 2013]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1292

KA 13-00150

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JYQUALE J. THOMAS, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered December 19, 2012. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]). We reject defendant's contention that a new trial is warranted because the People failed to disclose *Brady* material in a timely manner. Even assuming, arguendo, that the victim's pretrial expression of concern about possible negative consequences of not providing an in-court identification of defendant for the People constituted material favorable to defendant that was withheld until after commencement of the trial (*see generally People v Barnes*, 200 AD2d 751, 751-752 [2d Dept 1994], *lv denied* 83 NY2d 849 [1994]), we conclude that defendant's constitutional right to a fair trial was not violated (*see generally People v Garrett*, 23 NY3d 878, 884-885 [2014], *rearg denied* 25 NY3d 1215 [2015]). "Untimely or delayed disclosure will not prejudice a defendant or deprive him or her of a fair trial where[, as here,] the defense is provided with 'a meaningful opportunity to use the allegedly exculpatory [or impeaching] material to cross-examine the People's witnesses or as evidence during his [or her] case' " (*People v Carter*, 131 AD3d 717, 718-719 [3d Dept 2015], *lv denied* 26 NY3d 1007 [2015], quoting *People v Cortijo*, 70 NY2d 868, 870 [1987]; *see People v Jackson*, 281 AD2d 906, 907 [4th Dept 2001], *lv denied* 96 NY2d 920 [2001]). Contrary to defendant's contention, there is no "reasonable possibility that the outcome of the trial would have differed had the [information] been [disclosed sooner]" (*People v Scott*, 88 NY2d 888, 891 [1996]; *see People v Milton*, 90 AD3d 1636, 1637 [4th Dept 2011], *lv denied* 18 NY3d 996 [2012]).

Defendant also contends that the evidence is legally insufficient to establish his identity as the robber. We reject that contention. The evidence at trial established that the victim was walking home from a bus stop at night in his neighborhood when, after turning around a couple times and seeing someone in the area, the victim heard footsteps directly behind him, turned around again, and saw a man pointing what appeared to be a shotgun at his head. The robber demanded money, and the victim handed him money and a bus pass. Although the victim did not identify defendant as the robber, the People adduced circumstantial evidence of guilt, including defendant's statement to a fellow jail inmate that he was present for the robbery, evidence that defendant was connected to a vehicle that the victim recognized in the area around the time of the robbery, and evidence that both defendant and the victim were at an office building the following day when the victim observed a person who looked like the robber. There was also direct evidence of guilt, inasmuch as defendant admitted to a second inmate that he committed the robbery (*see People v Heck*, 103 AD3d 1140, 1141 [4th Dept 2013], *lv denied* 21 NY3d 1074 [2013]; *People v Williams*, 45 AD3d 905, 905 [3d Dept 2007], *lv denied* 10 NY3d 818 [2008]). In addition, the testimony that defendant requested that the second inmate kill the victim to prevent him from testifying at trial is evidence of consciousness of guilt and further supports the jury's finding of guilt (*see generally People v Pawlowski*, 116 AD2d 985, 986 [4th Dept 1986], *lv denied* 67 NY2d 948 [1986]). Based on the foregoing, we conclude that the direct and circumstantial evidence adduced at trial, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), provides a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury" (*People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's further contention, although a different result would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348 [2007]; *Bleakley*, 69 NY2d at 495), we conclude that, viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495; *People v Zacharek*, 170 AD2d 1008, 1008 [4th Dept 1991], *lv denied* 77 NY2d 969 [1991]). It is well settled that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010] [internal quotation marks omitted]), and we perceive no reason to disturb the jury's resolution of those issues here. Contrary to defendant's contention, "the testimony of the People's witnesses was not incredible as a matter of law, i.e., it was not impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Resto*, 147 AD3d 1331, 1334 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017] [internal quotation marks omitted]). The testimony of the People's witnesses "was not rendered incredible as a matter of law . . . by the fact that [several] of them had criminal histories and received favorable

treatment in exchange for their testimony" (*id.*).

We reject defendant's contention that Supreme Court abused its discretion in permitting one of the People's witnesses to testify about defendant's connection to the vehicle and his presence in the office building inasmuch as that testimony was relevant to the central issue in the case, i.e., identity, and the probative value of that testimony was not " 'substantially outweighed by the potential for prejudice' " (*People v Harris*, 26 NY3d 1, 5 [2015]; *see People v Inman*, 134 AD3d 1434, 1436 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]).

We also reject defendant's contention that he was deprived of a fair trial by prosecutorial misconduct on summation. Contrary to defendant's contention, "[t]he prosecutor did not improperly vouch for the credibility of a prosecution witness on summation, because '[a]n argument by counsel on summation, based on the record evidence and reasonable inferences drawn therefrom, that his or her witnesses have testified truthfully is not vouching for their credibility' " (*People v Womack*, 151 AD3d 1754, 1756 [4th Dept 2017], *lv denied* 29 NY3d 1136 [2017]; *see People v Bailey*, 58 NY2d 272, 277 [1983]). Furthermore, "the prosecutor's closing statement must be evaluated in light of the defense summation, which put into issue the [witnesses'] character and credibility and justified the People's response" (*People v Halm*, 81 NY2d 819, 821 [1993]) and, here, we conclude that "the prosecutor's comments at issue on summation were 'a fair response to defense counsel's summation and did not exceed the bounds of legitimate advocacy' " (*People v Carrasquillo-Fuentes*, 142 AD3d 1335, 1338 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]; *see Womack*, 151 AD3d at 1756).

We reject defendant's contention that the court abused its discretion in denying his motion for recusal from further proceedings after the court, over defendant's objection, spoke privately with the jurors following the verdict. Where, as here, "recusal is sought based upon 'impropriety as distinguished from legal disqualification, the judge . . . is the sole arbiter' " of whether to grant such a motion (*People v Moreno*, 70 NY2d 403, 406 [1987]). Here, the court determined that its discussion with the jurors stayed within appropriate parameters, and we conclude that there is no basis on this record to determine that the court abused its discretion in declining to recuse itself (*see People v Rios-Davilla*, 64 AD3d 482, 483 [1st Dept 2009], *lv denied* 13 NY3d 838 [2009]; *see generally Moreno*, 70 NY2d at 405-406).

Contrary to defendant's further contention, the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Finally, defendant's remaining contention is not preserved for

our review (*see* CPL 470.05 [2]) and, in any event, is without merit.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1297

KA 13-01973

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICOLE PRUITT, ALSO KNOWN AS NICKIE PRUITT,
DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (DANIELLE L. WILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered November 7, 2013. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We reject defendant's contention that County Court erred in refusing to suppress a handgun and her statements to the police.

Contrary to defendant's contention, the court properly determined that the police conduct was "justified in its inception and . . . reasonably related in scope to the circumstances [that] rendered its initiation permissible" (*People v De Bour*, 40 NY2d 210, 222 [1976]). Based upon the totality of the circumstances, including the short period of time between the 911 call reporting a female with a handgun and the arrival of the police officer at the reported location, defendant's presence at that location, and the officer's observations that defendant's physical characteristics and clothing matched the description of the suspect, the officer was " 'justified in forcibly detaining defendant in order to quickly confirm or dispel [his] reasonable suspicion of defendant's possible [possession of a weapon]' " (*People v Williams*, 136 AD3d 1280, 1283 [4th Dept 2016], *lv denied* 27 NY3d 1141 [2016], 29 NY3d 954 [2017]). Even assuming, arguendo, that the 911 call to which the officer was responding was

made by an anonymous caller, we conclude that "the information provided by the caller was sufficiently corroborated to provide reasonable suspicion" (*People v Moss*, 89 AD3d 1526, 1527 [4th Dept 2011], *lv denied* 18 NY3d 885 [2012]; *see People v Argyris*, 24 NY3d 1138, 1140 [2014], *rearg denied* 24 NY3d 1211 [2015], *cert denied* 577 US —, 136 S Ct 793 [2016]).

Contrary to defendant's further contention, she was not subjected to an unlawful de facto arrest when, after exiting his patrol vehicle and approaching defendant on foot, the officer handcuffed her, conducted a pat frisk, and placed her in the back of the patrol vehicle. "It is well established that not every forcible detention constitutes an arrest" (*People v Drake*, 93 AD3d 1158, 1159 [4th Dept 2012], *lv denied* 19 NY3d 1102 [2012]; *see People v Hicks*, 68 NY2d 234, 239 [1986]), and that an "officer[] may handcuff a detainee out of concern for officer safety" (*People v Wiggins*, 126 AD3d 1369, 1370 [4th Dept 2015]; *see People v Allen*, 73 NY2d 378, 379-380 [1989]). Moreover, a "corollary of the statutory right to temporarily detain for questioning is the authority to frisk if the officer reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed" (*De Bour*, 40 NY2d at 223; *see Wiggins*, 126 AD3d at 1370). Here, we conclude that defendant was not under arrest when she was handcuffed, pat frisked, and placed in the patrol vehicle for an investigatory detention (*see People v McCoy*, 46 AD3d 1348, 1349 [4th Dept 2007], *lv denied* 10 NY3d 813 [2008]). Contrary to defendant's related contention, although the pat frisk did not reveal any weapons, her continued detention in the patrol vehicle was justified while the officer immediately searched for anything that had been surreptitiously left behind a nearby parked SUV inasmuch as the officer, prior to approaching defendant, had observed her crossing the street with another individual and had lost sight of her as she walked behind the SUV. Under these circumstances, we conclude that defendant's brief, continued detention was reasonable inasmuch as the officer "diligently pursued a minimally intrusive means of investigation likely to confirm or dispel suspicion quickly" (*Hicks*, 68 NY2d at 242; *see Allen*, 73 NY2d at 380), and " 'a less intrusive means of fulfilling the police investigation was not readily apparent' " (*People v Howard*, 129 AD3d 1654, 1656 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]).

Contrary to defendant's further contention, even if she had been in custody, we conclude under the circumstances of this case that the court properly refused to suppress her pre-*Miranda* statements and any fruits thereof. The statements, which were made after the officer discovered a purse behind the SUV, "were responses to threshold inquiries by the [officer] that were intended to ascertain the nature of the situation during initial investigation of a crime, rather than to elicit evidence of a crime, and those statements thus were not subject to suppression" (*People v Mitchell*, 132 AD3d 1413, 1414 [4th Dept 2015], *lv denied* 27 NY3d 1072 [2016] [internal quotation marks omitted]; *see People v Coffey*, 107 AD3d 1047, 1050 [3d Dept 2013], *lv denied* 21 NY3d 1041 [2013]).

Defendant also contends that the court erred in refusing to suppress the handgun on the ground that the officer's discovery of it was the result of an unlawful warrantless search of the contents of the purse. We reject that contention. " 'It is well settled that the suppression court's credibility determinations and choice between conflicting inferences to be drawn from the proof are granted deference and will not be disturbed unless unsupported by the record' " (*People v Sylvester*, 129 AD3d 1666, 1667 [4th Dept 2015], *lv denied* 26 NY3d 1092 [2015]). Here, the evidence established that the officer discovered the purse discarded in a public place on the ground behind the SUV and acted reasonably in picking it up, and that he did not open or look inside it at that time (*see generally People v Wright*, 88 AD2d 879, 880 [1st Dept 1982], *affd* 58 NY2d 797 [1983]; *People v Branson*, 81 AD2d 1031, 1032 [4th Dept 1981]). After defendant indicated that the purse belonged to her, the officer put the purse down. Despite some equivocal testimony from the officer, the record supports the court's determination that the barrel of the handgun came into the plain view of the officer when the open, flexible purse "laid flat" upon being placed on the trunk of the patrol vehicle (*cf. People v Johnson*, 241 AD2d 527, 527-528 [2d Dept 1997], *lv denied* 90 NY2d 1012 [1997]; *see generally People v Brooks*, 110 AD2d 571, 572 [1st Dept 1985], *affd* 65 NY2d 1021 [1985]). Where, as here, an officer is lawfully in a position from which an object is viewed, has lawful access to the object, and the object's incriminating nature is immediately apparent, the officer may properly seize the object in plain view without a warrant (*see generally People v Brown*, 96 NY2d 80, 88-89 [2001]).

Inasmuch as there was no unlawful police conduct with respect to defendant's detention, her initial statements to the officer, or the seizure of the handgun, her further contention that her subsequent statements at the police station should have been suppressed as tainted by prior unlawful police conduct is necessarily without merit (*see People v Bethany*, 144 AD3d 1666, 1668 [4th Dept 2016], *lv denied* 29 NY3d 996 [2017]).

Finally, we reject defendant's contention that the court abused its discretion in denying her motion to withdraw her guilty plea on the ground that defense counsel was ineffective without conducting an evidentiary hearing. Defendant was "afforded [a] reasonable opportunity to present [her] contentions," and the court made "an informed determination" in denying the motion on the merits (*People v Tinsley*, 35 NY2d 926, 927 [1974]). Inasmuch as defendant's conduct was " 'utterly at odds with any claim of innocent possession' " of the handgun (*People v Griggs*, 108 AD3d 1062, 1063 [4th Dept 2013], *lv denied* 21 NY3d 1074 [2013]), defense counsel was not ineffective for failing to advise defendant of that potential defense (*see generally People v Adams*, 90 AD3d 1508, 1509-1510 [4th Dept 2011], *lv denied* 18 NY3d 954 [2012]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1315

KA 16-00618

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARVIN ROBERTS, DEFENDANT-APPELLANT.

KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C., WASHINGTON, D.C. (THOMAS G. SCHULTZ OF COUNSEL), AND TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered December 1, 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 reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress tangible evidence is granted, the indictment is dismissed, and the matter is remitted to Monroe County Court for proceedings pursuant to CPL 470.45.

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 County Court erred in denying that part of his omnibus motion seeking to suppress tangible evidence, including a handgun, that a police officer seized from him. We agree.

The evidence from the suppression hearing establishes that, at approximately 4:20 a.m., a Rochester police officer heard a radio broadcast stating that a person had been taken to a hospital by private vehicle for treatment of a gunshot wound. Approximately 15 minutes later, the officer heard a further broadcast stating that the shooting had occurred at a bar on Lake Avenue in Rochester, and that the suspect was a male Hispanic, approximately five feet, ten inches tall with a medium build. The broadcast did not indicate when the shooting had occurred, or whether it was inside or outside the bar. Along with other police officers, the officer responded to the bar's location within two minutes, where he saw five people standing in a parking lot near a vehicle. The officer testified that one member of the group "appeared to be a male Hispanic, two were male blacks, one

was a female white and the other was male white." The officer searched the parking lot and found blood spots and a bullet fragment located between 10 and 25 feet from the group, but the People introduced no evidence indicating how long those items may have been there.

Another officer, who did not testify at the hearing, approached the five people and questioned them. The testifying officer stated that he only heard the other officer ask the group about the shooting, and one, unidentified member of the group replied that "they didn't see anything, they didn't hear anything, that nothing like that happened out here." Nevertheless, the testifying officer decided to frisk all members of the group. He testified that he began the process with defendant, a male black, because he was standing closest to him. Defendant turned away from the officer, who seized defendant's hands, patted defendant's waist, and discovered a weapon.

We agree with defendant that, based on the evidence at the suppression hearing, the court erred in refusing to suppress the weapon. As an initial matter, we conclude that the police had an objective, credible reason to approach the group of five people in the parking lot and to request information in light of the report of a shooting at or near that location at some unidentified earlier time. Thus, we conclude that the police encounter was lawful at its inception (*see People v Hollman*, 79 NY2d 181, 185 [1992]; *People v De Bour*, 40 NY2d 210, 220 [1976]). The People correctly concede, however, that the officer's encounter with defendant constituted a level three forcible detention under the four-tiered *De Bour* framework (40 NY2d at 223; *see generally People v Bora*, 83 NY2d 531, 535 [1994]), and thus required "a reasonable suspicion that [defendant] was involved in a felony or misdemeanor" (*People v Moore*, 6 NY3d 496, 499 [2006]).

We conclude that, "[b]ecause of the lack of correspondence between defendant's appearance and the description of the suspected [shooter that was] transmitted to the officer[] . . . , the officer[] had no basis for concluding that the reported crime had been committed by defendant" (*People v Ross*, 251 AD2d 1020, 1021 [4th Dept 1998], *lv denied* 92 NY2d 882 [1998]; *cf. People v Wilson*, 144 AD3d 1500, 1500 [4th Dept 2016], *lv denied* 28 NY3d 1151 [2017]; *People v Waters*, 259 AD2d 642, 643-644 [2d Dept 1999]). "Nor can the [frisk of defendant] and seizure of the gun be justified as having been in the interests of the officer['s] safety, since there was no testimony that the officer[] believed defendant to be carrying a weapon" (*People v Thompson*, 127 AD3d 658, 662 [1st Dept 2015]), and the People presented no other evidence establishing that the officer had reason to fear for his safety (*cf. People v Fletcher*, 130 AD3d 1063, 1065 [2d Dept 2015], *affd* 27 NY3d 1177 [2016]). Consequently, we conclude that the People failed to establish that the officer had "a reasonable suspicion that [defendant] was involved in a felony or misdemeanor" (*Moore*, 6 NY3d at 499). Because the forcible detention and frisk of defendant was unlawful, the handgun and other tangible evidence seized by the police should have been suppressed. We therefore vacate the plea, dismiss the indictment, and remit the matter to County Court for proceedings

pursuant to CPL 470.45 (*see People v Elliott*, 140 AD3d 1752, 1753 [4th Dept 2016]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1331

CA 17-00645

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

DLJ MORTGAGE CAPITAL, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BILAL M. HUZAIR, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

ISAAC ZIMMERMAN, WATERPORT, FOR DEFENDANT-APPELLANT.

ECKERT SEAMANS CHERIN & MELLOTT, LLC, WHITE PLAINS (DAVID V. MIGNARDI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered August 23, 2016. The order granted plaintiff's motion for, inter alia, summary judgment striking the answer of defendant-appellant and the appointment of a referee and denied the cross motion of defendant-appellant for, inter alia, summary judgment dismissing the complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion with respect to the 13th affirmative defense of defendant Bilal M. Huzair, reinstating the answer of that defendant to that extent, and vacating the order of reference, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this mortgage foreclosure action against, among others, Bilal M. Huzair (defendant). Plaintiff moved for, inter alia, summary judgment striking defendant's answer and the appointment of a referee, and defendant cross-moved for, inter alia, summary judgment dismissing the complaint against him. Supreme Court granted the motion, issued an order of reference, and denied the cross motion.

Defendant contends that plaintiff failed to meet its burden on the motion with respect to the issue of standing because it failed to establish a chain of assignments of the mortgage and note from the original assignee to plaintiff. We reject that contention. Where, as here, "the note is endorsed in blank, the plaintiff may establish standing by demonstrating that it had physical possession of the original note at the time the action was commenced . . . The plaintiff may do so through an affidavit of an individual swearing to such possession following a review of admissible business records" (*Bank of N.Y. Mellon v Anderson*, 151 AD3d 1926, 1927 [4th Dept 2017]), and we note that plaintiff herein provided such an affidavit in support of

its motion. Contrary to defendant's contention, "[t]here is simply no requirement that an entity in possession of a negotiable instrument that has been endorsed in blank must establish how it came into possession of the instrument in order to be able to enforce it" (*JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 645 [2d Dept 2016]).

We agree, however, with defendant's further contention that the court erred in granting plaintiff's motion insofar as it sought summary judgment dismissing the 13th affirmative defense, which alleged that the loan was in violation of the anti-predatory lending statute (*see* Banking Law § 6-l), and we therefore modify the order accordingly. In support of that part of its motion, plaintiff contended only that the "note . . . was not a 'high-cost loan' because the max[imum] interest rate did not exceed more than 8% of the treasury yield at its making." Banking Law § 6-l (1) (d) defines a " '[h]igh-cost home loan' " as one that exceeds the thresholds in subdivision (g) of the statute, which in turn defines those thresholds as either a loan with a rate that is eight points higher than the yield on treasury securities in the month before the loan application (*see* § 6-l [1] [g] [i]), or a loan of $50,000 or more in which the points and fees exceed five percent of the total loan amount (*see* § 6-l [1] [g] [ii]). Inasmuch as the loan in question exceeded $50,000 and plaintiff failed to address the second threshold, "plaintiff . . . failed to establish [its] prima facie entitlement to judgment as a matter of law dismissing the [13th] affirmative defense" (*Diliberto v Barberich*, 94 AD3d 803, 804 [2d Dept 2012]). Thus, that part of the motion should have been denied "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). We note that, in reviewing whether plaintiff met its burden with respect to the 13th affirmative defense, we have not considered any evidence submitted with its reply papers on the motion (*see Miller v Spall Dev. Corp.*, 45 AD3d 1297, 1298 [4th Dept 2007]; *Wonderling v CSX Transp., Inc.*, 34 AD3d 1244, 1245 [4th Dept 2006]).

Defendant further contends that the court erred in denying his cross motion inasmuch as he met his burden of establishing his entitlement to judgment as a matter of law on the 13th affirmative defense. We reject that contention. The court, apparently after assuming, arguendo, that defendant met his burden on that part of the cross motion, concluded that plaintiff established that the loan had been modified twice and that those modifications removed the loan from the protection of Banking Law § 6-l. That was error. Where a loan is a high-cost home loan within the meaning of the statute, it may be modified under certain circumstances to bring it into compliance with the law, i.e., where the lender establishes that it failed to comply with the statute because of a good-faith error and, "within sixty days after the discovery of the compliance failure and prior to the institution of any action under this section or the receipt of written notice of the compliance failure, the borrower is notified of the compliance failure, appropriate restitution is made, and whatever adjustments are necessary are made to the loan to either, at the choice of the borrower, (i) make the high-cost home loan satisfy the requirements of this section, or (ii) change the terms of the loan in

a manner beneficial to the borrower so that the loan is no longer a high-cost home loan subject to the provisions of this section" (§ 6-l [4] [b]). In support of its position that the loan modifications brought the original loan into compliance with the statute, plaintiff failed to establish that such circumstances apply to this case. Indeed, we note that plaintiff submitted no evidence indicating that it notified defendant of a compliance failure, and in fact, plaintiff rolled the allegedly improper fees and costs into the modified loans with additional interest. Consequently, the court erred in concluding that the two modifications removed the original loan from the protection afforded by the statute.

Nevertheless, we conclude that defendant "failed to eliminate all triable issues of fact as to whether the loans constituted high-cost home loans within the meaning of Banking Law § 6-l, and whether the loans conformed to the statutory requirements and prohibitions set forth in Banking Law § 6-l, such as the prohibition [against] financing of points and fees" (*Meikle v Fremont Inv. & Loan Corp.*, 125 AD3d 616, 618 [2d Dept 2015]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and the court therefore properly denied the cross motion.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1342

KA 16-00008

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL FLOYD, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (STEPHEN EARNHART OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered December 15, 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: 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 and statements obtained by the police following the stop of a vehicle in which defendant was a passenger. We reject that contention.

At the suppression hearing, a police officer who was present on the morning of defendant's arrest testified that, at approximately 1:00 a.m., he and other officers were at the intersection of Ashley and Person Streets in the City of Buffalo investigating an unrelated crime. The officer had been at that location for approximately 30 minutes and had not observed any foot or vehicle traffic. He also was familiar with "that area," and knew that a person must travel north to Broadway in order to leave the area. Suddenly, the officer heard "several" gunshots coming from no farther than one city block south of his location. He and another officer "immediately" entered their patrol vehicle and headed south on Person Street. The officer then observed a vehicle driving north on Person Street at 40 or 45 miles per hour, headed toward Broadway and away from the direction of the gunshots. The officer maneuvered his patrol vehicle to block the path of the oncoming vehicle, which came to a stop. The officer exited his patrol vehicle and asked defendant, who was seated in the passenger seat of the stopped vehicle, to show his hands. Defendant complied,

but also spoke "garbled" words that the officer could not understand. The officer asked defendant to step out of the vehicle, laid him face down on the ground, and handcuffed him. When the officer stood up, he noticed the black handle of a gun underneath the passenger seat of the vehicle. Before advising defendant of his *Miranda* rights, the officer asked him whether anyone had been shot, and defendant responded that "nobody was shot."

The court properly refused to suppress the physical evidence and defendant's statements. It is well established that the police may stop a vehicle "when there exists 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 [1995], *cert denied* 516 US 905 [1995]; *see People v Lopez*, 149 AD3d 1545, 1547 [4th Dept 2017]). "A police officer's suspicion may be characterized as reasonable when it is based upon specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion" (*People v Taylor*, 31 AD3d 1141, 1142, [4th Dept 2006] [internal quotation marks omitted]; *see Terry v Ohio*, 392 US 1, 21 [1968]). Here, in light of the officer's testimony that, only seconds after he heard nearby gunshots, he observed a vehicle speeding away from the area and no other persons or vehicles had been observed in the area for approximately half an hour, we conclude that the officer had reasonable suspicion that an occupant of that vehicle had committed a crime (*see People v Wingfield*, 88 AD3d 537, 537 [1st Dept 2011], *lv denied* 18 NY3d 863 [2011]; *People v Williams*, 73 AD3d 1097, 1099 [2d Dept 2010], *lv dismissed* 15 NY3d 779 [2010]; *see also People v Alston*, 23 AD3d 487, 488 [2d Dept 2005], *lv denied* 6 NY3d 808 [2006]). The subsequent use of handcuffs to restrain defendant was justified inasmuch as it was "undertaken to effect his nonarrest detention, and to ensure the officers' safety late at night [in the vicinity of] premises where multiple gunshots had just been fired" (*Williams*, 73 AD3d at 1099; *see People v Allen*, 73 NY2d 378, 379-380 [1989]).

Insofar as defendant contends that the court erred in refusing to suppress the pre-*Miranda* statement that he made in response to a question from the officer, that contention was raised for the first time in defendant's reply brief and thus is not properly before us (*see People v Ford*, 69 NY2d 775, 777 [1987], *rearg denied* 69 NY2d 985 [1987]; *People v Kreutter*, 121 AD3d 1534, 1535 [4th Dept 2014], *lv denied* 25 NY3d 990 [2015]). In any event, we conclude that his contention lacks merit inasmuch as the public safety exception to the *Miranda* rule applies to the officer's question (*see People v Rose*, 129 AD3d 1631, 1632 [4th Dept 2015], *lv denied* 27 NY3d 1005 [2016]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1348

CA 17-00082

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

BROWN & BROWN, INC., AND BROWN & BROWN
OF NEW YORK, INC.,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

THERESA A. JOHNSON AND LAWLEY BENEFITS
GROUP, LLC, DEFENDANTS-RESPONDENTS-APPELLANTS.

SATTERLEE STEPHENS LLP, NEW YORK CITY (THOMAS J. CAHILL OF COUNSEL), AND LITTLER MENDELSON P.C., FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

PHILLIPS LYTLE LLP, BUFFALO (PRESTON L. ZARLOCK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 25, 2016. The order, among other things, denied partial enforcement of the non-solicitation covenant contained in an employment agreement between defendant Theresa A. Johnson and plaintiffs.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiffs' motion and dismissing the counterclaims of each defendant, and granting defendants' motion insofar as it sought summary judgment and dismissing the complaint in its entirety, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action against their former employee, defendant Theresa A. Johnson, and plaintiffs' competitor, defendant Lawley Benefits Group, LLC (Lawley), seeking damages that plaintiffs allegedly sustained after they terminated Johnson from her position and she was thereafter hired by Lawley. The first cause of action, against Johnson only, alleged breach of the employment agreement (agreement) between plaintiffs and Johnson, which consisted of breaches of the agreement's non-solicitation, confidentiality and non-inducement covenants. The second cause of action, also against Johnson only, alleged misappropriation of confidential and proprietary information. The third cause of action, against both defendants, alleged tortious interference with plaintiffs' prospective and existing business relations, and the fourth cause of action, against Lawley only, alleged tortious interference with the agreement. In her amended answer, Johnson asserted counterclaims alleging defamation and tortious interference

with prospective business relations. Lawley, in its amended answer, also asserted a counterclaim alleging tortious interference with prospective business relations.

On a prior appeal we reviewed an order of Supreme Court (Michalek, J.) that, inter alia, denied that part of defendants' motion seeking summary judgment dismissing the first cause of action insofar as it alleged breach of the non-solicitation covenant in the agreement. We modified the order by, inter alia, granting that part of the motion (*Brown & Brown, Inc. v Johnson*, 115 AD3d 162 [4th Dept 2014]). We thereafter granted plaintiffs' motion for leave to appeal to the Court of Appeals (117 AD3d 1506 [4th Dept 2014]), and certified a question, and the Court of Appeals reviewed that part of our order dismissing the first cause of action insofar as it alleged breach of the non-solicitation covenant.

As relevant to this appeal, the Court of Appeals reversed this Court's order, insofar as appealed from, and reinstated the claim based upon the non-solicitation covenant (*Brown & Brown, Inc. v Johnson*, 25 NY3d 364 [2015]). The Court "conclude[d] that factual issues exist which prevent[ed it] from determining whether partial enforcement of the agreement's non-solicitation provision is appropriate," and it remitted for further proceedings (*id.* at 367).

Upon remittal, Supreme Court (Walker, A.J.) conducted a bench trial limited to the issue whether the non-solicitation covenant should be partially enforced. Plaintiffs appeal and defendants cross-appeal from an order that, inter alia, determined that partial enforcement of the non-solicitation covenant was not warranted, denied plaintiffs' motion for summary judgment dismissing the counterclaims of each defendant, and denied defendants' second motion insofar as it sought summary judgment dismissing the claims that survived following the bench trial.

Contrary to plaintiffs' contention on appeal, we conclude that the evidence at trial supports the court's determination that partial enforcement of the non-solicitation covenant was not warranted. Plaintiffs had the burden of demonstrating that, in imposing the terms of the non-solicitation covenant, they did not engage in "overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, but ha[d] in good faith sought to protect a legitimate interest" (*BDO Seidman v Hirshberg*, 93 NY2d 382, 394 [1999]), and they did not meet that burden. The evidence established that the non-solicitation covenant was imposed as a condition of Johnson's employment, after she had left her former employer and her position there had been filled, which belies plaintiffs' contention that Johnson's bargaining position was equal or superior to theirs (*see Scott, Stackrow & Co., C.P.A.'s, P.C. v Skavina*, 9 AD3d 805, 807 [3d Dept 2004], *lv denied* 3 NY3d 612 [2004]). In addition, plaintiffs required all employees, regardless of position, to sign an agreement containing a non-solicitation covenant as a condition of employment, which undercuts plaintiffs' contention that the covenant was necessary to protect their legitimate business interests (*see id.*). Finally, the fact that the agreement provides for partial enforcement of the

non-solicitation covenant, which is clearly over-broad under New York law, casts doubt on plaintiffs' good faith in imposing the covenant on Johnson (*see Brown & Brown, Inc.*, 115 AD3d at 172).

We agree with plaintiffs, however, that the court erred in denying their motion seeking summary judgment dismissing the counterclaims asserted by Johnson and Lawley, and we modify the order accordingly. With respect to Johnson's counterclaim for defamation, plaintiffs met their burden of establishing as a matter of law that the statements made in their attorney's cease and desist letter were "pertinent to a good faith anticipated litigation" and thus privileged (*Front, Inc. v Khalil*, 24 NY3d 713, 720 [2015], *rearg denied* 25 NY3d 1036 [2015]). Johnson failed to raise a triable issue of fact with respect to the letter. Plaintiffs also met their burden of establishing as a matter of law that Johnson's supervisor did not make the other alleged defamatory statements, and the double hearsay accounts of the statements submitted by Johnson were insufficient to raise a triable issue of fact (*see Scaccia v Dolch*, 231 AD2d 885, 885 [4th Dept 1996]). Inasmuch as the counterclaims of Johnson and Lawley alleging tortious interference with prospective business relations are premised upon the alleged defamatory statements, those counterclaims should also have been dismissed (*see generally Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]).

With respect to the cross appeal, we conclude that the court also erred in denying defendants' motion insofar as it sought summary judgment dismissing plaintiffs' claims that survived following the bench trial, and we further modify the order accordingly. With respect to that part of the first cause of action alleging breach of the confidentiality covenant and the second cause of action, alleging misappropriation of confidential and proprietary information, defendants met their burden of establishing as a matter law that the information at issue was neither confidential, nor did it constitute trade secrets, because it was readily ascertainable from sources outside plaintiffs' business (*see Riedman Corp. v Gallager*, 48 AD3d 1188, 1189 [4th Dept 2008]; *Savannah Bank v Savings Bank of Fingerlakes*, 261 AD2d 917, 918 [4th Dept 1999]). In response, plaintiffs failed to raise a triable issue of fact.

That part of the first cause of action alleging that Johnson breached the non-inducement covenant should also have been dismissed because defendants submitted evidence establishing as a matter of law that Johnson did not solicit or encourage any of plaintiffs' employees to leave plaintiffs' employ following her termination, and plaintiffs failed to raise a triable issue of fact (*see Gerber v Empire Scale*, 147 AD3d 1434, 1435 [4th Dept 2017]). Defendants also met their burden of establishing that the tortious interference with prospective and existing business relations cause of action has no merit inasmuch as defendants established as a matter of law that they had not "engaged in wrongful or unlawful means to secure a competitive advantage over plaintiffs, or . . . acted for the sole purpose of inflicting intentional harm on plaintiffs" (*NBT Bancorp v Fleet/Norstar Fin. Group*, 215 AD2d 990, 990 [3d Dept 1995], *affd* 87 NY2d 614 [1996]). In response, plaintiffs failed to raise a triable

issue of fact. Finally, the cause of action alleging tortious interference with contract against Lawley should have been dismissed inasmuch as that cause of action is premised on Johnson's alleged breaches of the agreement, and there were no such breaches.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1372

CA 17-00675

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

MARLENE CORNELL, AS ADMINISTRATOR OF THE ESTATE
OF SAMUEL CONDELLO, DECEASED,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF MONROE, DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 1.)

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (MATTHEW D. BROWN OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

DAVID L. MURPHY, PC, ROCHESTER (DAVID L. MURPHY OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered June 23, 2016. The order, inter alia, denied the motion of plaintiff for partial summary judgment on the issue of liability with respect to her Public Health Law cause of action and the motion of defendant for partial summary judgment dismissing the Public Health Law and negligence causes of action.

It is hereby ORDERED that said appeal is unanimously dismissed and the order is affirmed without costs.

Memorandum: Plaintiff's decedent, Samuel Condello, was a wheelchair-bound resident at Monroe Community Hospital (MCH). On December 6, 2012, Condello was deprived of his manual wheelchair by MCH's executive director. Condello's health thereafter deteriorated, and he died on January 9, 2013. Plaintiff filed the instant complaint asserting causes of action for violations of Public Health Law § 2801-d, negligence, and wrongful death. Plaintiff moved for partial summary judgment on the issue of liability with respect to her Public Health Law cause of action, and defendant moved for partial summary judgment seeking to dismiss the causes of action concerning the Public Health Law and negligence on the ground that plaintiff allegedly failed to file a timely notice of claim. Plaintiff cross-moved for leave to file a late or amended notice of claim, if necessary, and leave to amend the complaint. By the order on appeal in appeal No. 1, Supreme Court denied the motions and cross motion. Thereafter, by the order on appeal in appeal No. 2, the court granted defendant's motion for leave to reargue its prior motion for partial summary judgment and, upon reargument, adhered to its determination denying that

motion. Defendant appeals in appeal Nos. 1 and 2, and plaintiff cross-appeals in appeal No. 1.

As a preliminary matter, we note that, because the court granted leave to reargue with respect to that part of the order in appeal No. 1 that denied defendant's motion, we dismiss defendant's appeal from the order in appeal No. 1 (*see Griffith Oil Co., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 15 AD3d 982, 983 [4th Dept 2005]; *Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]). We treat the order in appeal No. 1 only with respect to plaintiff's cross appeal.

Contrary to plaintiff's contention on her cross appeal in appeal No. 1, the court properly denied her motion. Liability under Public Health Law § 2801-d is not based on a deviation from accepted standards of medical practice or a breach of a duty of care (*see Novick v South Nassau Communities Hosp.*, 136 AD3d 999, 1001 [2d Dept 2016]). Rather, liability under the statute "contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule, subject to the defense that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient" (*Moore v St. James Health Care Ctr., LLC*, 141 AD3d 701, 703 [2d Dept 2016] [internal quotation marks omitted]). Here, even assuming, arguendo, that plaintiff met her initial burden on the motion, we conclude that defendant raised triable issues of fact by submitting evidence that it "exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient" (*id.*; *see* § 2801-d [1]). In light of our determination, we see no need to address plaintiff's contention concerning punitive damages.

Contrary to defendant's contention in appeal No. 2, we conclude that the court properly denied its motion inasmuch as it admitted in its answer that the notice of claim was timely as to all three causes of action. It is well settled that "[f]acts admitted by a party's pleadings constitute judicial admissions" (*Falkowski v 81 & 3 of Watertown*, 288 AD2d 890, 891 [4th Dept 2001]), and that "[f]ormal judicial admissions are conclusive of the facts admitted in the action in which they are made" (*Zegarowicz v Ripatti*, 77 AD3d 650, 653 [2d Dept 2010]; *see Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 412 [2014]; *Brainard v Barden*, 148 AD3d 1687, 1688 [4th Dept 2017]). In view of defendant's admission, we conclude that plaintiff's notice of claim was timely and, thus, we see no need to address the parties' remaining contentions with respect to the notice of claim.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1373

CA 17-00676

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

MARLENE CORNELL, AS ADMINISTRATOR OF THE ESTATE
OF SAMUEL CONDELLO, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF MONROE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (MATTHEW D. BROWN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID L. MURPHY, PC, ROCHESTER (DAVID L. MURPHY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered October 25, 2016. The order granted defendant's motion for leave to reargue its prior motion for partial summary judgment dismissing the first and second causes of action and, upon reargument, adhered to its determination denying that motion.

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

Same memorandum as in *Cornell v County of Monroe* ([appeal No. 1] — AD3d — [Feb. 2, 2018] [4th Dept 2018]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1379

CA 17-01221

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

NATALIE BECKWITH AND JON BECKWITH,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JOHN BOWEN, M.D. AND ASSOCIATES FOR WOMEN'S
MEDICINE, PLLC, DEFENDANTS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MICHAEL P. RINGWOOD OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DEFRANCISCO & FALGIATANO, LLP, EAST SYRACUSE (JEFF D. DEFRANCISCO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered December 8, 2016. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action on April 10, 2015 seeking damages for injuries sustained by Natalie Beckwith (plaintiff) as a result of two surgeries performed by defendant John Bowen, M.D. in October 2011 and March 2012, respectively. The complaint asserts three causes of action, for negligence, for lack of informed consent, and a derivative cause of action on behalf of plaintiff's husband, plaintiff Jon Beckwith. Defendants moved for summary judgment dismissing the complaint on the procedural ground that the complaint was untimely pursuant to CPLR 214-a, as well as on substantive grounds, e.g., that as a matter of law they did not deviate or depart from required standards of care and that they obtained from plaintiff the requisite informed consent. Supreme Court denied the motion, and we affirm.

Even assuming, arguendo, that defendants established their entitlement to judgment as a matter of law on the issue of the statute of limitations, we conclude that plaintiffs raised a triable issue of fact whether the continuous treatment doctrine operated as a toll thereon (*see Lohnas v Luzi* [appeal No. 2], 140 AD3d 1717, 1718 [4th Dept 2016]). The continuous treatment doctrine tolls the statute of limitations " 'when the course of treatment [that] includes the wrongful acts or omissions has run continuously and is related to the

same original condition or complaint' " (*McDermott v Torre*, 56 NY2d 399, 405 [1982]). In our view, there are issues of fact whether plaintiff continued to treat with Dr. Bowen for the same, rather than separate and discrete, medical conditions from October 4, 2011 until at least June 11, 2013. We therefore find no basis to disturb the court's denial of that part of defendants' motion based on the statute of limitations (*see Simons v Bassett Health Care*, 73 AD3d 1252, 1255 [3d Dept 2010]).

We further conclude that the court properly denied the motion insofar as it sought summary judgment dismissing the cause of action for negligence. "[O]n a motion for summary judgment, a defendant in a medical malpractice action bears the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the [patient's] injuries" (*Bagley v Rochester Gen. Hosp.*, 124 AD3d 1272, 1273 [4th Dept 2015]). Here, defendants failed to meet their initial burden inasmuch as the affidavit and deposition testimony of Dr. Bowen set forth only conclusory statements and opinions that the treatment of plaintiff did not deviate from accepted standards of care (*see Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 874 [2d Dept 2008]; *S'Doia v Dhabhar*, 261 AD2d 968, 968 [4th Dept 1999]). In any event, even assuming, arguendo, that defendants met their initial burden, we conclude that the affidavit of plaintiffs' expert raised triable issues of fact with respect to the issues of deviation from the applicable standard of care and proximate cause (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The court also properly denied the motion with respect to the cause of action for lack of informed consent. " 'To succeed in a medical malpractice cause of action premised on lack of informed consent, a plaintiff must demonstrate that (1) the practitioner failed to disclose the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed and (2) a reasonable person in the plaintiff's position, fully informed, would have elected not to undergo the procedure or treatment' " (*Gray v Williams*, 108 AD3d 1085, 1086 [4th Dept 2013]). Here, although defendants submitted the affidavit of Dr. Bowen in which he averred that plaintiff was fully advised of the alternatives and risks of the surgeries and that a reasonably prudent patient would have agreed to the surgeries after being so advised, he testified at his deposition that he either failed to discuss certain surgical options with plaintiff or that he could not recall whether he discussed other surgical options with her. Moreover, plaintiffs' expert opined that there are a wide variety of minimally invasive treatment options available for plaintiff's medical condition and that those options were not discussed with plaintiff. Consequently, we agree with the court that there are triable issues of fact with respect to the cause of action for lack of informed consent (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Finally, we conclude that the court properly denied that part of the motion seeking summary judgment dismissing the complaint insofar as asserted against defendant Associates for Women's Medicine, PLLC.

A “medical facility is liable for the negligence or malpractice of its employees” (*Hill v St. Clare’s Hosp.*, 67 NY2d 72, 79 [1986]), and it is undisputed that, at the time of alleged malpractice, Dr. Bowen was an employee of that defendant.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1382

CA 17-00702

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

LUIS ROSARIO AND DARLENA ROSARIO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MONROE MECHANICAL SERVICES, INC., AND MONROE MECHANICAL, INC., DEFENDANTS-RESPONDENTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (MICHAEL C. BOISVERT OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered September 27, 2016. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this negligence action seeking damages for, inter alia, injuries that Luis Rosario (plaintiff) sustained in an explosion at the scrap metal recycling company where he worked. A few weeks prior to the explosion, plaintiff's employer had purchased six used fuel pumps from defendants. Defendants' driver stated that the pumps had been drained, and the scrap yard paid defendants $320.36 for the pumps. On the day of the explosion, a heavy equipment operator at the scrap yard "mangled" two of the pumps and placed them on a conveyor belt leading to a metal shredder. Plaintiff was in the control booth operating the shredder at the time and, when the pumps were shredded, an explosion ensued that injured plaintiff. After the explosion, a coworker at the scrap yard dismantled the remaining four fuel pumps that had been purchased from defendants and discovered that each contained one to two gallons of gasoline.

Following discovery, defendants moved for summary judgment dismissing the complaint on the ground that they were casual sellers of gas pumps and owed no duty of care to plaintiff. Defendants further asserted that, even if they owed plaintiff a duty of care, they were entitled to summary judgment because the negligence of the heavy equipment operator in sending the pumps to the shredder was the

sole proximate cause of the accident. Supreme Court granted the motion and dismissed the complaint on the ground that defendants' casual sale of used gas pumps was incidental to their main business and did not give rise to a duty of care to the purchaser of the pumps. We reverse.

"The threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff?" (*Hamilton v Beretta U.S.A. Corp*, 96 NY2d 222, 232 [2001]). Viewing the evidence in the light most favorable to the nonmoving party, as we must, we agree with plaintiffs that defendants failed to "make a prima facie showing of entitlement to judgment as a matter of law, [by] tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]). Although it is well settled that casual or occasional sellers of products do "not undertake the special responsibility for public safety assumed by those in the business of regularly supplying those products" (*Clute v Paquin*, 219 AD2d 783, 784 [3d Dept 1995]; *see Gebo v Black Clawson Co.*, 92 NY2d 387, 394 [1998]), the evidence submitted by defendants in support of their motion failed to establish that their sale of gas pumps was "wholly incidental" to their business of installing and servicing petroleum distribution systems (*Sukljian v Ross & Son Co.*, 69 NY2d 89, 96 [1986]; *see Nutting v Ford Motor Co.*, 180 AD2d 122, 127 [3d Dept 1992]).

Even assuming, arguendo, that defendants were merely casual sellers of used gas pumps, we cannot conclude as a matter of law that defendants owed no duty to plaintiff. Even casual sellers owe a duty to warn of dangers that are not open and obvious or readily discernable (*see Piper v Kabar Mfg. Corp.*, 251 AD2d 1050, 1051 [4th Dept 1998]; *Colopy v Pitman Mfg. Co.*, 206 AD2d 864, 864 [4th Dept 1994]; *Stiles v Batavia Atomic Horseshoes*, 174 AD2d 287, 292 [4th Dept 1992], *revd on other grounds* 81 NY2d 950, 951 [1993], *rearg denied* 81 NY2d 1068 [1993]). The determination "[w]hether 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 [2d Dept 2012] [internal quotation marks omitted]). A drained fuel pump may present an obvious danger insofar as it contains gas vapors or some trace amount of gasoline, and thus there may be no duty to warn a purchaser of such. The circumstances here, however, are quite different, and we cannot conclude that there is no duty as a matter of law to warn a scrap yard of gallons of gasoline concealed inside a fuel pump that has been sold to the scrap yard with the explicit representation that the pump has been drained.

Finally, we reject defendants' contention that, even if they owed plaintiff a duty of care, summary judgment dismissing the complaint is warranted because the action of plaintiff's coworker was the sole

proximate cause of plaintiff's injuries and defendants merely "furnished the condition" for the accident. "As a general rule, the question of proximate cause is to be decided by the finder of fact, aided by appropriate instructions" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 312 [1980], *rearg denied* 52 NY2d 784 [1980]; *see Ard v Thompson & Johnson Equip. Co., Inc.*, 128 AD3d 1490, 1491 [4th Dept 2015]). We conclude that the action of plaintiff's coworker in sending the pumps to the shredder was "within the class of foreseeable hazards" (*Di Ponzio v Riordan*, 89 NY2d 578, 584 [1997]). Thus "a jury 'could rationally [find] that . . . there was a causal connection between [defendants' alleged] negligence and plaintiff's injuries' " (*Ard*, 128 AD3d at 1491, quoting *McMorrow v Trimper*, 149 AD2d 971, 972 [4th Dept 1989], *affd for the reasons stated* 74 NY2d 830, 832 [1989]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1388

KA 14-01859

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VERGIL J. WILLINGHAM, DEFENDANT-APPELLANT.

MULDOON, GETZ & RESTON, ROCHESTER (JON P. GETZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered October 14, 2014. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the indictment is dismissed, and the matter is remitted to Monroe County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him after a nonjury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that the conviction is not supported by legally sufficient evidence. We agree.

This prosecution arose from an incident in the City of Rochester that occurred while police officers were keeping a house under surveillance due to reports that its residents might engage in acts of retaliation after a homicide. The officers observed a man, later charged as a codefendant in this indictment, carrying a long gun that had a distinctive slotted stock. The man entered the left rear door of a vehicle while carrying that weapon, defendant entered the right rear door, and the vehicle was driven away. The officers attempted to keep the vehicle under observation and pursued it, but lost sight of it for a time. Other officers stopped the vehicle and removed the four occupants, including defendant and the codefendant described above, who were in the same positions in the vehicle. Nothing of interest was found in the vehicle, but officers found a long gun with a slotted stock on the ground at approximately the location where the officers had lost sight of the vehicle, and the gun was identical to the one that the officers had seen the codefendant take into the vehicle. Within approximately 50 feet of that weapon, the officers

also found a handgun and a cell phone. There was no direct evidence connecting defendant to either weapon, although the officers linked the cell phone to him. Defendant was convicted of possessing the long gun, which the parties stipulated was an assault weapon within the meaning of Penal Law § 265.00 (22) (c).

We agree with defendant that the evidence is legally insufficient to support the conviction. There is no evidence that he owned or was operating the vehicle, nor is there evidence that he engaged in any other activity that would support a finding that he constructively possessed the weapon (*cf. People v Ward*, 104 AD3d 1323, 1324 [4th Dept 2013], *lv denied* 21 NY3d 1011 [2013]). Furthermore, the statutory presumption of possession set forth in Penal Law § 265.15 (3) also does not apply here. The statute provides that "[t]he presence in an automobile, other than a stolen one or a public omnibus, of any firearm . . . is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon . . . is found" (*id.*). The statute further provides, however, that the presumption does not apply, inter alia, "if such weapon . . . is found upon the person of one of the occupants therein" (§ 265.15 [3] [a]). Here, the weapon was not found in the vehicle, and the codefendant was holding it while he was observed entering the vehicle. Consequently, "the evidence is clearcut and leads to the sole conclusion that the weapon was . . . upon the person" of the codefendant (*People v Lemmons*, 40 NY2d 505, 511 [1976]; *cf. People v Collins*, 105 AD3d 1378, 1379 [4th Dept 2013], *lv denied* 21 NY3d 1003 [2013]; *Matter of Rhamel C.*, 261 AD2d 125, 125 [1st Dept 1999]).

The People's contention that defendant threw the weapon out the window, or assisted the codefendant in doing so, because it was found on the right side of the vehicle is based on speculation. Finally, the People introduced no evidence that would support a finding that defendant possessed the weapon as an accomplice. Thus, in the absence of sufficient evidence that defendant possessed the weapon, the evidence is legally insufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We therefore reverse the judgment and dismiss the indictment.

Defendant's remaining contentions are academic in light of our determination.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1389

KA 15-01389

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH B.J., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 April 14, 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 reversed as a matter of discretion in the interest of justice, the conviction is vacated, defendant is adjudicated a youthful offender, and the matter is remitted to Monroe County Court for sentencing.

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 the County Court erred in denying his request to be adjudicated a youthful offender.

Initially, we agree with defendant that the court did not explicitly address the threshold issue whether defendant was an eligible youth despite his conviction of an armed felony (*see* CPL 720.10 [2] [a] [ii]; [3]). We conclude, however, that the court implicitly resolved the threshold issue of eligibility in defendant's favor (*see People v Stitt*, 140 AD3d 1783, 1784 [4th Dept 2016], *lv denied* 28 NY3d 937 [2016]), and that the court properly did so because, under the facts of this case, there are sufficient "mitigating circumstances" to render defendant eligible for youthful offender treatment (*see* CPL 720.10 [3] [i], [ii]; *People v Glen W.*, 89 AD2d 883, 883 [2d Dept 1982]).

We also agree with defendant that he should be afforded youthful offender status. In determining whether to afford such treatment to a defendant, a court must consider "the gravity of the crime and manner in which it was committed, mitigating circumstances, defendant's prior

criminal record, prior acts of violence, recommendations in the presentence reports, defendant's reputation, the level of cooperation with authorities, defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life" (*People v Cruickshank*, 105 AD2d 325, 334 [3d Dept 1985], *affd* 67 NY2d 625 [1986]; *see People v Shrubsall*, 167 AD2d 929, 930 [4th Dept 1990]). Here, the only factor weighing against affording defendant youthful offender treatment is the seriousness of the crime (*see Shrubsall*, 167 AD2d at 930; *Cruickshank*, 105 AD2d at 335). Defendant was 17 years old at the time of the crime and had no prior criminal record or history of violence. Defendant has accepted responsibility for his actions and expressed genuine remorse. The presentence report recommended youthful offender treatment, and the record establishes that defendant has the capacity for a productive and law-abiding future.

Although we do not conclude, after weighing the appropriate factors, that the court abused its discretion in denying defendant youthful offender status, we nevertheless choose to exercise our discretion in the interest of justice by reversing the judgment, vacating the conviction, and adjudicating defendant a youthful offender, and we remit the matter to County Court for sentencing on the adjudication (*see Cruickshank*, 105 AD2d at 335).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1394

CA 17-00551

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

PAIGE MECCA AND DANIEL MECCA,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

BUFFALO NIAGARA CONVENTION CENTER MANAGEMENT
CORPORATION, DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO, SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-APPELLANT.

MAXWELL MURPHY, LLC, BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered December 2, 2016. The order, among other things, granted plaintiffs' motion pursuant to CPLR 4404 seeking to set aside certain damages awarded to plaintiff Paige Mecca and seeking a new trial on those damages unless defendant stipulated to increase the amounts awarded.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiffs' motion and reinstating the jury's award of damages for past and future pain and suffering, future lost wages and business profits and future medical expenses, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover damages for injuries that Paige Mecca (plaintiff) allegedly sustained when an employee of defendant dropped a tray of dishes on her, and for derivative injuries allegedly sustained by plaintiff Daniel Mecca, her husband. The matter proceeded to trial and the jury issued a verdict by which it found defendant liable and awarded damages. Plaintiffs moved pursuant to CPLR 4404 to set aside the damages awarded to plaintiff for past and future pain and suffering, future lost wages and business profits and future medical expenses, and sought a new trial on those categories of damages unless defendant stipulated to increase the amounts awarded. Plaintiffs contended that the damages awarded under those categories were against the weight of the evidence and deviated materially from what would be reasonable compensation. Defendant cross-moved to decrease the derivative damages award. Supreme Court granted plaintiffs' motion, vacated those parts of the verdict that awarded damages for the categories of damages that plaintiffs challenged, granted plaintiffs a new trial on those damages

unless defendant stipulated to an increase in each of those categories, and denied defendant's cross motion. Defendant appeals.

We agree with defendant that the court abused its discretion in granting plaintiffs' motion. We therefore modify the order by denying plaintiffs' motion and reinstating the jury's award of damages. "It is well settled that the amount of damages to be awarded for personal injuries is primarily a question for the jury . . . , the judgment of which is entitled to great deference based upon its evaluation of the evidence, including conflicting expert testimony" (*Lai Nguyen v Kiraly* [appeal No. 2], 82 AD3d 1579, 1579-1580 [4th Dept 2011] [internal quotation marks omitted]). Thus, "even in cases where there is evidence which could support a conclusion different from that of a jury, its verdict will still be accorded great deference and respect so long as there is credible evidence to support its interpretation" (*Warnke v Warner-Lambert Co.*, 21 AD3d 654, 657 [3d Dept 2005]; *see Williams v City of New York*, 105 AD3d 667, 668 [1st Dept 2013]; *Vasquez v Jacobowitz*, 284 AD2d 326, 327 [2d Dept 2001]). In addition, " 'a jury is at liberty to reject an expert's opinion if it finds the facts to be different from those which formed the basis for the opinion or if, after careful consideration of all the evidence in the case, it disagrees with the opinion' " (*Quigg v Murphy*, 37 AD3d 1191, 1193 [4th Dept 2007]; *see Lai Nguyen*, 82 AD3d at 1580; *Salisbury v Christian*, 68 AD3d 1664, 1665 [4th Dept 2009]). In short, "[w]here the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*Tapia v Dattco, Inc.*, 32 AD3d 842, 845 [2d Dept 2006]).

Here, "through cross-examination and the presentation of evidence, the defense created a case that the injured plaintiff had exaggerated [her] injuries and that the injuries [she] complained of may have been preexisting. The plaintiffs were unable to proffer any objective evidence, i.e., . . . MRI reports[, CT scans, and EEGs], to prove the nature of the injuries that [plaintiff] sustained as a result of the accident" (*Minscher v McIntyre*, 277 AD2d 435, 436 [2d Dept 2000], *lv denied* 96 NY2d 717 [2001]; *see Hotaling v Carter*, 137 AD3d 1661, 1662-1663 [4th Dept 2016]; *see also Molter v Gaffney*, 273 AD2d 773, 775 [3d Dept 2000]). Furthermore, although plaintiffs introduced evidence that plaintiff had an abnormal SPECT test, defendant submitted evidence that, if credited by the jury, established that such a test is outdated and unreliable, and that there were other reasons for plaintiff's results on that test. Consequently, the jury's determination to award lesser amounts of damages than plaintiffs sought for plaintiff's injuries with respect to the categories of past and future pain and suffering "was based upon a fair interpretation of the evidence . . . , with consideration given to the credibility of the witnesses and the drawing of reasonable inferences therefrom" (*Raso v Jamdar*, 126 AD3d 776, 777 [2d Dept 2015]). The record provides no reason to disturb the jury's resolution of those issues, and thus we conclude that the court abused its discretion in doing so.

Similarly with respect to the awards of damages for future lost

wages and business profits, a jury may reject an expert's opinion regarding valuation in the calculation of damages "even where, as here, the expert's opinion was uncontradicted at trial" (*David Home Bldrs., Inc. v Misiak*, 91 AD3d 1362, 1362 [4th Dept 2012]). Defendant submitted evidence that, if credited by the jury, would establish that plaintiff's business would not suffer the severe losses claimed by plaintiffs, and that plaintiff's ability to work was not as severely impacted as she claimed. Consequently, we cannot say that the jury's award in this regard "deviates materially from what would be reasonable compensation" (CPLR 5501 [c]). In addition, defendant submitted evidence that called into question whether plaintiff would need the future medical treatment for which she sought damages, and thus the court abused its discretion in setting aside the verdict with respect to that part of the damages award (*cf. Smith v Woods Constr. Co.*, 309 AD2d 1155, 1156-1157 [4th Dept 2003]; *Hersh v Przydatek* [appeal No. 2], 286 AD2d 984, 985 [4th Dept 2001]).

We have considered defendant's contention with respect to the denial of its cross motion and conclude that it lacks merit.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1395

CA 16-02092

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

IN THE MATTER OF THOMAS FRECK,
PETITIONER-PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF PORTER, TOWN OF PORTER ZONING BOARD OF APPEALS, TOWN OF PORTER PLANNING BOARD, ET AL., RESPONDENTS-DEFENDANTS-RESPONDENTS, THOMAS FLECKENSTEIN, INDIVIDUALLY AND AS TRUSTEE OF THE JUDITH A. FLECKENSTEIN LIVING TRUST, JUDITH A. FLECKENSTEIN, INDIVIDUALLY AND AS TRUSTEE OF THE JUDITH A. FLECKENSTEIN LIVING TRUST, AND NIAGARA AQUACULTURE, INC., RESPONDENTS-DEFENDANTS-RESPONDENTS-APPELLANTS.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT-RESPONDENT.

MICHAEL J. DOWD, LEWISTON, FOR RESPONDENTS-DEFENDANTS-RESPONDENTS TOWN OF PORTER, TOWN OF PORTER ZONING BOARD OF APPEALS AND TOWN OF PORTER PLANNING BOARD.

HODGSON RUSS LLP, BUFFALO (CHARLES W. MALCOMB OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (John F. O'Donnell, J.), entered August 26, 2016 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment, inter alia, dismissed the petition/complaint.

It is hereby ORDERED that said cross appeal is unanimously dismissed, and the judgment is modified on the law by reinstating the petition/complaint to the extent that it seeks a declaration and granting judgment in favor of respondents-defendants-respondents-appellants as follows:

> It is ADJUDGED AND DECLARED that the approved farm pond project is not an unlawful mining operation in violation of the Town of Porter Zoning Code,

and as modified the judgment is affirmed without costs.

Memorandum: Petitioner-plaintiff (petitioner) commenced this

hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul the determination of respondent-defendant Town of Porter Zoning Board of Appeals (ZBA) approving the variance application of respondents-defendants Thomas Fleckenstein and Judith A. Fleckenstein, both individually and as trustees of the Judith A. Fleckenstein Living Trust, and respondent-defendant Niagara Aquaculture, Inc. (collectively, Fleckenstein respondents) for development of two farm ponds (farm pond project) on property in an agricultural zone in respondent-defendant Town of Porter (Town).

Initially, we conclude that, inasmuch as the Fleckenstein respondents are not aggrieved by the judgment, their cross appeal must be dismissed (*see* CPLR 5511; *Layaou v Xerox Corp.*, 298 AD2d 921, 922 [4th Dept 2002]). We nevertheless consider the Fleckenstein respondents' contention that petitioner lacked standing as an alternative ground for affirmance (*see Layaou*, 298 AD2d at 922), and we conclude that petitioner's allegations of harm were sufficient to confer standing (*see generally Matter of Sierra Club v Village of Painted Post*, 26 NY3d 301, 310-311 [2015]).

Petitioner contends that it was unlawful and/or arbitrary and capricious for the ZBA to determine that a variance from section 200-69 (Excavation, site grading, and filling) of the Town of Porter Zoning Code (Code) was not required for the excavation work associated with the construction of the farm ponds. We reject that contention. It is well settled that the interpretation by a zoning board of its governing code is generally entitled to great deference by the courts (*see Appelbaum v Deutsch*, 66 NY2d 975, 977-978 [1985]; *Matter of Emmerling v Town of Richmond Zoning Bd. of Appeals*, 67 AD3d 1467, 1467 [4th Dept 2009]) and, as long as the interpretation is not " 'irrational, unreasonable [or] inconsistent with the governing [code],' it will be upheld" (*Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 419 [1998], quoting *Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 62 NY2d 539, 545 [1984]). Here, section 200-69 (A) specifically permits excavation "in direct connection with an improvement or operation on such premises for which a building permit has been issued." Inasmuch as a building permit was issued in connection with the Fleckenstein respondents' farm pond project, petitioner's contention is without merit.

With respect to the area variance granted to the Fleckenstein respondents' project with regard to "yard and bulk" requirements (*see* Code § 200-8 [B]), the ZBA was required to weigh the benefit to the applicants of granting the variance against any detriment to the health, safety and welfare of the neighborhood or community affected thereby, taking into account the five factors set forth in Town Law § 267-b (3) (b) (*see Matter of Ifrah v Utschig*, 98 NY2d 304, 307-308 [2002]; *Matter of Sasso v Osgood*, 86 NY2d 374, 382 [1995]), and we conclude that the ZBA did so here.

Contrary to petitioner's further contention, we perceive no abuse of discretion or illegality in the ZBA's determination to extend the Fleckenstein respondents' time in which to complete the excavation

(*see generally Matter of New York Life Ins. Co. v Galvin*, 35 NY2d 52, 59-60 [1974]), and we decline to accept the parties' invitation to categorize the extension of time as either a "use" or an "area" variance. We reject petitioner's further contention that the ZBA was not bound by the negative declaration issued by the New York State Department of Environmental Conservation with respect to the excavation aspect of the project (*see* 6 NYCRR 617.6 [b] [3] [iii]; *Matter of Gordon v Rush*, 100 NY2d 236, 243 [2003]).

Petitioner also sought a declaration that the Fleckenstein respondents' farm pond project and attendant excavation constitutes an illegal mining operation prohibited by the Code. Contrary to petitioner's contention, we conclude that the farm ponds and their attendant excavation are lawfully permitted under the Code, subject to a special use permit and site plan approval (*see* §§ 200-33, 200-69). Inasmuch as petitioner sought declaratory relief, however, Supreme Court erred in dismissing the petition/complaint in its entirety without declaring the rights of the parties (*see generally Haines v New York Mut. Underwriters*, 30 AD3d 1030, 1030 [4th Dept 2006]). We therefore modify the judgment accordingly.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1399

CA 17-00588

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

IN THE MATTER OF THE APPLICATION OF MARK BUTTIGLIERI, DESIGNEE OF THE CHIEF EXECUTIVE OFFICER OF UPSTATE UNIVERSITY HOSPITAL OF THE STATE UNIVERSITY OF NEW YORK, PETITIONER-APPELLANT, FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND PROPERTY PURSUANT TO ARTICLE 81 OF THE MENTAL HYGIENE LAW FOR FERREL J.B., AN ALLEGED INCOMPETENT PERSON, RESPONDENT.

ORDER

M. KATHLEEN LYNN, ESQ., AND RAYMOND J. DAGUE, ESQ., RESPONDENTS.
(APPEAL NO. 1.)

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

M. KATHLEEN LYNN, FAYETTEVILLE, RESPONDENT PRO SE.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 26, 2016 in a proceeding pursuant to Mental Hygiene Law article 81. The order and judgment, insofar as appealed from, reserved decision on who would be responsible to pay the attorneys' fees of M. Kathleen Lynn, Esq. and Raymond J. Dague, Esq.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Cobb v Kittinger*, 168 AD2d 923, 923 [4th Dept 1990]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1400

CA 17-00589

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

IN THE MATTER OF THE APPLICATION OF MARK BUTTIGLIERI, DESIGNEE OF THE CHIEF EXECUTIVE OFFICER OF UPSTATE UNIVERSITY HOSPITAL OF THE STATE UNIVERSITY OF NEW YORK, PETITIONER-APPELLANT, FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND PROPERTY PURSUANT TO ARTICLE 81 OF THE MENTAL HYGIENE LAW FOR FERREL J.B., AN ALLEGED INCOMPETENT PERSON, RESPONDENT.

MEMORANDUM AND ORDER

M. KATHLEEN LYNN, ESQ., RESPONDENT.

(APPEAL NO. 2.)

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

M. KATHLEEN LYNN, FAYETTEVILLE, RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered May 26, 2016 in a proceeding pursuant to Mental Hygiene Law article 81. The order, insofar as appealed from, directed petitioner to pay M. Kathleen Lynn, Esq. certain attorneys' fees.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the language in the ordering paragraph ", and is to be paid by Petitioner as an administrative expense" is vacated.

Memorandum: In this proceeding in which petitioner sought the appointment of a guardian of the person and property of an alleged incapacitated person (AIP), petitioner appeals from two orders that, respectively, directed petitioner to pay the fees for services submitted by the court-appointed attorney for the AIP and by the court evaluator (collectively, respondents). We agree with petitioner that Supreme Court erred in directing it to pay those fees.

Petitioner contends in appeal No. 2 that the court erred in directing it to pay attorney fees for the court-appointed attorney. We agree. Article 81 of the Mental Hygiene Law provides that the court may appoint an attorney to represent the AIP, and that petitioner may be directed to pay for such services where the petition is dismissed or the AIP dies before the proceeding is concluded (*see* § 81.10 [f]). In all cases, "[t]he court shall determine the

reasonable compensation for the mental hygiene legal service or any attorney appointed pursuant to" that statute (*id.*). Nevertheless, "the statute is silent as to the source of funds for payment of counsel [where, as here,] the AIP is indigent" (*Matter of St. Luke's-Roosevelt Hosp. Ctr. [Marie H.-City of New York]*, 89 NY2d 889, 891 [1996]; *see Hirschfeld v Horton*, 88 AD3d 401, 403 [2d Dept 2011], *lv denied* 18 NY3d 804 [2012]). Despite that silence, it is well settled that "the Legislature, by providing for the assignment of counsel for indigents in the Mental Hygiene Law, intended, by necessary implication, to authorize the court to compensate counsel" (*St. Luke's-Roosevelt Hosp. Ctr.*, 89 NY2d at 892), and it is likewise well settled that the court should direct that requests for such compensation should be determined "in accordance with the procedures set forth in County Law article 18-B" (*id.*; *see Matter of Rapoport v G.M.*, 239 AD2d 422, 422-423 [2d Dept 1997]). Thus, the court erred in directing petitioner to pay those fees.

We also agree with the contention of petitioner in appeal No. 3 that the court erred in directing it to pay the fees requested by the court evaluator. Where, as here, a court appoints a court evaluator pursuant to Mental Hygiene Law § 81.09 (a) and then "grants a petition, the court may award a reasonable compensation to a court evaluator, including the mental hygiene legal service, payable by the estate of the allegedly incapacitated person" (§ 81.09 [f]). The statute further provides that a court may direct petitioner to pay for the services of a court evaluator only where the court "denies or dismisses a petition," or the AIP "dies before the determination is made in the petition" (§ 81.09 [f]). Therefore, "notwithstanding Supreme Court's broad discretion to award reasonable fees in Mental Hygiene Law article 81 proceedings . . . , [inasmuch as] petitioner was successful [and the AIP is alive], the court was without authority to ascribe responsibility to petitioner for payment of the court evaluator's fees" (*Matter of Charles X.*, 66 AD3d 1320, 1321 [3d Dept 2009]).

Contrary to petitioner's contentions, although the court had discretion to appoint Mental Hygiene Legal Services as attorney for the AIP and to dispense with a court evaluator (*see* Mental Hygiene Law § 81.10 [g]), under the circumstances presented here "the court did not abuse its discretion as a matter of law in failing to do so" (*St. Luke's-Roosevelt Hosp. Ctr.*, 89 NY2d at 892 n). Nevertheless, inasmuch as the court properly made the "determination that [the AIP] is incapacitated within the meaning of Mental Hygiene Law article 81, and [in] the absence of evidence that the petitioner commenced this proceeding in bad faith, it was an improvident exercise of discretion for . . . Supreme Court to direct the petitioner to pay the fees of the court-appointed evaluator and the attorney it appointed to represent [the AIP] in the proceeding" (*Matter of Loftman [Mae R.]*, 123 AD3d 1034, 1036-1037 [2d Dept 2014]; *cf. Matter of Samuel S. [Helene S.]*, 96 AD3d 954, 958 [2d Dept 2012], *lv dismissed* 19 NY3d 1065 [2012]). We therefore reverse, insofar as appealed from, the orders in appeal Nos. 2 and 3, and we vacate the language in each order directing petitioner to pay the respective fees for services

rendered.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1401

CA 17-00590

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

IN THE MATTER OF THE APPLICATION OF MARK BUTTIGLIERI, DESIGNEE OF THE CHIEF EXECUTIVE OFFICER OF UPSTATE UNIVERSITY HOSPITAL OF THE STATE UNIVERSITY OF NEW YORK, PETITIONER-APPELLANT, FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND PROPERTY PURSUANT TO ARTICLE 81 OF THE MENTAL HYGIENE LAW FOR FERREL J.B., AN ALLEGED INCOMPETENT PERSON, RESPONDENT.

MEMORANDUM AND ORDER

RAYMOND J. DAGUE, ESQ., RESPONDENT.
(APPEAL NO. 3.)

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

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered May 26, 2016 in a proceeding pursuant to Mental Hygiene Law article 81. The order, insofar as appealed from, directed petitioner to pay Raymond J. Dague, Esq. certain attorneys' fees.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the language in the ordering paragraph ", and is to be paid by Petitioner as an administrative expense" is vacated.

Same memorandum as in *Matter of Buttiglieri* ([appeal No. 2] — AD3d — [Feb. 2, 2018] [4th Dept 2018]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1402

CA 17-01102

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

PETER MITCHELL AND PARKER'S GRILLE, INC.,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF GENEVA AND CITY OF GENEVA INDUSTRIAL
DEVELOPMENT AGENCY, DEFENDANTS-RESPONDENTS.

PETER J. CRAIG & ASSOCIATES, P.C., PITTSFORD (PETER J. CRAIG OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (H. TODD BULLARD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a final order and judgment (one paper) of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered February 7, 2017. The final order and judgment granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for defendants' alleged inverse condemnation of their property and tortious interference with plaintiffs' business. In a scheduling order issued on November 18, 2014, Supreme Court established March 16, 2015 as the cut-off date for dispositive motions. Plaintiffs served the note of issue on April 29, 2016. At a pretrial conference held on July 18, 2016, the court indicated that it was "blocking out" an hour on its November 21, 2016 motion calendar for oral argument of any dispositive motions. Defendants never submitted or sought an amended scheduling order. On November 22, 2016, defendants filed a motion for summary judgment dismissing the complaint with a return date of January 23, 2017.

Defendants' summary judgment motion was made 618 days after the deadline set forth in the court's scheduling order and 204 days after the filing of the note of issue. Defendants did not make the motion in time to be heard on the court's November 21, 2016 motion calendar. Nonetheless, defendants' moving papers failed to address the issue of "good cause" required to make a summary judgment motion more than 120 days after the filing of the note of issue or after the date established by the court in a scheduling order (CPLR 3212 [a]; *see*

Finger v Saal, 56 AD3d 606, 606-607 [2d Dept 2008]; *cf. Stimson v E.M. Cahill Co., Inc.*, 8 AD3d 1004, 1005 [4th Dept 2004]). Plaintiffs opposed the motion on the ground that it was untimely. It was only in reply papers that defendants addressed the issue of "good cause." The court considered the merits of the motion, granted summary judgment to defendants and dismissed the complaint. That was error.

It is well settled that it is improper for a court to consider the "good cause" proffered by a movant if it is presented for the first time in reply papers (*see Bissell v New York State Dept. of Transp.*, 122 AD3d 1434, 1435 [4th Dept 2014]; *Cabibel v XYZ Assoc., L.P.*, 36 AD3d 498, 498-499 [1st Dept 2007]). Defendants also failed to move to vacate the note of issue. The motion should thus have been denied as untimely (*see* CPLR 3212 [a]), and the court should have declined to reach the merits. We therefore reverse the final order and judgment, deny defendants' motion and reinstate the complaint.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1416

KA 15-00765

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROMEO WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered October 22, 2014. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]) and assault in the second degree (§ 120.05 [12]). The evidence at trial established that, after a night of drinking alcohol and taking recreational drugs, defendant punched a 70-year-old man in the face outside a convenience store, without any provocation. Defendant entered the store, and while there he announced that he was going back outside into the parking lot to “kick the guy in the face” and “knock [him] out.” Witnesses observed as defendant kicked the victim in the face repeatedly and then fled. A bystander then approached the victim, who was “gurgling for breath.” When paramedics arrived seven minutes later, the victim had no pulse. He never regained consciousness.

Defendant contends that his conviction on the count of manslaughter in the first degree is based on legally insufficient evidence of intent to cause serious physical injury. Preliminarily, contrary to the People’s assertion, defendant preserved his contention for our review inasmuch as his motion for a trial order of dismissal was “ ‘specifically directed’ at the alleged error” (*People v Gray*, 86 NY2d 10, 19 [1995]). Nevertheless, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490,

495 [1987]). "[A] defendant may be presumed to intend the natural and probable consequences of his [or her] actions" (*People v Meacham*, 151 AD3d 1666, 1668 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017] [internal quotation marks omitted]), and "the natural and probable consequence of repeatedly [striking] a defenseless man in the face is that he will sustain a serious physical injury within the meaning of Penal Law § 10.00 (10)" (*People v Williams*, 94 AD3d 1452, 1452 [4th Dept 2012], *lv denied* 19 NY3d 978 [2012]; *see People v Mahoney*, 6 AD3d 1104, 1104 [4th Dept 2004], *lv denied* 3 NY3d 660 [2004]). Furthermore, it is well settled that "[a]n intoxicated person can form the requisite criminal intent to commit a crime, and it is for the trier of fact to decide if the extent of the intoxication acted to negate the element of intent" (*People v Gonzalez*, 6 AD3d 457, 457 [2d Dept 2004], *lv denied* 2 NY3d 799 [2004]; *see People v Principio*, 107 AD3d 1572, 1573 [4th Dept 2013], *lv denied* 22 NY3d 1090 [2014]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that he was denied a fair trial based on prosecutorial misconduct during summation (*see People v Santos*, 151 AD3d 1620, 1621-1622 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Furthermore, the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defense counsel provided defendant with meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, the sentence is not unduly harsh and severe.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1420

OP 17-00237

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

IN THE MATTER OF DWIGHT DELEE, PETITIONER,

V MEMORANDUM AND ORDER

HON. JOHN J. BRUNETTI, SUPREME COURT JUSTICE, ONONDAGA COUNTY, AND WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, ONONDAGA COUNTY, RESPONDENTS.

CHARLES A. KELLER, III, SYRACUSE, FOR PETITIONER.

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

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]). Petitioner seeks, inter alia, a writ of prohibition barring his retrial on the ground of double jeopardy.

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

Memorandum: Petitioner was convicted of manslaughter in the first degree as a hate crime (Penal Law §§ 125.20 [1]; 485.05 [1] [a]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). On appeal from the judgment of conviction, we determined that the verdict convicting him of manslaughter in the first degree as a hate crime yet acquitting him of manslaughter in the first degree was inconsistent, i.e., " 'legally impossible,' " inasmuch as all of the elements of manslaughter in the first degree are elements of manslaughter in the first degree as a hate crime (*People v DeLee*, 108 AD3d 1145, 1148 [4th Dept 2013], quoting *People v Muhammad*, 17 NY3d 532, 539-540 [2011]). We thus modified the judgment by reversing that part convicting him of manslaughter in the first degree as a hate crime and dismissing that count of the indictment.

The Court of Appeals agreed that "the jury's verdict was inconsistent, and thus repugnant" (*People v DeLee*, 24 NY3d 603, 608 [2014]), but disagreed with our remedy of dismissal. The Court explained that there is "no constitutional or statutory provision that mandates dismissal for a repugnancy error," that its footnote in *Muhammad*, requiring " 'dismissal of the repugnant conviction,' " was "dictum," and that "a repugnant verdict does not always signify that a

defendant has been convicted of a crime on which the jury actually found that he did not commit an essential element" (*id.* at 609-610). The Court added, "where a repugnant verdict [is] the result, not of irrationality, but mercy, courts 'should not . . . undermine the jury's role and participation by setting aside the verdict' . . . [I]f this mercy function is the cause of a repugnant verdict, the remedy of dismissal of the repugnant conviction is arguably unwarranted. Indeed, it provides a defendant with an even greater windfall than he has already received" (*id.* at 610). The Court thus held that "permitting a retrial on the repugnant charge upon which the jury convicted, but not on the charge of which the jury actually acquitted [petitioner], strikes a reasonable balance" (*id.*). As a result, the Court determined that the People could "resubmit the crime of first-degree manslaughter as a hate crime to a new grand jury" (*id.*).

A grand jury subsequently returned a second indictment charging petitioner with manslaughter in the first degree as a hate crime. Petitioner's motion to dismiss that second indictment was denied, and he commenced this CPLR article 78 proceeding seeking a writ of prohibition barring his retrial on the ground of double jeopardy and, in the event such relief were denied, leave to appeal to the Court of Appeals. Initially, we note that, although petitioner did not file an actual petition, "absent any claim that a substantial right of a party was prejudiced, [we may] properly treat[ ] the verified affirmation as a petition for purposes of commencing this special proceeding" (*Matter of Page v Ceresia*, 265 AD2d 730, 731 [3d Dept 1999]; *see* CPLR 402, 3026).

With respect to the merits of petitioner's contentions, "[i]t is axiomatic that the Appellate Division and the trial courts are 'court[s] of precedent and [are] bound to follow the holding of the Court of Appeals' " (*Margerum v City of Buffalo*, 148 AD3d 1755, 1758 [4th Dept 2017], quoting *Jiannaras v Alfant*, 124 AD3d 582, 586 [2d Dept 2015], *affd* 27 NY3d 349 [2016]). Inasmuch as the Court of Appeals has specifically authorized the People to obtain a new accusatory instrument charging the same offense under CPL 40.30 (4), we are bound to follow that holding, and we therefore reject defendant's challenges to the determination of the Court of Appeals and deny his request for leave to appeal to the Court of Appeals.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1423

CA 17-01165

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

IN THE MATTER OF ARBITRATION BETWEEN
CITY OF WATERTOWN, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

WATERTOWN PROFESSIONAL FIREFIGHTERS' ASSOCIATION
LOCAL 191, RESPONDENT-RESPONDENT.

BOND, SCHOENECK & KING, PLLC, GARDEN CITY (TERRY O'NEIL OF COUNSEL), FOR PETITIONER-APPELLANT.

BLITMAN & KING LLP, SYRACUSE (NOLAN J. LAFLER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered March 14, 2017 in a proceeding pursuant to CPLR article 75. The order denied the petition.

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

Memorandum: Petitioner, City of Watertown (City), commenced this proceeding pursuant to CPLR article 75, seeking a permanent stay of arbitration of a grievance filed by respondent. In its grievance and demand for arbitration, respondent alleged, inter alia, that the City violated the parties' collective bargaining agreement (CBA) with respect to the assignment and compensation of firefighters who performed out-of-title work as Acting Captains.

Supreme Court properly denied the petition. We reject the City's contention that arbitration of the grievance is contrary to public policy or those provisions of the Watertown City Charter defining the authority of the City Manager. At the outset, we note that, as a general proposition, arbitration of an out-of-title work dispute is not contrary to public policy (*see County of Rockland v Rockland County Unit of Rockland County Local of Civ. Serv. Empls. Assn.*, 74 AD2d 812, 812-813 [2d Dept 1980], *affd for reasons stated* 53 NY2d 741 [1981]; *Matter of Buffalo Sewer Auth. [Buffalo Sewer Auth. Unit, CSEA, Local 815]*, 112 AD2d 743, 743 [4th Dept 1985]). Nor is arbitration of the dispute inconsistent with the authority of the City Manager to approve expenditures of City funds (*see* Watertown City Charter Title III, § 26), or to act as administrative head of the fire department (*see* Title V, §§ 44 [4]; 45).

As in a prior appeal arising out of a proceeding commenced by the City to stay arbitration of a related grievance (*Matter of City of Watertown [Watertown Professional Firefighters' Assn. Local 191]*, 152 AD3d 1231 [4th Dept 2017]), we conclude that the parties agreed to arbitrate this grievance. Here, respondent alleges that the City violated the CBA by, inter alia, retroactively reversing out-of-title assignments made by the Battalion Chief and failing to compensate firefighters who performed out-of-title work at the appropriate rate of pay. As we concluded in the prior appeal, the instant dispute concerning out-of-title work "is reasonably related to the general subject matter of the CBA" (*id.* at 1233; *see Matter of City of Lockport [Lockport Professional Firefighters Assn., Inc.]*, 141 AD3d 1085, 1088 [4th Dept 2016]).

Finally, we again "reject the City's contention that arbitration should be stayed with respect to the issue of out-of-title work because such compensation for such work falls within the meaning of 'salary,' which is expressly excluded from the CBA's definition of 'grievance' " (*City of Watertown*, 152 AD3d at 1234). That contention is for the arbitrator to address (*see id.*).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1424

CA 17-01162

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

JOHN CHILINSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DEBORAH MALONEY AND JAMES MALONEY,
DEFENDANTS-APPELLANTS.

LAW OFFICES OF THERESA J. PULEO, SYRACUSE (MICHELLE M. DAVOLI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WEISBERG & ZUKHER, PLLC, SYRACUSE (DAVID E. ZUKHER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered May 17, 2017. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: In this action seeking damages for personal injuries that plaintiff allegedly sustained as the result of a collision between the bicycle he was riding and a motor vehicle driven by Deborah Maloney (defendant) and owned by defendant James Maloney, defendants appeal from an order denying their motion for summary judgment dismissing the complaint. We affirm.

Defendants' motion and supporting papers demonstrate that they were actually seeking a determination that plaintiff's negligence was the sole proximate cause of the accident and that defendant was not comparatively negligent. We conclude that defendants failed to meet their initial burden of establishing as a matter of law that plaintiff's negligence was the sole proximate cause of the accident.

Initially, we reject the contentions of both parties to the extent that they are based on the information contained in a police report submitted in support of and in opposition to the motion. Although "reports of police officers made upon their own observation and while carrying out their police duties are generally admissible in evidence" (*Yeargans v Yeargans*, 24 AD2d 280, 282 [1st Dept 1965]; *see Szymanski v Robinson*, 234 AD2d 992, 992 [4th Dept 1996]), the report in this case was inadmissible because it was "not authenticated" and, "[b]ecause the report was not submitted in evidentiary form, it should not have been considered on the summary judgment motion" (*Szymanski*,

234 AD2d at 992; *see Bush v Kovacevic*, 140 AD3d 1651, 1654 [4th Dept 2016]). Here, as in *Szymanski*, the parties failed to "provide[] an acceptable excuse" for failing to tender the evidence in admissible form (234 AD2d at 992; *see generally Grasso v Angerami*, 79 NY2d 813, 814-815 [1991]).

With respect to the merits, " '[w]hether a plaintiff [or defendant] is comparatively negligent is almost invariably a question of fact and is for the jury to determine in all but the clearest cases' " (*Yondt v Boulevard Mall Co.*, 306 AD2d 884, 884 [4th Dept 2003]). In support of their motion, defendants submitted the deposition testimony of defendant, which raised a question of fact regarding her attentiveness as she drove her vehicle (*see Spicola v Piracci*, 2 AD3d 1368, 1369 [4th Dept 2003]). It is well settled that every driver of a motor vehicle has "the 'common-law duty to see that which he [or she] should have seen . . . through the proper use of his [or her] senses' " (*Sauter v Calabretta*, 90 AD3d 1702, 1703 [4th Dept 2011]), and that "a motorist is required to keep a reasonably vigilant lookout for bicyclists, . . . and to operate the vehicle with reasonable care to avoid colliding with anyone on the road" (*Palma v Sherman*, 55 AD3d 891, 891 [2d Dept 2008]). Here, the evidence submitted by defendants established that defendant had an unobstructed view of the street as plaintiff's bicycle approached her vehicle, yet she failed to see him or his bicycle prior to the collision. Thus, we conclude that defendants "failed to establish that there was nothing [defendant] could do to avoid the accident and therefore failed to establish that she was free of comparative fault" (*Jackson v City of Buffalo*, 144 AD3d 1555, 1556 [4th Dept 2016]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1427

CA 17-00994

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

2305 GENESEE STREET, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF UTICA, DEFENDANT-RESPONDENT.

MARK A. WOLBER, UTICA, FOR PLAINTIFF-APPELLANT.

WILLIAM M. BORRILL, CORPORATION COUNSEL, UTICA (KATHRYN F. HARTNETT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered August 26, 2016. The order granted defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action alleging that its real and personal property were damaged in April 2011 when the drainage system located adjacent to its real property in defendant, City of Utica, overflowed and flooded plaintiff's premises. In its sole cause of action, plaintiff alleged, inter alia, that defendant was negligent in maintaining the drainage system. Defendant moved for summary judgment dismissing the complaint on the grounds that, inter alia, it was not negligent in maintaining the drainage system and the injuries to plaintiff's property were caused by an "act of God" for which defendant cannot be held liable. We agree with plaintiff that Supreme Court erred in granting the motion.

Defendant failed to meet its initial burden of establishing its entitlement to judgment as a matter of law inasmuch as its own moving papers raise an issue of fact whether it negligently maintained the drainage system (*see Zeltmann v Town of Islip*, 265 AD2d 407, 408 [2d Dept 1999]; *see generally Gilberti v Town of Spafford*, 117 AD3d 1547, 1548-1549 [4th Dept 2014]). Defendant submitted the affidavits of its commissioner of public works and its senior engineer, who averred that there is a "trash rack" located in the rear of plaintiff's property that is used to filter debris from the water entering the underground drainage system from a nearby ravine. If too much debris builds up in the trash rack, it will block the flow of water into the drainage system and flood plaintiff's premises. According to the deposition testimony of a member of plaintiff limited liability company, which

testimony defendant also submitted, such flooding occurred previously in 2006 and caused severe property damage. The senior engineer averred that, to prevent flooding on plaintiff's property, defendant's employees periodically inspect and maintain the ravine. Plaintiff's member, however, testified that defendant's employees rarely came to the property to clear debris from the trash rack. Although the commissioner submitted business records in an attempt to establish that the maintenance was performed, those records are inadmissible inasmuch as the commissioner failed to establish when the business records were made (*see* CPLR 4518 [a]; *Palisades Collection, LLC v Kedik*, 67 AD3d 1329, 1331 [4th Dept 2009]). In any event, the records do not establish that the required maintenance was performed.

Finally, we agree with plaintiff that defendant failed to establish that "the storms and . . . flooding were 'the sole and immediate cause[s] of the injur[ies] and that [defendant was] free from any contributory negligence' " (*Lopez v Adams*, 69 AD3d 1162, 1165 [3d Dept 2010]; *see Sawicki v GameStop Corp.*, 106 AD3d 979, 980 [2d Dept 2013]; *see generally Michaels v New York Cent. R.R. Co.*, 30 NY 564, 571 [1864]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1429

KA 17-00963

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARION D. MCILWAIN, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered March 5, 2012. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree, attempted robbery in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, assault in the first degree (Penal Law § 120.10 [4]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. Even assuming, arguendo, that defendant's oral waiver of the right to appeal was knowing, intelligent and voluntary, we conclude, and the People correctly concede, that the oral waiver does not encompass his challenge to the severity of the sentence because " 'no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction' that he was also waiving his right to appeal any issue concerning the severity of the sentence" (*People v Lorenz*, 119 AD3d 1450, 1450 [4th Dept 2014], *lv denied* 24 NY3d 962 [2014]; *see People v Kearns*, 125 AD3d 1473, 1473-1474 [4th Dept 2015], *lv denied* 26 NY3d 1040 [2015]). Furthermore, as the People also correctly concede, although the record indicates that defendant signed a written waiver, the written waiver was invalid inasmuch as there was "not even an attempt by the court to ascertain on the record an acknowledgment from defendant that he had, in fact, signed the waiver or that, if he had, he was aware of its contents" (*People v DeSimone*, 80 NY2d 273, 283 [1992]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1434

KA 15-01849

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER W. HOFFMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered September 16, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, burglary in the second degree and criminal possession of a controlled substance in the seventh 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]), burglary in the second degree (§ 140.25 [2]) and criminal possession of a controlled substance in the seventh degree (§ 220.03). The charges arose from defendant's burglary of his neighbor's home, which was witnessed by a neighbor, and the discovery of an unlicensed firearm and narcotics during a subsequent search of defendant's apartment. Defendant contends, inter alia, that Supreme Court erred in refusing to suppress the physical evidence that was obtained pursuant to the warrantless entry into his apartment.

"Where, as here, the People contend that a suspect gave his or her consent to the police to enter the suspect's apartment, 'the burden of proof rests heavily upon the People to establish the voluntariness of that waiver of a constitutional right' " (*People v Forbes*, 71 AD3d 1519, 1520 [4th Dept 2010], *lv denied* 15 NY3d 773 [2010], quoting *People v Whitehurst*, 25 NY2d 389, 391 [1969]). We conclude that defendant voluntarily consented to the entry of the police officers into his apartment (*see People v McCray*, 96 AD3d 1480, 1481 [4th Dept 2012], *lv denied* 19 NY3d 1104 [2012]). Testimony at the suppression hearing established that the police knocked twice before defendant opened the door. The officers were not brandishing

their firearms. After defendant opened the door, he turned around and went back into his apartment, leaving the door wide open. Defendant did not object to the officers' presence in his home, and he was cooperative throughout the entire encounter. Based on the totality of the circumstances, we conclude that defendant's consent to the entry of the police was voluntary (*see People v Putnam*, 50 AD3d 1514, 1514 [4th Dept 2008], *lv denied* 10 NY3d 963 [2008]; *cf. People v Freeman*, 29 NY3d 926, 928 [2017], *revg* 141 AD3d 1164, 1165 [4th Dept 2016]).

We have reviewed defendant's remaining contentions and conclude that they are unpreserved for our review (*see* CPL 470.05 [2]) and, in any event, are without merit.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1435

KA 15-01991

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY LOWERY, DEFENDANT-APPELLANT.

CATHERINE H. JOSH, ROCHESTER, 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 28, 2015. The judgment convicted defendant, upon a jury verdict, of failure to register or verify as a sex offender.

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 failure to register or verify as a sex offender (Correction Law § 168-f [3]). Defendant was sentenced, as a persistent felony offender (PFO), to an indeterminate term of 15 years to life.

Defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct during opening statements and on summation because he failed to object to any of the alleged instances of misconduct (*see People v Lewis*, 140 AD3d 1593, 1595 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). In any event, although we conclude on the merits that defendant was not deprived of a fair trial, we take this opportunity to voice our displeasure with the conduct of the prosecutor. We are certain that the Livingston County District Attorney's Office is well aware that "a prosecutor serves as an officer of the court and a representative of the People of the State" (*id*.), and that prosecutors " 'play a distinctive role in the search for truth in criminal cases. As public officers they are charged not simply with seeking convictions but also with ensuring that justice is done. This role gives rise to special responsibilities—constitutional, statutory, ethical, personal—to safeguard the integrity of criminal proceedings and fairness in the criminal process' " (*People v Flowers*, 151 AD3d 1843, 1845 [4th Dept 2017]). Here, the prosecutor's ill-advised decision to clap sarcastically during summation as he was describing defendant's

efforts to report a change of address is entirely inconsistent with the standards of conduct expected of prosecutors, and we therefore admonish the prosecutor for such conduct.

We reject defendant's contention that he was denied effective assistance of counsel. With respect to the failure to object to the alleged instances of prosecutorial misconduct, inasmuch as they were not so egregious as to deprive defendant of a fair trial, defense counsel's failure to object thereto did not deprive defendant of effective assistance of counsel (*see People v Black*, 137 AD3d 1679, 1680-1681 [4th Dept 2016], *lv denied* 27 NY3d 1128 [2016], *reconsideration denied* 28 NY3d 1026 [2016]).

We further reject defendant's contention that his waiver of immunity was ineffective and thus that the grand jury proceedings were defective. CPL 190.45 (2) provides that "[a] waiver of immunity is not effective unless and until it is sworn to before the grand jury conducting the proceeding in which the subscriber has been called as a witness." CPL 190.40 (2) (a) provides that a witness who gives evidence in a grand jury proceeding receives immunity unless, in relevant part, the witness "has effectively waived such immunity pursuant to section 190.45." Here, defendant was administered an oath by the grand jury foreperson. After being sworn in, defendant acknowledged that he intended to testify before the grand jury under a waiver of immunity, the waiver of immunity was explained to him by the assistant district attorney, defendant stated that his attorney had explained the waiver of immunity to him and he then signed the waiver in the presence of the grand jury. In our view, the statutory requirements were met and the waiver was valid (*see People v Edwards*, 37 AD3d 289, 289 [1st Dept 2007], *lv denied* 9 NY3d 843 [2007]; *People v Young*, 205 AD2d 908, 909-910 [3d Dept 1994]). Furthermore, the fact that defense counsel notarized the waiver does not render counsel ineffective and does not render the waiver invalid (*see generally Young*, 205 AD2d at 908).

Although we agree with defendant that County Court erred in counting defendant's prior felony convictions of perjury in the first degree, criminal possession of stolen property in the second degree and assault in the first degree as separate felonies (*see* Penal Law § 70.10 [1] [c]), defendant nevertheless had two qualifying prior felonies for PFO status. Contrary to defendant's contention, his 1977 rape conviction was properly used as both the registerable offense and a predicate felony for PFO purposes and does not violate the prohibition against double jeopardy. The Sex Offender Registration Act (SORA) "does not impose punishment, but is a civil statute aimed at prevention of crime and protection of the public" (*People v Szwalla*, 61 AD3d 1289, 1290 [3d Dept 2009]; *see People v Miller*, 77 AD3d 1386, 1387-1388 [4th Dept 2010], *lv denied* 16 NY3d 701 [2011]). The violation of Correction Law § 168-f is itself a crime, distinct from the original crime as having no shared elements, and sentencing as a PFO is "based solely on the existence of two prior felony convictions" (*People v Quinones*, 12 NY3d 116, 128 [2009], *cert denied* 558 US 821 [2009]). Defendant's rape conviction was the prerequisite to his adjudication as a sex offender, and that adjudication is not

considered a criminal punishment. The rape conviction is not an element of his Correction Law crime, but his subsequent failure to verify his address under the requirements of SORA is (*see* §§ 168-f, 168-t). Contrary to defendant's related contention, New York's PFO statute is constitutional on its face and as applied in this case (*see People v Giles*, 24 NY3d 1066, 1068 [2014], *cert denied* — US —, 136 S Ct 32 [2015]; *People v Battles*, 16 NY3d 54, 59 [2010], *cert denied* 565 US 828 [2011]; *People v Cehfus*, 140 AD3d 1644, 1645 [4th Dept 2016], *lv denied* 28 NY3d 969 [2016]).

We further conclude that defendant's sentence is not unduly harsh or severe and that the court properly exercised its discretion in adjudicating defendant a PFO (*see People v Boykins*, 134 AD3d 1542, 1543 [4th Dept 2015], *lv denied* 27 NY3d 1066 [2016]). "Defendant's 'history and character . . . and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest' " (*People v Prindle*, 129 AD3d 1506, 1507 [4th Dept 2015], *affd* 29 NY3d 463 [2017], *cert denied* — US — [Dec. 4, 2017] [2017]).

Finally, we reject defendant's related contention that his sentence was a result of prosecutorial and/or institutional vindictiveness. "[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting [his] right to trial . . . , and there is no indication in the record before us that the sentencing court [or the prosecutor] acted in a vindictive manner based on defendant's exercise of the right to a trial" (*People v Garner*, 136 AD3d 1374, 1374-1375 [4th Dept 2016], *lv denied* 27 NY3d 997 [2016] [internal quotation marks omitted]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1440

CA 17-01199

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

ELAINE M. PALUMBO AND MICHAEL PALUMBO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

BRISTOL-MYERS SQUIBB COMPANY, DEFENDANT,
AND CHARLES J. MALLO, M.D., DEFENDANT-RESPONDENT.

GRECO TRAPP, PLLC, BUFFALO (DUANE D. SCHOONMAKER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered September 8, 2016. The order granted the motion of defendant Charles J. Mallo, M.D. for summary judgment dismissing the amended complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the amended complaint is reinstated against defendant Charles J. Mallo, M.D.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained as a result of treatment provided by her physician Charles J. Mallo, M.D. (defendant). Plaintiff alleged in her amended complaint, among other things, that defendant committed medical malpractice by negligently injecting a scar on her chest from a prior cyst removal with a corticosteroid, and that defendant failed to obtain her informed consent for that treatment. In his answer, defendant asserted several affirmative defenses, including that the action was not timely commenced within the statute of limitations. Plaintiff amplified her allegations in a bill of particulars claiming that defendant was negligent in, among other things, treating a condition for which plaintiff did not seek treatment, failing to provide the risks and benefits of treatment involving the corticosteroid, failing to discuss alternative forms of treatment not involving the corticosteroid, failing to obtain informed consent before administering the corticosteroid, and failing to administer and dilute the corticosteroid in a proper manner. According to plaintiff, defendant’s negligent treatment caused fat atrophy and scarring of her chest.

Defendant subsequently moved for summary judgment dismissing the amended complaint against him on the grounds that he did not depart from the applicable standard of care, the injection did not cause plaintiff's alleged injuries, and he properly obtained plaintiff's informed consent before the injection. In an affidavit in support of his motion, defendant explained that plaintiff sought treatment to reduce the visibility of two other scars from a prior breast reduction surgery. After applying a local anesthetic, defendant injected the scar underneath plaintiff's right breast with a corticosteroid, but plaintiff thereafter requested that defendant not inject the scar under her left breast and, instead, inject the scar on her chest wall from the prior cyst removal. Upon examination, defendant noted the nature of the scar and that plaintiff already had a small cavity beneath the scar that had been created by the cyst removal. Defendant averred that he injected the corticosteroid into the skin, not the fat underneath the scar, and he thus opined that the injection did not create or exacerbate the defect. Defendant also averred that he undertook and completed the procedure because plaintiff had sought treatment for the appearance of the scar from the cyst removal. Before injecting the scars, defendant told plaintiff about the risks associated with the procedure and provided her with alternative forms of treatment, and plaintiff gave informed consent.

Plaintiff opposed the motion with various submissions, including her own affidavit. During the subsequent oral argument before Supreme Court, which was not transcribed, defendant apparently raised a new legal argument that he was entitled to summary judgment dismissing the amended complaint on the basis of his statute of limitations defense because plaintiff's submissions in opposition to the motion established that her claim sounded in battery only and the action was commenced beyond the applicable one-year period (*see* CPLR 215 [3]). Defendant relied upon averments in plaintiff's affidavit in which she asserted that she did not ask defendant to treat any scar on her chest in the area of the cyst removal and she never consented to corticosteroid injection treatment with respect to that area. The court determined that plaintiff's only cognizable claim sounded in battery, which was time-barred, and granted defendant's motion for summary judgment dismissing the amended complaint against him. We reverse.

It is well established that "[a] party moving for summary judgment must demonstrate that 'the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014], quoting CPLR 3212 [b]). Thus, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [internal quotation marks omitted]), "and every available inference must be drawn in the

[non-moving party's] favor" (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]; *see Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]). "The moving party's '[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*' " (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Alvarez*, 68 NY2d at 324 with emphasis added).

We conclude that defendant failed to meet his initial burden of establishing his entitlement to judgment as a matter of law on his statute of limitations defense. If plaintiff's only cognizable claim sounds in battery, then the action is time-barred (*see* CPLR 215 [3]). Here, defendant's submissions in support of his motion, including his affidavit, do not establish that plaintiff is seeking to recover for a battery inasmuch as defendant averred that plaintiff sought treatment for the appearance of the scar from the cyst removal and that, upon plaintiff's request and with her consent, defendant injected that scar with a corticosteroid (*see VanBrocklen v Erie County Med. Ctr.*, 96 AD3d 1394, 1394-1395 [4th Dept 2012]). Although "defendant relies on evidence submitted by plaintiff in opposition to the motion, i.e., plaintiff's [affidavit], we do not consider that [affidavit] in determining the merits of defendant's motion inasmuch as he failed to meet his initial burden of proof" (*Brown v Smith*, 85 AD3d 1648, 1649 [4th Dept 2011]). Defendant's failure to make a prime facie showing of entitlement to judgment as a matter of law on his statute of limitations defense requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *see generally Alvarez*, 68 NY2d at 324).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1444

CA 17-00503

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

KIMBERLY RUSSELL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HONRI V. HUNT AND DORIEN GARRETT,
DEFENDANTS-APPELLANTS.

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

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (GREGORY P. KRULL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered November 28, 2016. The order granted the motion of plaintiff for partial summary judgment on liability based on her strict liability cause of action and denied the cross motion of defendants for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiff and defendant Dorien Garrett resided in neighboring apartments in Buffalo, New York. On August 31, 2014, Garrett was dog-sitting Lily, a three-legged pit bull owned by defendant Honri V. Hunt, who was out of town. While Garrett and Lily were in the fenced-in backyard, plaintiff came into the yard with her dog, Chloe. The two dogs lunged at each other, and plaintiff and Garrett separated the dogs. According to plaintiff, Lily attempted to bite Chloe during the initial confrontation. After the dogs were separated, Garrett was unable to restrain Lily, and Lily again attacked Chloe. Lily bit plaintiff on the arm while the dogs were being separated for the second time. Plaintiff commenced this action seeking damages for injuries that she sustained from the dog bite, asserting causes of action for negligence and strict liability. We agree with defendants that Supreme Court erred in granting plaintiff's motion for partial summary judgment on liability based on her strict liability cause of action and in denying defendants' cross motion for summary judgment dismissing the amended complaint.

With respect to the issue of strict liability, we conclude that defendants established their entitlement to summary judgment dismissing that cause of action, and that plaintiff was not entitled

to partial summary judgment on liability based on that cause of action (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), inasmuch as defendants established as a matter of law that they lacked actual or constructive knowledge that Lily had any vicious propensities (*see Doerr v Goldsmith*, 25 NY3d 1114, 1116 [2015]; *Collier v Zambito*, 1 NY3d 444, 446-447 [2004]). We agree with defendants that the confrontation between the dogs was only one event, rather than two separate incidents as found by the court. Given the fact that only minutes passed between the two confrontations, we conclude that defendants did not acquire actual or constructive notice of any vicious propensities based on the initial confrontation. We likewise conclude that the court erred in denying that part of defendants' cross motion for summary judgment dismissing the negligence cause of action. It is well settled that " '[c]ases involving injuries inflicted by domestic animals may only proceed under strict liability based on the owner's knowledge of the animal's vicious propensities, not on theories of common-law negligence' " (*Blake v County of Wyoming*, 147 AD3d 1365, 1367 [4th Dept 2017]; *see Doerr*, 25 NY3d at 1116).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1445

CA 17-01156

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

ROBERT SCHAEFER AND KIMBERLY SCHAEFER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CHAUTAUQUA ESCAPES ASSOCIATION, INC., BOARD OF DIRECTORS OF CHAUTAUQUA ESCAPES ASSOCIATION, INC., AND CAMP CHAUTAUQUA, INC., DEFENDANTS-RESPONDENTS.

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

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MAURICE L. SYKES OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CHAUTAUQUA ESCAPES ASSOCIATION, INC., AND BOARD OF DIRECTORS OF CHAUTAUQUA ESCAPES ASSOCIATION, INC.

LUNDBERG LAW P.C., JAMESTOWN (DANA A. LUNDBERG OF COUNSEL), FOR DEFENDANT-RESPONDENT CAMP CHAUTAUQUA, INC.

Appeal from an order of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered December 12, 2016. The order denied the motion of plaintiffs for partial summary judgment and granted the cross motions of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs are lot owners in the Chautauqua Escapes residential subdivision in the Town of North Harmony, County of Chautauqua. Defendant Chautauqua Escapes Association, Inc. (Association) is a not-for-profit corporation comprised of property owners within the subdivision and, inter alia, enforces the "Declaration of Protective Covenants, Conditions, Restrictions, Easements, Charges and Liens - Chautauqua Escapes" for the subdivision (Declaration). In 1999, defendant Board of Directors of Chautauqua Escapes Association, Inc. (Board) resolved to waive any assessments on two lots owned by defendant Camp Chautauqua, Inc. (Sponsor), the entity that originally developed the subdivision and incorporated the Association. Plaintiffs commenced this action and asserted two causes of action. The first cause of action advanced a breach of contract theory seeking damages from, inter alia, the Sponsor on behalf of the Association for various unpaid assessments for the period covering 1999-2015 and for the alleged failure of the Sponsor to keep one of

the amenities, i.e., the Lodge building, in good repair as required by the Declaration and the Use of Facilities Agreement. The second cause of action alleged a breach of fiduciary duty by the Board. Plaintiffs moved for partial summary judgment, and defendants cross-moved for summary judgment dismissing the complaint against them. Supreme Court denied plaintiffs' motion and granted defendants' cross motions, relying extensively on the business judgment rule (*see 19 Pond, Inc. v Goldens Bridge Community Assn., Inc.*, 142 AD3d 969, 970 [2d Dept 2016]). We affirm, but our reasoning differs from that of the court.

In cross-moving for summary judgment, the Sponsor asserted that plaintiffs lacked standing to bring any claims "on behalf" of the Association. The court did not expressly decide the standing aspect of the Sponsor's cross motion, and we therefore deem it denied (*see Brown v U.S. Vanadium Corp.*, 198 AD2d 863, 864 [4th Dept 1993]). Although the Sponsor is not aggrieved by the court's order and thus did not cross appeal (*see generally id.*), we conclude that the Sponsor may properly raise the issue of standing as an alternate ground for affirmance on appeal (*see Layaou v Xerox Corp.*, 298 AD2d 921, 922 [4th Dept 2002]). With respect to the issue of plaintiffs' standing, we begin by observing that plaintiffs' attempt to recover damages from the Sponsor on behalf of the Association is a purely derivative claim (*see Tae Hwa Yoon v New York Hahn Wolee Church, Inc.*, 56 AD3d 752, 753-755 [2d Dept 2008]). Inasmuch as the record establishes that plaintiffs seek to vindicate the Association's rights and recover damages on behalf of the Association, plaintiffs' breach of contract cause of action had to be, but was not, asserted in the context of a derivative action brought by at least 5% of the Association members (*see* N-PCL 623 [a]). The complaint also fails to set forth with particularity the efforts of plaintiffs to secure the initiation of a derivative action by the Association's Board or the reason for not making such effort (*see* N-PCL 623 [c]). We therefore conclude that plaintiffs lacked standing to assert any derivative claims on behalf of the Association (*see Matter of St. Denis v Queensbury Baybridge Homeowners Assn., Inc.*, 100 AD3d 1326, 1326 [3d Dept 2012]). Thus, the claims for damages in the first cause of action, asserted against the Sponsor on behalf of the Association and in one instance against the Sponsor and the Board, were properly dismissed.

In any event, even assuming, arguendo, that plaintiffs had standing with respect to the claim in the first cause of action against the Sponsor on behalf of the Association for past assessments allegedly due on lots #138 and #139 for the period from 1999-2013, we conclude that the alleged breach of the Declaration occurred in 1999 when the Board resolved to waive those assessments. Thus, the court properly determined that plaintiffs' entire claim for those past due assessments was time-barred (*see* CPLR 203 [a]; 213 [2]; *Henry v Bank of Am.*, 147 AD3d 599, 601-602 [1st Dept 2017]).

With respect to plaintiffs' claim for damages from the Sponsor and the Board in the first cause of action for increasing payment to the Sponsor in 2013-2015 without satisfactory evidence of actual expenses incurred by the Sponsor, we conclude that section 11.03 of the Declaration precludes any such recovery. That section provides

that "[n]o liability shall attach to the Sponsor[,] the Association (or any officer, director, employee, Member, agent, committee or committee member) or to any other person or organization for failure to enforce the provisions of the Declaration." We therefore conclude that the court properly dismissed that claim.

Plaintiffs' cause of action alleging breach of fiduciary duty by the Board fails to allege any acts on the part of the Board members that were separate and apart from their collective actions taken on behalf of the Association (*see 20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733, 735-736 [1st Dept 2013]), and thus that cause of action is also precluded by section 11.03 of the Declaration and was properly dismissed.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1448

CA 17-00908

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

IN THE MATTER OF THE ESTATE OF JOAN W. ALFORD, DECEASED.

ELIZABETH S. GURNEY AND GREGORY D. STEVENS, AS COEXECUTORS OF THE ESTATE OF JOAN W. ALFORD, DECEASED, PETITIONERS-RESPONDENTS; MEMORANDUM AND ORDER

SHARON L. WICK, AS GUARDIAN AD LITEM FOR KAWIKA WALKER, APPELLANT, AND DAVID H. ALFORD, OBJECTANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (ALAN J. BOZER OF COUNSEL), FOR APPELLANT.

BREVORKA LAW FIRM, P.C., AMHERST (PETER J. BREVORKA OF COUNSEL), FOR OBJECTANT-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (DENNIS R. MCCOY OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeals from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered July 20, 2016. The order, entered after a hearing, determined that the release signed by objectant in June 2009 was valid and constitutes a defense to his objections to the accounting filed by the executor.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the determination that the release is valid is vacated and the matter is remitted to Surrogate's Court, Erie County, for further proceedings in accordance with the following memorandum: In this proceeding for the judicial settlement of the final accounting of decedent's estate, objectant and the guardian ad litem (hereafter, guardian) appeal from an order following a hearing determining that objectant's release of the final accounting provided to the previous executor (hereafter, executor) of the estate is valid and constitutes a valid defense by the estate against objections to the accounting filed by the executor. Objectant, who is decedent's son and a beneficiary of her will, signed a release form in June 2009 that purported, inter alia, to release and discharge the executor from liability for all matters relating to or derived from the administration of the estate, and to authorize Surrogate's Court to enter a decree settling the account and fully releasing and discharging each fiduciary. Objectant, however, refused to sign a second release in October 2009 after the executor sent him a revised accounting. The executor filed his final accounting of the

estate and petitioned for judicial settlement thereof. The executor passed away shortly thereafter, and the Surrogate appointed petitioners as coexecutors of the estate in his place. Objectant filed formal objections to the accounting, and petitioners moved for summary judgment dismissing the objections and approving the final accounting, alleging that the release that was signed by objectant in June 2009 barred any objections. Objectant opposed the motion on the ground that the release was invalid. The Surrogate denied the motion and conducted an evidentiary hearing on the validity of the release. The guardian was appointed to represent the interests of objectant's infant grandson, a potential beneficiary.

Initially, we reject the contention of petitioners that the guardian's appeal should be dismissed for lack of standing because her charge is not aggrieved by the order. Decedent's will, inter alia, directed the establishment of a trust to benefit her children and their descendants, and contemplated payments to them for maintenance, support, health and education. Objectant, as a co-trustee of the trust, maintained in the proceedings in Surrogate's Court that the failure to fund the trust was inappropriate. As a result of the Surrogate's determination that objectant's release of the executor is valid and constitutes a valid defense against the objections of objectant, the descendant beneficiaries stand to lose their trustee's voice in the proceedings in Surrogate's Court. We therefore conclude that the guardian's charge is an aggrieved party with a direct interest in the controversy that has been negatively affected by the Surrogate's order (*see* CPLR 5511; *see generally Advanced Distrib. Sys., Inc. v Frontier Warehousing, Inc.*, 27 AD3d 1151, 1152 [4th Dept 2006]).

We agree with objectant and the guardian that the Surrogate improperly shifted the burden from petitioners to objectant to prove that the release was fraudulently obtained and erred in determining that the release is valid. With releases, "as in other instances of dealing between a fiduciary and the person for whom he [or she] is acting, there must be proof of full disclosure by the [executor] of the facts of the situation and the legal rights of the beneficiary" (*Matter of Birnbaum v Birnbaum*, 117 AD2d 409, 416 [4th Dept 1986]). A release should be subject to careful scrutiny, and the executor must affirmatively demonstrate full disclosure of "material facts which he [or she] knew or should have known" (*id.*). "The mere absence of misrepresentation, fraud, or undue influence in the obtaining of a release is not sufficient to insulate the release from a subsequent attack by the beneficiaries; the fiduciary must affirmatively demonstrate that the beneficiaries were made aware of the nature and legal effect of the transaction in all its particulars" (*id.*). Here, petitioners' burden of proving that full disclosure was provided was improperly shifted to objectant, i.e., the beneficiary who challenged the validity of the release.

Decedent's will contemplated equal bequests to objectant and his sister (decedent's children). There was a substantial discrepancy in the value of the properties decedent left to each child, however, and most of objectant's inheritance was to come from the liquidation of

the estate's securities. The will also directed that the trust be funded in the maximum sum allowable to benefit decedent's children and their descendants. Objectant and the executor were named as co-trustees of the trust. Accurate information concerning the current value of the estate's securities and the propriety of defunding the trust in contravention of the will was therefore highly material to objectant. Such information bore directly on the amount of objectant's bequest and the possibility of future claims against him by trust beneficiaries. In connection with the executor's request for the release, however, the executor never disclosed the actual value of the estate's securities. Although objectant knew that the stock market was in decline, the executor never explained how the estate's securities were affected and never provided objectant with even an estimate of the securities' current worth, despite having received monthly statements with that information. By the time the securities were distributed to objectant in August 2009, they were worth hundreds of thousands of dollars less than objectant anticipated based on the outdated information that he had previously received from the executor and upon which he relied in executing the release. Inasmuch as the bequest to objectant derived almost entirely from the liquidation of the estate securities, he was entitled to know what they were worth before he released the executor from liability with respect to the final accounting (*see Matter of Saxton*, 274 AD2d 110, 119 [3d Dept 2000]).

The executor similarly failed to disclose the ramifications of leaving the trust unfunded. Although the record demonstrates that he suspected that it was improper to eliminate funding to the trust, the executor's only explanation to objectant of the consequences of doing so was that it would increase the individual distributions to decedent's children. Inasmuch as the executor's suggestion to leave the trust unfunded could lead to claims for breach of trust or breach of fiduciary duty against objectant and the executor (*see Matter of Lorie DeHimer Irrevocable Trust*, 122 AD3d 1352, 1353 [4th Dept 2014]), the executor should have provided objectant with such information before he asked to be absolved of all liability (*see Matter of James' Estate*, 86 NYS2d 78, 88 [Sur Ct, NY County 1948]; *see also Birnbaum*, 117 AD2d at 416-417).

We therefore reverse the order, vacate the determination that the release is valid and remit the matter to Surrogate's Court for further proceedings on the objections. In view of our determination, we do not review the remaining contentions of objectant and the guardian.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1452

KA 16-00444

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE D. THOMAS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY 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 (Russell P. Buscaglia, A.J.), rendered November 30, 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, his waiver of the right to appeal is valid (*see generally People v Bradshaw*, 18 NY3d 257, 264 [2011]; *People v Lopez*, 6 NY3d 248, 256 [2006]). *People v Brown* (296 AD2d 860 [4th Dept 2002], *lv denied* 98 NY2d 767 [2002]), relied on by defendant, is distinguishable. In *Brown*, we held that the plea court's "single *reference* to defendant's right to appeal [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" (*id.* at 860 [emphasis added and internal quotation marks omitted]). Here, in contrast, Supreme Court provided defendant with an extensive and detailed description of the proposed waiver of the right to appeal before securing his consent thereto. Defendant's valid waiver of the right to appeal forecloses his suppression claim (*see People v Kemp*, 94 NY2d 831, 833 [1999]; *People v Scott*, 144 AD3d 1597, 1597-1598 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *People v Verse*, 61 AD3d 1409, 1409 [4th Dept 2009], *lv denied* 12 NY3d 930 [2009]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1456

KA 14-00063

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVONTE R. MOORER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (LINDA M. CAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered March 15, 2013. The judgment convicted defendant, upon a nonjury verdict, 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 a nonjury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]). Defendant's cell phone was located when the police contacted defendant's cell phone service provider to "ping" the cell phone. The police found the cell phone in a backpack under a cot at a certain residence on Zimbrich Street in Rochester, and the contents of the backpack helped them to identify defendant as the perpetrator of the homicide herein. Defendant contends that County Court erred in denying that part of his omnibus motion seeking to suppress evidence obtained via the pinging of his cell phone. According to defendant, he had a reasonable expectation of privacy in the real-time location of his cell phone and that, to effect a real-time ping of the cell phone legally, the police were required to obtain a warrant. In defendant's view, without the illegal pinging of his cell phone and the evidence obtained as a result thereof, there was no trial evidence identifying him as the perpetrator. Even assuming, arguendo, that the pinging of defendant's cell phone constituted a search implicating the protections of the Federal and State Constitutions (*see* US Const Fourth Amend; NY Const, art I, § 12), we conclude that any error in failing to suppress the evidence obtained as a result of the pinging is harmless inasmuch as the proof of defendant's identity was overwhelming and there is no reasonable possibility that defendant otherwise would have been acquitted (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]). Similarly, even assuming, arguendo, that

the court erred in determining that defendant abandoned the backpack and its contents, we further conclude that any such error is harmless (*see id.*).

Contrary to defendant's contention, the sentence is not unduly harsh or severe.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1471

CA 17-01217

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

CACH, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NANNETTE RYAN, DEFENDANT-APPELLANT.

GRAHAM & BORGESE, LLP, WILLIAMSVILLE (FRANK J. BORGESE OF COUNSEL), FOR DEFENDANT-APPELLANT.

DANIELS NORELLI SCULLY & CECERE, P.C., HICKSVILLE (IRA R. SITZER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered November 1, 2016. The order denied defendant's motion to vacate a default judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action seeking to recover the unpaid balance with interest on a credit card issued to defendant by Providian Bank, which assigned the debt to plaintiff. After defendant failed to appear or answer in the action, a default judgment was entered against her in December 2007. Although the law firm representing plaintiff purportedly attempted to collect on the debt for several years, the judgment was not satisfied until June 2016 when another bank at which defendant maintained an account paid plaintiff pursuant to a property execution on defendant's account (*see generally* CPLR 5230). In August 2016, defendant moved to vacate the default judgment based upon a lack of personal jurisdiction (*see* CPLR 5015 [a] [4]). We conclude that Supreme Court erred in determining that defendant "lack[ed] standing to challenge the [default] judgment" and in denying the motion to vacate without conducting a traverse hearing to determine whether defendant was properly served.

In denying the motion to vacate, the court determined that defendant lacked standing to challenge the default judgment because the judgment had been satisfied in June 2016. That was error. Where, as here, a defendant moves to vacate a default judgment on the ground that the court that rendered the judgment lacked personal jurisdiction over the defendant (*see* CPLR 5015 [a] [4]), a finding in favor of the defendant would mean that the judgment was "a nullity" (*Royal Zenith Corp. v Continental Ins. Co.*, 63 NY2d 975, 977 [1984]; *see Empire of*

Am. Realty Credit Corp. v Smith, 227 AD2d 931, 932 [4th Dept 1996]). It necessarily follows that, "if a judgment is a nullity, it never legally existed so as to become extinguished by payment" (*Citibank [S.D.] v Farmer*, 166 Misc 2d 145, 146 [Mount Vernon City Ct 1995]). Plaintiff cites various cases for the proposition that "[a] judgment which is paid and satisfied of record ceases to have any existence since a defendant, by paying the amount due, extinguishes the judgment and the obligation thereunder," thereby depriving a court of jurisdiction to vacate the judgment (*H. D. I. Diamonds v Frederick Modell, Inc.*, 86 AD2d 561, 561 [1st Dept 1982], *appeal dismissed* 56 NY2d 645 [1982]; *see Delahanty v Anderson*, 161 AD2d 1164, 1165 [4th Dept 1990]). Those cases, however, are not applicable where, as here, a defendant disputes whether the court that rendered the judgment lacked personal jurisdiction over the defendant in the first instance (*see Citibank [S.D.]*, 166 Misc 2d at 146).

In addition, inasmuch as plaintiff levied the judgment amount with interest by a property execution on defendant's bank account, we conclude that defendant did not voluntarily pay and satisfy the judgment (*cf. Delahanty*, 161 AD2d at 1165; *H. D. I. Diamonds*, 86 AD2d at 561). Thus, it cannot be said that she waived the defense of lack of personal jurisdiction (*see Cadlerock Joint Venture, L.P. v Kierstedt*, 119 AD3d 627, 628 [2d Dept 2014]; *cf. Cach, LLC v Anderson*, 48 Misc 3d 136[A], 2015 NY Slip Op 51132[U], *1 [2d Dept App Term 2015]).

With respect to the merits, CPLR 308 (2) permits personal service on a party "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by . . . mailing the summons to the person to be served at his or her last known residence." "Ordinarily, the affidavit of a process server constitutes prima facie evidence that the defendant was validly served" (*Wachovia Bank, N.A. v Greenberg*, 138 AD3d 984, 985 [2d Dept 2016]; *see Alostar Bank of Commerce v Sanoian*, 153 AD3d 1659, 1659 [4th Dept 2017]). Although "bare and unsubstantiated denials are insufficient to rebut the presumption of service . . . , a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing" (*Wachovia Bank, N.A.*, 138 AD3d at 985; *see Fabian v Mullen*, 20 AD3d 896, 897 [4th Dept 2005]).

Here, the affidavit of plaintiff's process server constitutes prima facie evidence that defendant was validly served pursuant to CPLR 308 (2) inasmuch as the process server averred that he personally served the summons and complaint on a male named "Larry," a person of suitable age and discretion who refused to provide his relationship with defendant but was present at defendant's residence, and that he thereafter mailed the summons and complaint to defendant at the residential address (*see Wachovia Bank, N.A.*, 138 AD3d at 984; *Wells Fargo Bank, N.A. v Christie*, 83 AD3d 824, 824-825 [2d Dept 2011]). In response, however, defendant submitted a specific and detailed affidavit in which she averred that she was not, and could not have

been, served as described in the process server's affidavit inasmuch as she did not know anyone, including any neighbors, named "Larry," no one by that name was present at her residence at the time of the alleged service, and the only male that would have been in her home was her husband, whose name was not "Larry" and who did not fit the physical and age descriptions provided by the process server. We conclude that defendant's affidavit rebutted the presumption of proper service established by the process server's affidavit (*see Wachovia Bank, N.A.*, 138 AD3d at 985; *Wells Fargo Bank, N.A.*, 83 AD3d at 825; *cf. Washington Mut. Bank v Huggins*, 140 AD3d 858, 859 [2d Dept 2016]; *Roberts v Anka*, 45 AD3d 752, 754 [2d Dept 2007]; *Granite Mgt. & Disposition v Sun*, 221 AD2d 186, 186-187 [1st Dept 1995]). We therefore reverse the order and remit the matter to Supreme Court to conduct an evidentiary hearing to determine whether defendant was properly served pursuant to CPLR 308 (2).

We have reviewed plaintiff's alternative ground for affirmance (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]), and we conclude that it lacks merit.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1472

CA 17-00988

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

VILLAGE OF HERKIMER, PLAINTIFF-APPELLANT,
VILLAGE OF ILION, ET AL., PLAINTIFFS,

V MEMORANDUM AND ORDER

COUNTY OF HERKIMER, INDIVIDUALLY, AND AS
ADMINISTRATOR OF HERKIMER COUNTY SELF-INSURANCE
PLAN, DEFENDANT-RESPONDENT,
PMA MANAGEMENT CORP., ET AL., DEFENDANTS.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HINMAN, HOWARD & KATTELL LLP, BINGHAMTON (ALBERT J. MILLUS, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony J. Paris, J.), entered August 4, 2016. The order, entered after a nonjury trial, determined the discount rate to be applied to the jury's prior damages award.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following memorandum: The Village of Herkimer (plaintiff) is a former member of the Herkimer County Self-Insurance Plan (Plan), which was created in 1956 pursuant to article 5 of the Workers' Compensation Law. In 2005, plaintiffs commenced this action against, inter alia, the County of Herkimer (defendant), individually and as Plan administrator, after a dispute developed between defendant and its municipalities with respect to the Plan's future. Defendant moved for summary judgment dismissing the amended complaint against it and also moved separately for summary judgment on its amended and supplemental counterclaims concerning plaintiffs' liability under the Plan. Supreme Court granted defendants' two motions and directed an inquest on damages, and this Court affirmed the court's two orders (*Village of Ilion v County of Herkimer*, 63 AD3d 1546, 1549 [4th Dept 2009]). At the ensuing inquest, a jury awarded defendant $1,617,528 in damages against plaintiff, to which the court later added, inter alia, $833,580.87 in prejudgment interest. Plaintiff appealed the judgment on the ground, among others, that the dollar amount of the jury's award should be discounted to present value. This Court rejected plaintiff's position and affirmed the judgment (*Village of Ilion v County of Herkimer* [appeal No. 3], 103 AD3d 1168 [4th Dept

2013]), but the Court of Appeals modified on that ground and remitted the matter to the trial court for the purpose of establishing an appropriate discount rate (*Village of Ilion v County of Herkimer*, 23 NY3d 812, 822 [2014]). Upon remittal, the court conducted a nonjury trial and concluded that the discount rate would be 1.8% and ordered defendant to refund plaintiff the amount of $363,521.07 plus interest. This appeal by plaintiff ensued.

We agree with plaintiff that the court erred in failing to empanel a jury to determine the discount rate, and we therefore reverse the order and remit the matter to Supreme Court for a jury trial. "It is hardly necessary to state that the right to trial by jury is zealously protected in our jurisprudence and yields only to the most compelling circumstances" (*John W. Cowper Co. v Buffalo Hotel Dev. Venture*, 99 AD2d 19, 21 [4th Dept 1984]). " 'Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever[,]' . . . [and] [t]hat guarantee extends to all causes of action to which the right attached at the time of adoption of the 1894 Constitution" (*id.*). "Historically, however, actions at law were tried by a jury, matters cognizable in equity were tried by the Chancellor [and,] . . . [e]ven though the two systems have merged, vestiges of the law-equity dichotomy remain in the area relating to trial by jury" (*id.*). "Thus, the right to a jury trial 'depends upon the nature of the relief sought' " (*Matter of Colonial Sur. Co. v Lakeview Advisors, LLC*, 125 AD3d 1292, 1293 [4th Dept 2015], *lv denied* 26 NY3d 901 [2015]). CPLR 4101 provides, inter alia, that an action shall be tried by a jury when "a party demands and sets forth facts which would permit a judgment for a sum of money only" or when "a party is entitled by the constitution or by express provision of law to a trial by jury" (CPLR 4101 [1], [3]).

Here, it is undisputed that, prior to the original trial in this matter, plaintiff demanded a jury trial on all issues. During that trial, "[o]ver the [plaintiff's] objection, the jury was provided with a verdict form that did not allow for any damages discount" (*Village of Ilion*, 23 NY3d at 818). Although the Court of Appeals remitted the matter for the purpose of establishing a discount rate, it did not indicate whether the discount rate should be determined by the trial court or a jury. Nevertheless, prior to the trial that is the subject of this appeal, plaintiff renewed its request for a jury, which the court denied. Contrary to defendant's contention, neither article 50-A nor article 50-B of the CPLR requires that the discount rate be determined by the court. As the Court of Appeals stated, this is a breach of contract action (*see Village of Ilion*, 23 NY3d at 815). Article 50-A deals with periodic payment of judgments in actions concerning medical and dental malpractice, and article 50-B deals with periodic payment of judgments in actions concerning personal injury, injury to property, and wrongful death. Furthermore, we conclude that *Toledo v Iglesia Ni Christo* (18 NY3d 363 [2012]) does not require the trial court to determine the discount rate in this case inasmuch as *Toledo* was a wrongful death case within the purview of CPLR article 50-B. In light of our determination herein, plaintiff's remaining

contentions are hereby rendered moot.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1476

KA 16-01984

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CAMERON S. RIVES, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU 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 January 19, 2016. The judgment convicted defendant, upon his plea of guilty, of burglary 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 burglary in the first degree (Penal Law § 140.30 [2]), defendant contends that County Court abused its discretion in failing to adjudicate him a youthful offender. We reject that contention.

Initially, even assuming, arguendo, that defendant's challenge to the denial of his request for a youthful offender adjudication survives his waiver of the right to appeal because the court indicated during the waiver that it would permit defense counsel to argue for such an adjudication at sentencing (*see generally People v Scott*, 137 AD3d 1616, 1616 [4th Dept 2016], *lv denied* 27 NY3d 1139 [2016]), we reject that challenge. The record establishes that the four perpetrators invaded the home while the victims, including several small children, were present, and they then pistol-whipped the adult male victim, bound the adult female victim and urinated on her, stole property, and threatened to kill the family. Notwithstanding his later protestations of minimal participation, defendant admitted that he knew that a robbery was planned, and that he drove the three codefendants to the victims' home, took part in the crime, and retained his share of the proceeds. Thus, we see no abuse of discretion in the court's denial of youthful offender status.

Defendant's challenge to the severity of the sentence is encompassed by his valid waiver of the right to appeal (*see People v*

Hidalgo, 91 NY2d 733, 737 [1998]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1481

KA 16-01438

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN M. DOWNEY, DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., 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 February 24, 2016. 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 and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the first degree (Penal Law § 140.30 [2]). The charges arose from allegations that he entered a home in which his sister resided, then entered another resident's bedroom and assaulted that resident. Contrary to defendant's contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). 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 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends that reversal is required because the jury convicted him based on a theory that differs from the one set forth in the indictment as limited by the bill of particulars. Although defendant did not raise that contention in Supreme Court and thus did not preserve it for our review, we conclude that "preservation is not required" (*People v Greaves*, 1 AD3d 979, 980 [4th Dept 2003]), inasmuch as "defendant has a fundamental and nonwaivable right to be tried only on the crimes charged" in the indictment as limited by the bill of particulars (*People v Duell*, 124 AD3d 1225, 1226 [4th Dept 2015], *lv denied* 26 NY3d 967 [2015] [internal quotation marks omitted]; *see People v Sanford*, 148 AD3d 1580, 1582 [4th Dept 2017],

lv denied 29 NY3d 1133 [2017]). Nevertheless, defendant's contention is without merit. Defendant, in essence, contends that, because of variances between the evidence at trial and the allegations in the indictment as limited by the bill of particulars, the indictment failed to fulfill two of the primary functions of an indictment, i.e., to provide "defendant with fair notice of the accusations made against him, so that he will be able to prepare a defense," and "to provide some means of ensuring that the crime for which the defendant is brought to trial is in fact one for which he was indicted by the Grand Jury, rather than some alternative seized upon by the prosecution in light of subsequently discovered evidence" (*People v Iannone*, 45 NY2d 589, 594 [1978]; *see People v Rivera*, 84 NY2d 766, 769 [1995]; *see also Russell v United States*, 369 US 749, 770 [1962]). Here, however, we conclude that the indictment and bill of particulars provided defendant with "fair notice of the accusations made against him, so that he [was] able to prepare a defense" (*Iannone*, 45 NY2d at 594; *see People v Grega*, 72 NY2d 489, 495 [1988]; *People v Dawson*, 79 AD3d 1610, 1611 [4th Dept 2010], *lv denied* 16 NY3d 894 [2011]), and there is no possibility that defendant was convicted of a crime that was not charged by the grand jury (*cf. People v Graves*, 136 AD3d 1347, 1349 [4th Dept 2016], *lv denied* 27 NY3d 1069 [2016]).

Defendant further contends that the court erred in instructing the jury on the elements of the crime. We agree, and we therefore reverse the judgment and grant a new trial. As we determined on the appeal of the codefendant, "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' " (*People v Pritchard*, 149 AD3d 1479, 1480 [4th Dept 2017]). Because "defendant raises claims identical to those raised by the codefendant on [her] appeal, which claims required reversal in that case . . . , we conclude that . . . defendant's judgment of conviction must be reversed" (*People v Sanchez*, 304 AD2d 677, 677 [2d Dept 2003]; *see generally People v Rodriquez*, 299 AD2d 875, 875 [4th Dept 2002]; *People v Catalano*, 124 AD2d 304, 304 [3d Dept 1986]).

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1489

CA 17-01103

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

KATHERINE A. CATALANO AND ROSS CATALANO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

HEIDEN VALLEY FARMS, RICK AUSTIN AND DEBORAH AUSTIN, DEFENDANTS-APPELLANTS.

ANTHONY J. VILLANI, P.C., LYONS (DAVID M. FULVIO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE LAW OFFICES OF JOHN TROP, DEWITT (KEVIN M. MATHEWSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT KATHERINE A. CATALANO.

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

Appeal from an order of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered September 27, 2016. The order denied defendants' motion for summary judgment dismissing the complaint and granted the motion of plaintiff Katherine A. Catalano for summary judgment on defendants' counterclaim.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of plaintiff Katherine A. Catalano and reinstating the counterclaim, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries they sustained when their vehicle collided with a black angus bull owned by defendants. Although defendants had moved the bull just a few hours before the collision to a pasture that was enclosed by an electrical fence, it escaped from the pasture and ran across the roadway where it collided with plaintiffs' vehicle. Supreme Court, inter alia, denied defendants' motion for summary judgment dismissing the complaint, and granted the motion of Katherine A. Catalano (plaintiff), the driver of the vehicle, for summary judgment dismissing defendants' counterclaim for comparative negligence. We now modify the order by denying plaintiff's motion and reinstating the counterclaim.

Contrary to defendants' contention, the court properly determined that the doctrine of res ipsa loquitur raised an inference of their negligence (*see O'Hara v Holiday Farm*, 147 AD3d 1454, 1455 [4th Dept

2017]). Cattle are classified as "domestic animal[s]" in Agriculture and Markets Law § 108 (7), and it is well established that "a landowner or the owner of an animal may be liable under ordinary tort-law principles when a farm animal—i.e., a domestic animal as that term is defined in Agriculture and Markets Law § 108 (7)—is negligently allowed to stray from the property on which the animal is kept" (*Hastings v Sauve*, 21 NY3d 122, 125-126 [2013]; *see O'Hara*, 147 AD3d at 1455). Here, "defendants were in exclusive control of the [bull] and the fences surrounding the pasture where [it was] kept" and, because cattle "do not generally wander unattended on public streets in the absence of negligence" (*Loeffler v Rogers*, 136 AD2d 824, 824 [3d Dept 1988]; *see Sargent v Mammoser*, 117 AD3d 1533, 1534 [4th Dept 2014]), we conclude that the court properly inferred defendants' negligence as a starting point in determining their motion.

We further conclude that defendants failed to rebut the inference of negligence inasmuch as they failed to submit proof that "the animal's presence on the [road] was not caused by [their] negligence" (*Johnson v Waugh*, 244 AD2d 594, 596 [3d Dept 1997] [internal quotation marks omitted], *lv denied* 91 NY2d 810 [1998]), or "that something outside of [defendants'] control" allowed the bull to escape (*Emlaw v Clark*, 26 AD3d 790, 791 [4th Dept 2006]). To the contrary, deposition testimony submitted by defendants established that "the escape of [their cattle] was a recurring problem" (*Sargent*, 117 AD3d at 1534) and, although defendant Rick Austin had inspected the electrical fencing prior to the collision to insure that it was working properly, he testified that the animals could escape through the fence if a gate were left open. Indeed, he further testified that the bulls and the brood herd had mixed together just a few days before the collision when a gate had been left open inadvertently (*cf. Emlaw*, 26 AD3d at 791). Because defendants did not eliminate all issues of fact with respect to their alleged negligence, the court properly denied their motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We agree with defendants, however, that the court erred in granting plaintiff's motion inasmuch as there is an issue of fact whether plaintiff was also negligent. Plaintiff's burden on her motion was to establish both that defendants were negligent as a matter of law, and that she was free of comparative fault (*see Deering v Deering*, 134 AD3d 1497, 1498 [4th Dept 2015]). Even assuming, arguendo, that plaintiff met her burden with respect to defendants' alleged negligence, we conclude that she failed to meet her burden with respect to her own alleged comparative negligence. Plaintiff submitted evidence demonstrating that, at the time of the collision, she was lawfully proceeding in the southbound lane of travel on a public roadway when a bull weighing approximately 600 to 700 pounds suddenly ran onto the road and collided with her vehicle. Although plaintiff had the right-of-way in her lane as against other motorists and wandering livestock, it was raining and dark when the accident occurred, and plaintiff's submissions on her motion failed to establish as a matter of law "that there was nothing she could do to avoid the accident" (*Jackson v City of Buffalo*, 144 AD3d 1555, 1556

[4th Dept 2016]). Thus, there is an issue of fact whether slower travel would have enabled plaintiff to avoid the collision, and that issue must be determined by a jury (*see Yondt v Boulevard Mall Co.*, 306 AD2d 884, 884 [4th Dept 2003]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1490

CA 17-00820

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

KONRAD DEVELOPERS, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HOLBROOK HEATING, INC., DOING BUSINESS AS HOLBROOK HEATING AND AIR CONDITIONING, DEFENDANT-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LYNCH LAW OFFICE, PLLC, SYRACUSE (RYAN ABEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered May 24, 2016. The order, insofar as appealed from, denied the motion of defendant for summary judgment insofar as it sought dismissal of the indemnification claim.

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

Memorandum: In December 2008, plaintiff entered into a contract for the construction of a residence, agreeing to "furnish all labor and materials to construct and complete the project . . . in a good and workmanlike manner." Plaintiff subcontracted with defendant for the installation of a heating, air conditioning, and hot water system at the residence. During the course of the construction defendant submitted a series of invoices to plaintiff, which paid the invoices in full, with the final invoice being paid on July 29, 2009. Plaintiff thereafter filed a mechanics' lien and commenced an action against the owners of the residence seeking, inter alia, to foreclose the lien and to recover the sums allegedly remaining due for plaintiff's work on the project. The owners of the residence asserted a counterclaim against plaintiff, alleging that plaintiff breached the construction contract and, as a result, the owners "were forced to complete, correct and repair certain defective work."

On August 7, 2015, plaintiff commenced the instant action asserting causes of action for breach of contract and "contribution and/or indemnification". Defendant thereafter moved for summary judgment dismissing the complaint. Supreme Court granted the motion in part, dismissing the first cause of action as time-barred and the second cause of action insofar as it sought contribution (*see* CPLR 213

[2]).

At the outset, we note that, inasmuch as plaintiff did not cross-appeal from the order, its contentions with respect to that part of the order dismissing the first cause of action, for breach of contract, are not properly before us (*see Hecht v City of New York*, 60 NY2d 57, 61 [1983]; *Matter of Baker Hall v City of Lackawanna Zoning Bd. of Appeals*, 109 AD3d 1096, 1097 [4th Dept 2013]).

On defendant's appeal, we conclude that the court properly denied the motion to the extent that it sought summary judgment dismissing the indemnification claim. Contrary to defendant's contention, we conclude that the lack of privity between defendant and the owners of the residence has no bearing on plaintiff's entitlement, if any, to common-law or implied indemnification. "Indemnification is '[t]he right of one party to shift the entire loss to another' and 'may be based upon an express contract or an implied obligation' " (*Genesee/Wyoming YMCA v Bovis Lend Lease LMB, Inc.*, 98 AD3d 1242, 1244 [4th Dept 2012], quoting *Bellevue S. Assoc. v HRH Constr. Corp.*, 78 NY2d 282, 296 [1991], *rearg denied* 78 NY2d 1008 [1991]). We reject defendant's further contention that common-law or implied indemnification is not available in an action alleging breach of contract by the proposed indemnitee (*see e.g. Board of Educ. of Hudson City Sch. Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 29-30 [1987]; *Genesee/Wyoming YMCA*, 98 AD3d at 1243; *Westbank Contr., Inc. v Roundout Val. Cent. Sch. Dist.*, 46 AD3d 1187, 1189 [3d Dept 2007]; *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1st Dept 1999]; *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 452 [1st Dept 1985]). Moreover, it is of no moment whether the counterclaim asserted by the owners of the residence extends to work on the residence that was not performed by defendant inasmuch as plaintiff's "alleged wrongdoing with respect to these other obligations did not impair its right to seek indemnification on the claim relating to the [heating, air conditioning and hot water] system" installed by defendant (*17 Vista Fee Assoc.*, 259 AD2d at 82, *see Mas v Two Bridges Assoc.*, 75 NY2d 680, 689-690 [1990]).

Having concluded that the indemnification claim is legally viable, we further conclude, based upon the evidence in the record, that defendant failed to meet its burden of "establish[ing], prima facie, that it was entitled to judgment as a matter of law dismissing the common-law indemnification claim by demonstrating that the [alleged loss] was not due solely to its negligent performance or nonperformance of an act solely within its province" (*Proulx v Entergy Nuclear Indian Point 2, LLC*, 98 AD3d 492, 493 [2d Dept 2012]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1498

KA 14-00309

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN WILSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered November 6, 2013. The judgment convicted defendant, upon a jury verdict, of rape in the third degree and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him, after a jury trial, of rape in the third degree (Penal Law § 130.25 [2]) and endangering the welfare of a child (§ 260.10 [1]), defendant contends that reversal is required because Supreme Court failed to comply with the requirements of CPL 310.30 in accordance with *People v O'Rama* (78 NY2d 270, 276-278 [1991]) in responding to a certain jury note. Specifically, defendant contends that the court failed to mark the jury note as an exhibit or show the note to him before responding to it. As a preliminary matter, we note that defendant failed to preserve his contention for our review. Where, as here, "counsel has meaningful notice of a substantive jury note because the court has read the precise content of the note into the record in the presence of counsel, defendant, and the jury . . . [c]ounsel is required to object to the court's procedure to preserve any [alleged] error for appellate review" (*People v Nealon*, 26 NY3d 152, 161-162 [2015]; *see People v Mack*, 27 NY3d 534, 538-539 [2016]; *People v Morris*, 27 NY3d 1096, 1098 [2016]). Here, counsel failed to object to the court's procedure in responding to the jury note, and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

In contrast, defendant objected to the court's substantive response to the jury note, thereby preserving for our review his contention that the court should have included in a readback of

testimony to the jury the victim's testimony on cross-examination. We nevertheless conclude that defendant's contention is without merit. The jury's note requested the victim's testimony concerning her last sexual encounter with defendant. It is well settled that "[a] request for a reading of testimony generally is presumed to include cross-examination [that] impeaches the testimony to be read back, and any such testimony should be read to the jury unless the jury indicates otherwise" (*People v Morris*, 147 AD3d 873, 874 [2d Dept 2017] [internal quotation marks omitted]; *see People v Berger*, 188 AD2d 1073, 1074 [4th Dept 1992], *lv denied* 81 NY2d 881 [1993]). In this case, however, "there was no cross-examination testimony relevant to the matters requested by the jury" (*People v Grant*, 127 AD3d 990, 991 [2d Dept 2015], *lv denied* 26 NY3d 968 [2015]; *see generally People v Conroy*, 102 AD3d 979, 981 [2d Dept 2013], *lv denied* 21 NY3d 1014 [2013]; *People v Murray*, 258 AD2d 936, 936-937 [4th Dept 1999], *lv denied* 93 NY2d 927 [1999]), and we therefore conclude that the court did not err in its response to the jury note. Even assuming, arguendo, that the court erred in refusing to permit the disputed cross-examination testimony to be read back to the jury, we conclude that reversal is not required inasmuch as "defendant failed to show that any alleged omission of relevant testimony from the readback caused prejudice" to him (*People v Aller*, 33 AD3d 621, 622 [2d Dept 2006], *lv dismissed* 8 NY3d 918 [2007]; *see People v Schafer*, 81 AD3d 1361, 1362 [4th Dept 2011], *lv denied* 17 NY3d 861 [2011]).

We reject defendant's contention that the rape conviction is not supported by legally sufficient evidence because the trial evidence was insufficient to establish that he was over 21 years old when he committed the crime of statutory rape in the third degree (Penal Law § 130.25 [2]). Here, we conclude that there is a valid line of reasoning and permissible inferences by which the jury could have determined that the birth certificate admitted in evidence belonged to defendant and, coupled with other evidence presented by the People, that defendant was 29 years old when he began his relationship with the victim (*see People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Griffin*, 48 AD3d 1233, 1235-1236 [4th Dept 2008], *lv denied* 10 NY3d 840 [2008]; *see also People v Perryman*, 178 AD2d 916, 918 [4th Dept 1991], *lv denied* 79 NY2d 1005 [1992]; *People v Patterson*, 149 AD2d 966, 966 [4th Dept 1989], *lv denied* 74 NY2d 745 [1989]). Finally, the sentence is not unduly harsh or severe.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1499

KA 15-00133

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYSEAN JOHNSTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered December 16, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). On March 4, 2014, officers with the Syracuse Police Department (SPD) executed search warrants for defendant's house and vehicle, and seized 8.7 grams of cocaine, 1.2 grams of heroin, and cash secreted in shoeboxes. The warrants were issued based on the application of an SPD detective who had participated in an investigation over the preceding four months through the use of a confidential informant. According to the sworn statements in the detective's warrant application, he and other SPD officers set up six controlled buys between the informant and defendant at a predetermined location. Surveillance units were posted at defendant's house and at the location of the buy. Before the informant proceeded to the location of the buy, he was checked for drugs and money, and was found to have none. He was then given the buy money, and officers observed him as he proceeded to the location of the buy. Other officers then observed a vehicle with a particular license plate number proceed from defendant's residence to the location of the buy. Defendant emerged from the vehicle, met with the informant, and then returned home in the vehicle. During one of those controlled buys, the officers observed a hand-to-hand transaction. After each controlled buy, the informant met with the detective without first coming into contact with anyone else. Each time, the informant was in possession of a tan

powder, was checked for money and was found to be in possession of none, and made certain statements to the detective concerning the buy. Each time, the detective performed field tests on the powder and detected the presence of heroin.

We agree with defendant that his waiver of the right to appeal was invalid. County Court did not engage defendant in an adequate colloquy to ensure that the waiver was knowingly, intelligently, and voluntarily entered (*see People v Edwards*, 151 AD3d 1962, 1962 [4th Dept 2017], *lv denied* 29 NY3d 1126 [2017]; *People v Howington*, 144 AD3d 1651, 1652 [4th Dept 2016]). In particular, the court did not ensure that defendant "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see Howington*, 144 AD3d at 1652). We therefore address defendant's substantive contentions on appeal.

Defendant contends that the court erred in refusing to conduct a *Darden* hearing to confirm the existence of the confidential informant (*see generally People v Darden*, 34 NY2d 177, 181 [1974], *rearg denied* 34 NY2d 995 [1974]). We reject that contention. When the People cannot establish the existence of probable cause without information obtained from a confidential informant, the court must hold a *Darden* hearing in camera (*see People v Edwards*, 95 NY2d 486, 489 [2000]; *People v Phillips*, 237 AD2d 971, 971 [4th Dept 1997]). The purpose of such a hearing is "to allay any concern that the informant is 'wholly imaginary' and his statements to the police [are] 'fabricated' " (*Edwards*, 95 NY2d at 494, quoting *People v Serrano*, 93 NY2d 73, 77 [1999]). Here, however, such a hearing was unnecessary because the independent observations of the detective and the other police officers involved in the investigation established the existence of probable cause to support the search warrant (*see People v Crooks*, 27 NY3d 609, 614 [2016]; *see generally People v Myhand*, 120 AD3d 970, 973 [4th Dept 2014], *lv denied* 25 NY3d 952 [2015]).

Contrary to defendant's further contention, we lack the authority to amend the certificate of conviction in order to dispense with the mandatory surcharge (*see* Penal Law § 60.35 [1] [a]; *People v Parkison*, 151 AD3d 1647, 1648 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]). Finally, the sentence is not unduly harsh or severe.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1505

CA 17-00995

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND TROUTMAN, JJ.

DANIEL REDEYE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PROGRESSIVE INSURANCE COMPANY,
DEFENDANT-RESPONDENT.

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

HURWITZ & FINE, P.C., BUFFALO (DAN D. KOHANE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered December 21, 2016. The order denied the motion of plaintiff pursuant to CPLR 2221 (e) (2) for leave to renew and/or pursuant to CPLR 5015 (a) to vacate the court's prior order.

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

Memorandum: Plaintiff commenced this action against defendant, his motor vehicle liability insurer, seeking supplementary uninsured/underinsured motorist benefits. On a prior appeal, we held that Supreme Court properly granted the motion of defendant for summary judgment seeking, inter alia, to dismiss the complaint (*Redeye v Progressive Ins. Co.*, 133 AD3d 1261 [4th Dept 2015], *lv denied* 26 NY3d 918 [2016]). In our decision, we cited, inter alia, *Weiss v Tri-State Consumer Ins. Co.* (98 AD3d 1107 [2d Dept 2012]), and Supreme Court likewise relied on that case. In June 2016, the Second Department issued its decision in *Matter of Government Empls. Ins. Co. v Sherlock* (140 AD3d 872, 875 [2d Dept 2016]) in which it disavowed *Weiss* to an extent. Shortly thereafter, plaintiff moved pursuant to CPLR 2221 (e) (2) for leave to renew and/or pursuant to CPLR 5015 (a) to vacate the court's prior order on the ground that *Weiss*, upon which the court had relied, was no longer good law. The court denied the motion, and we now affirm.

Contrary to plaintiff's contention, the motion insofar as it sought leave to renew was properly denied. CPLR 2221 (e) does not impose a time limit on motions for leave to renew, unlike motions for leave to reargue, which must be made before the expiration of the time in which to take an appeal (*see* CPLR 2221 [d] [3]; 5512 [a]). A motion based on a change in the law formerly was considered a motion

for leave to reargue, with the same time limit, i.e., before the time to appeal the order expired (*see Matter of Huie [Furman]*, 20 NY2d 568, 572 [1967], *rearg denied* 21 NY2d 880 [1968]; *Glicksman v Board of Educ./Cent. Sch. Bd. of Comsewogue Union Free Sch. Dist.*, 278 AD2d 364, 365 [2d Dept 2000]). Over time, the rule evolved to allow such a motion "where the case was still pending, either in the trial court or on appeal" (*Glicksman*, 278 AD2d at 365-366). The Court of Appeals explained in *Huie* that denying as untimely a motion for leave to reargue based on a change in the law "might at times seem harsh, [but] there must be an end to lawsuits" (*id.* at 572).

After the statute was amended in 1999 to specify that a motion based on a change in the law is a motion for leave to renew, courts have nevertheless properly continued to impose a time limit on motions based on a change in law (*see Daniels v Millar El. Indus., Inc.*, 44 AD3d 895, 895 [2d Dept 2007]; *Matter of Eagle Ins. Co. v Persaud*, 1 AD3d 356, 357 [2d Dept 2003]; *Glicksman*, 278 AD2d at 366). As explained in *Glicksman*, "there is no indication in the legislative history of an intention to change the rule regarding the finality of judgments" (*id.* at 366). Here, the case was no longer pending when plaintiff made his motion for leave to renew based on a change in the law, and we therefore conclude that the motion insofar as it sought leave to renew was untimely (*see Daniels*, 44 AD3d at 895-896; *Glicksman*, 278 AD2d at 366).

We further conclude that the court did not abuse its discretion in denying the motion insofar as it sought to vacate the prior order (*see generally Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). None of the grounds set forth in CPLR 5015 (a) for vacatur of an order applies here. Although we agree with plaintiff that CPLR 5015 (a) "does not provide an exhaustive list" of the grounds for vacatur (*Woodson*, 100 NY2d at 68), we nevertheless reject plaintiff's contention that there are sufficient reasons to vacate the prior order in the interests of substantial justice (*see id.*).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1510

CA 17-01125

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

CERTIFIED ENVIRONMENTAL SERVICES, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ENDURANCE AMERICA INSURANCE COMPANY, ET AL.,
DEFENDANTS,
AMERICAN SAFETY CASUALTY INSURANCE COMPANY,
AND INDIAN HARBOR INSURANCE COMPANY,
DEFENDANTS-RESPONDENTS.

CAMARDO LAW FIRM, P.C., AUBURN (KEVIN M. COX OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TRAUB LIEBERMAN STRAUS & SHREWSBERRY LLP, HAWTHORNE (BRIAN M. MARGOLIES OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered August 16, 2016. The judgment granted the motion of defendants-respondents seeking, in effect, a declaration that defendants-respondents had no obligation to defend or indemnify plaintiff in the underlying criminal action, and dismissed the amended complaint against them.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the amended complaint against defendants-respondents and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff was indicted by a grand jury and later convicted upon a jury verdict of, inter alia, aiding and abetting violations of the Clean Air Act (*United States v Certified Envtl. Servs., Inc.*, 800 F Supp 2d 391 [ND NY 2011]), but the conviction was vacated on appeal and the matter was remitted for a new trial (753 F3d 72 [2d Cir 2014]). Plaintiff thereafter pleaded guilty to the criminal charge of negligently releasing into the ambient air a hazardous air pollutant, i.e., asbestos, thereby negligently placing other persons in imminent danger of death or serious bodily injury in violation of 42 USC § 7413 (c) (4). Plaintiff was sentenced to a probationary period and agreed to pay restitution. During the criminal action, plaintiff sought a defense and coverage under insurance policies issued by defendants American Safety Casualty Insurance Company (American Safety) and Indian Harbor Insurance Company (Indian Harbor) (collectively, defendants). American Safety

issued a policy to plaintiff that included "Environmental Consultant's Professional Liability" (environmental professional liability) coverage, while Indian Harbor issued a policy that included "Professional Liability" (professional liability) and "Contractors[']Pollution Legal Liability" (pollution liability) coverage. Defendants disclaimed any duty to defend or indemnify plaintiff in the criminal action. After the conclusion of the criminal action, plaintiff commenced this declaratory judgment and breach of contract action seeking to recover its defense costs.

Defendants moved, in effect, for a declaration that they had no obligation to defend or indemnify. We conclude that Supreme Court properly granted the motion. The American Safety policy is governed by Georgia law, which provides that, " '[w]here the language fixing the extent of liability of an insurer is unambiguous and but one reasonable construction is possible, the court must expound the contract as made' " (*State Farm Mut. Auto. Ins. Co. v Stanton*, 286 Ga 23, 25, 685 SE2d 263, 266 [2009]). Here, we conclude that the policy is unambiguous and does not require American Safety to provide a defense with respect to the criminal action under the environmental professional liability coverage, which provides that American Safety has the right and duty to defend plaintiff against "any 'claim' or 'suit' seeking . . . 'covered damages.' " A "[c]laim" is defined as "any written demand, notice, request for defense, request for indemnity, or other legal or equitable proceeding against [plaintiff]" by a person or entity for, inter alia, "covered damages" arising out of plaintiff's "negligent acts, errors, or omissions." "Covered damages" include "all 'claim related costs,' " which in turn are defined as "all costs and expenses associated with the handling, defense, settlement or appeal of any 'claim' or 'suit.' " Plaintiff contends that the "claim" was its demand requesting a defense and indemnity from American Safety for plaintiff's negligent acts and that the "covered damages" were its attorneys' fees and other costs incurred in the criminal action. Plaintiff's claim against American Safety, however, is not a "claim" within the meaning of the policy inasmuch as it was not made "*against* [plaintiff]," but rather, in this case, was made *by* plaintiff (emphasis added).

The Indian Harbor policy, on the other hand, is governed by the law of New York, where it is well settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Whether an agreement is ambiguous "is an issue of law for the courts to decide" (*id.*). As with the American Safety policy, we conclude that the Indian Harbor policy is unambiguous and does not require Indian Harbor to provide a defense on the criminal action under either the professional liability or pollution liability coverage. The professional liability coverage requires Indian Harbor to defend plaintiff "against any 'suit,' " which is defined as "a civil proceeding." Inasmuch as there was no civil proceeding against plaintiff in this case, there was no "suit" and, thus, Indian Harbor had no duty to defend under the professional liability coverage.

The pollution liability coverage requires Indian Harbor to pay "those sums that [plaintiff] becomes legally obligated to pay as compensatory damages . . . as a result of a 'claim' first made against [plaintiff]" and provides that Indian Harbor has the duty to defend plaintiff "against any 'suit' seeking those compensatory damages." Plaintiff contends that, inasmuch as the allegations of the indictment against plaintiff, if true, could have resulted in civil claims and liability against plaintiff, Indian Harbor had a duty to defend plaintiff in the criminal action. We conclude, however, that the contract unambiguously provides that Indian Harbor has a duty to defend plaintiff against suits only. Inasmuch as there was no suit against plaintiff here, Indian Harbor had no duty to provide a defense.

Finally, although the court properly issued the declaration effectively sought by defendants, it erred in dismissing the amended complaint against them in this declaratory judgment action (*see Tumminello v Tumminello*, 204 AD2d 1067, 1067 [4th Dept 1994]). We therefore modify the judgment accordingly.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1511

CA 17-00708

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

STEVEN R. KONESKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALEC R. SEPPALA AND ERIC K. SEPPALA,
DEFENDANTS-RESPONDENTS.

BOUVIER LAW LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (HENRY A. ZOMERFELD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Genesee County (Mark J. Grisanti, A.J.), entered December 21, 2016. The order granted in part defendants' motion for summary judgment dismissing the complaint with respect to certain categories of serious injury.

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 the vehicle he was driving was rear-ended by a vehicle operated by defendant Alec R. Seppala and owned by defendant Eric K. Seppala. 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) as a result of the accident. Supreme Court granted those parts of defendants' motion with respect to the permanent loss of use, permanent consequential limitation of use, and significant limitation of use categories of serious injury, and denied the motion with respect to the 90/180-day category. We affirm.

We note at the outset that plaintiff limits his appeal to the permanent consequential limitation of use and significant limitation of use categories of serious injury, and therefore he has abandoned his claim with respect to the permanent loss of use category alleged in his amended bill of particulars (*see Boroszko v Zylinski*, 140 AD3d 1742, 1743 [4th Dept 2016]; *Fanti v McLaren*, 110 AD3d 1493, 1494 [4th Dept 2013]).

We conclude that defendants' own submissions in support of their motion raised a triable issue of fact with respect to causation (*see Crane v Glover*, 151 AD3d 1841, 1842 [4th Dept 2017]). Defendants'

expert physician, who conducted a medical examination of plaintiff, concluded in two affirmed medical reports that the onset of pain in plaintiff's right hip approximately five days after the accident was consistent with a prior degenerative condition that became symptomatic spontaneously and was not consistent with an acute, traumatic labral tear in the right hip sustained in the accident. Defendants, however, also submitted medical records from plaintiff's treating orthopedic surgeon, who opined that it was "more likely than not [that] a spontaneous symptomatic hip injury did not occur" and that the labral tear in the right hip observed in a postaccident MRI resulted from the accident (*see id.*).

We agree with defendants, however, that they met their initial burden on the motion insofar as they established that plaintiff did not sustain a serious injury with respect to the categories of permanent consequential limitation of use and significant limitation of use, and that plaintiff failed to raise a triable issue of fact (*see Downie v McDonough*, 117 AD3d 1401, 1402-1403 [4th Dept 2014], *lv denied* 24 NY3d 906 [2014]). With respect to those two categories, the Court of Appeals has held that "[w]hether a limitation of use or function is significant or consequential (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002] [internal quotation marks omitted]). In support of their motion, defendants submitted, inter alia, the medical reports and affirmation of their expert physician who, after reviewing plaintiff's medical records and MRI and conducting an examination of plaintiff, opined that there was no objective medical evidence of a serious injury (*see Carfi v Forget*, 101 AD3d 1616, 1617 [4th Dept 2012]; *Austin v Rent A Ctr. E., Inc.*, 90 AD3d 1542, 1543 [4th Dept 2011]). Among other things, defendants' expert physician noted that the range of motion testing conducted by the orthopedic surgeon just over a month after the accident showed that plaintiff exhibited normal abduction and only mild or slight reductions of 10 degrees in flexion and adduction (*see Downie*, 117 AD3d at 1403; *Carfi*, 101 AD3d at 1617-1618). The medical examination of plaintiff conducted by defendants' expert physician 2½ years later likewise revealed only mild diminishment in certain types of movement (*see Thomas v NYLL Mgt. Ltd.*, 110 AD3d 613, 614 [1st Dept 2013]). Defendants thus established that the limitations from plaintiff's right hip injury were "minor, mild or slight," which the court properly classified as "insignificant" or inconsequential within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 236 [1982]; *see Downie*, 117 AD3d at 1403).

Contrary to plaintiff's contention, his submissions in opposition to the motion are insufficient to raise a triable issue of fact. The mere existence of a labral tear "is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration" (*Silla v Mohammad*, 52 AD3d 681, 683 [2d Dept 2008]; *see generally Pommells v Perez*, 4 NY3d 566, 574 [2005]). Here, the affirmation of plaintiff's orthopedic surgeon reflects that, just over a month after

the accident, plaintiff exhibited normal abduction, adduction, and external rotation, and slightly diminished flexion and internal rotation within 10 degrees of the normal range of movement. The orthopedic surgeon's postsurgical evaluation of plaintiff eight months after the accident showed that plaintiff exhibited full flexion without pain, as well as external and internal rotation within the normal range of movement. Such limitations are insufficient to meet the serious injury threshold with respect to the two categories at issue on appeal (*see Downie*, 117 AD3d at 1403).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1513

CA 17-00786

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

IN THE MATTER OF HAMILTON EQUITY GROUP, LLC, AS ASSIGNEE OF HSBC BANK USA, NATIONAL ASSOCIATION, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SOUTHERN WELLCARE MEDICAL, P.C., RESPONDENT-APPELLANT.

GILL & KADOCHNIKOV, P.C., KEW GARDENS (NAVPREET K. GILL OF COUNSEL), FOR RESPONDENT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (KYLE C. DIDONE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered June 8, 2016. The amended order denied respondent's motion to vacate the order of default entered in this matter in May 2014 in favor of petitioner.

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

Memorandum: Petitioner obtained a default judgment in August 2012 in Supreme Court against, inter alia, Dr. Svetlana Khandros (hereafter, 2012 judgment). After failing to receive any payment on the 2012 judgment, petitioner served an income execution to the Sheriff of the City of New York on respondent, Southern Wellcare Medical, P.C. (Southern), of which Khandros is sole shareholder. Upon Southern's failure to pay the required installments, petitioner commenced the instant action against Southern to enforce the income execution. Southern failed to appear and, as a result, the court entered an order of default in May 2014 in favor of petitioner for the full amount of the 2012 judgment. Almost two years later, in March 2016, Southern moved to vacate the default pursuant to CPLR 5015 (a)(1), alleging that the default was excusable and that it had a meritorious defense. The court denied the motion. We affirm.

As an initial matter, we reject petitioner's contention that Southern may not raise on appeal its alternative claim that it is entitled to vacatur of the default based on CPLR 317. Although Southern's motion invokes only CPLR 5015 as a basis for relief, it is well settled that the court had the discretion to treat the motion "as having been made as well pursuant to CPLR 317" (*Eugene Di Lorenzo,*

Inc. v A.C. Dutton Lbr. Co., 67 NY2d 138, 142-143 [1986]). We nevertheless conclude, contrary to Southern's contention, that Southern failed to establish that it did not receive actual notice of the proceeding against it. Here, the process server's affidavit constituted prima facie evidence of proper service on the Secretary of State, and Southern failed to rebut the presumption of proper service (*see* Business Corporation Law § 306 [b] [1]; *Gartner v Unified Windows, Doors & Siding, Inc.*, 71 AD3d 631, 631-632 [2d Dept 2010]). Khandros's self-serving affidavit, which merely denied receipt, is insufficient to rebut the presumption (*see Gartner*, 71 AD3d at 631-632; *see also Wassertheil v Elburg, LLC*, 94 AD3d 753, 754 [2d Dept 2012]).

We further conclude that the court properly denied relief pursuant to CPLR 5015 (a) (1) inasmuch as Southern failed to establish a reasonable excuse for its default based on the same claim of lack of actual notice (*see generally Matter of County of Livingston [Mort]*, 101 AD3d 1755, 1755 [4th Dept 2012], *lv denied* 20 NY3d 862 [2013]).

In light of our determination herein, we do not reach Southern's remaining contention.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1520

KA 16-01795

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

ROBERT TARBELL, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), dated March 11, 2016. The order granted in part the motion of defendant seeking, inter alia, to suppress statements that he made to police.

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

Memorandum: The People appeal from an order that granted in part defendant's motion seeking, inter alia, to suppress statements that he made to the police. This prosecution arises from an incident in which a motor vehicle registered to defendant struck a guardrail on an interstate highway, and came to rest in the passing lane. The vehicle was then hit by a bus, resulting in injuries to several passengers on the bus. The operator of the vehicle left the scene before the State Police arrived, and no one responded when one of the troopers went to defendant's home to investigate. About an hour after the accident, that trooper found defendant walking some distance from the accident in an apparently intoxicated condition, and defendant initially denied operating the vehicle. The trooper placed defendant in the police vehicle and continued to question him. Defendant eventually admitted that he was driving the vehicle when it struck the guardrail, and that he left it in the roadway. The People concede that the trooper did not provide *Miranda* warnings to defendant. After defendant was indicted on a series of charges arising from the incident, including assault in the first degree (Penal Law § 120.10 [3]), he submitted a series of motions, including a motion seeking, inter alia, to suppress the statements he made to the trooper. County Court granted that motion in part, suppressing the statements defendant made in response to the trooper's questions after defendant was placed in the trooper's patrol vehicle. We affirm.

We reject the People's contention that the trooper was justified in questioning defendant without providing *Miranda* warnings, pursuant to the emergency doctrine. It is well settled that "the emergency doctrine . . . recognizes that the Constitution is not a barrier to a police officer seeking to help someone in immediate danger . . . , thereby excusing or justifying otherwise impermissible police conduct that is an objectively reasonable response to an apparently exigent situation . . . [The Court of Appeals has] explained that the exception is comprised of three elements: (1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property and this belief must be grounded in empirical facts; (2) the search must not be primarily motivated by an intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched" (*People v Doll*, 21 NY3d 665, 670-671 [2013], *rearg denied* 22 NY3d 1053 [2014], *cert denied* — US —, 134 S Ct 1552 [2014] [internal quotation marks omitted]). Here, contrary to the People's contention, the evidence at the suppression hearing failed to establish that "the circumstances known to the [trooper] supported an objectively reasonable belief that [further questioning] was needed to render emergency assistance to an injured [person] or to protect [a person] from imminent injury" (*People v Ringel*, 145 AD3d 1041, 1045 [2d Dept 2016], *lv denied* 29 NY3d 952 [2017]; *see People v Hammett*, 126 AD3d 999, 1001 [2d Dept 2015], *lv denied* 25 NY3d 1202 [2015]; *cf. People v Samuel*, 152 AD3d 1202, 1204-1205 [4th Dept 2017], *lv denied* 30 NY3d 983 [2017]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1521

CAF 17-00437

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

IN THE MATTER OF DOROTHY HWANG, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL TAM, RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered December 6, 2016 in a proceeding pursuant to Family Court Act article 4. The order confirmed the Support Magistrate's determination that respondent willfully violated a prior order to pay child support.

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

Memorandum: Respondent father appeals from an order confirming the Support Magistrate's determination that he willfully violated a prior order to pay child support for the parties' children and conditionally sentencing him to six months in jail if the adjudged child support arrearage was not satisfied within a stated period of time. We affirm.

A parent is presumed to be able to support his or her minor children (*see* Family Ct Act § 437; *Matter of Powers v Powers*, 86 NY2d 63, 68-69 [1995]; *Matter of Kasprowicz v Osgood*, 101 AD3d 1760, 1761 [4th Dept 2012], *lv denied* 20 NY3d 863 [2013]). A "failure to pay support as ordered itself constitutes 'prima facie evidence of a willful violation' . . . [and] establishes [the] petitioner's direct case of willful violation, shifting to [the] respondent the burden of going forward" (*Powers*, 86 NY2d at 69; *see Matter of Roshia v Thiel*, 110 AD3d 1490, 1492 [4th Dept 2013], *lv dismissed in part and denied in part* 22 NY3d 1037 [2013]). To meet that burden, the respondent must "offer some competent, credible evidence of his [or her] inability to make the required payments" (*Powers*, 86 NY2d at 69-70). If the respondent contends that he or she was unable to meet the support obligation because a physical disability interfered with his or her ability to maintain employment, the respondent must "offer competent medical evidence to substantiate" that claim (*Matter of Fogg v Stoll*, 26 AD3d 810, 810-811 [4th Dept 2006]; *see Matter of Yamonaco v Fey*, 91 AD3d 1322, 1323 [4th Dept 2012], *lv denied* 19 NY3d 803 [2012]). Specifically, that medical evidence must establish that the

alleged physical disability "affected [his or] her ability to work" (*Matter of Lewis v Cross*, 72 AD3d 1228, 1230 [3d Dept 2010]).

Here, petitioner mother established that the father willfully violated the prior order by presenting evidence that the father had not made any of the required child support payments, and the father failed to offer any medical evidence to substantiate his claim that his disability prevented him from making any of the required payments (*see Yamonaco*, 91 AD3d at 1322). The fact that the father was receiving Social Security benefits does not preclude a finding that he was capable of working where, as here, his claimed inability to work was not supported by the requisite medical evidence (*see generally Matter of Wilson v LaMountain*, 83 AD3d 1154, 1156 [3d Dept 2011]).

We have reviewed the father's remaining contentions and conclude that they are without merit.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1532

CA 17-01107

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

URSULA BURKE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, DEFENDANT-APPELLANT.

BRIAN F. CURRAN, CORPORATION COUNSEL, ROCHESTER (CHRISTOPHER S. NOONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered November 7, 2016. The order denied the motion of defendant for summary judgment dismissing the complaint and granted the cross motion of plaintiff to compel certain depositions.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained when she stepped into a snow covered area between the street curb and the sidewalk in front of her home. She alleges that her foot went through the snow and into a sinkhole, causing, inter alia, injuries to her knee. A year earlier, defendant performed a "lawn cut" in the area where plaintiff fell, and plaintiff alleges that defendant's negligence in performing the work resulted in a dangerous or defective condition. We agree with defendant that Supreme Court erred in denying its motion for summary judgment dismissing the complaint.

Defendant met its initial burden on the motion by establishing that it did not receive prior written notice of the allegedly dangerous or defective condition as required by Rochester City Charter § 7-13 (*see Pulver v City of Fulton Dept. of Pub. Works*, 113 AD3d 1066, 1066 [4th Dept 2014]; *Hall v City of Syracuse*, 275 AD2d 1022, 1023 [4th Dept 2000]) and, in opposition to the motion, plaintiff did not dispute the absence of prior written notice. The burden thus shifted to plaintiff to demonstrate, as relevant here, that defendant "affirmatively created the defect through an act of negligence . . . that immediately result[ed] in the existence of a dangerous condition" (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008] [internal quotation marks omitted]; *see Simpson v City of Syracuse*, 147 AD3d

1336, 1337 [4th Dept 2017]; *Christy v City of Niagara Falls*, 103 AD3d 1234, 1234 [4th Dept 2013]). We agree with defendant that plaintiff failed to meet her burden (*see Simpson*, 147 AD3d at 1337; *Christy*, 103 AD3d at 1235; *Horan v Town of Tonawanda*, 83 AD3d 1565, 1567 [4th Dept 2011]). Although plaintiff submitted evidence that defendant may have created the sinkhole by improperly excavating and backfilling the excavated area, we agree with defendant that plaintiff failed to proffer evidence that the depression "was present *immediately* after completion of the work" (*Simpson*, 147 AD3d at 1337 [emphasis added]). Indeed, it is well settled that the affirmative negligence exception " 'does not apply to conditions that develop over time' " (*id.*; *see Christy*, 103 AD3d at 1234-1235; *Horan*, 83 AD3d at 1567).

In light of our determination, plaintiff's cross motion to compel certain depositions must be denied as moot (*see State of New York v Peerless Ins. Co.*, 108 AD2d 385, 392 [1st Dept 1985], *affd* 67 NY2d 845 [1986]), and we do not reach defendant's remaining contentions.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1533

CA 17-00165

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

S.K., AN INFANT BY HER MOTHER AND NATURAL GUARDIAN, TIFFANY KOBEE, AND TIFFANY KOBEE, INDIVIDUALLY, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

BEVERLY KOBEE AND DEVIN KOBEE, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

MURA & STORM, PLLC, BUFFALO (ROY A. MURA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FINKELSTEIN & PARTNERS, LLP, NEWBURGH (VICTORIA LIGHTCAP OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered August 18, 2016. The amended order denied the motion of defendants for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiffs commenced this action seeking, inter alia, damages for injuries sustained by the infant plaintiff (hereafter, plaintiff) when a dog owned by defendants bit plaintiff's face. In appeal No. 1, defendants appeal from an amended order denying their motion for summary judgment dismissing the amended complaint. In appeal No. 2, defendants appeal from a further order that, inter alia, granted plaintiffs' motion to quash a subpoena.

With respect to appeal No. 1, we agree with defendants that the court erred in denying their motion. Thus, we reverse the amended order in appeal No. 1, grant the motion and dismiss the amended complaint. Since at least 1816 (*see e.g. Vrooman v Lawyer*, 13 Johns 339, 339 [1816]), "the law of this state has been that the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities" (*Collier v Zambito*, 1 NY3d 444, 446 [2004]). It is equally well settled, however, that, "when harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule articulated in *Collier*"

(*Bard v Jahnke*, 6 NY3d 592, 599 [2006]). Thus, "[t]here is no cause of action in negligence as against the owner of a dog who causes injury, but one may assert a claim in strict liability against a dog owner for harm caused by the dog's vicious propensities when the owner knew or should have known of those propensities" (*Clark v Heaps*, 121 AD3d 1384, 1384 [3d Dept 2014]; *see Blake v County of Wyoming*, 147 AD3d 1365, 1367 [4th Dept 2017]).

Here, defendants met their initial burden on their motion by establishing as a matter of law that they lacked actual or constructive knowledge that their dog had any vicious propensities (*see Scheidt v Oberg*, 65 AD3d 740, 740 [3d Dept 2009]; *see generally Doerr v Goldsmith*, 25 NY3d 1114, 1116 [2015]), and plaintiffs failed to raise a triable issue of fact (*see Scheidt*, 65 AD3d at 740-741; *cf. Arrington v Cohen*, 150 AD3d 1695, 1696 [4th Dept 2017]).

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1534

CA 17-00166

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

S.K., AN INFANT BY HER MOTHER AND NATURAL GUARDIAN, TIFFANY KOBEE, AND TIFFANY KOBEE, INDIVIDUALLY, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

BEVERLY KOBEE AND DEVIN KOBEE, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

MURA & STORM, PLLC, BUFFALO (ROY A. MURA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FINKELSTEIN & PARTNERS, LLP, NEWBURGH (VICTORIA LIGHTCAP OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered October 28, 2016. The order, inter alia, granted the motion of plaintiffs to quash a subpoena.

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

Same memorandum as in *S.K. v Kobee* ([appeal No. 1] — AD3d — [Feb. 2, 2018] [4th Dept 2018]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1535

CA 17-01018

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

JAN MARIE FAY, AS ADMINISTRATOR OF THE ESTATE OF PETER JAMES HUNTER, SR., ALSO KNOWN AS PETER J. HUNTER, SR., DECEASED, AND AS GUARDIAN OF THE PROPERTY OF PETER J. HUNTER, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CLYDE H. SATTERLY, M.D., FAMILY MEDICINE MEDICAL SERVICE GROUP, RLLP, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

ROBERT E. LAHM, PLLC, SYRACUSE (ROBERT E. LAHM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered January 6, 2017. The order granted the motion of defendants Clyde H. Satterly, M.D., and Family Medicine Medical Service Group, RLLP for summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated against defendants Clyde H. Satterly, M.D. and Family Medicine Medical Service Group, RLLP.

Memorandum: Plaintiff, as administrator of the decedent's estate and guardian of the property of decedent's son, commenced this medical malpractice and wrongful death action seeking damages for the death of decedent following elective spinal surgery. According to plaintiff, defendant Clyde H. Satterly, M.D., while employed by defendant Family Medicine Medical Service Group, RLLP (collectively, defendants), was negligent in, inter alia, clearing decedent for elective surgery despite the presence of an occult infection during Dr. Satterly's examination of decedent on June 10, 2013. The surgery was performed on June 19, 2013, and decedent died five days later due to cardiac arrest as a consequence of sepsis, a systemic inflammatory response to infection. Supreme Court granted defendants' motion for summary judgment dismissing the complaint against them. We reverse.

Even assuming, arguendo, that defendants met their initial burden

on their motion, we agree with plaintiff that the affidavit of her medical expert raised triable issues of fact (*see Selmensberger v Kaleida Health*, 45 AD3d 1435, 1436 [4th Dept 2007]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Contrary to defendants' contention, we conclude that plaintiff's expert, a board certified anesthesiologist, was qualified to offer an opinion about the performance of a presurgical clearance examination by a primary care physician (*see generally Diel v Bryan*, 71 AD3d 1439, 1440 [4th Dept 2010]), inasmuch as the expert possessed the requisite skill, training, knowledge and experience to render a reliable opinion with respect to the standard of care applicable in this case (*see id*.). We further conclude that "[t]he conflicting opinions of the experts for plaintiff and defendant[s] with respect to . . . defendant[s'] alleged deviation[s] from the accepted standard of medical care present credibility issues that cannot be resolved on a motion for summary judgment" (*Ferlito v Dara*, 306 AD2d 874, 874 [4th Dept 2003]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1541

KA 16-01334

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRAIG MOBAYED, DEFENDANT-APPELLANT.

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

CHRISTOPHER BOKELMAN, ACTING DISTRICT ATTORNEY, LYONS (TIMOTHY G. CHAPMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered March 24, 2016. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of robbery in the first degree (Penal Law § 160.15 [4]). We note at the outset that defendant's purported waiver of the right to appeal is invalid. County Court failed to obtain a knowing and voluntary waiver of the right to appeal at the time of the plea (*see People v Brown*, 148 AD3d 1562, 1562-1563 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]; *People v Blackwell*, 129 AD3d 1690, 1690 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]). Moreover, even if it had occurred at the time of the plea, the inquiry made by the court when defendant purportedly waived his right to appeal after sentencing in the combined plea and sentencing proceeding 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 Sanford*, 138 AD3d 1435, 1435-1436 [4th Dept 2016] [internal quotation marks omitted]). Defendant also signed a written waiver of the right to appeal at that time, but "[t]he court did not inquire of defendant whether he understood the written waiver or whether he had even read the waiver before signing it" (*People v Bradshaw*, 18 NY3d 257, 262 [2011]; *see Sanford*, 138 AD3d at 1436).

Although a valid waiver of the right to appeal would not preclude defendant's challenge to the voluntariness of his plea, defendant failed to preserve that challenge for our review inasmuch as he did

not move to withdraw the plea or to vacate the judgment of conviction (*see Sanford*, 138 AD3d at 1436). In *People v Lopez* (71 NY2d 662 [1988]), however, the Court of Appeals carved out a narrow exception to the preservation requirement for the "rare case" in which "the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea," thereby imposing upon the trial court "a duty to inquire further to ensure that defendant's guilty plea is knowing and voluntary" (*id.* at 666). This case does not fall within that exception. Nothing defendant said during the plea colloquy itself raised the possibility that the affirmative defense under Penal Law § 160.15 (4) was applicable (*see People v Vogt*, 150 AD3d 1704, 1705 [4th Dept 2017]; *People v Masterson*, 57 AD3d 1443, 1443 [4th Dept 2008]) and, contrary to defendant's contention, we conclude that the court had no duty to conduct an inquiry concerning the affirmative defense based upon comments made by defendant during the sentencing portion of the proceeding (*see Vogt*, 150 AD3d at 1705; *People v Garbarini*, 64 AD3d 1179, 1179 [4th Dept 2009], *lv denied* 13 NY3d 744 [2009]; *but see People v Gresham*, 151 AD3d 1175, 1177-1178 [3d Dept 2017]).

Finally, inasmuch as the certificate of conviction and uniform sentence and commitment form incorrectly reflect that defendant was sentenced as a second felony offender, they must be amended to reflect that he was sentenced as a second violent felony offender (*see People v Carducci*, 143 AD3d 1260, 1263 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1547

CAF 16-01565

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

IN THE MATTER OF WILLIAM J.B., JR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DAYNA L.S., RESPONDENT-APPELLANT.

PAUL A. NORTON, CLINTON, FOR RESPONDENT-APPELLANT.

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

PAUL SKAVINA, ATTORNEY FOR THE CHILD, ROME.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered August 17, 2016 in a proceeding pursuant to Family Court Act article 6. The order modified a prior custody order by awarding primary physical custody of the parties' daughter to petitioner, with supervised visitation with respondent.

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

Memorandum: Respondent mother appeals from an order that modified a prior custody order by awarding petitioner father primary physical custody of the parties' daughter, with supervised visitation with the mother. Contrary to the mother's contention, Family Court did not abuse its discretion in determining that the daughter's out-of-court statements describing her alleged sexual abuse by the mother's boyfriend were sufficiently corroborated.

Family Court Act § 1046 (a) (vi) provides that a child's "previous statements . . . relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect." Corroboration may be provided by "[a]ny other evidence tending to support the reliability of [the child's] previous statements" (*id.*). Although section 1046 is applicable to child protective proceedings, we have routinely applied its provisions as "an exception to the hearsay rule in custody cases involving allegations of abuse and neglect . . . where . . . the statements are corroborated" (*Matter of Mateo v Tuttle*, 26 AD3d 731, 732 [4th Dept 2006] [internal quotation marks omitted]; *see Matter of Ordona v Campbell*, 132 AD3d 1246, 1247 [4th Dept 2015]; *Matter of Sutton v Sutton*, 74 AD3d 1838, 1840 [4th Dept 2010]).

Here, corroboration was provided by the daughter's " 'age-inappropriate knowledge of sexual conduct' . . . , which 'demonstrated specific knowledge of sexual activity' " (*Matter of Briana A.*, 50 AD3d 1560, 1560 [4th Dept 2008]; *see Matter of Shardanae T.-L. [Bryan L.]*, 78 AD3d 1631, 1631 [4th Dept 2010]; *Matter of Breanna R.*, 61 AD3d 1338, 1340 [4th Dept 2009]). Moreover, the daughter's statements described unique sexual conduct that the boyfriend engaged in with the daughter, and the father submitted evidence that the mother and her boyfriend had admitted that the boyfriend engaged in such conduct with the mother during their sexual relations (*see Matter of Sha-Naya M.S.C. [Derrick C.]*, 130 AD3d 719, 721 [2d Dept 2015]; *Matter of Leah R. [Miguel R.]*, 104 AD3d 774, 774 [2d Dept 2013]; *see generally People v Brewer*, 129 AD3d 1619, 1620 [4th Dept 2015], *affd* 28 NY3d 271 [2016]).

Contrary to the mother's remaining contention, the court's determination to award primary physical custody of the child to the father with supervised visitation with the mother is supported by a sound and substantial basis in the record (*see Matter of Voorhees v Talerico*, 128 AD3d 1466, 1466-1467 [4th Dept 2015], *lv denied* 25 NY3d 915 [2015]; *see generally Matter of Cobane v Cobane*, 57 AD3d 1320, 1321-1322 [3d Dept 2008], *lv denied* 12 NY3d 706 [2009]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1550

CA 17-00579

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

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE FINAL ACCOUNT OF JPMORGAN CHASE BANK, N.A., (SUCCESSOR BY CONVERSION TO JPMORGAN CHASE BANK, SUCCESSOR BY MERGER TO THE CHASE MANHATTAN BANK, SUCCESSOR BY MERGER TO THE CHASE MANHATTEN BANK, N.A., SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A., SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.), AS TRUSTEE OF THE TRUST UNDER THE LAST WILL AND TESTAMENT OF LUCY GAIR GILL, DECEASED, FOR THE BENEFIT OF MARY GILL ROBY, ET AL., PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

ELIZABETH LEE ROBY, KATHRYN STARR ROBY JOHNSON AND WILLIAM S. ROBY, III, OBJECTANTS-APPELLANTS.

WILLIAM S. ROBY, III, ROCHESTER, FOR OBJECTANTS-APPELLANTS.

NIXON PEABODY LLP, ROCHESTER (MEGHAN K. MCGUIRE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a decree of the Surrogate's Court, Monroe County (John M. Owens, S.), entered November 18, 2016. The decree granted the petition seeking judicial settlement of the account and to fix and approve attorneys' fees.

It is hereby ORDERED that the decree so appealed from is unanimously modified on the law by vacating the award of attorneys' fees, costs and disbursements and as modified the decree is affirmed without costs, and the matter is remitted to Surrogate's Court, Monroe County, for further proceedings in accordance with the following memorandum: As set forth in our prior appeal, petitioner trustee filed a petition for judicial settlement and final accounting regarding a trust established for the benefit of Mary Gill Roby, which terminated upon her death (*Matter of JPMorgan Chase Bank N.A. [Roby]*, 122 AD3d 1274 [4th Dept 2014]). After we affirmed the amended order of Surrogate's Court that dismissed the objections (*id.* at 1275), petitioner sought judicial settlement of the account and to fix and approve attorneys' fees. The Surrogate issued a final decree granting the petition and fixing the attorneys' fees, costs and disbursements for the attorney for petitioner. Objectants now appeal.

Objectants' contention that the Surrogate exceeded his jurisdiction in awarding attorneys' fees is raised for the first time on appeal and is therefore not properly before us (*see Matter of*

Trombley, 137 AD3d 1641, 1643 [4th Dept 2016]). In any event, we conclude that it is without merit. The Surrogate has jurisdiction to award legal fees (*see Matter of Stortecky v Mazzone*, 85 NY2d 518, 525-526 [1995]). On the prior appeal, we did not impose costs upon objectants (*see generally* SCPA 2302 [5]; *Matter of Wilhelm*, 60 AD2d 32, 39 [4th Dept 1977], *amended* 62 AD2d 1155, 1156 [4th Dept 1978], *affd* 46 NY2d 947 [1979]). That did not preclude the Surrogate, however, from awarding attorneys' fees to petitioner for work on that appeal pursuant to SCPA 2110 (1) (*see Matter of Marsh*, 13 Misc 3d 1231[A], 2006 NY Slip Op 52077[U], *3-4 [Sur Ct, Westchester County 2006]; *see also Matter of Reimers*, 264 NY 62, 64-65 [1934]).

We nevertheless agree with objectants that the Surrogate erred in approving the attorneys' fees, costs and disbursements requested by petitioner without considering the required factors. "It is well settled that, in determining the proper amount of attorneys' fees and costs, the court 'should consider the time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services, the amount involved, the professional standing of the counsel, and the results obtained' " (*Matter of HSBC Bank USA, N.A. [Campbell]*, 150 AD3d 1661, 1663 [4th Dept 2017], quoting *Matter of Potts*, 213 App Div 59, 62 [4th Dept 1925], *affd* 241 NY 593 [1925]). Here, the Surrogate failed to make any findings with respect to the *Potts* factors, and we are therefore unable to review the Surrogate's implicit determination that the attorneys' fees, costs and disbursements are reasonable (*see Matter of HSBC Bank USA, N.A. [Vaida]*, 151 AD3d 1712, 1713 [4th Dept 2017]). We therefore modify the decree by vacating the award of attorneys' fees, costs and disbursements, and we remit the matter to Surrogate's Court for a determination whether those fees, costs and disbursements are reasonable, following a hearing if necessary (*see id*).

Objectants further contend that the Surrogate did not consider the *McDonald* factors in awarding commissions to petitioner (*see Matter of McDonald*, 138 Misc 2d 577, 580 [Sur Ct, Westchester County 1988]). We reject that contention. Those factors are used to determine what are "reasonable" commissions to a trustee pursuant to SCPA 2312 (2). SCPA 2312 (4) (a) provides, however, that a corporate trustee "shall be entitled to receive *at least* the compensation provided for an individual trustee under," inter alia, SCPA 2309 (1) (emphasis added). Here, the Surrogate awarded the statutory commissions (*see* SCPA 2309 [1]), and there was therefore no need to address the *McDonald* factors. We reject the further contention of objectants that they are entitled to disclosure on the issue of commissions.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1552

CA 17-00996

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND WINSLOW, 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.

MEMORANDUM AND ORDER

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

V

SEYMOUR H. KNOX, IV, W.A. READ KNOX, AVERY KNOX, HELEN KNOX KEILHOLTZ, OBJECTANTS-RESPONDENTS, ET AL., RESPONDENTS.

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

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

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered October 26, 2016. The order, insofar as appealed from, granted that part of the motion of objectants seeking leave to amend their objections to an accounting.

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

Memorandum: Petitioner appeals from an order insofar as it granted that part of the motion of objectants (hereafter, Income Beneficiaries) seeking leave to amend their objections to an accounting to conform to the proof presented during the 2010 trial. We agree with petitioner that Surrogate's Court erred in granting that part of the motion inasmuch as "the proposed amendment is lacking in merit" (*Manufacturers & Traders Trust Co. v Reliance Ins. Co.*, 8 AD3d 1000, 1001 [4th Dept 2004]). The Income Beneficiaries sought to amend their objections to an accounting to assert, verbatim, the objections that were asserted by the guardian ad litem related to the same accounting. We previously determined that those same objections lacked merit (*Matter of HSBC Bank USA, N.A. [Knox]*, 98 AD3d 300 [4th Dept 2012], *lv dismissed* 20 NY3d 1056 [2013]). Inasmuch as our prior

decision is the law of the case, the Surrogate was bound by our decision and erred in granting relief "that was inconsistent with this Court's decision in the prior appeal" (*J.N.K. Mach. Corp. v TBW, Ltd.*, 98 AD3d 1259, 1260 [4th Dept 2012]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

1

KA 16-00486

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. IRBY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

RAYMOND P. KOT, II, WILLIAMSVILLE, 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 July 1, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: In each of these appeals, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). As a preliminary matter, we note that it is unnecessary to review defendant's challenge in each appeal to his waiver of the right to appeal inasmuch as none of the issues he raises would be foreclosed from review by a valid waiver of the right to appeal (*see People v Cooper*, 34 AD3d 827, 827 [2d Dept 2006]).

Defendant contends in each appeal that his guilty plea was not knowingly, voluntarily, and intelligently entered because, at the time of each plea, County Court did not advise him that he would be sentenced as a second felony offender and did not advise him of his *Boykin* rights. Defendant failed to preserve for our review his contention in either appeal inasmuch as he did not move to withdraw either plea or to vacate either judgment of conviction (*see People v Metayeo*, 155 AD3d 1239, 1241 [3d Dept 2017]; *People v Kopy*, 54 AD3d 441, 441 [3d Dept 2008]; *see also People v Conceicao*, 26 NY3d 375, 382 [2015]; *People v Hampton*, 142 AD3d 1305, 1306 [4th Dept 2016], *lv denied* 28 NY3d 1124 [2016]).

In addition, to the extent that defendant contends in each appeal that "certain conversations and interactions with defense counsel gave rise to ineffective assistance of counsel and also established that

[each] plea was involuntary, such contentions are 'based on matters outside the record and must therefore be raised by way of a motion pursuant to CPL article 440' " (*People v Dale*, 142 AD3d 1287, 1290 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]; *see People v Cook*, 46 AD3d 1427, 1428 [4th Dept 2007], *lv denied* 10 NY3d 809 [2007]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

2

KA 14-00722

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH J. GAMBALE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered September 6, 2013. The appeal was held by this Court by order entered May 5, 2017, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (150 AD3d 1667). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to County Court to rule on the issue whether, as the People contended in opposition to defendant's suppression motion, a parole officer's identification of defendant as the person committing a robbery depicted in a surveillance video was confirmatory (*People v Gambale*, 150 AD3d 1667 [4th Dept 2017]). We previously concluded that the court erred in ruling that the procedure employed by the police investigator was not unduly suggestive, and we thus remitted the matter to the court to address the alternative ground for denial of the motion raised by the People (*id.*). We were precluded from reviewing that alternative ground because the court "failed to rule on [that] 'separate and analytically distinct' issue" (*id.* at 1670).

Contrary to defendant's contention, the court properly determined upon remittal that the People met their burden of establishing that the parole officer's identification of defendant on the surveillance video was merely confirmatory. Here, the testimony of the investigator established that the parole officer and defendant were known to one another inasmuch as the parole officer had previously supervised defendant for several years (*see People v Lewis*, 292 AD2d 814, 814 [4th Dept 2002], *lv denied* 98 NY2d 677 [2002]; *see also People v Hines*, 132 AD3d 1385, 1387 [4th Dept 2015], *lv denied* 26 NY3d

1109 [2016]; *see generally People v Rodriguez*, 79 NY2d 445, 452 [1992]). The evidence adduced at the suppression hearing "was sufficient to establish that defendant and [the parole officer] were 'long-time acquaintances' . . . , whose prior relationship was not 'fleeting and distant' . . . or the result of a brief encounter" (*People v Graham*, 283 AD2d 885, 887-888 [3d Dept 2001], *lv denied* 96 NY2d 940 [2001]; *see People v Collins*, 60 NY2d 214, 219 [1983]; *People v Perez*, 12 AD3d 1028, 1030 [4th Dept 2004], *lv denied* 4 NY3d 801 [2005]). Thus, although the procedure employed by the investigator was unduly suggestive, the hearing evidence established that, "as a matter of law, the [parole officer was] so familiar with . . . defendant that there [was] 'little or no risk' that [such] police suggestion could lead to a misidentification" upon the parole officer's observation of the individual depicted on the surveillance video (*Rodriguez*, 79 NY2d at 450). We therefore conclude that the court properly refused to suppress the parole officer's identification of defendant.

Contrary to defendant's further contention, we conclude that the court properly exercised its discretion at trial in permitting the parole officer to identify defendant as the perpetrator of the armed robbery depicted in the surveillance video inasmuch as there was some basis for concluding that the parole officer was more likely to identify defendant correctly than was the jury (*see People v Brown*, 145 AD3d 1549, 1549 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]; *People v Montanez*, 135 AD3d 528, 528 [1st Dept 2016], *lv denied* 27 NY3d 1072 [2016]). The parole officer's testimony thus " 'served to aid the jury in making an independent assessment regarding whether the man in the [video] was indeed the defendant' " (*Montanez*, 135 AD3d at 528; *see Brown*, 145 AD3d at 1549). We note that the court properly instructed the jurors that the parole officer's opinion was merely to aid their decision based upon all the facts and circumstances of the case and that they were entitled to accept or reject it (*see People v Sanchez*, 21 NY3d 216, 225 [2013]; *People v Russell*, 165 AD2d 327, 336 [2d Dept 1991], *affd* 79 NY2d 1024 [1992]; *Brown*, 145 AD3d at 1549).

Finally, we reject defendant's contention that the court abused its discretion in its *Sandoval* ruling. "While the [September 1986] conviction was [nearly] 30 years old, the court considered the fact that defendant had spent [approximately 17] of those years in prison, and thus it was not error to permit its limited use" (*People v Williams*, 186 AD2d 469, 469 [1st Dept 1992], *lv denied* 81 NY2d 849 [1993]; *see People v Smalls*, 16 AD3d 1154, 1155 [4th Dept 2005], *lv denied* 5 NY3d 769 [2005]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 15-01225

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN F. TALBOTT, II, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), 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 (Frederick G. Reed, A.J.), rendered June 17, 2014. The judgment convicted defendant, after a nonjury trial, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of assault in the second degree (Penal Law § 120.05 [3]). The case arose from an incident in which defendant struggled with parole officers who were arresting him for alleged parole violations. During the fracas, defendant fell on the left knee of one of the officers. We reject defendant's contention that his conviction is not supported by legally sufficient evidence that the officer sustained physical injury, which is defined as "impairment of physical condition or substantial pain" (§ 10.00 [9]). " '[S]ubstantial pain' cannot be defined precisely, but it can be said that it is more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). Here, the officer testified that he felt "a radiant pain throughout [his] entire knee." He described the pain level while standing or putting pressure on the knee as a 7 or 8 on a scale of 1 to 10, causing him to limp "noticeably" for a "couple days," and he further testified that he used ibuprofen on the day of the injury to manage the pain. We conclude that his testimony is sufficient to establish that he sustained physical injury (*see People v Kraatz*, 147 AD3d 1556, 1557 [4th Dept 2017]; *People v Delaney*, 138 AD3d 1420, 1421 [4th Dept 2016], *lv denied* 28 NY3d 928 [2016]). Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence on the issue of physical injury (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Finally, the sentence is

not unduly harsh or severe.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 16-00487

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. IRBY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

RAYMOND P. KOT, II, WILLIAMSVILLE, 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 July 1, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Same memorandum as in *People v Irby* ([appeal No. 1] — AD3d — [Feb. 2, 2018] [4th Dept 2018]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

12

KA 15-00644

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DARIAN WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered January 20, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted menacing of a police officer or peace officer.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

15

CA 17-01346

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

IN THE MATTER OF LAURA VIEIRA-SUAREZ,
PETITIONER-APPELLANT,

V ORDER

SYRACUSE CITY SCHOOL DISTRICT,
RESPONDENT-RESPONDENT.

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

FERRARA FIORENZA PC, EAST SYRACUSE (HEATHER M. COLE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered March 3, 2017 in a CPLR article 75 proceeding. The order dismissed the petition.

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: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

16

CA 16-02313

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

IN THE MATTER OF SAMUEL AYALA,
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 (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered November 14, 2016 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

20

CA 17-01331

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

DENISE A. LEWIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CARROLS LLC, DEFENDANT-APPELLANT.

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

WILLIAM MATTAR, P.C., WILLIAMSVILLE (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered April 12, 2017. The order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint insofar as the complaint, as amplified by the bill of particulars, alleges that defendant created the dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she slipped on water in the vestibule of a restaurant owned by defendant. In her complaint, as amplified by her bill of particulars, plaintiff alleged that defendant either created the dangerous condition or had actual or constructive notice of it. Defendant moved for summary judgment dismissing the complaint, and Supreme Court denied the motion.

We conclude that the court erred in denying that part of the motion concerning creation of the dangerous condition, and we therefore modify the order accordingly. Defendant established as a matter of law that it did not create the alleged dangerous condition by submitting evidence that it was raining on the date of the incident and that any accumulation of water was the result of the weather conditions as opposed to an employee spilling anything on the floor (*see Costanzo v Woman's Christian Assn. of Jamestown*, 92 AD3d 1256, 1257 [4th Dept 2012]; *Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857, 857 [4th Dept 2005]). Plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We further conclude, however, that defendant failed to establish

as a matter of law that it lacked actual or constructive notice of the dangerous condition. With respect to actual notice, defendant submitted an affidavit from the restaurant manager establishing that she did not personally observe any dangerous condition in the vestibule when she inspected the area 30 minutes before plaintiff's accident. Nevertheless, defendant failed to submit any evidence establishing that other employees "did not observe any water . . . on the [floor] before [the accident]" (*Costanzo*, 92 AD3d at 1257), or that defendant "did not receive any complaints about the allegedly wet floor prior to plaintiff's fall" (*Seferagic v Hannaford Bros. Co.*, 115 AD3d 1230, 1231 [4th Dept 2014]).

With respect to constructive notice, we note that "defendant cannot satisfy its burden merely by pointing out gaps in the plaintiff's case, and instead must submit evidence concerning when the area was last cleaned and inspected prior to the accident" (*Sabalza v Salgado*, 85 AD3d 436, 437-438 [1st Dept 2011]; *see Mancini v Quality Mkts.*, 256 AD2d 1177, 1177-1178 [4th Dept 1998]). Here, although defendant submitted evidence that the manager performed routine inspections of the vestibule that day, with the last one being 30 minutes before the incident, defendant also submitted the deposition testimony of plaintiff's husband, an employee of the restaurant, who testified that the manager was not even present at the store at the time of the incident and that the assistant manager who was present failed to perform any inspections in the five hours preceding plaintiff's fall. Contrary to defendant's contention, the husband's deposition testimony is not incredible as a matter of law, i.e., " 'manifestly untrue, physically impossible, contrary to experience or self-contradictory' " (*Key Bank of N.Y. v Dembs*, 244 AD2d 1000, 1000 [4th Dept 1997]).

We thus conclude that " '[t]he conflict between [the husband's] deposition testimony and . . . [the manager's] affidavit raises a question of credibility to be resolved at trial' " (*Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1470 [4th Dept 2013]). As a result of that conflict, "[a] triable issue of fact exists as to when the [vestibule] was last inspected in relation to the accident and, thus, whether the alleged hazardous condition . . . existed for a sufficient length of time prior to the incident to permit . . . defendant to remedy that condition" (*Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1012 [2d Dept 2015]; *see King v Sam's E., Inc.*, 81 AD3d 1414, 1415 [4th Dept 2011]).

Defendant contends that the allegedly dangerous condition was not visible or apparent and thus not discoverable upon reasonable inspection (*see Quinn*, 15 AD3d at 857), and that it therefore lacked constructive notice of the condition. We disagree. "The fact that plaintiff did not notice water on the floor before [s]he fell does not establish defendant['s] entitlement to judgment as a matter of law on the issue whether that condition was visible and apparent" (*Navetta*, 106 AD3d at 1469-1470; *see Farrauto v Bon-Ton Dept. Stores, Inc.*, 143 AD3d 1292, 1293 [4th Dept 2016]; *Rivera v Tops Mkts., LLC,* 125 AD3d 1504, 1505 [4th Dept 2015]).

In any event, defendant's own evidence established that the water was visible and apparent. In deposition testimony submitted by defendant in support of its motion, plaintiff testified that she observed water after her fall, and her husband testified that he observed that the floor of the vestibule was "wet" (*see Navetta*, 106 AD3d at 1470; *King*, 81 AD3d at 1415; *cf. Seferagic*, 115 AD3d at 1231; *Quinn*, 15 AD3d at 857).

The failure of defendant to meet its burden concerning the issues related to actual notice and constructive notice required denial of the motion to that extent, "regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

25

KA 15-00585

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CARLTON C. BEVEL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered December 4, 2014. 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.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

28

KA 16-01083

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KRISTA SCHULTZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered October 20, 2015. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of grand larceny in the third degree (Penal Law § 155.35 [1]). Defendant had a part-time position as the chief financial officer of a charter school in Buffalo, where she was responsible for managing the school's payroll. Defendant had an annual salary of about $42,000, but she caused the school to pay her $117,000 during her first seven months of employment. Although defendant claimed that she had actually worked 13 hours per day for more than 100 consecutive days, she nevertheless took $27,567 over and above the amount to which she would have been entitled had she actually worked those additional hours. Preliminarily, we note that, as the People correctly concede, defendant's waiver of the right to appeal was invalid. Although defendant executed a written waiver, " 'there was no colloquy between [Supreme] Court and defendant regarding the waiver of the right to appeal to ensure that it was knowingly, voluntarily and intelligently entered' " (*People v McCoy*, 107 AD3d 1454, 1454 [4th Dept 2013], *lv denied* 22 NY3d 957 [2013]).

We reject defendant's contention that the court abused its discretion in denying her motion to withdraw her guilty plea on the grounds that it was not knowingly, voluntarily and intelligently entered, and the plea allocution was factually insufficient. "[P]ermission 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 Dale*, 142 AD3d 1287, 1289 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017] [internal quotation marks omitted]). There is no such evidence here. Contrary to defendant's contention, there is no requirement that a defendant must acknowledge the commission of "every element of the pleaded-to offense" in order for a guilty plea to be effective (*People v Seeber*, 4 NY3d 780, 781 [2005]), and we note that defendant did not negate an element of the offense to which she pleaded guilty during the plea colloquy (*see People v Lopez*, 71 NY2d 662, 666 [1988]). Further, " '[a] court does not abuse its discretion in denying a motion to withdraw a guilty plea where[, as here,] the defendant's allegations in support of the motion are belied by the defendant's statements during the plea proceeding' " (*People v Manor*, 121 AD3d 1581, 1582 [4th Dept 2014], *affd* 27 NY3d 1012 [2016]).

Finally, contrary to defendant's contention, we conclude that the court did not abuse its discretion in denying defendant's request to adjourn sentencing because defendant did not make the requisite showing of prejudice (*see People v Aikey*, 94 AD3d 1485, 1486 [4th Dept 2012], *lv denied* 19 NY3d 956 [2012]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

29

KA 14-00660

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARQUIS R. MCMILLIAN, ALSO KNOWN AS JOHN DOE/"DAP",
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered October 1, 2013. The judgment convicted defendant, after a nonjury trial, 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: In appeal No. 1 of these consolidated appeals, defendant appeals from a judgment convicting him, following a bench trial, 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]), arising from an incident in which he shot a man who was sitting on a stopped motorcycle while speaking with two people. In appeal No. 2, he appeals from a judgment convicting him, following the same bench trial, of attempted murder in the second degree (§§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), arising from an incident in which he fired nine shots into a stopped vehicle in which the two people who witnessed the first incident were sitting, seriously injuring one of them.

In both appeals, defendant contends that he was deprived of a fair trial by the prosecutor’s failure to disclose *Brady* material pursuant to defendant’s pretrial demands. The record from the trial establishes that a witness was told that federal prosecutors did not wish to charge him with any drug dealing that the witness conducted, but wished only to hear the truth regarding this incident. Initially, we reject the People’s contention that no *Brady* violation occurred

because no specific promise of leniency was made, inasmuch as the record establishes that the witness believed that he would not be charged with certain criminal activity if he testified against defendant (*see Giglio v United States*, 405 US 150, 154-156 [1972]). Nevertheless, it is well settled that, although " 'the People unquestionably have a duty to disclose exculpatory material in their control,' a defendant's constitutional right to a fair trial is not violated when, as here, he is given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witness[ ]" (*People v Cortijo*, 70 NY2d 868, 870 [1987]; *see generally People v Hines*, 132 AD3d 1385, 1386 [4th Dept 2015], *lv denied* 26 NY3d 1109 [2016]).

Defendant objected solely on speculation grounds when the prosecutor elicited testimony from a police investigator, and defendant therefore failed to preserve for our review his contention that "the testimony of [that investigator] interpreting recorded telephone conversations between defendant and other individuals invaded the province of the jury" (*People v Martinez*, 39 AD3d 1246, 1247 [4th Dept 2007], *lv denied* 9 NY3d 878 [2007]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's contention, County Court properly admitted recordings of telephone calls that he made from the jail in which he asked to have an associate obtain the weapon used in the shooting and dispose of it, and then expressed his dismay that another associate had been apprehended with the weapon. Those recordings were properly admitted over defendant's hearsay objection inasmuch as "they reflected his consciousness of guilt" (*People v Moore*, 118 AD3d 916, 918 [2d Dept 2014], *lv denied* 24 NY3d 1086 [2014]; *see People v Voymas*, 39 AD3d 1182, 1184 [4th Dept 2007], *lv denied* 9 NY3d 852 [2007]).

Contrary to defendant's further contention, we conclude that the evidence, when viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to establish defendant's identity, and thus to support the conviction of the crimes charged (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference" (*People v Van Akin*, 197 AD2d 845, 845 [4th Dept 1993]), and we see no basis to reject the court's credibility and weight determinations here.

We reject defendant's contention that the court erred in refusing to allow him to withdraw his waiver of the right to a jury trial. The record establishes that, one week prior to trial, after indicating for several weeks that he wished to waive a jury trial, defendant elected

to proceed without a jury and executed a waiver of that right after a thorough inquiry by the court. On the day of trial, the court received defendant's request to vacate that waiver. Particularly in light of the lack of any cognizable basis for the request, we cannot conclude that the court abused its discretion in denying it (*see People v McQueen*, 52 NY2d 1025, 1025-1026 [1981]). We reject defendant's further contention that reversal is required based on ineffective assistance of counsel regarding defendant's motion to revoke his waiver of a jury trial. The record establishes that defense counsel was "afforded the opportunity to explain his performance with respect to the [waiver] . . . , but [did] not take a position on the motion that [was] adverse to the defendant" (*People v Mitchell*, 21 NY3d 964, 967 [2013]).

In appeal No. 2, defendant contends that the court erred in denying his request to consider attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [1]) as a lesser included offense of attempted murder in the second degree. We conclude that the court properly denied that request. Viewed in the light most favorable to defendant, there was "no 'reasonable view of the evidence . . . that would support a finding that [defendant] committed the lesser offense but not the greater' " with respect to that incident (*People v Hymes*, 70 AD3d 1371, 1373 [4th Dept 2010], *lv denied* 15 NY3d 774 [2010], quoting *People v Glover*, 57 NY2d 61, 63 [1982]; *cf. People v Cabassa*, 79 NY2d 722, 728-730 [1992]).

Finally, although not raised by defendant, we conclude in appeal No. 2 that the court erred in directing that the periods of postrelease supervision run consecutively to the periods of postrelease supervision imposed in appeal No. 1 (*see People v Allard*, 107 AD3d 1379, 1379 [4th Dept 2013]). "Penal Law § 70.45 (5) (c) requires that the periods of postrelease supervision merge and are satisfied by the service of the longest unexpired term" (*id.*; *see People v Hollis*, 147 AD3d 1505, 1506 [4th Dept 2017], *lv denied* 29 NY3d 1033 [2017]). We cannot allow an illegal sentence to stand (*see People v Johnson*, 136 AD3d 1338, 1340 [4th Dept 2016], *lv denied* 27 NY3d 1134 [2016]; *Allard*, 107 AD3d at 1379), and we therefore modify the judgment in appeal No. 2 accordingly.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

30

KA 14-00661

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARQUIS R. MCMILLIAN, ALSO KNOWN AS JOHN DOE/"DAP",
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered October 1, 2013. The judgment convicted defendant, after a nonjury trial, of attempted murder in the second degree, 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 modified on the law by directing that the periods of postrelease supervision imposed on counts one through four of the indictment shall run concurrently with the periods of postrelease supervision imposed on counts two through four of indictment No. 2012/0446, and as modified the judgment is affirmed in accordance with the same memorandum as in *People v McMillian* ([appeal No. 1] — AD3d — [Feb. 2, 2018] [4th Dept 2018]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

31

KA 15-00587

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CARLTON C. BEVEL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered December 4, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

33

KA 16-01690

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL WRIGHT, 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 Supreme Court, Monroe County (Francis A. Affronti, J.), entered June 17, 2016. 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 (Correction Law § 168 *et seq*.). Defendant failed to request a downward departure, and he thus failed to preserve for our review his contention that Supreme Court erred in failing to afford him that downward departure from his presumptive level three risk (*see People v Williams*, 122 AD3d 1378, 1379 [4th Dept 2014]). In any event, we conclude that the facts herein do not warrant a downward departure (*see People v McCall*, 148 AD3d 1769, 1769 [4th Dept 2017], *lv denied* 29 NY3d 914 [2017]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

36

CA 17-00792

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

ANGELO P. ZAPPIE AND DEBORAH ZAPPIE,
PLAINTIFFS-APPELLANTS,

V ORDER

DOLORES L. PERRY, DEFENDANT-RESPONDENT.

THE JOY E. MISERENDINO LAW FIRM P.C., ORCHARD PARK, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SMITH, MURPHY & SCHOEPPERLE, LLP, BUFFALO (STEPHEN P. BROOKS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Paul Wojtaszek, J.), dated December 28, 2016. The order denied the motion of plaintiffs seeking leave to amend the complaint, and granted the motion of defendant for summary judgment dismissing the complaint.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

38

CA 17-01456

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

RICHARD INFARINATO, PLAINTIFF-APPELLANT,

V ORDER

ROCHESTER TELEPHONE CORPORATION, ET AL.,
DEFENDANTS,
AND FRONTIER TELEPHONE OF ROCHESTER, INC.,
AS SUCCESSOR IN INTEREST TO ROCHESTER TELEPHONE
CORPORATION, DEFENDANT-RESPONDENT.

CHENEY & BLAIR, LLP, GENEVA (DAVID D. BENZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE GLENNON LAW FIRM, P.C., ROCHESTER (PETER J. GLENNON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a decision of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered October 20, 2016. The decision, inter alia, denied the motion of plaintiff for partial summary judgment on the first and second causes of action.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]; *see also* CPLR 5701 [a] [2] [iv]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

40

CA 17-00819

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

CRAIG EMMERLING, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTINA A. AGOLA AND CHRISTINA A. AGOLA ATTORNEYS & COUNSELORS AT LAW, PLLC, DEFENDANTS-APPELLANTS.

CHRISTINA A. AGOLA, WEBSTER, DEFENDANT-APPELLANT PRO SE.

ROBERT L. BURKWIT, ROCHESTER, FOR DEFENDANT-APPELLANT CHRISTINA A. AGOLA ATTORNEYS & COUNSELORS AT LAW, PLLC.

E. PETER PFAFF, EAST AURORA, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), entered July 5, 2016. The judgment awarded plaintiff money damages following a bench trial.

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

Memorandum: Plaintiff entered into a series of three legal services contracts, pursuant to which defendants agreed to provide legal representation for him in several legal actions. Plaintiff provided defendants with a separate retainer in each of the three contracts, all of which included payment of a retainer for disbursements: $7,500 in the first contract, $7,500 in the second and $3,500 in the third. Defendants refused to return the unexpended portions of those retainers at the conclusion of the actions. Plaintiff commenced this action asserting, inter alia, that defendants breached their fiduciary duty in failing to account for costs and disbursements (second cause of action). Supreme Court issued a judgment after a bench trial, awarding damages on that cause of action in the amount of the unexpended fees. Defendants appeal.

Initially, we note that we do not consider defendants' contentions with respect to the first cause of action, seeking damages for fraud, inasmuch as the court did not grant any relief with respect to that cause of action.

We reject defendants' contention that the court erred in denying that part of their pretrial motion to dismiss with respect to the second cause of action, inasmuch as plaintiff stated a cause of action

for breach of fiduciary duty therein (*see Englert v Schaffer*, 61 AD3d 1362, 1363-1364 [4th Dept 2009]; *see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

We also reject defendants' contention that the court erred in denying their posttrial motion pursuant to CPLR 4404 (b). In support of their motion, defendants contended that the evidence failed to support the court's conclusion that they entered into a contingency fee arrangement with plaintiff because the words "flat fee" were handwritten on the agreement, and thus all money paid by plaintiff became the property of defendants. In opposing the motion, plaintiff contended that the evidence, including his copy of the retainer agreement that lacked those handwritten words, established that the parties entered into a contingency fee arrangement and that the money paid by plaintiff was intended to be used only for disbursements. The court implicitly denied the motion by granting a money judgment in favor of plaintiff.

"A judgment rendered after a bench trial should not be disturbed unless it is obvious that the court's conclusions cannot be supported by any fair interpretation of the evidence, particularly where the credibility of witnesses is central to the case" (*Saperstein v Lewenberg*, 11 AD3d 289, 289 [1st Dept 2004]). Here, we agree with the court that "the retainer agreements between [defendants] and the client[] in question provide that the funds at issue were to be used for disbursements, precluding [defendants'] contention that the funds became [defendants'] property . . . upon receipt" (*Matter of Agola*, 128 AD3d 78, 83 [4th Dept 2015], *appeal dismissed* 25 NY3d 1181 [2015], *lv denied* 26 NY3d 919 [2016], *cert denied* — US —, 136 S Ct 2473 [2016]). Consequently, the court properly determined that defendants committed misconduct and violated their fiduciary duty to plaintiff, and that plaintiff sustained damages as a result thereof. Therefore, the court properly awarded damages for the second cause of action, and also properly denied the posttrial motion.

Finally, defendants contend that the court erred in refusing to reduce the judgment by $1,600, which defendants contend that they spent to copy plaintiff's file and provide it to him. The only evidence introduced on that issue was the testimony of defendant Christina A. Agola, which was contradicted by her deposition testimony that she did not keep a copy of plaintiff's file, and which the court declined to credit. We see no basis to reject the court's credibility determination (*see id.* at 86), and we therefore we reject defendants' contention.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

46

CA 17-01538

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

BETTY MCCLAIN, PLAINTIFF-RESPONDENT,

V ORDER

BUFFALO MUNICIPAL HOUSING AUTHORITY,
DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered May 22, 2017. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment dismissing the complaint.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

47

KA 14-00040

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISAAC L. MCDONALD, DEFENDANT-APPELLANT.

KATHLEEN A. KUGLER, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered December 11, 2013. The appeal was held by this Court by order entered February 6, 2015, decision was reserved and the matter was remitted to Niagara County Court for further proceedings (125 AD3d 1280). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on count three of the superior court information and as modified the judgment is affirmed, and the matter is remitted to Niagara County Court for resentencing on that count.

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of, inter alia, rape in the third degree (Penal Law § 130.25 [2]), and failure to register internet identifiers (Correction Law § 168-f [4]). We previously held the case, reserved decision, and remitted the matter to County Court to rule on defendant's motion to withdraw his plea of guilty (*People v McDonald*, 125 AD3d 1280, 1280 [4th Dept 2015]). Upon remittal, the court denied the motion, and we conclude that the court did not thereby abuse its discretion. It is well settled that the denial of a motion to withdraw a guilty plea is not an abuse of discretion "unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Henderson*, 137 AD3d 1670, 1671 [4th Dept 2016] [internal quotation marks omitted]; *see People v Noce*, 145 AD3d 1456, 1457 [4th Dept 2016]; *People v Ernst*, 144 AD3d 1605, 1606 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]), and defendant presented no such evidence here.

Defendant's valid waiver of the right to appeal forecloses review of his challenge to the severity of the sentence (*see People v Lococo*, 92 NY2d 825, 827 [1998]).

Nevertheless, it is well settled that "even a valid waiver of the right to appeal will not bar [review of] an illegal sentence" (*People v Fishel*, 128 AD3d 15, 17 [3d Dept 2015]; *see People v Lopez*, 6 NY3d 248, 255 [2006]), and we note that the sentence imposed by the court on count three of the superior court information, i.e., a determinate term of incarceration for failure to register internet identifiers as a class D felony, is illegal. That crime is defined in the Correction Law, and "only a person convicted of a felony defined by the Penal Law may be sentenced as a second felony offender" to a determinate term of incarceration (*People v Attea*, 269 AD2d 829, 829 [4th Dept 2000]; *see People v Cammarata*, 216 AD2d 965, 965 [4th Dept 1995]; *cf.* Penal Law § 70.80 [1] [a]). "Although [the] issue was not raised before the [sentencing] court or on appeal, we cannot allow an [illegal] sentence to stand" (*People v Gibson*, 52 AD3d 1227, 1227-1228 [4th Dept 2008] [internal quotation marks omitted]). We therefore modify the judgment by vacating the sentence imposed on count three, and we remit the matter to County Court for resentencing on that count.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

48

TP 16-01610

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

IN THE MATTER OF ALBERT FOUNTAIN, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION AND JOHN COLVIN, ACTING SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENTS.

ALBERT FOUNTAIN, 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, Seneca County [Dennis F. Bender, A.J.], entered September 14, 2016) to review a determination finding, after a tier III hearing, that petitioner had violated various inmate rules.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

52

KA 17-00342

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK GEORGE, JR., 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 (Sara Sheldon, J.), rendered December 16, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted rape 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 attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]). We reject defendant's contention that his waiver of the right to appeal is invalid. County Court "expressly ascertained from defendant that, as a condition of the plea, he was agreeing to waive his right to appeal, and the court did not conflate that right with those automatically forfeited by a guilty plea" (*People v McCrea*, 140 AD3d 1655, 1655 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016] [internal quotation marks omitted]; *see People v Toney*, 153 AD3d 1583, 1583 [4th Dept 2017]). The court also specifically explained to defendant that the waiver encompassed any challenge to the severity of his sentence, thereby foreclosing our review of any such challenge (*see Toney*, 153 AD3d at 1583; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

53

KA 15-01993

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER A. SNELL, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered June 15, 2015. The judgment convicted defendant, upon a jury verdict, of assault in the third degree and criminal trespass in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the third degree (Penal Law § 120.00 [1]) and criminal trespass in the second degree (§ 140.15 [1]). Contrary to defendant's contention, County Court properly denied his motion to dismiss the indictment on speedy trial grounds (*see* CPL 30.30). On appeal, defendant does not dispute that, prior to April 3, 2014, the District Attorney's Office had no knowledge of the charges against defendant set forth in the accusatory instrument, which was filed on September 11, 2013. "It is axiomatic that the People cannot prepare for a trial of a case they do not know exists" (*People v Smietana*, 98 NY2d 336, 342 [2002]; *see People v LaBounty*, 104 AD2d 202, 205 [4th Dept 1984]). Thus, the court properly determined that the time period from the date on which the accusatory instrument was filed until April 3, 2014 should be excluded from the time within which the People must be ready for trial based on the existence of exceptional circumstances within the meaning of CPL 30.30 (4) (g), i.e., the failure of either the police department or the local criminal court to notify the District Attorney's Office of the charges against defendant. Those were circumstances "beyond the control of the District Attorney's [O]ffice . . . that prevented the prosecution from being ready for trial" (*LaBounty*, 104 AD2d at 204; *see Smietana*, 98 NY2d at 341; *People v Mickewitz*, 210 AD2d 1004, 1004 [4th Dept

1994], *lv denied* 85 NY2d 977 [1995]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

54

KA 16-00214

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT D. WRIGHT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered November 23, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [4]), defendant contends that his waiver of the right to appeal is invalid. We reject that contention. To the contrary, we conclude that "the plea colloquy here was sufficient because the right to appeal was adequately described without lumping it into the panoply of rights normally forfeited upon a guilty plea" (*People v Sanders*, 25 NY3d 337, 341 [2015]). Furthermore, the record establishes that defendant's "plea and waiver of his right to appeal were knowingly, voluntarily and intelligently made, with the advice of counsel, and the waiver was manifestly intended to cover all aspects of the case" (*People v Kemp*, 94 NY2d 831, 833 [1999]). Consequently, defendant's valid waiver of the right to appeal encompasses his contention that County Court should have suppressed certain evidence (*see People v Goodwin*, 147 AD3d 1352, 1352 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]; *see generally Kemp*, 94 NY2d at 833), as well as his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

58

CAF 16-01430

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

IN THE MATTER OF ALEXANDRIA G. MCGRATH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOHNATHON J. HEALEY, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered August 2, 2016 in a proceeding pursuant to Family Court Act article 4. The order, among other things, revoked a suspended sentence imposed for respondent's admitted willful violation of a child support order and committed him to jail for 90 days.

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

Memorandum: Respondent appeals from an order revoking a suspended sentence imposed for his admitted willful violation of a child support order and committing him to jail for 90 days. Inasmuch as respondent concedes that he has served his sentence, the instant appeal is moot (*see Matter of Davis v Williams*, 133 AD3d 1354, 1355 [4th Dept 2015]; *Matter of St. Lawrence County Dept. of Soc. Servs. v Pratt*, 24 AD3d 1050, 1050 [3d Dept 2005], *lv denied* 6 NY3d 713 [2006]). To the extent that respondent contends that this appeal is not moot because a finding of contempt and willful violation may have significant collateral consequences for him, we note that he did not appeal from the order finding him in willful violation of the order requiring him to pay child support (*see Davis*, 133 AD3d at 1355; *St. Lawrence County Dept. of Soc. Servs.*, 24 AD3d at 1050; *cf. Matter of Bickwid v Deutsch*, 87 NY2d 862, 863 [1995]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

59

CAF 16-02311

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

IN THE MATTER OF RHIANNON H.-W., AND JUDE S.H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

ELIZABETH E.H.-W., RESPONDENT-APPELLANT.

HOPPE & ASSOCIATES, INC., BUFFALO (BERNADETTE M. HOPPE OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

MICHELLE G. CHAAS, ATTORNEY FOR THE CHILD, BUFFALO.

EDWARD J. MARTNSHIN, ATTORNEY FOR THE CHILD, HAMBURG.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered November 21, 2016 in a proceeding pursuant to Family Court Act article 10. The order denied the motion of respondent to dismiss the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Nicholas B.*, 26 AD3d 764, 764 [4th Dept 2006]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

60

CA 17-01387

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

OTU A. OBOT, PLAINTIFF-APPELLANT,

V ORDER

DENNIS EVCHICH AGENCY, INC., DEFENDANT-RESPONDENT.

OTU A. OBOT, PLAINTIFF-APPELLANT PRO SE.

LOTEMPIO P.C. LAW GROUP, BUFFALO (BRIAN J. BOGNER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Erie County Court (Thomas P. Franczyk, J.), dated October 26, 2016. The order affirmed a judgment of the Amherst Town Court.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

61

CA 16-02203

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

JOSEPH A. RAIMONDI AND LISA M. RAIMONDI,
PLAINTIFFS-RESPONDENTS,

V ORDER

JOSEPH C. FLASK, THE QUIKRETE COMPANIES, INC.,
PENSKE TRUCK LEASING CO., L.P., AND IDEALEASE
OF CENTRAL NEW YORK, LLC, DEFENDANTS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS JOSEPH C. FLASK AND THE QUIKRETE COMPANIES, INC.

SUGARMAN LAW FIRM, LLP, BUFFALO (MICHAEL A. RIEHLER OF COUNSEL), FOR DEFENDANT-APPELLANT PENSKE TRUCK LEASING CO., L.P.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MELISSA A. FOTI OF COUNSEL), FOR DEFENDANT-APPELLANT IDEALEASE OF CENTRAL NEW YORK, LLC.

GELBER & O'CONNELL, LLC, AMHERST (TIMOTHY G. O'CONNELL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered September 7, 2016. The order, among other things, struck most of defendants' affirmative defenses.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

68

KA 16-00156

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL PEREZ, 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 December 14, 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 (Correction Law § 168 *et seq.*), defendant contends that County Court erred in granting an upward departure from his presumptive classification as a level one risk to a level two risk. We reject that contention.

It is well settled that when the People establish, by clear and convincing evidence (*see* Correction Law § 168-n [3]), the existence of aggravating factors that are, "as a matter of law, of a kind or to a degree not adequately taken into account by the [risk assessment] guidelines," a court "must exercise its discretion by weighing the aggravating and [any] mitigating factors to determine whether the totality of the circumstances warrants a departure" from a sex offender's presumptive risk level (*People v Gillotti*, 23 NY3d 841, 861 [2014]; *see People v Sincerbeaux*, 27 NY3d 683, 689-690 [2016]; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]). Here, the People established by clear and convincing evidence that, concurrent with his conviction in Florida of the felony sex offense underlying the present registration, defendant was convicted of two counts of attempted false imprisonment arising from an incident occurring several months after he was arrested for the underlying sex offense in which he attempted to lure two female children under the age of 13 into his vehicle. The court properly

determined that the concurrent conviction is an aggravating factor not taken into account by the risk assessment guidelines that provides a basis for an upward departure inasmuch as it is "indicative that the offender poses an increased risk to public safety" (Risk Assessment Guidelines and Commentary at 14; *see People v Colsrud*, 155 AD3d 1601, 1602 [4th Dept 2017]; *People v Neuer*, 86 AD3d 926, 927 [4th Dept 2011], *lv denied* 17 NY3d 716 [2011]). Contrary to defendant's further contention, his two more recent convictions based on his failure to register as a sex offender are "not adequately taken into consideration by the risk assessment guidelines and [were] properly considered as [further] justification for the upward departure" (*People v Roberts*, 54 AD3d 1106, 1107 [3d Dept 2008], *lv denied* 11 NY3d 713 [2008]; *see People v Allen*, 151 AD3d 1087, 1088 [2d Dept 2017], *lv denied* 30 NY3d 903 [2017]; *People v Brown*, 149 AD3d 411, 411 [1st Dept 2017], *lv denied* 29 NY3d 914 [2017]; *People v Staples*, 37 AD3d 1099, 1099 [4th Dept 2007], *lv denied* 8 NY3d 813 [2007]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

69

KA 16-00164

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW SHERADIN, 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.), dated December 8, 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 (Correction Law § 168 *et seq*.). We reject defendant's contention that County Court abused its discretion in denying his request for a downward departure from his presumptive risk level. Even assuming, arguendo, that defendant established that his response to treatment was exceptional so as to warrant a downward departure, we conclude upon examining all of the relevant circumstances that the court providently exercised its discretion in denying defendant's request (*see People v Smith*, 122 AD3d 1325, 1326 [4th Dept 2014]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

70

KA 14-00561

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE L. BARNES, DEFENDANT-APPELLANT.

WILLIAM G. PIXLEY, PITTSFORD, FOR DEFENDANT-APPELLANT.

ANDRE L. BARNES, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered March 14, 2014. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that the verdict is against the weight of the evidence because the victim's testimony was "manifestly suspect" for various reasons. We reject that contention. Defendant initially challenges the victim's testimony on the ground that she was a prostitute, drug addict and petty thief who was testifying pursuant to a cooperation agreement. Nevertheless, even if a witness has an "unsavory and criminal background, and testifie[s] pursuant to a cooperation agreement," such facts merely raise credibility issues for the jury to resolve (*People v Chin*, 69 AD3d 752, 753 [2d Dept 2010], *lv denied* 15 NY3d 772 [2010]; *see People v Woods*, 142 AD3d 1356, 1358 [4th Dept 2016]; *People v Davis*, 120 AD3d 1542, 1543 [4th Dept 2014], *lv denied* 26 NY3d 1087 [2015]). Although "[t]he credibility of the victim was undoubtedly open to question as she was an acknowledged user of heroin and crack cocaine and had mental health issues, as well as a varied criminal history that included crimes of deceit," her testimony was corroborated in certain respects (*People v Bowman*, 139 AD3d 1251, 1252 [3d Dept 2016], *lv denied* 28 NY3d 927 [2016]).

Contrary to defendant's further contention, the verdict is not against the weight of the evidence with respect to defendant's use of a dangerous instrument. Although defendant correctly concedes that a telephone receiver can constitute a dangerous instrument (*see e.g.*

People v Williams, 40 AD3d 402, 403 [1st Dept 2007], *lv denied* 9 NY3d 883 [2007]; *People v Prior*, 23 AD3d 1076, 1076 [4th Dept 2005], *lv denied* 6 NY3d 817 [2006]; *Matter of Brittanie G.*, 6 AD3d 1213, 1214 [4th Dept 2004]), he contends that it is "utter[ly] implausib[le] . . . that [the victim] was assaulted with a telephone receiver." We conclude that the victim's testimony that defendant assaulted her with a telephone receiver was not incredible as a matter of law, i.e., " 'manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Smith*, 73 AD3d 1469, 1470 [4th Dept 2010], *lv denied* 15 NY3d 778 [2010]), and the fact that the receiver "was not recovered does not render . . . the verdict against the weight of the evidence" (*People v Cohens*, 81 AD3d 1442, 1444 [4th Dept 2011], *lv denied* 16 NY3d 894 [2011]; *see People v Ryder*, 146 AD3d 1022, 1025 [3d Dept 2017], *lv denied* 29 NY3d 1086 [2017]; *People v Pine*, 126 AD3d 1112, 1116 [3d Dept 2015], *lv denied* 27 NY3d 1004 [2016]).

"Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor" (*People v Streeter*, 118 AD3d 1287, 1288 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014] [internal quotation marks omitted]; *see generally People v Gay*, 105 AD3d 1427, 1428 [4th Dept 2013]). The victim's "testimony that defendant [used a receiver] was uncorroborated, but also unrefuted," and we reject defendant's contention that the jury failed to give the evidence the weight it should be accorded in finding that he used a dangerous instrument (*People v Ingram*, 95 AD3d 1376, 1377 [3d Dept 2012], *lv denied* 19 NY3d 974 [2012]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

We have reviewed the contentions raised by defendant in his pro se supplemental brief and conclude that they are not preserved for our review (*see* CPL 470.05 [2]) and, in any event, lack merit.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

71

KA 16-00045

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS M. SHARP, 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 December 16, 2015. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree, welfare fraud in the fourth degree and offering a false instrument for filing in the first degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of grand larceny in the fourth degree (Penal Law § 155.30 [1]), welfare fraud in the fourth degree (§ 158.10) and three counts of offering a false instrument for filing in the first degree (§ 175.35 [1]). In response to the jury's request for a readback of the "full testimony" of the only defense witness, the stenographer did not read the portions of the transcript in which the witness invoked her Fifth Amendment privilege against self-incrimination. Even assuming, arguendo, that County Court erred in redacting those portions of the transcript, we conclude that defendant was not "seriously prejudiced" by the redaction and thus reversal on that ground is not required (*People v Lourido*, 70 NY2d 428, 435 [1987]; *see People v Schafer*, 81 AD3d 1361, 1362 [4th Dept 2011], *lv denied* 17 NY3d 861 [2011]). As defendant correctly concedes, the invocation of the privilege could be considered by the jury only in assessing the credibility of the defense witness (*see generally People v Siegel*, 87 NY2d 536, 543 [1995]). Moreover, as the People contend, the readback of those portions would have invited the jury to speculate as to the witness's reasons for invoking the privilege.

We reject defendant's further contention that his sentence is

unduly harsh and severe.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

72

KA 16-01990

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS D. DOWNER, 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 (Victoria M. Argento, J.), entered August 5, 2016. 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 modified on the law by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), defendant contends, and the People correctly concede, that County Court erred in assessing points for his criminal history based upon a prior juvenile delinquency adjudication (*see People v Gibson*, 149 AD3d 1567, 1568 [4th Dept 2017]; *People v Updyke*, 133 AD3d 1063, 1064 [3d Dept 2015]). Removing those points renders defendant a presumptive level one risk.

Nevertheless, we reject defendant's further contention that the court erred in determining that an upward departure from his presumptive risk level was warranted, and we therefore modify the order by determining that defendant is a level two risk pursuant to SORA. "An upward departure is warranted where, as here, there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines" (*People v Poleun*, 119 AD3d 1378, 1379 [4th Dept 2014], *affd* 26 NY3d 973 [2015] [internal quotation marks omitted]; *see People v Tatner*, 149 AD3d 1595, 1595 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]). Here, the People established by clear and convincing evidence the existence of aggravating factors not adequately taken into account by the risk assessment guidelines (*see Tatner*, 149 AD3d at 1595-1596).

They established that defendant sexually abused a five-year-old relative when he was 11 years old, and was subsequently placed with the Office of Children and Family Services (OCFS) for a period of two years. Additionally, he was placed with OCFS for a period of one year as a result of sexually abusive conduct that he committed when he was 15 years old. Despite those placements, defendant reoffended when he was 18 years old, resulting in the instant conviction (*see generally People v Duryee*, 130 AD3d 1487, 1488 [4th Dept 2015]; *People v Tidd*, 128 AD3d 1537, 1537-1538 [4th Dept 2015], *lv denied* 25 NY3d 913 [2015]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

76

CAF 16-02239

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

IN THE MATTER OF DONNA M. TINUCCI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL VOLTRA, RESPONDENT-RESPONDENT.

IN THE MATTER OF MICHAEL VOLTRA,
PETITIONER-RESPONDENT,

V

DONNA M. TINUCCI, RESPONDENT-APPELLANT.

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

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (LAWRENCE D. HASSELER OF COUNSEL), FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

KIMBERLY A. WOOD, ATTORNEY FOR THE CHILDREN, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered December 5, 2016 in proceedings pursuant to Family Court Act article 6. The order, among other things, dismissed the petition of petitioner-respondent for modification of an April 2003 order of visitation and granted the petition of respondent-petitioner seeking to terminate the visitation rights of petitioner-respondent.

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

Memorandum: Petitioner-respondent is the subject children's maternal grandmother, and respondent-petitioner is their father. After the untimely death of the children's mother, a Family Court order was entered in April 2003 awarding the grandmother "reasonable rights of visitation with the subject [children] as the parties shall mutually determine." For approximately two years immediately thereafter, the grandmother had limited visitation with the children. For the next approximately 10 years, however, the grandmother did not have contact with the children. In September 2015, the grandmother filed the instant petition for modification of the 2003 order of visitation. The father filed his own petition seeking to terminate

the grandmother's visitation rights. After a hearing before a court attorney referee, the court accepted the Referee's recommended findings, dismissed the grandmother's petition and granted the father's petition terminating the grandmother's visitation rights. The grandmother appeals.

"Once a visitation order is entered, it may be modified only 'upon a showing that there has been a subsequent change of circumstances and modification is required' . . . Extraordinary circumstances are not a prerequisite to obtaining a modification; rather, the 'standard ultimately to be applied remains the best interests of the child when all of the applicable factors are considered' " (*Matter of Wilson v McGlinchey*, 2 NY3d 375, 380-381 [2004]). A court's "determination concerning whether to award visitation depends to a great extent upon its assessment of the credibility of the witnesses and upon the assessments of character, temperament, and sincerity of the parents and grandparents . . . The court's determination concerning visitation will not be disturbed unless it lacks a sound and substantial basis in the record" (*Matter of Hilgenberg v Hertel*, 100 AD3d 1432, 1434 [4th Dept 2012] [internal quotation marks omitted]).

Contrary to the grandmother's contention, the court properly determined that it is not in the children's best interests to continue visitation with the grandmother (*see generally Wilson*, 2 NY3d at 382). The record supports the court's determination that a change of circumstances had occurred and that it was in the best interests of the children to terminate the grandmother's visitation in view of, inter alia, the lack of contact between the grandmother and the children for at least 10 years.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

77

CAF 16-02240

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

IN THE MATTER OF MICHAEL SIMS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CARRIE STARKEY, RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered September 1, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, modified a prior visitation order by awarding petitioner additional visitation with the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, increased petitioner father's visitation with the subject child to three weekends per month. We affirm. Contrary to the mother's contention, Family Court's decision that such visitation is in the child's best interests is supported by a sound and substantial basis in the record (*see generally Matter of Austin v Smith*, 144 AD3d 1467, 1469-1470 [3d Dept 2016]; *Cesario v Cesario*, 168 AD2d 911, 911 [4th Dept 1990]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

78

CAF 17-01433

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

IN THE MATTER OF YOLANDA M. ROBINSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

GLENN L. ROBINSON, RESPONDENT-APPELLANT.

R. BRIAN GOEWEY, ROCHESTER, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Monroe County (Paul M. Riordan, R.), entered January 30, 2017 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 8, respondent husband appeals from a two-year order of protection entered upon a finding that he committed the family offense of harassment in the second degree (*see* Family Ct Act § 812 [1]; Penal Law § 240.26 [1], [3]) against petitioner wife. Respondent failed to preserve for our review his contention that Family Court improperly assumed the role of advocate for petitioner, who appeared pro se, in asking questions to guide her direct testimony (*see Matter of Gallo v Gallo*, 138 AD3d 1189, 1190 [3d Dept 2016]) and, in any event, the record does not support respondent's contention (*see Matter of Veronica P. v Radcliff A.*, 126 AD3d 492, 492 [1st Dept 2015], *lv denied* 25 NY3d 911 [2015]). Contrary to respondent's further contention, "the court's assessment of the credibility of the witnesses is entitled to great weight, and the court was entitled to credit the testimony of [petitioner] over that of [respondent]" (*Matter of Kobel v Holiday*, 78 AD3d 1660, 1660 [4th Dept 2010]; *see Matter of Fleming v Fleming*, 52 AD3d 600, 601 [2d Dept 2008]). The record supports the court's determination that petitioner met her burden of establishing by a preponderance of the evidence that respondent committed the family offense of harassment in the second degree (*see* Family Ct Act § 812 [1]; Penal Law § 240.26 [1], [3]). We reject respondent's contention that the court erred in failing to conduct a dispositional hearing (*see* Family Ct Act §§ 833, 835 [a]), inasmuch as the record establishes that respondent waived such a hearing. Finally, we conclude that the duration and conditions of the order of protection are reasonably designed to advance "the purpose of attempting to stop the violence, end the family disruption and obtain

protection" (Family Ct Act § 812 [2] [b]; *see* § 842; *Matter of Harrington v Harrington*, 63 AD3d 1618, 1619 [4th Dept 2009], *lv denied* 13 NY3d 705 [2009]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

83

CA 17-01299

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

DAVID THUMAN, JR., PLAINTIFF-RESPONDENT,

V ORDER

JILL DEMARTINO, DEFENDANT-APPELLANT.

KNAUF SHAW LLP, ROCHESTER (DWIGHT E. KANYUCK OF COUNSEL), FOR DEFENDANT-APPELLANT.

STAMM LAW FIRM, WILLIAMSVILLE (BRIAN G. STAMM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered September 9, 2016. The order denied defendant's motion for summary judgment on her counterclaims and granted plaintiff's "cross motion for summary judgment and motion to dismiss" the counterclaims.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

84

CA 17-00913

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

KAUFMANN'S CAROUSEL, INC., PLAINTIFF-RESPONDENT,

V ORDER

CAROUSEL CENTER COMPANY LP, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NICOLE MARLOW-JONES OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (DOUGLAS A. FOSS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered February 1, 2017. The judgment, inter alia, granted that part of the motion of plaintiff for partial summary judgment declaring that defendant Carousel Center Company LP could not recover from plaintiff legal fees incurred by defendant City of Syracuse Industrial Development Agency.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

89

KA 16-00778

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOHN W. FLANIGAN, 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 (Thomas G. Leone, J.), rendered February 23, 2016. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, as a class E felony, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

90

KA 14-00995

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NELSON TAPIA, DEFENDANT-APPELLANT.

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

BARRY PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (W. Patrick Falvey, A.J.), rendered April 24, 2014. The judgment convicted defendant, upon his plea of guilty, 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 his plea of guilty of promoting prison contraband in the first degree (Penal Law § 205.25 [2]). Contrary to defendant's contention, the record establishes that County Court "conducted an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Burtes*, 151 AD3d 1806, 1806 [4th Dept 2017], *lv denied* 30 NY3d 978 [2017] [internal quotation marks omitted]; *see People v Hand*, 147 AD3d 1326, 1326 [4th Dept 2017], *lv denied* 29 NY3d 998 [2017]). Contrary to defendant's further contention, the court " 'was not required to specify during the colloquy which specific claims survive the waiver of the right to appeal' " (*Burtes*, 151 AD3d at 1806-1807).

Defendant's contention that "his plea was not knowing, intelligent and voluntary 'because he did not recite the underlying facts of the crime but simply replied to [the court's] questions with monosyllabic responses is actually a challenge to the factual sufficiency of the plea allocution,' which is encompassed by the valid waiver of the right to appeal" (*People v Simcoe*, 74 AD3d 1858, 1859 [4th Dept 2010], *lv denied* 15 NY3d 778 [2010]; *see Burtes*, 151 AD3d at 1807).

In addition, defendant contends that his plea was involuntary because he negated essential elements of the crime and expressed confusion in his responses during the plea colloquy, and the court

failed to conduct a sufficient inquiry to ensure that the plea was voluntary. That contention survives the waiver of the right to appeal, but defendant failed to preserve it for our review because he did not move to withdraw the plea or to vacate the judgment of conviction, and this case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 665 [1988]). Although defendant initially negated essential elements of promoting prison contraband in the first degree by denying that he knowingly possessed dangerous contraband (*see* Penal Law § 205.25 [2]; *People v Harris*, 134 AD3d 1587, 1587-1588 [4th Dept 2015], *lv denied* 27 NY3d 998 [2016]), the record establishes that the court conducted the requisite further inquiry and that defendant's responses to the court's subsequent questions removed any doubt about his guilt (*see People v Bonacci*, 119 AD3d 1348, 1349 [4th Dept 2014], *lv denied* 24 NY3d 1042 [2014]). To the extent that defendant's other statements during the plea colloquy "otherwise call[ed] into question the voluntariness of the plea" (*Lopez*, 71 NY2d at 666), we conclude that the court properly accepted the plea after making "further inquir[ies] to ensure that defendant underst[ood] the nature of the charge and that the plea [was] intelligently entered" (*id.*).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

93

KA 13-01753

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EZEQUIEL SANTANA, DEFENDANT-APPELLANT.

LORENZO NAPOLITANO, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered November 15, 2012. The judgment convicted defendant, upon his plea of guilty, of arson 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 arson in the third degree (Penal Law § 150.10 [1]). Defendant contends that he did not validly waive his right to appeal inasmuch as the questions asked of him with respect to the waiver were vague and thus do not demonstrate that he knowingly, voluntarily, and intelligently waived his right to appeal. We reject that contention. The oral and written waiver of the right to appeal obtained during the plea proceeding establish that defendant knowingly, intelligently, and voluntarily waived his right to appeal (*see People v Butler*, 151 AD3d 1959-1960 [4th Dept 2017], *lv denied* 30 NY3d 948 [2017]). Defendant's valid waiver of the right to appeal encompasses his contention that the sentence imposed is unduly harsh and severe (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

97

KA 16-00381

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAUREAN SMITH, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO 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 (Russell P. Buscaglia, A.J.), rendered February 26, 2016. The judgment convicted defendant, after a nonjury trial, 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 a nonjury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The case arose from a daytime traffic stop in the City of Buffalo of a vehicle in which defendant was a passenger. A suppression hearing established that an officer of the Buffalo Police Department (BPD) observed that neither the vehicle's driver nor defendant were wearing seatbelts over their white shirts. As the officer began to follow the vehicle in his patrol car, the driver of the vehicle pulled to the side of the road and parked, so the officer engaged the patrol car's overhead lights and pulled up behind the parked vehicle. Defendant exited the parked vehicle and began walking away, prompting the officer to order him to return to the vehicle. Instead, defendant fled on foot. During the ensuing chase, defendant dropped a handgun and tore his shirt. Defendant was eventually apprehended and made statements to police officers.

Defendant contends that Supreme Court erred in denying that part of his omnibus motion seeking to suppress the physical evidence and his subsequent statements. We reject that contention. An officer's observation that a person is not wearing a seatbelt is sufficient reason to stop a vehicle (*see People v Thompson*, 106 AD3d 1134, 1135 [3d Dept 2013]; *People v Cosme*, 70 AD3d 1364, 1364 [4th Dept 2010], *lv denied* 14 NY3d 886 [2010]). In such circumstances, where the person subsequently flees from the vehicle, the police act reasonably in

arresting him (*see People v Bradford*, 114 AD3d 1163, 1163 [4th Dept 2014], *lv denied* 23 NY3d 1060 [2014]). The court's determination to credit the testimony of the arresting officer with respect to his observations is entitled to great deference, and we decline to disturb it (*see People v Bush*, 107 AD3d 1581, 1582 [4th Dept 2013], *lv denied* 22 NY3d 954 [2013]).

Defendant further contends that he was denied effective assistance of counsel. In particular, he contends that his trial counsel should have moved to recall the arresting officer to the witness stand during the suppression hearing because subsequent evidence cast doubt upon the officer's prior testimony that BPD procedures did not require him to call the traffic stop into the dispatcher. We reject that contention. Defense counsel is not ineffective for failing to make a motion that has little or no chance of success (*see People v Caban*, 5 NY3d 143, 152 [2005]; *People v Jones*, 147 AD3d 1521, 1521 [4th Dept 2017], *lv denied* 29 NY3d 1033 [2017]). Here, the court properly concluded that the officer's allegedly inaccurate testimony about BPD procedures did not render incredible the testimony about his observations of defendant prior to the arrest (*see generally People v Dunbar*, 104 AD3d 198, 216-217 [2d Dept 2013], *affd* 24 NY3d 304 [2014], *cert denied* — US —, 135 S Ct 2015 [2015]). Defendant also contends that his trial counsel was ineffective in failing to move to reopen the suppression hearing based upon trial evidence that defendant was wearing a green shirt, not a white shirt, in jail following his arrest. That contention is without merit. A suppression motion may be renewed "upon a showing by the defendant . . . that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion" (CPL 710.40 [4]). Here, the color of the shirt that defendant was wearing at the time of his arrest was known to him prior to the determination of the motion.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

99

CAF 16-01527

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

IN THE MATTER OF YVONNE STEWARD,
PETITIONER-APPELLANT,

V ORDER

CARMELL LUCAS, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

WILLIAM D. BRODERICK, JR., ELMA, FOR PETITIONER-APPELLANT.

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

AYOKA A. TUCKER, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered August 5, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

100

CAF 16-01528

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

IN THE MATTER OF YVONNE STEWARD,
PETITIONER-APPELLANT,

V ORDER

CARMELL LUCAS, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

WILLIAM D. BRODERICK, JR., ELMA, FOR PETITIONER-APPELLANT.

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

AYOKA A. TUCKER, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered August 5, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

101

CAF 16-01529

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

IN THE MATTER OF YVONNE STEWARD,
PETITIONER-APPELLANT,

V ORDER

CARMELL LUCAS, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

WILLIAM D. BRODERICK, JR., ELMA, FOR PETITIONER-APPELLANT.

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

AYOKA A. TUCKER, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered August 5, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

102

CAF 16-01530

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

IN THE MATTER OF YVONNE STEWARD,
PETITIONER-APPELLANT,

V ORDER

CARMELL LUCAS, RESPONDENT-RESPONDENT.
(APPEAL NO. 4.)

WILLIAM D. BRODERICK, JR., ELMA, FOR PETITIONER-APPELLANT.

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

AYOKA A. TUCKER, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered August 5, 2016 in a proceeding pursuant to Family Court Act article 6. The order granted respondent's motion to, inter alia, dismiss the petition.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

103

CAF 16-01531

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

IN THE MATTER OF YVONNE STEWARD,
PETITIONER-APPELLANT,

V ORDER

CARMELL LUCAS, RESPONDENT-RESPONDENT.
(APPEAL NO. 5.)

WILLIAM D. BRODERICK, JR., ELMA, FOR PETITIONER-APPELLANT.

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

AYOKA A. TUCKER, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered August 5, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

106

CA 16-02213

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

IN THE MATTER OF PHILIP CONGILARO,
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 (ADAM W. KOCH 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 October 28, 2016 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

108

CA 17-01452

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

IN THE MATTER OF ARBITRATION BETWEEN
GEORGINA POTOCKI AND CIVIL SERVICE EMPLOYEES
ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,
PETITIONERS-RESPONDENTS,

AND ORDER

JOANNE M. MAHONEY, AS COUNTY EXECUTIVE, COUNTY
OF ONONDAGA, WILLIAM J. FITZPATRICK, AS ONONDAGA
COUNTY DISTRICT ATTORNEY, AND COUNTY OF ONONDAGA,
RESPONDENTS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (STEVEN W. WILLIAMS OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

DAREN J. RYLEWICZ, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., ALBANY (STEVEN M. KLEIN OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County (Spencer J. Ludington, A.J.), entered January 19, 2017. The judgment, inter alia, granted the petition to confirm an arbitration award.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

109

CA 17-01512

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

HAS K'PAW MU AND SA QUE FARA, INFANTS BY THEIR FATHER AND LEGAL GUARDIAN, HEN BLAY HTOO, AND HEN BLAY HTOO, AS ADMINISTRATOR OF THE ESTATE OF EH KAW MU, DECEASED, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ALBERT LYON, M.D., ET AL., DEFENDANTS, WILLIAM GRABER, M.D., JOY BLACK, M.D., AND FAXTON-ST. LUKE'S HEALTHCARE, DEFENDANTS-APPELLANTS.

LEVENE GOULDIN & THOMPSON, LLP, BINGHAMTON (JARED R. MACK OF COUNSEL), FOR DEFENDANT-APPELLANT WILLIAM GRABER, M.D.

NAPIERSKI, VANDENBURGH, NAPIERSKI & O'CONNOR, LLP, ALBANY (ANDREW S. HOLLAND OF COUNSEL), FOR DEFENDANTS-APPELLANTS JOY BLACK, M.D. AND FAXTON-ST. LUKE'S HEALTHCARE.

PETER E. TANGREDI & ASSOCIATES, WHITE PLAINS (RAYMOND V. NICOTERA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, AMICUS CURIAE.

Appeals from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered May 25, 2017. The order, inter alia, denied the motions of defendants-appellants to compel authorizations to release the personal tax returns of Hen Blay Htoo and decedent for certain years.

Now, upon the stipulation to partially withdraw appeal with respect to defendant Joy Black, M.D. signed by the attorneys for defendants-appellants and plaintiffs-respondents on November 21, 2017 and November 28, 2017,

It is hereby ORDERED that the appeal by defendant Joy Black, M.D. is unanimously dismissed upon stipulation, and the order so appealed from is modified on the law by granting the motions of defendants William Graber, M.D. and Faxton-St. Luke's Healthcare in accordance with the following memorandum, and as modified the order is affirmed without costs.

Memorandum: Eh Kaw Mu (decedent) died on November 19, 2010, and plaintiff Hen Blay Htoo (Htoo) was issued letters of guardianship for the infant plaintiffs, the children of decedent and Htoo, in December 2013 and limited letters of administration for decedent's estate in February 2014. Plaintiffs commenced this wrongful death action on May 1, 2014. Defendant Faxton-St. Luke's Healthcare, inter alia, moved pursuant to CPLR 3124 to compel Htoo to provide, inter alia, duly executed DTF-505 forms from the New York State Department of Taxation and Finance (NYSDTF), that would allow them to obtain copies of tax returns for the years 2008, 2009, and 2010 for Htoo and decedent. Those defendants also sought an order directing NYSDTF to comply with a proposed subpoena duces tecum seeking copies of those income tax returns. By a separate motion, defendant William Graber, M.D., inter alia, joined in the above motion. As relevant to this appeal, Faxton-St. Luke's Healthcare and Graber (hereafter, defendants) asserted that the information was needed to show that decedent and Htoo were married at the time of decedent's death, which would permit them to establish subsequently that the complaint was untimely. At his deposition, Htoo testified that he and decedent, who are Burmese, met in a refugee camp in Thailand and had one child who was born before they came to the United States as refugees in 2009, and that another child was born thereafter. Those children are plaintiffs in this action. Htoo denied that he and decedent were ever married. In certain immigration forms, however, they are listed as married. When asked at his deposition if he filed his tax returns as a single or married person in 2009/2010, he responded "I guess marry [sic]."

We conclude that Supreme Court erred in denying the motions. Individual tax returns are generally not discoverable unless the movant makes a " 'requisite showing that [the] tax returns [are] indispensable to [the] litigation and that [the] relevant information possibly contained therein [is] unavailable from other sources' " (*Neuman v Frank*, 82 AD3d 1642, 1644 [4th Dept 2011]; *see Latture v Smith*, 304 AD2d 534, 536 [2d Dept 2003]). A wrongful death action has a two-year statute of limitations from the date of the decedent's death (*see* EPTL § 5-4.1[1]). Where the sole distributee is an infant, the statute is tolled "until appointment of a guardian or the majority of the sole distributee, whichever is earlier" (*Hernandez v New York City Health & Hosps. Corp.*, 78 NY2d 687, 694 [1991]). Where, however, the decedent is married and the surviving spouse is thus a distributee of the estate, the infancy toll does not apply because the spouse "was available both to seek appointment as the personal representative of the estate and to commence an action on behalf of the children in a timely fashion" (*Barnaba-Hohm v St. Joseph's Hosp. Health Ctr.*, 130 AD3d 1482, 1484 [4th Dept 2015]; *see Baez v New York City Health & Hosps. Corp.*, 80 NY2d 571, 576-577 [1992]).

In support of their motions, defendants asserted that they had "attempted to obtain the marriage records of . . . Htoo and the decedent from Thailand/Myanmar; however, the location of these documents [has] proven to be difficult, if not impossible, to find." We conclude that defendants made the requisite showing that the tax returns are "relevant and indispensable" to support their affirmative defense based on the statute of limitations (*Levine v City Med.*

Assoc., P.C., 108 AD3d 746, 747 [2d Dept 2013]; *see Neuman*, 82 AD3d at 1644). We therefore grant the motions, and we direct Htoo to provide the duly executed forms for release of the tax returns. With respect to the requested relief of an order directing NYSDTF to comply with a subpoena, NYSDTF submitted an attorney affirmation in response to the motions, noting that it would comply with the proposed subpoena when properly completed DTF-505 forms were provided with service of the subpoena. NYSDTF also submitted an amicus brief on this appeal asking this Court not to order compliance with the subpoena unless and until it was provided with the completed forms, and the moving defendants do not seek otherwise. We agree with NYSDTF that it is required to comply with the subpoena only if the subpoena is accompanied by the completed forms.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

116

KA 15-01995

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

FRANKIE L. BARRINGTON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 (Thomas G. Leone, J.), rendered June 25, 2015. The judgment convicted defendant, upon his plea of guilty, of welfare fraud in the fourth degree and misuse of food stamps.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

117

KA 15-01994

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

FRANKIE L. BARRINGTON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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 (Thomas G. Leone, J.), rendered June 25, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and unlawful manufacture of methamphetamine in the third degree.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

118

KA 16-02160

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANDREW FREY, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered October 7, 2016. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on January 8, 2018 and by the attorneys for the parties on January 8 and 9, 2018,

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

119

KA 12-01814

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARTINOUS HUDSON, DEFENDANT-APPELLANT.

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

MARTINOUS HUDSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 1, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), attempted murder in the second degree, criminal possession of a weapon in the second degree (two counts), robbery in the first degree and robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1]) and one count of attempted murder in the second degree (§§ 110.00, 125.25 [1]), defendant contends in his main brief that Supreme Court erred in refusing to suppress his statements to law enforcement. Defendant failed to raise in his motion papers or at the suppression hearing the specific contentions he raises on appeal in support of suppression and, thus, he failed to preserve his contentions for our review (*see* CPL 470.05 [2]; *People v Heidgen*, 22 NY3d 259, 280 [2013]; *People v Harrison*, 128 AD3d 1410, 1411 [4th Dept 2015]), *lv denied* 26 NY3d 929 [2015]). Defendant also failed to preserve for our review his contention in his main and pro se supplemental briefs that the prosecutor violated his right to discovery pursuant to CPL 240.20 inasmuch as he failed to raise the specific contentions now raised on appeal (*see People v Delatorres*, 34 AD3d 1343, 1344 [4th Dept 2006], *lv denied* 8 NY3d 921 [2007]). In any event, even assuming, arguendo, that the People violated CPL 240.20, we conclude that reversal based on that alleged violation would not be required (*see id.*; *People v Benitez*, 221 AD2d 965, 965-966 [1995], *lv denied* 87 NY2d 970 [1996]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The credibility of defendant and the weight to be accorded to his version of the events was a matter for the jury (*see People v Gray*, 15 AD3d 889, 890 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005]; *People v Halwig*, 288 AD2d 949, 949 [4th Dept 2001], *lv denied* 98 NY2d 710 [2002]). Contrary to defendant's further contention, his sentence is not unduly harsh or severe.

We have considered defendant's remaining contentions in his main and pro se supplemental briefs and conclude that none requires reversal or modification of the judgment.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

131

CA 17-00327

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

ANDREW SOLECKI AND DEBORAH SOLECKI,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

OAKWOOD CEMETERY ASSOCIATION AND WOLCOTT GRASS FARM, INC., DOING BUSINESS AS WOLCOTT LAWN & CEMETERY MAINTENANCE, DEFENDANTS-RESPONDENTS.

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

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MELISSA A. FOTI OF COUNSEL), FOR DEFENDANT-RESPONDENT OAKWOOD CEMETERY ASSOCIATION.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR DEFENDANT-RESPONDENT WOLCOTT GRASS FARM, INC., DOING BUSINESS AS WOLCOTT LAWN & CEMETERY MAINTENANCE.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered November 23, 2016. The order, among other things, granted the motion of defendant Wolcott Grass Farm, Inc., doing business as Wolcott Lawn & Cemetery Maintenance and the cross motion of defendant Oakwood Cemetery Association for summary judgment dismissing the amended complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion and cross motion in part and reinstating the common-law negligence claim, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Andrew Solecki (plaintiff) when he fell into a grave at Oakwood Cemetery. The grave had been dug by defendant Wolcott Grass Farm, Inc., doing business as Wolcott Lawn & Cemetery Maintenance (Wolcott), pursuant to a contract with defendant Oakwood Cemetery Association (Oakwood), the owner of the premises. On the day of the accident, plaintiff, a funeral director employed by Wood Funeral Home, traveled to the cemetery in a vehicle driven by a coworker. Plaintiff went to the cemetery to make sure that the grave site was ready for a burial that was to take place that day. As he approached the grave site, plaintiff observed that the grave was dug but it appeared that the site was not properly "dressed," meaning, inter alia, that the vault

and lowering device for the casket had not been installed, nor was a railing placed around the grave. Instead, the grave opening was covered with a piece of plywood. The accident occurred after plaintiff exited the vehicle and approached the grave on foot, intending to lift the plywood to see whether the vault had been installed. He stepped on a corner of the plywood and fell into the grave.

Supreme Court properly granted those parts of the motion of Wolcott and the cross motion of Oakwood seeking summary judgment dismissing the Labor Law §§ 200, 240 (1) and 241 (6) claims against them. With respect to Labor Law § 240 (1), defendants met their burden of establishing as a matter of law that plaintiff "was neither among the class of workers . . . nor performing the type of work . . . that Labor Law § 240 (1) is intended to protect" (*Chiarello v J & D Leasing Co.*, 299 AD2d 183, 183 [1st Dept 2002]; *see Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521, 524-525 [2012]), and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Defendants further established that plaintiff was not entitled to the protection of Labor Law § 241 (6) inasmuch as his inspection of the grave site in his capacity as a funeral director had no direct connection with the alteration or excavation work performed by Wolcott (*cf. Dubin v S. DiFazio & Sons Constr., Inc.*, 34 AD3d 626, 627 [2d Dept 2006]; *see generally Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 577 [1990]), and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562). Finally, the court properly granted summary judgment dismissing the Labor Law § 200 claim because, while that statute is not limited to construction work (*see Foots v Consolidated Bldg. Contrs., Inc.*, 119 AD3d 1324, 1325 [4th Dept 2014]), it does not apply where, as here, the plaintiff was "not permitted or suffered to work on a building or structure at the accident site" (*Johnson v Ebidenergy, Inc.*, 60 AD3d 1419, 1422 [4th Dept 2009] [internal quotation marks omitted]).

The court erred, however, in granting those parts of defendants' respective motion and cross motion seeking summary judgment dismissing the common-law negligence claim against them, and we therefore modify the order accordingly. Inasmuch as plaintiffs allege that plaintiff's injury occurred as the result of a dangerous condition on the premises, defendants "were required to establish as a matter of law that they did not exercise any supervisory control over the general condition of the premises or that they neither created nor had actual or constructive notice of the dangerous condition on the premises" (*Burns v Lecesse Constr. Servs. LLC*, 130 AD3d 1429, 1434 [4th Dept 2015] [internal quotation marks omitted]). Defendants' own submissions establish that each had some level of supervisory control over the premises. Moreover, it is undisputed that Wolcott dug the grave and placed plywood over it, thus creating and having actual notice of the condition that plaintiffs allege was dangerous. Further, while Oakwood established that it did not create the dangerous condition, it "failed to establish as a matter of law that the condition was not visible and apparent or that it had not existed for a sufficient length of time before the accident to permit

[Oakwood] or [its] employees to discover and remedy it," and it thereby failed to establish that it lacked constructive notice of it (*St. John v Westwood-Squibb Pharms., Inc.*, 138 AD3d 1501, 1503 [4th Dept 2016] [internal quotation marks omitted]).

We reject the contention of both defendants that they are entitled to summary judgment dismissing the amended complaint against them on the ground that an open grave is an inherent feature of a cemetery, of which plaintiff, a funeral director, was necessarily aware (*cf. Badalbaeva v City of New York*, 55 AD3d 764, 764-765 [2d Dept 2008]; *Stanton v Town of Oyster Bay*, 2 AD3d 835, 836 [2d Dept 2003], *lv denied* 3 NY3d 604 [2004]). Here, the allegedly dangerous condition was not simply an open grave, but instead was an open grave guarded by a piece of plywood that was allegedly inadequate by virtue of its size or placement to protect against plaintiff's fall.

Finally, we reject defendants' contention that they are entitled to summary judgment on the ground that plaintiff's actions were the sole proximate cause of his injuries. Plaintiff testified that he was generally aware that it is not safe to step on plywood covering an open grave and, indeed, he further testified that he tried to avoid stepping on the plywood. In any event, plaintiff's awareness of the danger " 'does not negate the duty to maintain [the cemetery] in a reasonably safe condition but, rather, bears only on [plaintiff's] comparative fault' " (*Roosa v Cornell Real Prop. Servicing, Inc.*, 38 AD3d 1352, 1355 [4th Dept 2007]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

138

CA 17-00798

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

MAXIMUM INCOME PARTNERS, INC.,
PLAINTIFF-APPELLANT,

V ORDER

CARL E. WEBBER, ET AL., DEFENDANTS,
MARIO CURCIO AND NICOLE CURCIO,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

SILVER & FELDMAN, ROCHESTER (MICHAEL A. ROSENHOUSE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PHETERSON SPATORICO LLP, ROCHESTER (DERRICK A. SPATORICO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered October 3, 2016. The order denied the motion of plaintiff for leave to renew and/or reargue its prior motion 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: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

139

CA 17-00822

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

MAXIMUM INCOME PARTNERS, INC.,
PLAINTIFF-APPELLANT,

V ORDER

CARL E. WEBBER, ET AL., DEFENDANTS,
MARIO CURCIO AND NICOLE CURCIO,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

SILVER & FELDMAN, ROCHESTER (MICHAEL A. ROSENHOUSE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PHETERSON SPATORICO LLP, ROCHESTER (DERRICK A. SPATORICO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered August 1, 2016. The judgment denied the motion of plaintiff for summary judgment and granted the cross motion of defendants-respondents for summary judgment declaring, inter alia, the priority of liens.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

142

TP 17-01432

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

IN THE MATTER OF JAMES ADAMS, 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 (VICTOR PALADINO 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 August 7, 2017) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs, the petition is granted in part and the matter is remitted to respondent for a new hearing.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III hearing, that he violated inmate rules 100.11 (7 NYCRR 270.2 [B] [1] [ii] [assault on staff]), 104.11 (7 NYCRR 270.2 [B] [5] [ii] [violent conduct]), 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusal to obey a direct order]), and 113.10 (7 NYCRR 270.2 [B] [14] [i] [possession of a weapon]). Contrary to petitioner's contention, the determination is supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]). We agree with petitioner, however, that he was denied the right to call two inmate witnesses. "An inmate has a right to call witnesses at a disciplinary hearing so long as the testimony is not immaterial or redundant and poses no threat to institutional safety or correctional goals" (*Matter of Lopez v Fischer*, 100 AD3d 1069, 1070 [3d Dept 2012]; *see Matter of Johnson v Prack*, 122 AD3d 1323, 1323 [4th Dept 2014]). Respondent correctly concedes that the Hearing Officer violated petitioner's right to call witnesses as provided in the regulations (*see* 7 NYCRR 254.5; *see generally Matter of Barnes v LeFevre*, 69 NY2d 649, 650 [1986]). Inasmuch as a good faith reason for denying the witnesses appears in the record, only

petitioner's regulatory right, not his constitutional right, to call those witnesses was violated, and thus the proper remedy is a new hearing (*see Matter of Allaway v Prack*, 139 AD3d 1203, 1205 [3d Dept 2016]; *Johnson*, 122 AD3d at 1324). We therefore annul the determination and remit the matter to respondent for a new hearing. Because we are remitting the matter for a new hearing rather than granting all of the relief sought in the petition, i.e., expungement of the charges, we are granting the petition only in part.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

145

KA 15-01430

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MARK A. PERRIN, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered March 16, 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.

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

148

KAH 16-00071

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ANTHONY T. WOODS, PETITIONER-APPELLANT,

V ORDER

JOHN B. LEMPKE, SUPERINTENDENT, WENDE
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

ANTHONY T. WOODS, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (M. William Boller, A.J.), entered November 17, 2015 in a habeas corpus proceeding. The judgment, inter alia, denied the petition.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

151

CAF 16-01386

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

IN THE MATTER OF MICHAEL R. RODOLPH,
PETITIONER-APPELLANT,

V ORDER

SOU PHOMMAVONGSA, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

ELIZABETH CIAMBRONE, BUFFALO, FOR PETITIONER-APPELLANT.

HAWTHORNE & VESPER, PLLC, BUFFALO (TINA M. HAWTHORNE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered June 14, 2016 in a proceeding pursuant to Family Court Act article 6. The order granted respondent's motion to dismiss the petition, which was filed on March 31, 2016.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Whitney v Whitney* [appeal No. 3], 154 AD3d 1295, 1295 [4th Dept 2017]; *Matter of Schultz v Schultz* [appeal No. 2], 107 AD3d 1616, 1616 [4th Dept 2013]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

152

CAF 16-01387

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

IN THE MATTER OF MICHAEL R. RODOLPH,
PETITIONER-APPELLANT,

V ORDER

SOU PHOMMAVONGSA, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

ELIZABETH CIAMBRONE, BUFFALO, FOR PETITIONER-APPELLANT.

HAWTHORNE & VESPER, PLLC, BUFFALO (TINA M. HAWTHORNE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered June 14, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition filed on March 31, 2016.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Whitney v Whitney* [appeal No. 3], 154 AD3d 1295, 1295 [4th Dept 2017]; *Matter of Schultz v Schultz* [appeal No. 2], 107 AD3d 1616, 1616 [4th Dept 2013]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

153

CAF 16-01388

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

IN THE MATTER OF MICHAEL R. RODOLPH,
PETITIONER-APPELLANT,

V ORDER

SOU PHOMMAVONGSA, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

ELIZABETH CIAMBRONE, BUFFALO, FOR PETITIONER-APPELLANT.

HAWTHORNE & VESPER, PLLC, BUFFALO (TINA M. HAWTHORNE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered June 15, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition filed on June 2, 2016.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

154

CAF 16-00466

PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, NEMOYER, 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,
AND ALAN J., RESPONDENT-APPELLANT.

LISA DIPOALA HABER, SYRACUSE, FOR RESPONDENT-APPELLANT.

MICHAEL D. 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 Alan J. 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: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

160

CA 17-00711

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

PATRICIA J. CURTO, PLAINTIFF-APPELLANT,

V ORDER

TOWN OF ORCHARD PARK, ORCHARD PARK POLICE DEPARTMENT, ORCHARD PARK POLICE OFFICER A. KOWALSKI, ORCHARD PARK POLICE OFFICER R. SIMMONS, ORCHARD PARK POLICE OFFICER J. CULLEN, REMY ORFFEO, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 1.)

PATRICIA J. CURTO, PLAINTIFF-APPELLANT PRO SE.

BARCLAY DAMON, LLP, BUFFALO (JAMES DOMAGALSKI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered December 12, 2016. The order granted the motion of defendants-respondents to dismiss the amended complaint against them and denied as moot the motion of plaintiff for a default judgment.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

161

CA 17-01487

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

PATRICIA J. CURTO, PLAINTIFF-APPELLANT,

V ORDER

TOWN OF ORCHARD PARK, ET AL., DEFENDANTS,
AND COUNTY OF ERIE, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

PATRICIA J. CURTO, PLAINTIFF-APPELLANT PRO SE.

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

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered December 12, 2016. The order granted the motion of defendant County of Erie to dismiss the amended complaint against it, and denied as moot the motion of plaintiff for a default judgment.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

162

CA 17-00823

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

KAREN A. TRACY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (CHRISTOPHER R. POOLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHIACCHIA & FLEMING, LLP, HAMBURG (DANIEL J. CHIACCHIA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered January 12, 2017. The order denied defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action to recover damages that she allegedly sustained in a motor vehicle accident caused by potholes. We agree with defendant that Supreme Court erred in denying its motion for summary judgment dismissing the complaint. Defendant established that it lacked prior written notice of a defective or unsafe condition in the road, and plaintiff failed to meet its burden of demonstrating that an exception to the general rule is applicable (*see Malek v Village of Depew*, — AD3d —, —, 2017 NY Slip Op 08998 [4th Dept 2017]). Contrary to plaintiff's contention, it is well established that "verbal or telephonic communication to a municipal body that is reduced to writing [does not] satisfy a prior written notice requirement" (*Gorman v Town of Huntington*, 12 NY3d 275, 280 [2009]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

170

TP 17-01307

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

IN THE MATTER OF DANIEL WILLIAMS, PETITIONER,

V ORDER

JOHN COLVIN, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT.

DANIEL WILLIAMS, 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 July 20, 2017) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated inmate rules.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

208

CA 17-00633

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

CARLA L. PICCARRETO, PLAINTIFF-RESPONDENT,

V ORDER

DAVID J. MURA, DEFENDANT,
ANN MARIE MURA, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ROBERT J. LUNN, ROCHESTER, AND FRANK A. ALOI, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered July 21, 2016. The judgment, inter alia, granted the motion of plaintiff for summary judgment on the complaint.

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

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

209

CA 17-00634

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

CARLA L. PICCARRETO, PLAINTIFF-RESPONDENT,

V ORDER

DAVID J. MURA, DEFENDANT,
ANN MARIE MURA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ROBERT J. LUNN, ROCHESTER, AND FRANK A. ALOI, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered August 29, 2016. The order, insofar as appealed from, established the parameters for an in camera review of the terms of settlement of a legal malpractice action between plaintiff and her former attorney.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Entered: February 2, 2018

Mark W. Bennett
Clerk of the Court

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

210

CA 17-00635

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

CARLA L. PICCARRETO, PLAINTIFF-RESPONDENT,

V ORDER

DAVID J. MURA, DEFENDANT,
ANN MARIE MURA, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

ROBERT J. LUNN, ROCHESTER, AND FRANK A. ALOI, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered March 16, 2017. The order denied the motion of defendant Ann Marie Mura for a determination that she is entitled to an offset against plaintiff's judgment for any proceeds received in plaintiff's malpractice case against plaintiff's former attorney.

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: February 2, 2018

Mark W. Bennett
Clerk of the Court

MOTION NO. (1576/90) KA 90-01576. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HARRY AYRHART, DEFENDANT-APPELLANT. -- Motion for a writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed Feb. 2, 2018.)

MOTION NO. (880/94) KA 17-02181. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TIMOTHY MILLER, DEFENDANT-APPELLANT. -- Motion for a writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Feb. 2, 2018.)

MOTION NO. (593/01) KA 98-05633. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT MCCULLOUGH, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed Feb. 2, 2018.)

MOTION NO. (1122/02) KA 00-01303. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER T. FAETH, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., DEJOSEPH, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Feb. 2, 2018.)

MOTION NO. (417/03) KA 01-01972. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SAMUEL LEFLORE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., DEJOSEPH, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Feb. 2, 2018.)

MOTION NO. (10/14) KA 10-01130. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JEFFREY THOMAS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, CARNI, AND NEMOYER, JJ. (Filed Feb. 2, 2018.)

MOTION NO. (1042/17) CA 17-00259. -- IN THE MATTER OF ARBITRATION BETWEEN MONROE COUNTY DEPUTY SHERIFFS' ASSOCIATION, INC., PETITIONER-RESPONDENT-RESPONDENT, AND MONROE COUNTY AND MONROE COUNTY SHERIFF, RESPONDENTS-PETITIONERS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND WINSLOW, JJ. (Filed Feb. 2, 2018.)

MOTION NO. (1045/17) TP 17-00220. -- IN THE MATTER OF TOWN OF BOSTON, PETITIONER, V NEW YORK STATE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, AND WINSLOW, JJ. (Filed Feb. 2, 2018.)

MOTION NO. (1047/17) CA 17-00020. -- U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR STRUCTURED ASSET INVESTMENT LOAN TRUST 2005-4, PLAINTIFF-RESPONDENT, V JAMES D. LIEBEL, DEFENDANT-APPELLANT, ET AL., DEFENDANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND WINSLOW, JJ. (Filed

Feb. 2, 2018.)

MOTION NO. (1139/17) CA 17-00432. -- LODGE II HOTEL LLC, AND JAY GELB, PLAINTIFFS-RESPONDENTS, V JOSO REALTY LLC, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ. (Filed Feb. 2, 2018.)

MOTION NO. (1149/17) CA 17-00403. -- U.S. ENERGY DEVELOPMENT CORPORATION, PLAINTIFF-RESPONDENT, V SUPERIOR WELL SERVICES, INC., NOW KNOWN AS NABORS COMPLETION & PRODUCTION SERVICES, CO., AS SUCCESSOR IN INTEREST TO SUPERIOR WELLS SERVICES, LTD., DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ. (Filed Feb. 2, 2018.)

MOTION NO. (1161/17) KAH 16-01019. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. CHARLES B., PETITIONER-APPELLANT, V DEBORAH MCCULLOCH, EXECUTIVE DIRECTOR, CENTRAL NEW YORK PSYCHIATRIC CENTER, RESPONDENT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND WINSLOW, JJ. (Filed Feb. 2, 2018.)

MOTION NO. (1262/17) CA 16-01971. -- IN THE MATTER OF THE APPLICATION FOR THE RESCISSION OF THE LORIE DEHIMER IRREVOCABLE TRUST, SUCCESSOR TO THE

MARION A. SEARS TRUSTS. LORIE M. DEHIMER, PETITIONER-APPELLANT; HOWARD P. SEARS, JR., THOMAS A. SEARS AND DAVID H. WOOD, TRUSTEES, RESPONDENTS-RESPONDENTS. IN THE MATTER OF THE APPLICATION FOR THE RESCISSION OF THE J. STEVEN DEHIMER IRREVOCABLE TRUST, SUCCESSOR TO THE MARION A. SEARS TRUSTS. J. STEVEN DEHIMER, PETITIONER-APPELLANT; HOWARD P. SEARS, JR., THOMAS A. SEARS AND DAVID H. WOOD, TRUSTEES, RESPONDENTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ. (Filed Feb. 2, 2018.)

MOTION NO. (1309/17) CA 16-00828. -- MARITA E. HYMAN, PLAINTIFF-APPELLANT, V SUSAN N. BURGESS, DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, DEJOSEPH, AND WINSLOW, JJ. (Filed Feb. 2, 2018.)

MOTION NO. (1311/17) CA 17-00085. -- KEYBANK NATIONAL ASSOCIATION, PLAINTIFF-RESPONDENT, V PHILIP SIMAO, DEFENDANT-APPELLANT, ET AL., DEFENDANTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, DEJOSEPH, AND WINSLOW, JJ. (Filed Feb. 2, 2018.)