SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 23, 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

1250
KA 14-00474
PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAJH ANDERSON, DEFENDANT-APPELLANT.

WILLIAM G. PIXLEY, PITTSFORD, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered September 19, 2013. 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 affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that he was denied a fair trial by the admission of prejudicial propensity evidence, and that his waiver of the right to be present at trial was invalid because County Court did not investigate whether he was receiving a proper dosage of psychiatric medication. We affirm the judgment of conviction.

In 2005, the 15-year-old victim was shot to death near the Campbell Street Recreation Center in Rochester with a 9 millimeter semiautomatic weapon. On the evening of the murder, the police questioned but did not charge defendant, who was then 14 years old. The case went cold until 2011, when defendant made admissions about the murder to another inmate (informant) while he was incarcerated on unrelated charges. Defendant's admissions to the crime were contained in a handwritten letter, which defendant showed to the informant before mailing it to the mother of his child. After the informant reported defendant's admissions to the authorities, investigators outfitted him with a wire to record future conversations with defendant. Defendant made further admissions in audio-recorded conversations with the informant.

Defendant was indicted for the 2005 murder and, at trial, the People sought to admit the letter in evidence. Defense counsel requested the redaction of certain information, and the court granted counsel's request in part. After the letter was redacted to omit

references to unrelated charges that were pending against defendant at the time he wrote it, the court received it in evidence. The letter was read aloud to the jury by the mother of defendant's child, who testified that she received it and recognized the handwriting as defendant's. In the letter, defendant wrote, inter alia, that he "first shot somebody" on Campbell Street when he was 14 years old, that wiser persons were "always" telling him to calm down or he would "end up killin' somebody," that he "let a lot of people live," and that he was hopeful that he would not get killed or "kill somebody" in prison. The letter further read, "It's like sometimes I turn into the Devil in true form," and "I am a wolf, tiger, bear, bull, lion, shark, . . . I'm a [ ] beast. I never had fear pump in my soul or heart."

The court also admitted in evidence audio recordings of defendant's conversations with the informant. In one recording, defendant admitted to the crime charged and also claimed to be responsible for an unrelated shooting with a "deuce-deuce rifle," which he described as his "favorite shot." Defendant spoke knowledgeably about different makes and models of guns, none of which had been used to commit the crime charged, and the two men discussed the best ways to shoot different guns. Defendant also spoke of various crimes that had been committed by members of his family, and told the informant that guns had been available to him since he was 14 years old. Defendant said that he had no regard for feelings, and he and the informant mimicked the sounds of gunfire.

As a preliminary matter, defendant correctly concedes that he did not object to the admission of the alleged propensity evidence at issue on appeal and thus failed to preserve for our review his contention that the court erred in admitting that evidence (*see* CPL 470.05 [2]; *People v Chase*, 277 AD2d 1045, 1045 [4th Dept 2000], *lv denied* 96 NY2d 733 [2001]). We decline to exercise our power to review that contention as a matter of our discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We conclude, contrary to the view of our dissenting colleagues, that defendant received effective assistance of counsel. It is well settled that "a reviewing court must avoid confusing 'true ineffectiveness with mere losing tactics' " (*People v Benevento*, 91 NY2d 708, 712 [1998]). It "is not for [the] court to second-guess whether a course chosen by defendant's counsel was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation" (*People v Satterfield*, 66 NY2d 796, 799-800 [1985]). Crucially, we note that the evidence in question is the very same evidence upon which defendant relied to establish his defense at trial. The defense theory of the case, as articulated in defense counsel's summation, was that defendant did not kill the victim; he was merely "talking tough" because he was afraid of being in jail. Indeed, as defendant told the investigators, he was just "trying to sound bigger than he really was." Defense counsel urged the jury to find defendant's statements unworthy of belief because defendant was frightened and "puffing." In an effort to deflect the jury's attention from defendant's admissions to the charged crime, defense counsel made a deliberate choice, as a matter of trial strategy, to

leave those admissions in the context of the gratuitous boasting in which they arose. Although the evidence in question would have been excludable upon a motion by defendant, we conclude that the evidence was consistent with the defense strategy. Moreover, the redaction of such material from the letter and audio recording would have highlighted defendant's confession to the Campbell Street homicide. In other words, extracting defendant's admissions from the extraneous talk that was consistent with the puffing defense would have undercut the defense theory and focused the jury's attention on defendant's admissions of guilt.

We are mindful that counsel was tasked with providing a cogent defense notwithstanding defendant's repeated and recorded admissions of guilt, which would ultimately be presented to the jury regardless of whether the other material was redacted. As a result, counsel was in the unenviable position of having to convince the jury that defendant's admissions were unworthy of belief. To that end, it was favorable to the defense for the jurors to observe for themselves the extent to which defendant was a tough-talker. Otherwise, the defense theory that defendant was "puffing" and "trying to sound bigger than he really was" would have had no corroboration in the trial record. Moreover, counsel presented a clear and effective opening statement, a blistering cross-examination of the informant, and a powerful summation on defendant's behalf. We conclude that he provided defendant with meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]), and that defendant was afforded a fair trial.

Finally, we reject defendant's contention that his waiver of the right to be present at trial was not knowingly, intelligently, and voluntarily made. There were no concerns raised about defendant's mental health as the trial date approached, or in the first several days of the trial. The court had the opportunity to observe defendant's behavior as the trial proceeded, and the court observed that he was actively assisting his attorney and behaving "like a gentleman." Notably, defendant's request to absent himself from the trial came after he attentively sat through jury selection, opening statements, and the testimony of 10 prosecution witnesses. It was only after defendant's childhood friend offered damaging testimony against defendant that he indicated that he no longer wished to be present in the courtroom. At that time, the court conducted a careful inquiry and defendant responded in a lucid and unambiguous manner. Defendant convincingly established that he understood the consequences of his decision. Thus, we conclude that defendant knowingly, intelligently, and voluntarily waived his right to be present at trial (*see People v Parker*, 57 NY2d 136, 140-141 [1982]).

All concur except LINDLEY and TROUTMAN, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent. We agree with the majority concerning the waiver of the right to be present. In our view, however, defendant was denied a fair trial by the admission of egregious and prejudicial propensity evidence, and was also denied effective assistance of counsel by his attorney's failure to seek appropriate redaction of

that evidence. Therefore, we would reverse the judgment and grant defendant a new trial.

The victim was killed in 2005 near the Campbell Street Recreation Center by the use of a 9 millimeter semiautomatic weapon. Defendant was 14 years old when the crime occurred. The police questioned him that same night, but he was not charged. The case went cold. Years later, defendant was jailed on unrelated charges. While in jail, he showed an inmate a letter that he had written to the mother of his child. The inmate reported that letter to the authorities and agreed to work as a jailhouse informant. Investigators outfitted him with a wire to record future conversations with defendant. The investigation resulted in defendant's indictment on the charge of murder.

The People sought to admit a redacted version of the letter in evidence at trial. References to the unrelated charges were redacted, but little else was. Defense counsel moved to redact repeated references to defendant's self-applied alias, "Shotz," but County Court ruled that all of those references should remain in the letter as evidence of authorship. Authorship was never genuinely in dispute. Defense counsel could have proposed to stipulate to authorship if the People agreed to redact defendant's prejudicial alias, but he inexplicably failed to do so. Defense counsel also failed to object to additional propensity evidence contained in the letter. Consequently, the jury listened as the mother of defendant's child read that defendant "first shot somebody" on Campbell Street when he was 14 years old, suggesting that he had committed this crime and other unrelated shootings as well. He wrote that he "let a lot of people live," suggesting that he believed that he held the power of life and death over others. Defendant recalled that others were "always" telling him to calm down or he would "end up killin' somebody," and he expressed hope that he would not "kill somebody" in prison. "It's like sometimes I turn into the Devil in true form," defendant wrote, "a wolf, tiger, bear, bull, lion, shark, . . . [a] beast."

Furthermore, although the letter was redacted to remove references to the unrelated charges, defense counsel failed to object to an additional reference to a witness who was "about to take the stand" against him in that other case. That witness did not testify at this trial, suggesting that there was additional damaging evidence that the jury had not heard.

The People also sought to admit audio recordings of conversations between defendant and the jailhouse informant. In one of those recordings, defendant admitted to the crime charged at the outset. The recording could have been played for the jury only until that point, but the People played the rest of the conversation for the jury without objection from defense counsel. Thus, the jury heard defendant claim that he had committed an unrelated shooting near a police station using a "deuce deuce" rifle, which defendant called his "favorite" gun. Indeed, defendant spoke knowledgeably about many different brands and styles of guns, none of which had been used in the crime charged. He claimed that such guns had been available to

him since he was 14 years old, and he explained how to shoot them, even correcting the jailhouse informant on technical points. Midway through the conversation, defendant and the informant mimicked the sound of gunfire, apparently enjoying the subject matter. Defendant also discussed deplorable crimes that were committed by family members. In particular, one of his brothers "shot up" a car, and another brother punched his child's grandmother in the face.

It is longstanding judicial policy that evidence of uncharged crimes or prior bad acts is inadmissible if its only conceivable relevance is to the defendant's bad character or criminal propensity (*see People v Leonard*, 29 NY3d 1, 6 [2017]; *People v Molineux*, 168 NY 264, 313-314 [1901]). Such evidence is inherently prejudicial because "it may induce the jury to base a finding of guilt on collateral matters or to convict a defendant because of his past" (*People v Alvino*, 71 NY2d 233, 241 [1987]; *see People v Arafet*, 13 NY3d 460, 465 [2009]). It is well recognized that " '[t]he natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge' " (*People v Cass*, 18 NY3d 553, 559 [2012]; *see People v Zackowitz*, 254 NY 192, 198 [1930]).

There can be no doubt that the propensity evidence contained in the letter and audio recording was inadmissible and that the court would have committed reversible error had it admitted the evidence over defendant's objection. Indeed, the People on appeal do not even assert that the propensity evidence admitted against defendant was admissible. Instead, they point out that defendant failed to object to the evidence and contend that we should not address his contention in the interest of justice because the evidence was not so prejudicial as to deprive him of a fair trial. The majority agrees with the People, but we do not. In our view, the propensity evidence was highly prejudicial and inadmissible (*see People v Mhina*, 110 AD3d 1445, 1446-1447 [4th Dept 2013]), and the proof of guilt was by no means overwhelming considering that this was a cold case murder investigation with no eyewitnesses (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]). We would exercise our power to review as a matter of discretion in the interest of justice defendant's contention concerning the inadmissibility of the propensity evidence (*see* CPL 470.15 [6] [a]), reverse the judgment, and grant defendant a new trial.

In any event, defendant contends that he received ineffective assistance of counsel due to his attorney's failure to object to the propensity evidence, a contention that need not be preserved. We agree. Every defendant has a right to effective assistance of counsel guaranteed by the federal and state constitutions (*see* US Const 6th Amend; NY Const, art I, § 6; *People v Baldi*, 54 NY2d 137, 146 [1981]). That right "is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial in an adversarial system of justice" (*People v Benevento*, 91 NY2d 708, 711 [1998] [internal quotation marks omitted]; *see People v Claudio*,

83 NY2d 76, 80 [1993], *rearg dismissed* 88 NY2d 1007 [1996]). Thus, to establish that counsel was ineffective, the defendant must demonstrate that "he or she did not receive a fair trial because counsel's conduct was 'egregious and prejudicial' " (*People v Ambers*, 26 NY3d 313, 317 [2015], quoting *People v Oathout*, 21 NY3d 127, 131 [2013]). It is also necessary that the defendant "demonstrate the absence of strategic or other legitimate explanations" to rebut the presumption that "counsel acted in a competent manner and exercised professional judgment" (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see Benevento*, 91 NY2d at 712).

In evaluating defendant's contention, we must "avoid both confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis" (*Baldi*, 54 NY2d at 146; *see Benevento*, 91 NY2d at 712). Although our analysis is focused on " 'the fairness of the process as a whole' " (*People v Wright*, 25 NY3d 769, 779 [2015]; *see People v Clark*, 28 NY3d 556, 563 [2016]), even a single failing in an otherwise competent performance may be "so 'egregious and prejudicial' as to deprive a defendant of his [or her] constitutional right" (*People v Turner*, 5 NY3d 476, 480 [2005], quoting *People v Caban*, 5 NY3d 143, 152 [2005]).

The majority asserts that "defense counsel made a deliberate choice, as a matter of trial strategy, to [allow the jury to hear the propensity evidence] in the context of the gratuitous boasting in which they arose." The majority cannot be sure that this was defense counsel's strategy. Rather, the majority's conclusion is based on conjecture. We note that the People in their brief do not even suggest that this was defense counsel's strategy. Defense counsel's opening statement does not suggest that this was his strategy. To the extent that his summation referenced the propensity evidence, defense counsel's belated attempt to address highly prejudicial propensity evidence that was erroneously admitted at an earlier stage of trial does not indicate that it had been his strategy all along. We submit that any reliance on defense counsel's summation to establish that it had been his strategy to allow the evidence would give undue significance to retrospective analysis.

Regardless, even if defense counsel's strategy involved intentionally failing to object to the highly prejudicial propensity evidence, we conclude that it was not a reasonable strategy. The evidence of defendant's prior bad acts and his criminal propensity painted him as nothing other than a cold-blooded killer. Defendant, going by the self-applied alias "Shotz," intimated that he had committed numerous shootings, and gave specifics about an unrelated shooting near a police station where he used his "favorite" gun, the "deuce deuce" rifle. Not only did defendant discuss having killed people, but he also expressed that others had observed his tendency toward homicidal behavior, and he engaged in a lengthy discussion with the informant about his prolific use of guns. The majority asserts that "redaction of such material from the letter and audio recording would have highlighted defendant's confession" and undermined the defense. We respectfully submit that juries do not deliberate in that manner, as the courts recognize in *Molineux* and its progeny. If

history is any guide, the propensity evidence more likely led the jury to conclude that, even if defendant was being untruthful about having killed someone at the early age of 14, he had almost certainly killed *someone* in the intervening years and therefore deserved to be imprisoned for murder in this case.

The challenged evidence was unnecessary to establish that defendant's disclosures were untruthful and that he was merely bragging. Counsel certainly could have presented such a defense without allowing an avalanche of prejudicial propensity evidence before the jury. The evidence was not only unnecessary; it undoubtedly undermined his defense. The extensive, detailed, and highly prejudicial discussion of guns between defendant and the jailhouse informant established that defendant was not merely bragging about using guns, but in fact had in-depth knowledge of guns and experience using them. There was no legitimate excuse for counsel's failure to object to that evidence. Furthermore, some of the objectionable portions of the letter and audio recording bore no conceivable relation to the defense whatsoever. The reference to another witness who had supposedly agreed to testify against him in another case did nothing to advance the defense. Nor did the references to crimes of defendant's family members, which might have suggested to the jury that he came from "bad stock" and belongs in prison. Nor did the reference to anticipated, unspecified testimony from a nonexistent witness.

Under the circumstances, we conclude that defense counsel's failings deprived defendant of effective assistance of counsel (*see Wright*, 25 NY3d at 780). We would therefore reverse the judgment and grant defendant a new trial on that ground as well.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

1412
KA 16-01947
PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

EARL J. WILSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered August 19, 2016. The judgment convicted defendant, upon his plea of guilty, of aggravated driving while intoxicated, aggravated vehicular homicide (two counts) and manslaughter in the second degree (two counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Seneca County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of one count of aggravated driving while intoxicated (Vehicle and Traffic Law § 1192 [2-a] [a]), and two counts each of aggravated vehicular homicide (Penal Law § 125.14 [1]) and manslaughter in the second degree (§ 125.15 [1]). Defendant's conviction arises out of a fatal motor vehicle accident that occurred when the pickup truck operated by defendant collided with a motorcycle, killing both the operator of the motorcycle and the passenger on it.

We agree with defendant that County Court erred in summarily denying his motion to withdraw his plea. In support of the motion, defendant contended, inter alia, that the People violated their *Brady* obligation by failing to disclose the autopsy and toxicology reports of the motorcycle operator. We note at the outset that we reject the People's contention that defendant forfeited his right to raise the alleged *Brady* violation by pleading guilty (*see People v Ortiz*, 127 AD2d 305, 308 [3d Dept 1987], *lv denied* 70 NY2d 652 [1987]; *People v Benard*, 163 Misc 2d 176, 181 [Sup Ct, NY County 1994]; *see generally People v Fisher*, 28 NY3d 717, 722 [2017]). *Brady* is premised upon considerations of fairness and due process (*see People v Mangarillo*, 152 AD3d 1061, 1064 [3d Dept 2017]; *People v Martin*, 240 AD2d 5, 8 [1st Dept 1998], *lv denied* 92 NY2d 856 [1998]), and we conclude that it would undermine the prosecutor's *Brady* obligations if a defendant is deemed to have forfeited his or her right to raise an alleged *Brady* violation by entering a plea without the knowledge that the People

possessed exculpatory evidence (*see People v DeLaRosa*, 48 AD3d 1098, 1098-1099 [4th Dept 2008], *lv denied* 10 NY3d 861 [2008]). To the extent that our prior decisions hold that a defendant, by pleading guilty, forfeits the right to raise an alleged *Brady* violation (*see e.g. People v Brockway*, 148 AD3d 1815, 1816 [4th Dept 2017]; *People v Chant*, 140 AD3d 1645, 1648 [4th Dept 2016], *lv denied* 28 NY3d 970 [2016]; *People v Chinn*, 104 AD3d 1167, 1168 [4th Dept 2013], *lv denied* 21 NY3d 1014 [2013]), they are no longer to be followed.

On the merits, the People correctly concede that they are charged with having knowledge of the reports as of the time the reports were in the possession of the State Police, which was prior to the plea proceeding, even though the reports did not come into the possession of the District Attorney until after the plea was entered (*see People v Santorelli*, 95 NY2d 412, 421 [2000]).

We reject the People's contention that the reports do not contain exculpatory material and that they were thus under no obligation to disclose them. Rather, we agree with defendant that evidence of the motorcycle operator's intoxication is relevant with respect to the cause of the fatal accident and defendant's culpability therefor and, here, the toxicology report states that two blood samples obtained from the motorcycle operator indicated blood alcohol concentrations of .081 and .098. Moreover, the exculpatory value of that evidence is enhanced by defendant's initial account of the accident to State Police officers at the scene, wherein defendant asserted that the accident occurred when the motorcycle was passing another vehicle and suddenly appeared "right in front of him."

Contrary to the People's further contention, defendant cannot be charged with knowledge of the contents of the toxicology and autopsy reports based upon the assertions in his affidavit that State Police officers disclosed information to him that the operator of the motorcycle was intoxicated (*cf. People v Doshi*, 93 NY2d 499, 506 [1999]; *People v McClain*, 53 AD3d 556, 556 [2d Dept 2008], *lv denied* 11 NY3d 791 [2008]). We agree with defendant, moreover, that the court should not have summarily determined whether and to what extent the exculpatory information, if disclosed, would have affected defendant's decision to plead guilty (*cf. Fisher*, 28 NY3d at 722; *People v Drossos*, 291 AD2d 723, 724 [3d Dept 2002]).

We therefore hold the case, reserve decision, and remit the matter to County Court for a hearing on defendant's motion. In light of our determination, we do not address defendant's remaining contentions.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

1419
CA 17-00714

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

MURNANE BUILDING CONTRACTORS, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CAMERON HILL CONSTRUCTION, LLC, ET AL.,
DEFENDANTS,
AND SYRACUSE UNIVERSITY, DEFENDANT-RESPONDENT.

COUCH WHITE, LLP, ALBANY (JEREMY M. SMITH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JOHN G. POWERS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered June 24, 2016. The order granted the pre-answer motion of defendant Syracuse University to dismiss the complaint against it and to vacate a mechanic's lien.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the mechanic's lien is reinstated, and the complaint is reinstated against defendant Syracuse University.

Memorandum: This action arises from a construction project in which Syracuse University (defendant) entered into a series of contracts with a number of entities, including defendant Cameron Hill Construction, LLC (Cameron). Plaintiff was a subcontractor of Cameron on the project, which was to culminate in the construction of a building that was located on property owned by defendant. Defendant would lease the land to Cameron via a ground lease, Cameron and other entities would construct a building on that land pursuant to defendant's specifications, and defendant would then lease back certain parts of the building through several intermediate leases. The ground lease between defendant and Cameron provided, inter alia, that "[n]othing in this [l]ease shall be construed as the consent or request of [defendant], express or implied, by inference or otherwise, to any contractor, subcontractor, laborer or materialman for the performance of any labor or the furnishing of any material for any improvement, alteration, or repair of the [p]remises, the [i]mprovements, or any part of either." Construction was delayed, and defendant and Cameron eventually entered into a right of entry agreement and then a modified right of entry agreement (collectively,

rights of entry), which permitted certain specified construction work on the property to go forward. The rights of entry included a provision requiring that Cameron obtain a mechanic's lien waiver from plaintiff. To comply with that requirement, plaintiff executed a document indicating that plaintiff "waives and releases all liens or rights of lien now existing for work, labor, or materials furnished to 4/30/2014" (lien waiver). Plaintiff later filed a mechanic's lien on the property based on allegations that plaintiff was not paid for work performed pursuant to the rights of entry, and plaintiff commenced this action seeking, inter alia, to foreclose on the mechanic's lien.

Defendant made a pre-answer motion to vacate the mechanic's lien and dismiss the complaint against it pursuant to CPLR 3211 (a) (1) and (7), on the grounds that, inter alia, documentary evidence established that defendant did not consent to the improvements within the meaning of the Lien Law, and that plaintiff released the lien. We agree with plaintiff that Supreme Court erred in granting the motion, and we therefore reverse the order, deny the motion, reinstate the mechanic's lien, and reinstate the complaint against defendant.

It is well settled that, in the context of a motion to dismiss the complaint, we must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A motion pursuant to CPLR 3211 (a) (7) will be granted if the plaintiff does not have a cause of action (*see id.* at 88), and a motion pursuant to CPLR 3211 (a) (1) will be granted if "the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the [plaintiff's] claim[s]" (*Baumann Realtors, Inc. v First Columbia Century-30, LLC*, 113 AD3d 1091, 1092 [4th Dept 2014] [internal quotation marks omitted]). The court may "freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*Leon*, 84 NY2d at 88; *see Sargiss v Magarelli*, 12 NY3d 527, 531 [2009]).

The Lien Law provides in relevant part that a "subcontractor . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof . . . shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . . or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this chapter" (§ 3). "The term 'consent' within the meaning of Lien Law § 3 is not mere acquiescence and benefit, but [it is] some affirmative act or course of conduct establishing confirmation . . . Such consent may be inferred from the . . . conduct of the owner[] . . . Therefore, the owner[] must either be an affirmative factor in procuring the improvement to be made, or having possession and control of the premises assent to the improvement in the expectation that [the owner] will reap the benefit of it" (*Tomaselli v Oneida County Indus. Dev. Agency*, 77 AD3d 1315, 1316-1317 [4th Dept 2010] [internal quotation marks omitted]).

We reject defendant's contention that the documentary evidence that it submitted is sufficient to establish as a matter of law that it did not consent to the improvements that were performed by plaintiff and that gave rise to the mechanic's lien. Defendant relies upon a clause in the ground lease, which provides that defendant did not consent to any work done on the project. We have previously stated that "a 'requirement in a contract between . . . landlord and tenant[] that the . . . tenant shall make certain improvements on the premises is a sufficient consent of the owner to charge his property with claims which accrue in making those improvements' " (*Ferrara v Peaches Café LLC*, 138 AD3d 1391, 1393 [4th Dept 2016], *lv granted* 29 NY3d 917 [2017], quoting *Jones v Menke*, 168 NY 61, 64 [1901]; *cf. e.g. Tri-North Bldrs. v Di Donna*, 217 AD2d 886, 887 [3d Dept 1995]). The "consent [for purposes of Lien Law § 3] may be inferred from the terms of the lease and the conduct of the owner" (*J.K. Tobin Constr. Co., Inc. v David J. Hardy Constr. Co., Inc.*, 64 AD3d 1206, 1208 [4th Dept 2009] [internal quotation marks omitted]). In addition, after owners, tenants, lessors and others with an interest in the property "have given their consent to an improvement, they cannot by any arrangement among themselves cut off the rights of lienors" (*McNulty Bros. v Offerman*, 221 NY 98, 105 [1917]; *see Grassi & Bro. v Lovisa & Pistoresi, Inc.*, 259 NY 417, 423 [1932]; *see generally West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY2d 148, 156-159 [1995]).

Here, it is clear from the terms of the ground lease and the rights of entry that the entire purpose of those agreements was to construct a building, of which defendant would obtain the benefit. In addition, the record establishes that defendant was aware that plaintiff would be performing work on the project. Indeed, in the ground lease, defendant specifically "agrees that Murnane Building Contractors Inc. [i.e., plaintiff] is an acceptable contractor," and the original right of entry provides, inter alia, that "Cameron . . . will . . . deliver[ ] . . . a payment and performance bond for the Project Work provided by Murnane Building Contractors, Inc." Thus, based on the inconsistencies in the documents submitted by defendant with respect to whether defendant consented to plaintiff performing work on the project within the meaning of the Lien Law, we cannot conclude that "the allegations in the complaint, taken as true, fail to state any cognizable cause of action against [defendant], . . . or that the documentary evidence submitted by . . . defendant[] conclusively disposes of . . . plaintiff['s] causes of action" (*Clement v Delaney Realty Corp.*, 45 AD3d 519, 521 [2d Dept 2007]; *see generally Ferrara*, 138 AD3d at 1393-1394).

We also reject defendant's contention that the complaint was properly dismissed based on the lien waiver. Of paramount importance, the lien waiver by its terms applied only to claims accruing prior to April 30, 2014, and the allegations in the complaint include claims accruing after that date. Thus, the plain language of the lien waiver does not release those later claims. Moreover, "[w]here a waiver form purports to acknowledge that no further payments are owed, but the parties' conduct indicates otherwise, the instrument will not be construed as a release" (*Leonard E. Riedl Constr., Inc. v Homeyer*, 105 AD3d 1391, 1392 [4th Dept 2013] [internal quotation marks omitted]).

Here, plaintiff submitted affidavits indicating that the parties' actions and course of dealing demonstrate that the lien waiver should not be construed as a release (*see generally Apollo Steel Corp. v Sicolo & Massaro*, 300 AD2d 1021, 1022 [4th Dept 2002]) and, therefore, "the documentary evidence warranted the denial of [the] pre-answer motion to dismiss" (*Dienst v Paik Constr., Inc.*, 139 AD3d 607, 608 [1st Dept 2016]).

Finally, it is well settled that contentions that are raised for the first time in a reply brief are not properly before us (*see Becker-Manning, Inc. v Common Council of City of Utica*, 114 AD3d 1143, 1144 [4th Dept 2014]; *Stubbs v Capellini*, 108 AD3d 1057, 1059 [4th Dept 2013]; *Turner v Canale*, 15 AD3d 960, 961 [4th Dept 2005], *lv denied* 5 NY3d 702 [2005]). We therefore do not review plaintiff's contentions that the lien waiver is merely a receipt, and that the lien waiver is invalid because plaintiff never received the payment reflected in the lease.

Entered: March 23, 2018 Mark W. Bennett
Clerk of the Court

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

1422
CA 17-01181
PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

MARY K. RUGG, MICHAEL VAN SANFORD, AND
RICHARD D. ELLIS, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

GERALD J. O'DONNELL AND FRANCES C. O'DONNELL,
DEFENDANTS-RESPONDENTS.

BARCLAY DAMON, LLP, SYRACUSE (J. ERIC CHARLTON OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (ERIN K. SKUCE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered September 7, 2016. The order denied the motion of plaintiffs for summary judgment on the complaint and for summary judgment dismissing the counterclaims and granted the cross motion of defendants for leave to serve a second amended answer.

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, the counterclaims are dismissed, and judgment is granted in favor of plaintiffs in the amount of $41,000, together with interest at the contract rate of 6% commencing February 14, 2014, plus costs and disbursements with respect to this action and costs of collection, including reasonable attorneys' fees and expenses, and the matter is remitted to Supreme Court, Cayuga County, to determine the amount of costs of collection in accordance with the following memorandum: In 1988, Frank H. Van Sanford, Jr. (Van Sanford), sold defendants a parcel of land (premises) for $200,000. At that time, defendants signed and delivered to Van Sanford a note in the amount of $50,000, to be repaid at 9% interest, which was secured by a mortgage on the premises (first note). In addition, defendants signed and delivered to Van Sanford another note in the amount of $111,000, to be repaid at 9% interest, which was secured by a security agreement on personal property (second note). In 2004, Van Sanford died and plaintiff Mary K. Rugg, the executor of his estate, discovered that defendants were in default on both notes. In 2005, the first and second notes were consolidated into a new note signed by defendants and delivered to Rugg, Susan Ellis, and plaintiff Michael Van Sanford, as individuals, in the amount of $100,000, to be repaid at 6% interest (consolidated note). Defendants were to make monthly payments on the consolidated note until June 1, 2010, when the entire

amount would become due. In addition, the amount remaining due on the second note was secured by a mortgage on the premises, and the parties to the consolidated note entered into a mortgage consolidation, extension, and modification agreement (CEMA). In the CEMA, defendants agreed that there were no offsets or defenses to the notes, the mortgages, or the indebtedness, and they expressly waived any claim or defense that could be asserted as an offset to the indebtedness. In 2009, Susan Ellis assigned her interests to plaintiff Richard D. Ellis. The consolidated note matured on June 1, 2010, but plaintiffs permitted defendants to continue to make monthly payments after that date. On February 14, 2014, however, defendants stopped making payments.

Thereafter, plaintiffs commenced this action to recover the $41,000 that remained due on the consolidated note. In their amended answer, defendants asserted affirmative defenses and counterclaims for breach of contract and fraud based on allegations that, in the 1988 contract of sale, Van Sanford falsely represented that there were no underground tanks on the premises, nor was there environmental contamination. Plaintiffs appeal from an order that denied their motion for summary judgment on the complaint and for summary judgment dismissing the counterclaims, and granted defendants' cross motion for leave to serve a second amended answer containing a counterclaim based on allegations that Van Sanford violated state and federal environmental laws prior to the 1988 sale. We reverse.

We conclude that Supreme Court erred in denying the motion. Plaintiffs met their initial burden on the motion by submitting a copy of the note and evidence of nonpayment (*see Wehle v Moroczko*, 151 AD3d 1846, 1846 [4th Dept 2017]; *Brandywine Pavers, LLC v Bombard*, 108 AD3d 1209, 1209 [4th Dept 2013]). The burden then shifted to defendants to submit evidence establishing the existence of a triable issue of fact with respect to a bona fide defense to plaintiffs' recovery on the consolidated note (*see Wehle*, 151 AD3d at 1846; *Sun Convenient, Inc. v Sarasamir Corp.*, 123 AD3d 906, 907 [2d Dept 2014]). Although defendants submitted evidence in support of their affirmative defenses and counterclaims based on breach of contract and fraud, the broad language of the waiver contained in the CEMA unambiguously encompasses those defenses and counterclaims (*see Petra CRE CDO 2007-1, Ltd. v 160 Jamaica Owners, LLC*, 73 AD3d 883, 884 [2d Dept 2010]; *Malsin v Stockman*, 265 AD2d 533, 533 [2d Dept 1999]; *Chemical Bank v Allen*, 226 AD2d 137, 138 [1st Dept 1996]). Contrary to defendants' contention, the waiver is not invalid with respect to their allegations of fraud. Although "a written waiver in any form cannot operate to shield a party from his [or her] own fraud" (*Sterling Natl. Bank & Trust Co. of N.Y. v Giannetti*, 53 AD2d 533, 533 [1st Dept 1976]; *see Mishal v Fiduciary Holdings, LLC*, 109 AD3d 885, 885-886 [2d Dept 2013]), here, the fraud was allegedly committed by a third party. Thus, the waiver does not operate to shield plaintiffs from their own fraud (*cf. Sterling Natl. Bank & Trust Co. of N.Y.*, 53 AD2d at 533).

We further conclude that the court erred in granting the cross motion. Leave to amend a pleading should be denied where, as here, the proposed amendment is "patently devoid of merit" (*Pieroni v*

Phillips Lytle LLP, 140 AD3d 1707, 1709 [4th Dept 2016], *lv denied* 28 NY3d 901 [2016] [internal quotation marks omitted]). Even if defendants had not expressly waived any counterclaim that could be asserted as an offset to the indebtedness, defendants cannot assert a counterclaim against plaintiffs in their individual capacities to recover damages based on Van Sanford's alleged violations of environmental statutes (*see generally Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259-260 [1970]).

We therefore reverse the order, deny the cross motion, grant the motion, dismiss the counterclaims, and grant judgment in favor of plaintiffs in the amount of $41,000, together with interest at the contract rate of 6% commencing February 14, 2014, the date on which defendants stopped making payments on the note, plus costs and disbursements with respect to this action and costs of collection, including reasonable attorneys' fees and expenses. We remit the matter to Supreme Court to make a determination of those costs of collection.

Entered: March 23, 2018 Mark W. Bennett
Clerk of the Court

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

1432
KA 16-01502
PRESENT: PERADOTTO, J.P., CARNI, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MELVIN H. MILLER, DEFENDANT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR DEFENDANT-APPELLANT.

MELVIN H. MILLER, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. FLAHERTY, JR., SPECIAL DISTRICT ATTORNEY, WARSAW, FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered July 28, 2016. The judgment convicted defendant upon a nonjury verdict of, inter alia, burglary in the second degree, petit larceny, and criminal contempt in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]), petit larceny (§ 155.25), and criminal contempt in the first degree (§ 215.51 [b] [iv]). By failing to renew his motion to dismiss at the close of proof, defendant failed to preserve for our review his challenges to the legal sufficiency of the evidence (*see People v Memon*, 145 AD3d 1492, 1493 [4th Dept 2016]; *People v Steiniger*, 142 AD3d 1320, 1321 [4th Dept 2016], *lv denied* 28 NY3d 1189 [2017]). Nonetheless, "we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge[s] regarding the weight of the evidence" (*People v Stephenson*, 104 AD3d 1277, 1278 [4th Dept 2013], *lv denied* 21 NY3d 1020 [2013], *reconsideration denied* 23 NY3d 1025 [2014] [internal quotation marks omitted]).

Viewing the evidence in light of the elements of burglary in the second degree and petit larceny in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence with respect to those counts (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The evidence, including the recording of a 911 call made by the complainant, defendant's ex-girlfriend, and the arresting officer's body camera footage, establishes that defendant unlawfully

entered the complainant's residence with the intent to steal her dogs. At trial, the complainant testified that defendant had moved out of the residence three months earlier and would contact her for permission to visit the dogs. Defendant called the complainant on the morning in question and asked if he could come get the dogs, but the complainant already had plans to take the dogs with her on an outing and she told defendant that he could not visit the dogs that day. Thereafter, defendant showed up at the complainant's residence, and her neighbor witnessed defendant arrive and begin to bang on the complainant's door. Defendant then opened a window on the complainant's porch and climbed through the window into the complainant's house. Upon observing defendant's actions, the neighbor retreated into her house with her young children.

Once inside the complainant's home, defendant went upstairs to the complainant's bedroom and forced his way through her locked door. The complainant told defendant to leave, and he began to take the dogs. The complainant called 911 and defendant left while the complainant was on the phone with the operator. In the 911 recording, the complainant could be heard yelling "Leave . . . Leave!" and screaming "Get out of here!" The complainant frantically reported to the 911 operator that she needed help "immediately" because defendant broke into her house through a window, "busted" through her door, and tried to steal her dogs. She told the operator that she was afraid he was going to kill her. The neighbor heard the complainant yelling and observed her pushing defendant out the door. The neighbor then observed defendant get into his truck and "barrel[ ] down" the road.

We respectfully disagree with our dissenting colleagues' view of the record that defendant simply intended to take the dogs for a walk and then return them. Defendant led the police on a high-speed vehicle chase. He was eventually apprehended after he exited his vehicle, attempted to flee on foot, and was tased by the police. Despite defendant's testimony at trial that he merely wanted to take the dogs for a walk, the arresting officer's body camera footage from the morning of the crime shows that defendant repeatedly told the police that his ex-wife stole his dogs and his money, and that he wanted "one of them." Although defendant also claimed to have paperwork proving that the dogs were licensed to him, the evidence at trial established that the dogs were licensed to the complainant. We also disagree with our colleagues' view that there is no dispute that the record establishes that defendant commonly used the window to enter the complainant's home with her consent to gain access to the dogs. When asked by defense counsel whether, to her knowledge, defendant had ever gone through that window previously, the complainant responded, "[m]aybe once." The complainant also testified that she was afraid that defendant was going to hurt her, and that she did not give him permission to enter her home through the window. We conclude that the finder of fact heard all of the testimony and was in the best position to assess the witnesses' credibility (*see generally People v Lane*, 7 NY3d 888, 890 [2006]).

Viewing the evidence in light of the elements of criminal contempt in the first degree in this nonjury trial, we likewise reject

defendant's contention that the verdict is against the weight of the evidence with respect to that count. The evidence included the recordings of 52 telephone calls made by defendant to the complainant while he was in jail, in violation of an order of protection, and established that he possessed the requisite intent to harass, annoy, threaten or alarm the complainant (*see* Penal Law § 215.51 [b] [iv]).

Finally, we have reviewed the contentions raised in defendant's pro se supplemental brief and conclude that they are unpreserved for our review (*see* CPL 470.05 [2]), and are in any event without merit.

All concur except CARNI, and DEJOSEPH, JJ., who dissent in part and vote to modify in accordance with the following memorandum: We respectfully dissent in part, because we conclude that the verdict is against the weight of the evidence with respect to the crimes of burglary in the second degree and petit larceny.

Pursuant to Penal Law § 140.25 (2), "[a] person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when . . . [t]he building is a dwelling." Here, the People alleged that the crime defendant intended to commit was larceny. Thus, the People were required to prove beyond a reasonable doubt that defendant intended to steal the dogs, by permanently depriving the complainant of them (*see* §§ 155.00 [3]; 155.05 [1]; 155.25). Our colleagues in the majority conclude that "[t]he evidence, including the recording of a 911 call made by the complainant, defendant's ex-girlfriend, and the arresting officer's body camera footage, establishes that defendant unlawfully entered the complainant's residence with the intent to steal her dogs."

In our view, defendant had at least a good faith basis for claiming an ownership interest in the dogs despite the fact that they were licensed in the complainant's name (*see* Penal Law § 155.15 [1]). As stated by the Court of Appeals, "[l]arceny is committed when one wrongfully takes, obtains or withholds 'property from an owner thereof' with intent to deprive the owner of it, or appropriate it to oneself or another (Penal Law § 155.05 [1]). 'Owner' is defined in Penal Law § 155.00 (5) as one 'who has a right to possession [of the property taken] superior to that of the taker, obtainer or withholder.' This broad definition is immediately qualified by the declaration that '[a] joint or common owner of property shall not be deemed to have a right of possession thereto superior to that of any other joint or common owner thereof' (Penal Law § 155.00 [5])" (*People v Zinke*, 76 NY2d 8, 10 [1990]).

Here, the complainant conceded that she was a "joint owner" of the dogs inasmuch as she testified that she considered the dogs to be owned by both her and defendant. She testified at trial that the dogs were licensed to her merely because she "was the one that took the time to go do the licensing." Notably, while defendant was incarcerated, the complainant was using defendant's debit card to contribute to veterinary care for the dogs and, while they were still living together, defendant and the complainant split the cost for

Invisible Fencing. Defendant testified that he and the victim both purchased the dogs, he paid most of the cost of the dogs, and he paid for licensing every year.

Furthermore, upon our review of the record, we note that there is no dispute that defendant, with the consent of the complainant, commonly used the window to enter the house and gain access to the dogs. Indeed, it appears that, prior to his arrest, defendant simply intended to take the dogs for a walk and then return them. Viewing the evidence as a whole, we conclude that the People failed to satisfy their burden of proving beyond a reasonable doubt that defendant committed the crimes of burglary and petit larceny. We would therefore modify the judgment by reversing those parts convicting defendant of burglary in the second degree and petit larceny and dismissing those counts of the indictment.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

1501
CAF 16-02241
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF JEFFREY KELLEY, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ASHLIE FIFIELD, RESPONDENT-RESPONDENT.

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

VOLUNTEER LAWYERS PROJECT OF ONONDAGA COUNTY, INC., SYRACUSE (MARY C. JOHN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered September 9, 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 reversed on the law without costs, the petition is reinstated and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order in which Family Court sua sponte dismissed his petition seeking modification of a prior custody and visitation order. As a preliminary matter, inasmuch as the order did not determine a motion made on notice, it is not appealable as of right (*see Sholes v Meagher*, 100 NY2d 333, 335 [2003]; *Matter of Walker v Bowman*, 70 AD3d 1323, 1323 [4th Dept 2010]). Although the father did not seek leave to appeal, under the circumstances of this case we treat the notice of appeal as an application for leave to appeal and grant the application in the interest of justice (*see Matter of Majuk v Carbone*, 129 AD3d 1485, 1486 [4th Dept 2015]; *Walker*, 70 AD3d at 1323-1324; *see generally* CPLR 5701 [c]).

Here, the father sought to modify the prior order, which provided that he was entitled to supervised visitation with the subject child "under such circumstances and conditions as the parties can mutually agree." In support of his petition, the father alleged that, since the entry of the prior order, there had been a change of circumstances inasmuch as respondent mother had not allowed the father to have any contact with the child, it had been three years since the last such contact, the mother had alienated the child from the father, and the father had been incarcerated. The father thus requested "correspondence with the child" and "supervised visitation to

reconnect with the child." The court determined that it could not grant supervised visitation to which the father was already entitled and, in dismissing the petition without prejudice to file an enforcement petition, the court apparently took the view that modification of the prior order was not available under the circumstances herein. That was error.

Although "[a] court cannot delegate its authority to determine visitation to either a parent or a child" (*Matter of Merkle v Henry*, 133 AD3d 1266, 1268 [4th Dept 2015] [internal quotation marks omitted]), it may order visitation as the parties may mutually agree so long as such an arrangement is not untenable under the circumstances (*see Matter of Pierce v Pierce*, 151 AD3d 1610, 1611 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]; *Matter of Thomas v Small*, 142 AD3d 1345, 1345-1346 [4th Dept 2016]; *Matter of Alleyne v Cochran*, 119 AD3d 1100, 1102 [3d Dept 2014]; *cf. Matter of Michael B. v Dolores C.*, 113 AD3d 517, 518 [1st Dept 2014]; *Matter of Nicolette I. [Leslie I.]*, 110 AD3d 1250, 1255 [3d Dept 2013]). Where, as here, a prior order provides for visitation as the parties may mutually agree, a party who is unable to obtain visitation pursuant to that order "may file a petition seeking to enforce or modify the order" (*Pierce*, 151 AD3d at 1611; *see Thomas*, 142 AD3d at 1346; *Matter of Moore v Kazacos*, 89 AD3d 1546, 1547 [4th Dept 2011], *lv denied* 18 NY3d 806 [2012]).

We agree with the father that the court erred in dismissing the modification petition without a hearing inasmuch as the father made "a sufficient evidentiary showing of a change in circumstances to require a hearing" (*Matter of Gelling v McNabb*, 126 AD3d 1487, 1487 [4th Dept 2015] [internal quotation marks omitted]). Contrary to the mother's contention, upon giving the petition a liberal construction, accepting the facts alleged therein as true, and according the father the benefit of every favorable inference (*see Matter of Machado v Tanoury*, 142 AD3d 1322, 1323 [4th Dept 2016]; *see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that the father adequately alleged a change of circumstances insofar as the visitation arrangement based upon mutual agreement was no longer tenable given that the mother purportedly denied the father any contact with the child (*see Gelling*, 126 AD3d at 1487-1488). In addition, we note that, although the father is now incarcerated, there is a rebuttable presumption that visitation is in the child's best interests (*see Matter of Fewell v Ratzel*, 121 AD3d 1542, 1542 [4th Dept 2014]; *see generally Matter of Brown v Divelbliss*, 105 AD3d 1369, 1369-1370 [4th Dept 2013]). We therefore reverse the order, reinstate the petition, and remit the matter to Family Court for a hearing thereon.

Entered: March 23, 2018 Mark W. Bennett
Clerk of the Court

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

1537
CA 17-00578
PRESENT: SMITH, J.P., CARNI, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

ALICE ELAINE SWEETMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SONJA G. SUHR, DEFENDANT-RESPONDENT.

NIXON PEABODY LLP, ROCHESTER (DAVID H. TENNANT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PHETERSON SPATORICO LLP, ROCHESTER (DERRICK A. SPATORICO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered June 2, 2016. The order granted defendant's motion for a trial order of dismissal and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the complaint is reinstated and judgment is ordered in accordance with the following memorandum: Plaintiff's son was murdered in the State of Texas by a contract killer hired by the son's ex-wife. Plaintiff thereafter received a portion of her son's life insurance proceeds, and she deposited these funds in a bank account for the benefit of her son's now fatherless daughter. Before plaintiff traveled to Texas to testify at the capital murder trial of her late son's ex-wife, plaintiff added her husband, nonparty John C. Suhr (John), to the bank account as a matter of convenience to protect the money meant for her granddaughter. Plaintiff added John to the bank account because she feared retaliation while in Texas for the murder trial.

John, however, had a long outstanding child support judgment from 1995 against him in favor of his ex-wife (defendant). It is undisputed that plaintiff had nothing to do with this debt, and that she was not liable for it. Upon discovering the bank account in John's name, the Monroe County Office of Child Support Enforcement issued a property execution in favor of defendant and removed the funds necessary to satisfy the judgment, which by that point consisted of more interest than principal.

Plaintiff then commenced this action for money had and received, alleging that defendant possessed money that belonged to her and that, in equity and good conscience, defendant should not be permitted to retain the funds. Supreme Court, inter alia, granted plaintiff's

ensuing motion for summary judgment on the complaint, but we modified that order by denying the motion on appeal (*Sweetman v Suhr*, 126 AD3d 1438 [4th Dept 2015]). At a subsequent nonjury trial, the court granted defendant's motion for a trial order of dismissal and dismissed the complaint, citing the statutory presumption set forth in Banking Law § 675. We now reverse.

Following a nonjury trial, the Appellate Division has "authority . . . as broad as that of the trial court . . . and . . . may render the judgment it finds warranted by the facts" (*Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]). Here, we conclude that judgment should be rendered in favor of plaintiff, not defendant. Plaintiff's claim for money had and received "sounds in quasi contract and arises when, in the absence of an agreement, one party possesses money [that belongs to another and] that in equity and good conscience it ought not retain" (*Gillon v Traina*, 70 AD3d 1443, 1444 [4th Dept 2010], *lv denied* 14 NY3d 711 [2010] [internal quotation marks omitted]). The evidence at trial establishes that defendant possesses funds that were obtained from plaintiff's bank account to satisfy John's debt. The record further establishes, however, that John neither provided nor owned any of the funds in the account. Although John's name was eventually placed on the account along with plaintiff's, the uncontradicted evidence establishes that plaintiff added John's name solely as a matter of convenience, i.e., to allow John to write checks and administer the account on behalf of plaintiff's granddaughter should tragedy befall plaintiff while she attended the capital murder trial in Texas. It is clear from plaintiff's actions that she did not intend to grant John a present personal interest in its funds. Thus, the funds in the account belonged solely to plaintiff (*see Matter of Friedman*, 104 AD2d 366, 367 [2d Dept 1984], *affd* 64 NY2d 743 [1984]; *Matter of Camarda*, 63 AD2d 837, 838-839 [4th Dept 1978]; *see generally Matter of Harrison*, 184 AD2d 42, 45 [3d Dept 1992]), and defendant may not, in equity and good conscience, retain such funds in payment of a debt that plaintiff did not owe. Indeed, the equities weigh even stronger in plaintiff's favor given that the funds constituted life insurance proceeds from the murder of plaintiff's son, which were being held by plaintiff for the benefit of his fatherless daughter.

Contrary to defendant's contention, we did not determine in the prior appeal that the evidence was legally insufficient to sustain plaintiff's burden on her claim for money had and received. Rather, we determined only that there were triable questions of fact with respect to that claim (*Sweetman*, 126 AD3d at 1440). The trial has now occurred, and the evidence preponderates decidedly in plaintiff's favor.

Furthermore, and contrary to the court's determination, the presumption of joint account-ownership found in Banking Law § 675 does not apply. In the prior appeal, we explicitly stated that this particular "statutory presumption . . . does not apply" under these circumstances (*id.* at 1439 [internal quotation marks omitted]). That ruling is the law of the case, and the court therefore erred in

dismissing the complaint based on the very statutory presumption that we held inapplicable in the prior appeal (*see Martin v City of Cohoes*, 37 NY2d 162, 165 [1975], *rearg denied* 37 NY2d 817 [1975]).

In light of the foregoing, we reverse the order, deny the motion for a trial order of dismissal, reinstate the complaint and direct judgment in favor of plaintiff in the sum of $58,814.64, together with interest from March 26, 2012.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

1553
CA 17-00074
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND WINSLOW, JJ.

RALFAEL CASTRO, PLAINTIFF-RESPONDENT,

V — MEMORANDUM AND ORDER

ADMAR SUPPLY COMPANY, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

BERGEN & SCHIFFMACHER, LLP, BUFFALO (JOSEPH R. BERGEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered March 14, 2016. The order, among other things, denied defendant's motion for a protective order.

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

Same memorandum as in *Castro v Admar Supply Company, Inc*. ([appeal No. 2] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

1554
CA 17-00170

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

RALFAEL CASTRO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ADMAR SUPPLY COMPANY, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

BERGEN & SCHIFFMACHER, LLP, BUFFALO (JOSEPH R. BERGEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered November 30, 2016. The order, among other things, denied in part defendant's motion to, among other things, compel plaintiff to provide authorizations for certain records.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion to the extent that plaintiff is directed to submit to Supreme Court, for the five years preceding the accident, medical and pharmacy records related to the body parts allegedly injured in the accident, including any treatment for head or brain injuries; educational records relating to learning, attention, or cognitive difficulties; and medical or treatment records relating to drug and/or alcohol abuse and mental health, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained when he was struck by defendant's aerial lift while he and defendant's former employee were moving the lift. In his bill of particulars, plaintiff alleged that he suffered injuries to his head, neck, back, shoulders, hands, right arm, right knee, and left leg, and he stated that he sought damages for "pain and suffering, past, present, and future; permanency of his injuries and conditions, loss of enjoyment of life and loss of earnings." In appeal No. 1, defendant appeals from an order that denied its motion for a protective order. In appeal No. 2, defendant appeals from an order that, inter alia, denied those parts of its subsequent motion (second motion) seeking to compel plaintiff to provide authorizations for certain records, and to dismiss the complaint or suppress the deposition testimony of defendant's former employee on the ground that plaintiff violated a prior discovery order by deposing the former employee prior to

defendant's deposition of plaintiff.

We reject defendant's contention in appeal No. 1 that Supreme Court erred in denying that part of its motion for a protective order preventing plaintiff's counsel from speaking with defendant's former employee outside of his deposition on the ground that such communication would violate the attorney-client privilege. "It is well settled that the court is invested with broad discretion to supervise discovery . . . , and only a clear abuse of discretion will prompt appellate action" (*Mosey v County of Erie*, 148 AD3d 1572, 1573 [4th Dept 2017] [internal quotation marks omitted]; *see Hann v Black*, 96 AD3d 1503, 1504 [4th Dept 2012]). Where, as here, a party seeks a protective order under the attorney-client privilege, "the burden of establishing any right to protection is on the party asserting it" (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]; *see generally Cascardo v Cascardo*, 136 AD3d 729, 730 [2d Dept 2016]), and we conclude that the court did not abuse its discretion in denying defendant's motion. Even assuming, arguendo, that the attorney-client privilege extends to communications between counsel for a corporation and a former employee of that corporation, we conclude that the boilerplate claims of privilege asserted in defendant's moving papers were insufficient to establish the existence of confidential communications between counsel and the former employee for the purpose of rendering or facilitating the rendition of legal advice or services (*see Matter of Priest v Hennessy*, 51 NY2d 62, 68-69 [1980]; *see also Nicastro v New York Cent. Mut. Fire Ins. Co.*, 117 AD3d 1545, 1546 [4th Dept 2014], *lv dismissed* 24 NY3d 998 [2014]).

We reject defendant's further contention in appeal No. 1 that the court erred in denying that part of its motion for a protective order preventing plaintiff's counsel from deposing defendant's former employee before defendant deposed plaintiff. As a general rule, a defendant has priority of depositions where notice of the deposition of a party is served before the time to answer has expired (*see Serio v Rhulen*, 29 AD3d 1195, 1196 [3d Dept 2006]; *see also* CPLR 3106 [a], [b]). The "examination of a former employee of a party[, however,] is not examination of that party through the former employee" (*McGowan v Eastman*, 271 NY 195, 198 [1936]). Inasmuch as defendant's former employee is not a party, defendant does not have priority of depositions with respect to the former employee, and thus the court did not err in denying defendant's motion for a protective order preventing plaintiff's counsel from deposing defendant's former employee before defendant deposed plaintiff. For the same reason, contrary to defendant's contention in appeal No. 2, the court did not err in denying that part of the second motion seeking to dismiss the complaint or preclude the deposition of defendant's former employee on the ground that plaintiff improperly deposed the former employee before defendant deposed plaintiff.

Defendant further contends in appeal No. 2 that the court erred in denying that part of its second motion seeking to compel plaintiff to provide unrestricted authorizations for his preaccident medical records, drug and alcohol treatment and mental health treatment records, pharmaceutical records, and employment and school records.

Contrary to defendant’s contention, the allegations in plaintiff’s bill of particulars are not so broad “ ‘that they place plaintiff’s entire medical history in controversy’ ” (*Reading v Fabiano* [appeal No. 2], 126 AD3d 1523, 1524 [4th Dept 2015]; *see Schlau v City of Buffalo*, 125 AD3d 1546, 1547-1548 [4th Dept 2015]; *Tabone v Lee*, 59 AD3d 1021, 1022 [4th Dept 2009]). Plaintiff, in commencing a personal injury action, waived “the physician/patient privilege only with respect to the physical and mental conditions [that he] affirmatively placed in controversy” (*Mayer v Cusyck*, 284 AD2d 937, 937 [4th Dept 2001]), and not with respect “to information involving unrelated illnesses and treatments” (*Schlau*, 125 AD3d at 1548 [internal quotation marks omitted]).

We agree with defendant, however, that plaintiff’s preaccident medical and pharmacy records, insofar as they relate to the body parts and conditions at issue in the action, may contain relevant information about preexisting conditions and thus may be material and necessary in defense of the action (*see Boyea v Benz*, 96 AD3d 1558, 1560 [4th Dept 2012]; *Rothstein v Huh*, 60 AD3d 839, 839-840 [2d Dept 2009]). We further agree with defendant that plaintiff affirmatively placed his mental health and cognitive condition in issue by alleging in his bill of particulars that, as a result of the accident, he suffered from “concussion and post-concussion syndrome,” “sleep disorder,” and “cognitive communication deficit,” and by providing an affirmative answer when asked whether he had any cognitive difficulties before the concussion that resulted from the accident (*see Rothstein*, 60 AD3d at 839-840). Thus, we conclude that plaintiff’s medical and pharmacy records, including records for mental health and drug and alcohol treatment, are material and necessary in defense of the action, and are therefore discoverable. Disclosure, however, shall be limited to those records for the five years preceding the accident, and the records “should not be released to defendant[] until the court has conducted an in camera review thereof, so that irrelevant information is redacted” (*Nichter v Erie County Med. Ctr. Corp.*, 93 AD3d 1337, 1338 [4th Dept 2012]; *see Donald v Ahern*, 96 AD3d 1608, 1610-1611 [4th Dept 2012]). We therefore modify the order in appeal No. 2 accordingly, and we remit the matter to Supreme Court for an in camera review of the records.

Finally, we have considered defendant’s remaining contention, and we conclude that defendant failed to make the requisite showing that plaintiff’s school and employment records contain information that is relevant and material to the injuries in question, or that those records “may contain information reasonably calculated to lead to relevant evidence” (*Bozek v Derkatz*, 55 AD3d 1311, 1312 [4th Dept 2008] [internal quotation marks omitted]; *see Helmer v Draksic*, 38 AD3d 1297, 1298 [4th Dept 2007]; *see also* CPLR 3101 [a]).

Entered: March 23, 2018 Mark W. Bennett
Clerk of the Court

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

13
CA 17-01421
PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, AND TROUTMAN, JJ.

DARWIN HALE, JR., INDIVIDUALLY AND AS PARENT
AND NATURAL GUARDIAN OF JEFFERY HALE, A MINOR,
PLAINTIFF-RESPONDENT,

V   MEMORANDUM AND ORDER

HOLLEY CENTRAL SCHOOL DISTRICT, DEFENDANT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (JODY E. BRIANDI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF MARK A. YOUNG, ESQ., ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered April 18, 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 reversed on the law without costs, the motion is granted, and the complaint is dismissed.

Memorandum: Plaintiff commenced this action, individually and on behalf of his son, a ninth-grade student at defendant's high school. Plaintiff's son was injured in April 2012 when an 11th-grade classmate unexpectedly walked up behind him before gym class and put him in a choke hold, causing him to lose consciousness and fall face-first against the floor. We agree with defendant that Supreme Court erred in denying its motion for summary judgment dismissing the complaint.

It is well established that "[s]chools are under a duty to adequately supervise the students in their charge[,] and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *see Brandy B. v Eden Cent. Sch. Dist.*, 15 NY3d 297, 302 [2010]). "Schools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students; therefore, schools are not to be held liable 'for every thoughtless or careless act by which one pupil may injure another' " (*Mirand*, 84 NY2d at 49). "In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that

is, that the third-party acts could reasonably have been anticipated" (*id.*; *see Brandy B.*, 15 NY3d at 302). "Actual or constructive notice to the school of prior similar conduct is generally required because, obviously, school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily" (*Mirand*, 84 NY2d at 49). Thus, "an injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act" (*id.*). "Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B.*, 15 NY3d at 302, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Here, defendant met its initial burden on its motion by establishing that it did not have "sufficiently specific knowledge or notice of the dangerous conduct which caused injury" such that the classmate's acts "could reasonably have been anticipated" (*Mirand*, 84 NY2d at 49), and plaintiff failed to raise a triable issue of fact (*see generally Alvarez*, 68 NY2d at 324). Defendant's submissions, including the deposition testimony of plaintiff's son and the classmate, established that there were no prior incidents and no history of any animosity between the two students (*see DeMunda v Niagara Wheatfield Bd. of Educ.*, 213 AD2d 975, 976 [4th Dept 1995]). Indeed, the classmate testified that he intended only to "horse around" and that he "[d]idn't mean anything by it." Moreover, the classmate had never engaged in disorderly, insubordinate, disruptive, or violent conduct in any of the gym teacher's classes prior to the subject incident. Contrary to plaintiff's contention and the court's determination, we agree with defendant that the classmate's overall disciplinary record is insufficient to create an issue of fact whether the subject incident could reasonably have been anticipated. Although the classmate had an extensive disciplinary history, the majority of the incidents involved insubordinate and disruptive behavior, and the instances of violent and endangering conduct occurred when the classmate was in sixth through eighth grade, with his last citation for violent conduct occurring in April 2009, i.e., three years prior to the subject incident when the classmate was in 11th grade (*see Morman v Ossining Union Free Sch. Dist.*, 297 AD2d 788, 789 [2d Dept 2002]). We thus conclude that the classmate's prior violent and endangering conduct was too remote to provide defendant with sufficiently specific knowledge or notice that the classmate posed a danger to other students in gym class (*see Jake F. v Plainview-Old Bethpage Cent. Sch. Dist.*, 94 AD3d 804, 805-806 [2d Dept 2012]; *Morman*, 297 AD2d at 789; *Malik v Greater Johnstown Enlarged Sch. Dist.*, 248 AD2d 774, 776 [3d Dept 1998]; *DeMunda*, 213 AD2d at 976).

We further agree with defendant that the single, dissimilar previous incident that occurred in March 2012 in which two different students engaged in consensual choking is insufficient to raise an issue of fact whether the classmate's nonconsensual, unexpected choking of plaintiff's son in gym class could reasonably have been

anticipated (*see Hernandez v Board of Educ. of City of New York*, 302 AD2d 493, 493 [2d Dept 2003]; *Velez v Freeport Union Free Sch. Dist.*, 292 AD2d 595, 596 [2d Dept 2002]; *Malik*, 248 AD2d at 776). The email written by the principal, which was submitted by plaintiff in opposition to the motion, merely confirmed that defendant was aware of only one previous incident of choking in the school before the subject incident. Indeed, if the single, consensual choking incident between different students occurring approximately one month before the subject incident could place defendant on notice of any spontaneous, nonconsensual choking between students throughout the high school, defendant would unreasonably be expected "to continuously supervise and control all movements and activities of students" (*Mirand*, 84 NY2d at 49).

Finally, we agree with defendant that the court erred in determining that there is an issue of fact precluding summary judgment based upon the mixed grade levels in the gym class and, relatedly, the size differences between plaintiff's son and the classmate. The evidence established that it was common for students to wait in the gym until all students exited the locker room before class began. The gym teacher usually would be in his office during this readying time period because his office had doors leading directly to both the gym and the locker room, which allowed him to monitor both areas simultaneously. Despite the mixed grade levels and the corresponding differences in age and physical characteristics of the students, the record establishes that there were no problems at all in that gym class before the subject incident. Thus, unlike cases in which there is a history of dangerous conduct occurring in a particular class that is similar to the injury-causing conduct at issue, we conclude that there is nothing in this record that provided defendant or its gym teacher with specific knowledge or notice of dangerous circumstances or conduct occurring during the readying time period prior to commencement of gym class (*cf. Schirmer v Board of Educ. of Spencerport Cent. Sch. Dist.*, 34 AD3d 1356, 1357 [4th Dept 2006]; *Maynard v Board of Educ. of Massena Cent. Sch. Dist.*, 244 AD2d 622, 623 [3d Dept 1997]; *see generally Brandy B.*, 15 NY3d at 302).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

18
CA 17-01228
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

JUN W. CARNEY, PLAINTIFF-RESPONDENT,

V — OPINION AND ORDER

PATRICK J. CARNEY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, APPELLANT.
(APPEAL NO. 1.)

HARRIS BEACH PLLC, PITTSFORD (SVETLANA K. IVY OF COUNSEL), FOR DEFENDANT-APPELLANT AND APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

CHIEF DEFENDERS ASSOCIATION OF NEW YORK, ALBANY (JAMES A. HOBBS OF COUNSEL), AND THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO, FOR CHIEF DEFENDERS ASSOCIATION OF NEW YORK, AMICI CURIAE.

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered June 29, 2017. The order, among other things, directed that the court had authority to impute income to defendant in determining his eligibility for assigned counsel and further directed that a hearing be held to determine his eligibility.

It is hereby ORDERED that said appeal insofar as taken by Timothy P. Donaher is unanimously dismissed and the order is reversed on the law without costs, the motion is granted, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following opinion by PERADOTTO, J.:

In these consolidated appeals, we must determine whether courts may impute income to a party in determining the party's eligibility for assigned counsel. We hold that courts have no such authority.

I

Plaintiff and defendant are the divorced parents of two children. Following the divorce, plaintiff was awarded sole legal custody and primary physical residence of the children. Plaintiff subsequently filed several motions seeking a finding of contempt against defendant for his disobedience of prior orders of Supreme Court. Although the matter proceeded to trial in January 2015, the parties settled the dispute by an oral stipulation in which defendant admitted that he willfully violated a prior order by having contact with the children,

providing them with phones, and having face-to-face and telephonic communication with them. The court sentenced defendant to five consecutive jail weekends followed by one work weekend. The parties agreed to further restrictions on defendant's access to the children, including scheduled periods of supervised visitation. The oral stipulation was subsequently entered as a written order (hereafter, stipulated order).

According to plaintiff, defendant thereafter filed a petition in Family Court in May 2015 seeking sole custody of the children, but that petition was dismissed. Defendant moved by order to show cause in October 2015 to modify the terms of the stipulated order by granting joint custody of the children and primary physical residence with him or, alternatively, unsupervised visitation, but he subsequently limited that request to changing his visitation from supervised to unsupervised. The court granted plaintiff's motion to dismiss defendant's application, and this Court affirmed the order (*Carney v Carney*, 151 AD3d 1912, 1912 [4th Dept 2017], *lv dismissed* 30 NY3d 1012 [2017]).

In April 2016, defendant filed a petition in Family Court seeking to modify the stipulated order by removing the supervised visitation restriction and obtaining custody and primary physical residence of the children. Defendant was assigned a public defender in Family Court. Plaintiff subsequently moved in Supreme Court by order to show cause filed in June 2016 seeking, among other things, an order adjudicating defendant in contempt for his continued disobedience of the court's prior orders, sentencing defendant to an appropriate period of incarceration, and modifying defendant's visitation to "eliminate all rights of visitation and all rights of communication with [the] children."

During a subsequent appearance before Supreme Court, defendant appeared pro se and requested that counsel be appointed for him given his status as an unemployed graduate student and his lack of a full-time job. Defendant admitted that his living expenses were "next to nothing," except for his car payment and insurance, because he had been residing with his parents for 6½ years. The court expressed reservation about appointing counsel because of defendant's advanced degree and demonstrated "high level of skills," stated that its "obligation is to protect the taxpayers of this state," and questioned whether it could impute income to defendant before making a decision on his request for assigned counsel. The court reserved decision on defendant's request and scheduled a hearing, and it also transferred defendant's April 2016 petition from Family Court.

Following correspondence in which the Monroe County Public Defender's Office informed the court that defendant qualified for assigned counsel under the applicable eligibility guidelines, the court responded with further questions and thereafter requested a formal motion for the assignment of counsel. Defendant then moved ex parte for an order assigning counsel pursuant to County Law § 722, which he supported with an affirmation from an assistant public defender and several exhibits. The assistant public defender affirmed

that the Public Defender's Office had evaluated defendant's financial circumstances in determining his eligibility for assigned counsel, and asserted that the court was precluded from considering defendant's potential income in determining whether to assign counsel. The motion was thereafter the subject of a lengthy oral argument.

By the order in appeal No. 1, the court concluded that it had the authority to impute income to defendant in determining his eligibility for assigned counsel and that a hearing was required to determine the appropriate amount of income to impute to defendant (*Carney v Carney*, 54 Misc 3d 411, 414-436 [Sup Ct, Monroe County 2016]). As relevant here, the court reasoned that the legislature adopted an " 'unable to retain counsel' standard to assure representation at public expense to those in real need, but not [to] extend that precious right to litigants who, by choice, intentionally limit their income to avail themselves of publicly financed legal services" (*id.* at 417). With respect to the right to assigned counsel under the Family Court Act and other statutes for a party who "is financially unable to obtain" counsel (Family Ct Act § 262 [a]), the court held that the term "unable" meant "incapable" of paying counsel, and that the legislature intended for courts to consider "not what an individual is doing now, but what he [or she] is *capable* of doing now," which suggested an inquiry into the individual's "employment potential—the current capability to earn sums that exceed poverty limits—before assigning counsel" (*Carney*, 54 Misc 3d at 418). The court further determined that there is no authority restricting its ability to impute income to an applicant for assigned counsel (*id.* at 426), and that the imputation of income concept in the area of spousal maintenance and child support was likewise justified by public policy in the context of assigned counsel (*id.* at 429). The court then created a framework for an adversarial hearing by, among other things, appointing the Public Defender's Office to represent defendant for the limited purpose of supporting his application for assigned counsel and appointing special counsel to present the facts in favor of imputation (*id.* at 432-435). Finally, the court sought to limit the reach of its decision by urging that it "should not be read outside its current facts, in this a civil case context" (*id.* at 436). The court thus ordered an evidentiary hearing to determine defendant's eligibility for assigned counsel based on any imputed income.

Following further proceedings and the evidentiary hearing, the court issued the order in appeal No. 2 in which it determined that $50,000 in income should be imputed to defendant and that defendant is not eligible for the appointment of counsel in the pending proceeding (*Carney v Carney*, 55 Misc 3d 1220[A], 2017 NY Slip Op 50667[U], *16 [Sup Ct, Monroe County 2017]).

Defendant and Timothy P. Donaher, the Monroe County Public Defender, appeal from each order.

II

As a preliminary matter, we note that the order in appeal No. 1

is not appealable as of right inasmuch as it did not decide a motion made on notice (*see* CPLR 5701 [a] [2]; *Sholes v Meagher*, 100 NY2d 333, 335 [2003]) and instead merely directed a hearing to aid in the disposition of a motion (*see* CPLR 5701 [a] [2] [v]; *Matter of Martin [Henderson-Johnson Co., Inc.]*, 71 AD3d 1503, 1503 [4th Dept 2010]; *Howell v Independent Union of Plant Protection Empls.*, 112 AD2d 754, 754 [4th Dept 1985]). Nevertheless, under the limited circumstances of this case, we treat the notice of appeal in appeal No. 1 as an application for leave to appeal and grant the application in the interest of justice (*see Dreher v Martinez*, 155 AD3d 688, 689 [2d Dept 2017]; *Hurd v Hurd*, 66 AD3d 1492, 1493 [4th Dept 2009]; *Bergner v Bergner*, 170 AD2d 421, 422 [2d Dept 1991]; *see generally* CPLR 5701 [c]; *City of Buffalo Urban Renewal Agency v Moreton*, 100 AD2d 20, 21 [4th Dept 1984]).

As a further preliminary matter, we conclude that the appeals insofar as taken by Donaher must be dismissed inasmuch as he is not an "aggrieved party" and thus is not a proper appellant (CPLR 5511). A party is aggrieved when he or she " 'has a direct interest in the controversy which is affected by the result' and [when] 'the adjudication has a binding force against the rights, person or property of the party' " (*Matter of DeLong*, 89 AD2d 368, 370 [4th Dept 1982], *lv denied* 58 NY2d 606 [1983]). "The fact that the adjudication 'may remotely or contingently affect interests which [the party] represents does not give [it] a right to appeal' " (*id.*). Here, Donaher has no direct interest in the controversy between plaintiff and defendant, and the fact that the court's determinations may contingently affect interests that Donaher and his office represent does not give him a right to appeal. "The fact that the [decisions] contain[] language or reasoning that [Donaher] deems adverse to his interests does not provide him with 'a basis for standing to take an appeal' " (*Matter of Cooper v Cooper*, 74 AD3d 1868, 1869 [4th Dept 2010], quoting *Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 472-473 [1986]).

III

New York State law recognizes that "[p]ersons involved in certain family court proceedings may face the infringements of fundamental interests and rights, including the loss of a child's society and the possibility of criminal charges, and therefore have a constitutional right to counsel in such proceedings" (Family Ct Act § 261). As pertinent here, any person seeking custody of his or her child or "contesting the substantial infringement of his or her right to custody of such child" (§ 262 [a] [v]), as well as "any person in any proceeding before the court in which an order . . . is being sought to hold such person in contempt of the court or in willful violation of a previous order of the court" (§ 262 [a] [vi]), has "the right to have counsel assigned by the court in any case where he or she is financially unable to obtain the same" (§ 262 [a]; *see* County Law § 722; Judiciary Law § 770; *Matter of Bly v Hoffman*, 114 AD3d 1275, 1275 [4th Dept 2014]; *Matter of Kissel v Kissel*, 59 AD2d 1036, 1036 [4th Dept 1977]; *see generally Matter of Jung [State Commn. on Jud.*

Conduct], 11 NY3d 365, 373 [2008]). Where, as here, Supreme Court exercises jurisdiction over a matter over which Family Court might have exercised jurisdiction had the proceeding been commenced there, Supreme Court must appoint counsel if required under Family Court Act § 262 (*see* Judiciary Law § 35 [8]).

In that context, the court is statutorily obligated to advise a person of "the right to be represented by counsel of his or her own choosing, of the right to have an adjournment to confer with counsel, and of the right to have counsel assigned by the court in any case where he or she is financially unable to obtain the same" (Family Ct Act § 262 [a]). "Where a party indicates an inability to retain private counsel, the court must make inquiry to determine whether the party is eligible for court-appointed counsel" (*Matter of Bader v Hazzis*, 77 AD3d 742, 744 [2d Dept 2010]; *see Matter of Otto v Otto*, 26 AD3d 498, 499-500 [2d Dept 2006]). In fulfilling that obligation, the court may inquire into the person's financial circumstances, including, but not limited to, his or her income, expenses, obligations and other relevant financial information (*see Matter of Pugh v Pugh*, 125 AD3d 663, 664 [2d Dept 2015]; *People v Lincoln*, 158 AD2d 545, 546 [2d Dept 1990]) and, in furtherance of that inquiry, the court may require the submission of documentation (*see Matter of Moiseeva v Sichkin*, 129 AD3d 974, 975 [2d Dept 2015]).

Here, the submissions in support of the motion for the assignment of counsel establish that, as of June 30, 2016, defendant was a Ph.D. candidate at Binghamton University, lived with his parents, was unemployed beyond some tutoring jobs while school was in session, did not own any real property, and owned a 14-year-old car that recently required an expensive repair. Defendant's tax returns and bank statements further confirmed a lack of income and assets. In light of these financial circumstances—the accuracy of which were not disputed (*cf. Cohen v Cohen*, 33 Misc 3d 448, 451-452 [Sup Ct, Nassau County 2011])—defendant qualified for assigned counsel pursuant to the Public Defender's Office eligibility guidelines.

IV

Notwithstanding the foregoing, the court concluded that it had the authority to impute income to defendant in determining his eligibility and, upon imputing income to him, denied his motion for assigned counsel. We agree with defendant and the amici public defender organizations that the court had no authority to deprive defendant of his constitutional and statutory right to counsel on the basis of imputed income, and it therefore lacked the authority to conduct a hearing on that issue, requiring reversal of the order in appeal No. 1 and vacatur of the order in appeal No. 2 (*see generally City of Buffalo Urban Renewal Agency*, 100 AD2d at 26).

A

Addressing first the statutory language, we observe that the legislature has used the same phrase throughout New York State law to

designate when a person is entitled to court-appointed, state-financed counsel, i.e., the person is "financially unable to obtain" counsel (Family Ct Act § 262 [a]; *see* County Law § 722; CPL 180.10 [3] [c]; Judiciary Law § 35 [1]; *see also* Correction Law § 168-d [2]). Thus, contrary to the court's assertion, interpretation of that language implicates the appointment of counsel in both civil and criminal matters. We agree with defendant that a plain reading of the phrase "is financially unable to obtain" counsel (Family Ct Act § 262 [a]), which is written in the present tense, evinces that the requisite inquiry must relate to the person's present financial ability to pay for counsel. That interpretation is logically and legally cogent because the concern addressed in the relevant legislation is whether a party *currently possesses* the financial ability to obtain private counsel to represent him or her in the immediate, impending legal proceeding, not whether the party *should have* such an ability or *may have* such an ability in the future (*see generally People v Simmons*, 31 NY2d 997, 997-998 [1973]; *Matter of DeMarco v Raftery*, 242 AD2d 625, 626 [2d Dept 1997]). Moreover, contrary to the court's determination, Family Court Act § 261 expressly states that the purpose of sections 261 and 262 "is to provide a means for implementing the right to assigned counsel for *indigent* persons in proceedings under this act" (§ 261 [emphasis added]; *see generally* Bill Jacket, L 1975, ch 682, § 2). Thus, to the extent that the court properly suggested that the use of the word "indigent" would imply a present financial status (*see Carney*, 54 Misc 3d at 418 n 7), its use by the legislature in classifying the persons to whom the right of assigned counsel is provided under the statute further supports the conclusion that the phrase "is financially unable to obtain" counsel (Family Ct Act § 262 [a]) demands an inquiry into the person's present and actual financial ability to afford an attorney, not an inquiry into the person's potential employment capacity or hypothetical income.

B

In determining that imputation of income was justified in evaluating eligibility for assigned counsel, the court held that the "fusion" of the imputed income concept from the Domestic Relations Law into the application for appointment of counsel under other statutes was justified by public policy (*see Carney*, 54 Misc 3d at 429). The court reasoned that, if a court may impute income to a party in the spousal maintenance and child support context, then the public has the same right to compel a highly-qualified party to obtain more remunerative employment before it extends free or low-cost legal services (*see id.*). We conclude that the court's analysis is flawed.

Unlike imputation of income in the context of child support or spousal maintenance, there is no statutory authority for imputing income in determining eligibility for assigned counsel. With respect to child support, Family Court Act § 413 (1) (a) imposes an affirmative duty on parents to support their children "if possessed of sufficient means or *able to earn such means*" (emphasis added). Similarly, Domestic Relations Law § 236 (B) (6) (e) (1) (b) permits courts to consider "future earning capacity" when calculating post-

divorce maintenance obligations. It is thus well established that, in determining a party's child support or spousal maintenance obligation, a court need not rely upon a party's own account of his or her finances, but may exercise its discretion by imputing income based upon such factors as the party's "education, qualifications, employment history, past income, and demonstrated earning potential" (*Lauzonis v Lauzonis*, 105 AD3d 1351, 1351 [4th Dept 2013]; *see Matter of Deshotel v Mandile*, 151 AD3d 1811, 1811-1812 [4th Dept 2017]; *Haines v Haines*, 44 AD3d 901, 902 [2d Dept 2007]; *Matter of Dukes v White*, 295 AD2d 899, 900 [4th Dept 2002]; *McCanna v McCanna*, 274 AD2d 949, 949 [4th Dept 2000]; *see also* Family Ct Act § 413 [1] [b] [5] [iv]). Family Court Act § 262 (a), by contrast, is silent on the imputation of income in the context of assigned counsel. The omission regarding imputation suggests that the legislature intended that courts consider an applicant's present financial status only, and not the potential earnings an applicant could or should be receiving in employment commensurate with his or her education and skills (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 74).

Furthermore, the court's public policy rationale is unsound. Imputing income for purposes of calculating child support or spousal maintenance is justified on the basis that the obligation imposed upon the parent or former spouse is an ongoing responsibility over a period of time and may be paid over that period (*see* Family Ct Act § 413 [1] [a]; Domestic Relations Law § 236 [B] [1] [a]; [6] [f]). Conversely, the evaluation of eligibility for assigned counsel requires a determination whether a party has presently available financial resources to pay an attorney to fulfill the immediate need for representation (*see e.g.* Family Ct Act § 262 [a]). Indeed, the legislature has specifically recognized that, in proceedings such as those in this case, "[c]ounsel is often indispensable to a practical realization of due process of law and may be helpful to the court in making reasoned determinations of fact and proper orders of disposition" (§ 261). A party cannot, however, fulfill the immediate need for representation by paying a private attorney with hypothetical, imputed income. We thus conclude that the court's reliance on cases allowing for the imputation of income in determining child support and spousal maintenance is misplaced.

C

With respect to the general concern that public funds for assigned counsel may be misused to benefit persons able to afford private counsel, we note that County Law § 722-d provides in pertinent part that, "[w]henever it appears that the defendant is financially able to obtain counsel or to make partial payment for the representation or other services, counsel may report this fact to the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to the public defender."

Furthermore, the court and plaintiff express concerns regarding the imbalance inherent in requiring plaintiff, the party in a better financial position, to pay for private counsel in order to seek

defendant's compliance with prior court orders and defend against his petitions while allowing defendant to defend against his alleged violations and assert his claims with the assistance of publicly-funded counsel (*Carney*, 54 Misc 3d at 435-436; *see Carney*, 2017 NY Slip Op 50667[U], *15). Although those concerns are worth noting under the circumstances herein, we conclude that they do not warrant the denial of defendant's motion for the assignment of counsel. Contrary to the court's determination (*see Carney*, 2017 NY Slip Op 50667[U], *15), a person facing potential jail time for willfully violating court orders has a significant stake in the proceedings, and the legislature has guaranteed an equal playing field between the parties by providing such a person with assigned counsel if he or she is financially unable to obtain private counsel (*see* Family Ct Act §§ 261, 262 [a] [vi]). Moreover, to the extent that the court is concerned that defendant could bring serial modification petitions with impunity, thereby causing plaintiff to repeatedly expend her personal funds, we note that sanctions may be imposed for frivolous conduct (*see* 22 NYCRR 130-1.1) and, in an appropriate case, a court may preclude a party from filing new petitions without permission of the court where the record establishes that the party has abused the judicial process by engaging in meritless, frivolous or vexatious litigation (*see Matter of Naclerio v Naclerio*, 132 AD3d 679, 680 [2d Dept 2015]; *Matter of Shreve v Shreve*, 229 AD2d 1005, 1006 [4th Dept 1996]; *see also Matter of Otrosinka v Hageman*, 144 AD3d 1609, 1611 [4th Dept 2016]).

V

We thus conclude that the court erred in determining that it was authorized to impute income to defendant in determining his eligibility for assigned counsel and, based upon the documentation provided by defendant indisputably establishing that he "is financially unable to obtain" counsel (Family Ct Act § 262 [a]), the court should have granted defendant's motion by the order in appeal No. 1. We note that the Public Defender's Office has previously represented that, in the event that defendant comes into greater income or assets during the course of the proceedings, the Public Defender's Office will request that the court, pursuant to County Law § 722-d, either mandate repayment by defendant or terminate the representation. Accordingly, we conclude that the order in appeal No. 1 should be reversed, defendant's motion for the assignment of counsel should be granted, and the matter should be remitted to Supreme Court for further proceedings before a different justice. In light of our determination in appeal No. 1, there is no reason to address any substantive issues in appeal No. 2 with respect to the court's calculation of imputed income following the evidentiary hearing, and we conclude that the order therein should be vacated.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

19
CA 17-01229
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

JUN W. CARNEY, PLAINTIFF-RESPONDENT,

V   OPINION AND ORDER

PATRICK J. CARNEY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, APPELLANT.
(APPEAL NO. 2.)

HARRIS BEACH PLLC, PITTSFORD (SVETLANA K. IVY OF COUNSEL), FOR DEFENDANT-APPELLANT AND APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

CHIEF DEFENDERS ASSOCIATION OF NEW YORK, ALBANY (JAMES A. HOBBS OF COUNSEL), AND THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO, FOR CHIEF DEFENDERS ASSOCIATION OF NEW YORK, AMICI CURIAE.

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered June 26, 2017. The order directed that $50,000 in income should be imputed to defendant and that defendant is not eligible for the appointment of counsel in the pending proceeding.

It is hereby ORDERED that said appeal insofar as taken by Timothy P. Donaher is unanimously dismissed and the order is vacated on the law without costs.

Same opinion as in *Carney v Carney* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

22
CA 17-00664
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

LONNIE DOTSON AND SONIA DOTSON,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

J.C. PENNEY COMPANY, INC., J.C. PENNEY CAROUSEL STORE, DAVID STANTON, INDIVIDUALLY, AND ACTING AS AGENT, SERVANT AND/OR EMPLOYEE OF J.C. PENNEY COMPANY, INC., AND ANDREW VAUGHN, INDIVIDUALLY, AND ACTING AS AGENT, SERVANT AND/OR EMPLOYEE OF J.C. PENNEY COMPANY, INC., GARY MIGUEL, CHIEF OF POLICE FOR CITY OF SYRACUSE, CITY OF SYRACUSE POLICE DEPARTMENTL, CITY OF SYRACUSE,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KRISTIN L. NORFLEET OF COUNSEL), FOR DEFENDANTS-APPELLANTS J.C. PENNEY COMPANY, INC., J.C. PENNEY CAROUSEL STORE, DAVID STANTON, INDIVIDUALLY, AND ACTING AS AGENT, SERVANT AND/OR EMPLOYEE OF J.C. PENNEY COMPANY, INC., AND ANDREW VAUGHN, INDIVIDUALLY, AND ACTING AS AGENT, SERVANT AND/OR EMPLOYEE OF J.C. PENNEY COMPANY, INC.

JOSEPH E. FAHEY, CORPORATION COUNSEL, SYRACUSE (MARY L. D'AGOSTINO OF COUNSEL), FOR DEFENDANTS-APPELLANTS GARY MIGUEL, CHIEF OF POLICE FOR CITY OF SYRACUSE, CITY OF SYRACUSE POLICE DEPARTMENT AND CITY OF SYRACUSE.

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered October 20, 2016. The order, among other things, denied in part the motion of defendants Gary Miguel, City of Syracuse Police Department and City of Syracuse for summary judgment.

Now, upon reading and filing the stipulation of discontinuance with respect to defendants J.C. Penney Company, Inc., J.C. Penney Carousel Store, David Stanton, individually, and acting as agent, servant and/or employee of J.C. Penney Company, Inc., and Andrew Vaughn, individually, and acting as agent, servant and/or employee of J.C. Penney Company, Inc. signed by counsel for those

defendants and for plaintiffs on November 22, 2017,

It is hereby ORDERED that said appeal by defendants J.C. Penney Company, Inc., J.C. Penney Carousel Store, David Stanton, individually, and acting as agent, servant, and/or employee of J.C. Penney Company, Inc., and Andrew Vaughn, individually, and acting as agent, servant, and/or employee of J.C. Penney Company, Inc. is unanimously dismissed upon stipulation, and the order is modified on the law by granting the motion of defendants Gary Miguel, Chief of Police for City of Syracuse, and City of Syracuse in its entirety, and dismissing the amended complaint against them, and as modified the order is affirmed without costs.

Memorandum: Sonia Dotson (plaintiff) and plaintiff Lonnie Dotson (Dotson) commenced this action against, inter alia, defendant J.C. Penney Company, Inc. seeking damages arising from a physical altercation in a shopping mall store on October 21, 2006. Thereafter, the complaint was amended to assert the 10th to 15th causes of action against the City of Syracuse (City) and Gary Miguel, the chief of police for the City (collectively, defendants), as well as against defendant City of Syracuse Police Department (SPD). Plaintiff was an SPD community service officer (CSO) and Dotson, her spouse, was an SPD police officer. The 10th to 15th causes of action allege, inter alia, that the SPD orchestrated the arrest and criminal prosecution of plaintiff for the shopping mall altercation in retaliation for a prior complaint of discrimination filed by plaintiff against it.

Defendants and the SPD moved to dismiss the amended complaint (complaint) against them. Supreme Court granted their motion in part, dismissed the complaint against the SPD and the 11th cause of action against defendants, and otherwise denied the motion. There was no appeal. Thereafter, defendants moved for summary judgment dismissing the remainder of the complaint against them. The court granted their motion only in part, dismissing the 10th cause of action insofar as it is based on allegations of unlawful discrimination and dismissing the remainder of the complaint against defendants insofar as it is asserted by Dotson. In appeal No. 1, defendants contend that the court should have granted their motion in its entirety and dismissed the complaint against them. We agree, and we therefore modify the order in appeal No. 1 accordingly.

We agree with defendants that the court erred in denying that part of their motion for summary judgment dismissing the retaliation-based causes of action against them. Defendants met their initial burden by demonstrating that plaintiffs failed to establish every element of retaliation (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *Clark v Thruway Fasteners, Inc.*, 100 AD3d 1435, 1435 [4th Dept 2012]), and plaintiffs failed to raise an issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). More particularly, plaintiffs failed to establish the existence of a causal connection between plaintiff's discrimination complaint and the alleged retaliatory action (*see Dotson v City of Syracuse*, 688 Fed Appx 69, 73 [2d Cir 2017]; *Howard v City of New York*, 602 Fed Appx 545, 549 [2d Cir 2015]; *see also*

Forrest, 3 NY3d at 312-313).

A plaintiff may establish causation by submitting evidence of, inter alia, temporal proximity between the protected activity and the adverse action or disparate treatment of similarly situated employees (*see Hicks v Baines*, 593 F3d 159, 170 [2d Cir 2010]). Although temporal proximity may be sufficient to establish the causation element, the relevant period is measured from the date of the "employer's knowledge of [the] protected activity" (*Clark County Sch. Dist. v Breeden*, 532 US 268, 273 [2001]; *see Kim v Columbia Univ.*, 460 Fed Appx 23, 25 [2d Cir 2012]). In support of their motion, defendants submitted plaintiff's complaint to the Equal Employment Opportunity Commission, which was dated November 4, 2003, i.e., nearly three years before the physical altercation that allegedly gave rise to the retaliatory action. Thus, to the extent that plaintiffs relied on temporal proximity to establish causation, we conclude that they failed to establish the requisite causal nexus (*see Howard*, 602 Fed Appx at 549).

Plaintiffs also failed to establish causation based upon disparate treatment of similarly situated employees. "An employee is similarly situated to [coemployees] if they were (1) 'subject to the same performance evaluation and discipline standards' and (2) 'engaged in comparable conduct' " (*Ruiz v County of Rockland*, 609 F3d 486, 493-494 [2d Cir 2010], quoting *Graham v Long Is. R.R.*, 230 F3d 34, 40 [2d Cir 2000]). Each of the employees identified by plaintiffs was a police officer, not a CSO, and thus, by plaintiffs' own admission, they were subject to different performance and discipline standards. Moreover, unlike plaintiff, none of those employees was alleged to have engaged in a physical confrontation with a civilian while off duty. We therefore conclude that plaintiffs failed to raise an issue of fact sufficient to defeat defendants' motion (*see generally Zuckerman*, 49 NY2d at 562).

In light of the above analysis, we agree with defendants that the cause of action alleging that Miguel aided and abetted the City's retaliatory acts cannot survive (*see Forrest*, 3 NY3d at 314). Furthermore, the cause of action alleging municipal liability for Miguel's conduct cannot survive absent an act taken in violation of plaintiff's constitutional rights (*see City of Los Angeles v Heller*, 475 US 796, 799 [1986]; *Curley v Village of Suffern*, 268 F3d 65, 71 [2d Cir 2001]).

Finally, in view of our determination in appeal No. 1, we dismiss the appeal from the order in appeal No. 2 as moot (*see JPMorgan Chase Bank, N.A. v Kobee*, 140 AD3d 1622, 1624 [4th Dept 2016]).

Entered: March 23, 2018 Mark W. Bennett
Clerk of the Court

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

23
CA 17-00665
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

LONNIE DOTSON AND SONIA DOTSON,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

J.C. PENNEY COMPANY, INC., ET AL., DEFENDANTS,
GARY MIGUEL, CHIEF OF POLICE FOR CITY OF SYRACUSE,
CITY OF SYRACUSE POLICE DEPARTMENT, AND CITY OF
SYRACUSE, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

JOSEPH E. FAHEY, CORPORATION COUNSEL, SYRACUSE (MARY L. D'AGOSTINO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOSMAN LAW LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered March 31, 2017. The order denied the motion of defendants-appellants seeking leave to renew their motion for summary judgment.

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

Same memorandum as in *Dotson v J.C. Penney Company, Inc.* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

56

KA 16-00326

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SIR PRINCE SOMMERVILLE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered February 8, 2016. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the second degree (Penal Law § 120.05 [2]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). 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 with respect to defendant's identity as the perpetrator (*see People v Henley*, 145 AD3d 1578, 1579 [4th Dept 2016], *lv denied* 29 NY3d 998 [2017], *reconsideration denied* 29 NY3d 1080 [2017]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The victim testified that he was well acquainted with defendant, and he identified defendant as the person who shot him. Moreover, defendant demonstrated his consciousness of guilt by attempting to bribe the victim into not testifying. The jury reasonably found defendant's exculpatory testimony incredible and rejected it (*see People v Nunez*, 147 AD3d 423, 423 [1st Dept 2017], *lv denied* 29 NY3d 951 [2017]) and, notwithstanding minor inconsistencies in the testimony of the People's witnesses, "there is no basis for disturbing the jury's determinations concerning credibility" (*People v Sykes*, 47 AD3d 501, 502 [1st Dept 2008], *lv denied* 10 NY3d 817 [2008]; *see People v McCallie*, 37 AD3d 1129, 1130 [4th Dept 2007], *lv denied* 8 NY3d 987 [2007]).

Contrary to defendant's contention, County Court responded meaningfully to a jury note requesting a readback of testimony from

the victim and the paramour of defendant's brother regarding the bribery attempt (*see generally* CPL 310.30; *People v O'Rama*, 78 NY2d 270, 276 [1991]), and it did not abuse its discretion in declining to read back a portion of the paramour's cross-examination that was not directly responsive to the jury's request. Although a meaningful response to a request for a readback of testimony "is presumed to include cross-examination which impeaches the testimony to be read back" (*People v Grant*, 127 AD3d 990, 991 [2d Dept 2015], *lv denied* 26 NY3d 968 [2015] [internal quotation marks omitted]; *see People v Berger*, 188 AD2d 1073, 1074 [4th Dept 1992], *lv denied* 81 NY2d 881 [1993]), the portion of the paramour's cross-examination at issue here did not in any way impeach her direct testimony about the bribery attempt. Thus, it cannot be said that the court abused its "significant discretion in determining the proper scope and nature of the response" to the jury's note (*People v Taylor*, 26 NY3d 217, 224 [2015]; *see People v Jones*, 297 AD2d 256, 257 [1st Dept 2002], *lv denied* 98 NY2d 769 [2002]; *cf. People v Morris*, 147 AD3d 873, 874 [2d Dept 2017]).

Defendant's remaining contention is unpreserved for our review, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

67.1
CA 17-01195
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF TOWN OF ELLERY,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION AND CHAUTAUQUA COUNTY,
RESPONDENTS-DEFENDANTS-RESPONDENTS.

THE ZOGHLIN GROUP, PLLC, ROCHESTER (MINDY L. ZOGHLIN OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (SUSAN L. TAYLOR OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION.

WEBSTER SZANYI LLP, BUFFALO (JEREMY A. COLBY OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT CHAUTAUQUA COUNTY.

Appeal from a judgment (denominated order) of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered October 24, 2016 in a hybrid CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, dismissed the amended petition/complaint of petitioner.

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

Memorandum: Petitioner-plaintiff (petitioner) commenced this CPLR article 78 proceeding and declaratory judgment action seeking annulment of permits issued by respondent-defendant New York State Department of Environmental Conservation (Department) to respondent-defendant Chautauqua County (County) in connection with the expansion of a County-operated waste management facility. Petitioner appeals from a judgment that, inter alia, dismissed the amended petition/complaint. At the outset, we reject the County's contention that the appeal must be dismissed as moot on the ground that petitioner did not seek a stay of construction inasmuch as the County failed to establish that construction has been substantially completed (*see Matter of Vector Foiltec, LLC v State Univ. Constr. Fund*, 84 AD3d 1576, 1577 [3d Dept 2011], *lv denied* 17 NY3d 716 [2011]; *Matter of Mirabile v City of Saratoga Springs*, 67 AD3d 1178, 1180 [3d Dept 2009]). We also reject the County's contention that the appeal should be dismissed under the doctrine of laches inasmuch as petitioner did

not neglect to assert its rights for such a period of time that it caused prejudice to the County (*see generally Matter of Schulz v State of New York*, 81 NY2d 336, 348 [1993]).

We nonetheless conclude that Supreme Court properly dismissed the amended petition/complaint. Contrary to petitioner's contention, the Department properly exercised its discretion in determining that petitioner failed to raise a substantive and significant issue warranting the commencement of the adjudicatory hearing procedure pursuant to 6 NYCRR part 624 (*see Matter of Eastern Niagara Project Power Alliance v New York State Dept. of Envtl. Conservation*, 42 AD3d 857, 859-860 [3d Dept 2007]; *see also Matter of Riverkeeper, Inc. v New York State Dept. of Envtl. Conservation*, 152 AD3d 1016, 1018-1019 [3d Dept 2017]). Petitioner contends that the Department lacked the discretion to make this determination because petitioner articulated a specific ground for opposition to the County's application that petitioner, as opposed to the Department, concluded "could lead the department to deny or impose significant conditions on the permit" (6 NYCRR 621.8 [d]). The applicable regulations, however, provide that the adjudicatory hearing procedures set forth in 6 NYCRR part 624 are triggered upon "identification *by department staff* of substantive and significant issues" (6 NYCRR 624.1 [a] [1] [emphasis added]; *see Eastern Niagara Project Power Alliance*, 42 AD3d at 859-860), regardless of whether such an issue is first raised by internal Department evaluation or public comment (*see* ECL 70-0119 [1]; 6 NYCRR 621.8 [b]). We therefore conclude that petitioner's contention that the Department acted in violation of applicable adjudicatory hearing procedure is without merit. Further, we conclude that the Department's determination that petitioner's expressed concerns did not raise substantive and substantial issues was not arbitrary and capricious (*see Riverkeeper, Inc.*, 152 AD3d at 1018-1019).

We reject petitioner's further contention that the Department failed to comply with the requirements of the State Environmental Quality Review Act (ECL art 8) in issuing the permits. The record establishes that the Department took the requisite hard look and provided a reasoned elaboration of the basis for its determination regarding the potential impacts of the expansion project on bald eagles (*see generally Akpan v Koch*, 75 NY2d 561, 570 [1990]). Petitioner's remaining contention, that the Department falsely certified that noise mitigation measures were incorporated into the permits as enforceable conditions, is improperly raised for the first time on appeal (*see Matter of Davis v Czarny*, 153 AD3d 1556, 1557 [4th Dept 2017]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

95

KA 15-01697

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LELAND JIRDON, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Supreme Court, Erie County (Sheila A. DiTullio, A.J.), rendered July 9, 2015. Defendant was resentenced to a determinate term of incarceration of five years followed by five years' postrelease supervision.

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

Memorandum: Defendant was convicted, upon his plea of guilty, of robbery in the second degree (Penal Law § 160.10 [1]), and he now appeals from a resentence with respect to that conviction. Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see People v Porterfield*, 107 AD3d 1478, 1478 [4th Dept 2013], *lv denied* 21 NY3d 1076 [2013]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]).

Although defendant validly waived his right to appeal during the plea proceeding, the waiver does not preclude his challenge to the resentence under the circumstances of this case. As a condition of his plea, defendant agreed to waive his right to appeal the conviction and sentence in exchange for the minimum lawful sentence for a second violent felony offender (*see* Penal Law §§ 70.04 [3] [b]; 70.45 [2]). After it was determined that defendant did not qualify as a predicate felon, Supreme Court—contrary to the sentencing commitment to defendant at the time of the plea and waiver of the right to appeal—resentenced defendant to a sentence greater than the minimum lawful sentence (*see* §§ 70.02 [3] [b]; 70.45 [2] [f]). Where, as here, the sentencing conditions under which a defendant agrees to waive the right to appeal change following the waiver, the defendant is not precluded by that waiver from challenging the severity of a subsequent resentence (*see People v Gray*, 32 AD3d 1052, 1053 [3d Dept 2006], *lv denied* 7 NY3d 902 [2006]; *People v Tausinger*, 21 AD3d 1181,

1183 [3d Dept 2005]; *see also People v Allen*, 97 AD3d 1164, 1164 [4th Dept 2012], *lv denied* 19 NY3d 994 [2012]). Moreover, inasmuch as "defendant was not asked [during resentencing] if he further agreed to waive his right to pursue an appeal regarding the modified terms of his sentence, he is not foreclosed from requesting appellate review of . . . the severity of the imposed sentence" (*People v Johnson*, 14 NY3d 483, 487 [2010]). We also note that "defendant's release to parole supervision does not render his challenge moot because he 'remains under the control of the Parole Board until his sentence has terminated' " (*People v Sebring*, 111 AD3d 1346, 1347 [4th Dept 2013], *lv denied* 22 NY3d 1159 [2014]; *see People v Rowell*, 5 AD3d 1073, 1074 [4th Dept 2004], *lv denied* 2 NY3d 806 [2004]). We nevertheless conclude that defendant's sentence is not unduly harsh or severe.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

104
CA 17-01368
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

HEATHER R. ODDO AND CHRISTOPHER ODDO,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, CITY OF BUFFALO POLICE
DEPARTMENT AND JAMES DUFFY,
DEFENDANTS-APPELLANTS-RESPONDENTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

R. THOMAS BURGASSER, PLLC, NORTH TONAWANDA (R. THOMAS BURGASSER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered October 28, 2016. The order denied defendants' motion for summary judgment dismissing the complaint and denied plaintiffs' cross motion for partial summary judgment on the issue of liability.

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

Memorandum: Plaintiffs commenced this action seeking to recover damages for, inter alia, injuries sustained by Heather R. Oddo (plaintiff) when the vehicle she was driving collided at an intersection with a police vehicle operated by defendant James Duffy, a police officer employed by defendant City of Buffalo Police Department (hereafter, defendant officer), while he was responding to a police call. Defendants thereafter moved for summary judgment dismissing the complaint and plaintiffs cross-moved for partial summary judgment on the issue of liability. Supreme Court denied the motion and cross motion, determining that the applicable standard of care is reckless disregard for the safety of others as set forth in Vehicle and Traffic Law § 1104 (e), and that there are triable issues of fact precluding summary judgment to either plaintiffs or defendants, including the issues whether plaintiff failed to yield the right-of-way and whether defendant officer slowed down before proceeding into the intersection. We affirm the order, but our reasoning differs from that of the court.

It is well settled that "[t]he proponent on a summary judgment motion bears the initial burden of establishing entitlement to

judgment as a matter of law by submitting evidence sufficient to eliminate any material issues of fact” (*Rice v City of Buffalo*, 145 AD3d 1503, 1504-1505 [4th Dept 2016]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). We conclude that defendants failed to meet that burden on their motion. “[T]he reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b),” and “[a]ny other injury-causing conduct of such a driver is governed by the principles of ordinary negligence” (*Kabir v County of Monroe*, 16 NY3d 217, 220 [2011]). Here, the evidence submitted by defendants established that defendant officer was responding to the scene of an accident with an injury as reported in a police call and was therefore operating an authorized emergency vehicle while involved in an emergency operation (*see* §§ 101, 114-b; *Criscione v City of New York*, 97 NY2d 152, 157-158 [2001]; *Williams v Fassinger*, 119 AD3d 1368, 1368-1369 [4th Dept 2014], *lv denied* 24 NY3d 912 [2014]). Contrary to plaintiffs’ contention, defendant officer’s deposition testimony that the police call was a “priority call,” but not a “priority one call”—an apparent reference to the police department’s response classifications—is irrelevant inasmuch as the statute does not evince any “legislative intent to vary the definition of ‘emergency operation’ based on individual police department incident classifications” (*Criscione*, 97 NY2d at 157).

The evidence submitted on defendants’ motion further established that the only specific exempt conduct in which defendant officer potentially engaged was proceeding past a steady red signal (*see* Vehicle and Traffic Law § 1104 [b] [2]). Defendants’ own submissions, however, raised a material issue of fact with respect to the color of the traffic lights facing both plaintiff and defendant officer at the intersection. Plaintiff testified at her deposition that she had a green light as she approached the intersection traveling westbound, and that account was further supported by the sworn statements of one of plaintiff’s passengers and a witness who was stopped at a red light as defendant officer was coming toward her from the opposite direction across the intersection. Conversely, defendant officer unequivocally testified at his deposition that he looked up as he approached the intersection and saw a green light controlling the southbound direction in which he was traveling.

We reject defendants’ contention that the color of the traffic light is not a material issue of fact precluding summary judgment. If the factfinder determines that defendant officer was engaged in the exempt conduct of proceeding past a steady red signal (*see* Vehicle and Traffic Law § 1104 [b] [2]), then the reckless disregard standard of care would apply under the circumstances presented herein (*see* § 1104 [e]). If, however, the factfinder credits defendant officer’s account that he was proceeding through a green light, then the alleged injury-causing conduct by defendant officer would be governed by principles of ordinary negligence (*see Kabir*, 16 NY3d at 220). Inasmuch as the resolution of that factual issue will determine the standard of care by which the factfinder must evaluate defendant officer’s conduct (*see*

Rice, 145 AD3d at 1505; *see generally* PJI 2:79A; NY PJI 2:79A, Comment, Caveat 1), we conclude that the court erred in determining on the submissions before it that the reckless disregard standard applies as a matter of law. Furthermore, the determination of the color of the traffic light at the time of the collision, and each driver's compliance with the standard of care that will apply upon resolution of that material factual issue, depends on the memory and credibility of witnesses (*see Lindgren v New York City Hous. Auth.*, 269 AD2d 299, 303 [1st Dept 2000]). Inasmuch as a court's role in deciding a motion for summary judgment is " 'issue-finding, rather than issue-determination' " (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), we reject defendants' contention that they are entitled to summary judgment at this juncture (*see Lindgren*, 269 AD2d at 303).

Contrary to plaintiffs' contentions on their cross appeal, the above-mentioned material issue of fact precludes granting their cross motion. We also note that, contrary to plaintiffs' contention, "the evidence establishing that [defendant officer] did not slow down prior to entering the intersection does not render [defendant officer's] conduct 'unprivileged as a matter of law, but rather presents an issue of fact whether he acted with reckless disregard for the safety of others' " in the event that such standard of care applies in this case (*Perkins v City of Buffalo*, 151 AD3d 1941, 1942 [4th Dept 2017]; *see Rice*, 145 AD3d at 1505; *Connelly v City of Syracuse*, 103 AD3d 1242, 1242-1243 [2013]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

132

CA 17-00875

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

KIMBERLY SNICKLES, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 125350.)
(APPEAL NO. 1.)

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (MATTHEW J. BIRD OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered July 19, 2016. The order, inter alia, granted the pre-answer motion of defendant to dismiss the claim and granted that part of the cross motion of claimant seeking permission to file a late notice of claim with respect to certain causes of action.

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

Memorandum: These consolidated appeals concern orders issued in six similar claims, in which each claimant sought to recover damages under several theories. All of the claims arise from allegations that former New York State Assemblyman Dennis Gabryszak, who employed all six claimants in various capacities, engaged in acts of sexual harassment and employment discrimination against claimants, spanning nearly a decade. Each claimant alleged that she was constructively discharged from Gabryszak's employment, beginning with claimant Emily C. Trimper, who left that employment in March 2008, and ending with claimants Kimberly Snickles and Jamie L. Campbell, who left in October 2013. Claimants Snickles, Annalise C. Freling, and Campbell served a consolidated "notice of claim," which the Court of Claims treated as a notice of intention to file a claim (hereafter, notice of intention), on December 19, 2013, claimants Trimper and Trina Tardone served a consolidated notice of intention on January 2, 2014, and claimant Kristy L. Mazurek filed a notice of intention on January 8, 2014. All claimants then filed claims dated December 3, 2014.

Defendant submitted six pre-answer motions seeking to dismiss the claims on several grounds, including that the notices of intention of Freling, Trimper, Tardone, and Mazurek were untimely under Court of

Claims Act § 10 (3) and (4), and that the 2013 notice of intention covering Snickles and Campbell was not sufficiently specific. Claimants opposed the respective motions and cross-moved for several forms of relief, including permission to file late claims. In six orders, the court granted the motions and denied the cross motions with the exception of granting that part of the cross motion of Snickles seeking permission to file a late claim with respect to her causes of action alleging sexual discrimination and violations of Executive Law § 296. Claimants appeal.

Contrary to claimants' contention, the court properly dismissed the claims of Freling, Trimper, Tardone, and Mazurek because they did not timely file a claim or notice of intention. "Under section 8 of the Court of Claims Act, the State has waived its sovereign immunity from liability 'provided the claimant complies with the limitations of this article [§§ 8-12].' The Act contains several conditions that must be met in order to assert a claim against the State" (*Kolnacki v State of New York*, 8 NY3d 277, 280 [2007], *rearg denied* 8 NY3d 994 [2007]). "[B]ecause suits against the State are allowed only by the State's waiver of sovereign immunity and in derogation of the common law, statutory requirements conditioning suit must be strictly construed" (*id.* [internal quotation marks omitted]). Consequently, a claim must be dismissed if it is not commenced in accordance with Court of Claims Act § 10, inasmuch as "the Legislature incorporated as an integral part of its waiver of immunity the requirement that claims be filed within the time limits imposed under" that section (*Alston v State of New York*, 97 NY2d 159, 163 [2001]). Section 10 provides that a claim, or a notice of intention, must be filed within 90 days of the claim's accrual for most tort claims, and six months for certain other claims (*see* § 10 [3], [4]).

Here, even assuming, arguendo, that some of the claims of Freling, Trimper, Tardone, and Mazurek were governed by the six-month limit, we conclude that their notices of intention were untimely because they were filed more than six months after the claims accrued. Freling alleged that the actionable conduct by Gabryszak ended when her employment with him ended in March 2013, which was more than six months before her notice of intention was filed in December 2013. Trimper, Tardone, and Mazurek allege conduct that ceased when their employment with Gabryszak ended, which was in 2010 or earlier. Consequently, all of those claims were properly dismissed as untimely.

With respect to Snickles and Campbell, we agree with the court that the notice of intention covering their allegations was insufficiently specific. Insofar as relevant here, the statute requires that a "claim shall state the time when and place where such claim arose, the nature of same, [and] the items of damage or injuries claimed to have been sustained[,] . . . [and a] notice of intention to file a claim shall set forth the same matters" (Court of Claims Act § 11 [b]). "With regard to the requisite specificity as to the place where the claim arose, we note that [w]hat is required is not absolute exactness, but simply a statement made with sufficient definiteness to enable [defendant] to be able to investigate the claim promptly and to ascertain its liability under the circumstances" (*Mosley v State of*

New York, 117 AD3d 1417, 1418 [4th Dept 2014] [internal quotation marks omitted]). Here, the relevant notice of intention did not set forth with respect to either Snickles or Campbell the place where any of the alleged misconduct occurred, and the court therefore properly dismissed their claims. We reject claimants' contention that the claims of Snickles and Campbell should not have been dismissed because the alleged misconduct occurred wherever they were working at any particular time and defendant could easily ascertain such information from its records. "The Court of Claims Act does not require [defendant] to ferret out or assemble information that section 11 (b) obligates the claimant to allege" (*Lepkowski v State of New York*, 1 NY3d 201, 208 [2003]; *see Triani v State of New York*, 44 AD3d 1032, 1032-1033 [2d Dept 2007]).

We have considered claimants' remaining contentions, and we conclude that they are without merit.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

133
CA 17-00876
PRESENT: WHALEN, P.J., SMITH, LINDLEY, DEJOSEPH, AND CURRAN, JJ.

ANNALISE C. FRELING, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 125347.)
(APPEAL NO. 2.)

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (MATTHEW J. BIRD OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered July 5, 2016. The order granted the pre-answer motion of defendant to dismiss the claim and denied the cross motion of claimant seeking, inter alia, to file a late claim.

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

Same memorandum as in *Snickles v State of New York* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

134
CA 17-00877
PRESENT: WHALEN, P.J., SMITH, LINDLEY, DEJOSEPH, AND CURRAN, JJ.

JAMIE L. CAMPBELL, CLAIMANT-APPELLANT,

V   MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 125348.)
(APPEAL NO. 3.)

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (MATTHEW J. BIRD OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered July 19, 2016. The order granted the pre-answer motion of defendant to dismiss the claim and denied the cross motion of claimant seeking, inter alia, to file a late claim.

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

Same memorandum as in *Snickles v State of New York* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018   Mark W. Bennett
Clerk of the Court

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

135
CA 17-00878
PRESENT: WHALEN, P.J., SMITH, LINDLEY, DEJOSEPH, AND CURRAN, JJ.

EMILY C. TRIMPER, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 125345.)
(APPEAL NO. 4.)

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (MATTHEW J. BIRD OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered June 8, 2016. The order granted the pre-answer motion of defendant to dismiss the claim and denied the cross motion of claimant seeking, inter alia, to file a late claim.

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

Same memorandum as in *Snickles v State of New York* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

136
CA 17-00879

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

TRINA TARDONE, CLAIMANT-APPELLANT,

V — MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 125349.)
(APPEAL NO. 5.)

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (MATTHEW J. BIRD OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered June 13, 2016. The order granted the pre-answer motion of defendant to dismiss the claim and denied the cross motion of claimant seeking, inter alia, to file a late claim.

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

Same memorandum as in *Snickles v State of New York* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

137
CA 17-00880
PRESENT: WHALEN, P.J., SMITH, LINDLEY, DEJOSEPH, AND CURRAN, JJ.

KRISTY L. MAZUREK, CLAIMANT-APPELLANT,

V   MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 125346.)
(APPEAL NO. 6.)

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (MATTHEW J. BIRD OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered June 13, 2016. The order granted the pre-answer motion of defendant to dismiss the claim and denied the cross motion of claimant seeking, inter alia, to file a late claim.

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

Same memorandum as in *Snickles v State of New York* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018   Mark W. Bennett
Clerk of the Court

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

141
CA 17-01315
PRESENT: WHALEN, P.J., SMITH, LINDLEY, DEJOSEPH, AND CURRAN, JJ.

JOSEPH H. LATES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF HUME, DEFENDANT-APPELLANT.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (SARAH E. HANSEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DOUGLAS WALTER DRAZEN, BINGHAMTON, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered November 10, 2016. The order denied defendant's motion for summary judgment dismissing plaintiff's amended 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 amended complaint is dismissed.

Memorandum: Plaintiff commenced the instant action against defendant, Town of Hume (Town), after his free-standing garage on his property was destroyed by waters from the adjacent Hudson Creek (creek) following a night of hard rain. The creek had been experiencing erosion, causing it to encroach progressively on plaintiff's property, especially in the vicinity of the garage, where the flowing water began to undermine the garage's foundation. Plaintiff alleged in his amended complaint that the Town was negligent in, among other things, failing to maintain the creek despite being notified by plaintiff of the ongoing erosion, and in constructing or maintaining a bridge over the creek with the result that water was directed onto his property. Supreme Court denied the Town's motion for summary judgment dismissing plaintiff's amended complaint. We reverse.

We agree with the Town that the court erred in denying those parts of the motion with respect to the first and fourth causes of action alleging, among other things, that the Town's negligence in the construction and alteration of the bridge resulted in damage to plaintiff's property. Plaintiff conceded in his affidavit opposing the motion that it was not the bridge that caused the destruction to his garage but, rather, it was the lack of regular creek maintenance. In light of those admissions, we conclude that plaintiff abandoned the first and fourth causes of action and that the Town is entitled to

summary judgment dismissing them (*see* CPLR 3212 [g]; *see also Iskalo Elec. Tower LLC v Stantec Consulting Servs., Inc.*, 79 AD3d 1605, 1607 [4th Dept 2010]; *see generally Yost v Blue Cross & Blue Shield of Cent. N.Y.*, 139 AD2d 903, 904 [4th Dept 1988]).

We further agree with the Town that the court erred in denying those parts of the motion with respect to the second, third, and fifth causes of action alleging, among other things, that the Town was negligent or careless in failing to act to prevent or abate damage on his property caused by the erosion. Here, plaintiff's allegations arise out of the Town's alleged failures to prevent or repair the erosion on plaintiff's property, which are alleged failures to engage in proprietary functions, inasmuch as any remediation by the Town would " 'substitute for or supplement traditionally private enterprises' " (*Sebastian v State of New York*, 93 NY2d 790, 793 [1999]). However, the Town established on the motion that it owed no duty to plaintiff either to remediate or to abate the soil erosion. Plaintiff conceded at his General Municipal Law § 50-h examination that the County of Allegany, not the Town, secured an easement across plaintiff's property and performed the creek maintenance since the 1990s.

With respect to plaintiff's allegation that the Town assumed a duty when it promised to provide plaintiff with a Town employee to perform work on plaintiff's property, we note that any such work by the Town was conditioned on plaintiff's first securing the necessary permits from the County and purchasing the materials for the creek repair, and plaintiff never did so. Thus, the Town established that it owed plaintiff no duty to abate or to remediate the soil, and plaintiff failed to raise a question of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In light of our determination, the Town's remaining contentions are academic.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

165
CA 17-01239
PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

NEIL DOUCETTE AND VICTORIA DOUCETTE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KYLE T. CUVIELLO, DEFENDANT-APPELLANT.

KYLE T. CUVIELLO, THIRD-PARTY
PLAINTIFF-APPELLANT,

V

SARAH DOUCETTE, THIRD-PARTY DEFENDANT-RESPONDENT.

LAW OFFICES OF VICTOR M. WRIGHT, ORCHARD PARK (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT.

BARRY J. DONOHUE, TONAWANDA, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Mark Montour, J.), entered September 29, 2016. The order granted plaintiffs' motion pursuant to CPLR 4404 (a) and directed partial judgment on the issues of defendant-third-party plaintiff's liability in favor of plaintiffs.

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

Memorandum: Plaintiffs commenced this action asserting direct and derivative causes of action based on injuries sustained by Neil Doucette (plaintiff) when the vehicle operated by third-party defendant, in which plaintiff was a passenger, collided with the vehicle operated by defendant-third-party plaintiff (defendant). The main and third-party actions were tried jointly, and the jury reached a verdict finding that defendant's negligence was not a substantial factor in causing injury to plaintiff. Plaintiffs moved pursuant to CPLR 4404 (a) to set aside the verdict and for judgment in their favor or, in the alternative, to set aside the verdict as against the weight of the evidence and for a new trial. Supreme Court granted plaintiffs' motion to set aside the verdict and directed partial judgment on the issue of liability in favor of plaintiffs, determining as a matter of law that defendant was negligent and that such negligence was a substantial factor in causing injuries to plaintiff.

The court ordered that the matter be set for a new jury trial to determine the issues of third-party defendant's negligence, apportionment of any fault, serious injury under Insurance Law § 5102 (d), and damages. We reverse and reinstate the verdict.

As a preliminary matter, we note our difficulty in reviewing this case inasmuch as the court failed to set forth its reasoning for setting aside the verdict (*see generally McMillian v Burden*, 136 AD3d 1342, 1343 [4th Dept 2016]). Overturning the verdict of a duly impaneled jury is an act of such significance and impact to the parties and the court system that a trial court should rarely, if ever, foreclose appellate review of its rationale by failing to issue a decision.

We agree with defendant that there was no basis to set aside the jury's verdict based on the legal insufficiency of the evidence or as against the weight of the evidence. In order to find that a jury verdict is not supported by sufficient evidence as a matter of law, there must be "no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). In light of the evidence of plaintiff's preexisting injuries and treatment, there is a valid line of reasoning by which the jury could have concluded that plaintiff's alleged neck and/or back injuries and his consequent surgeries were not the result of the motor vehicle accident (*see Quigg v Murphy*, 37 AD3d 1191, 1193 [4th Dept 2007]). We are cognizant of the fact that even defendant's expert opined in general terms that plaintiff sustained strains of his neck and back as a result of the accident. However, our review of his testimony as a whole establishes that he found no objective evidence of a sprain or a strain and that he was simply giving plaintiff "the benefit of the doubt" on the issue of causation. The jury chose not to give plaintiff the same "benefit of the doubt," as it was entitled to do (*Zapata v Dagostino*, 265 AD2d 324, 325 [2d Dept 1999]). Indeed, the jury was entitled to reject the testimony of both plaintiffs' and defendant's experts upon determining that "the facts differed from those which formed the basis of [the experts'] opinions" (*id.* at 325). In our view, it cannot be said that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen*, 45 NY2d at 499). Nor can it be said that the verdict was against the weight of the evidence, i.e., that the evidence so preponderated in favor of plaintiffs that the verdict " 'could not have been reached upon any fair interpretation of the evidence' " (*Dennis v Massey*, 134 AD3d 1532, 1533 [4th Dept 2015]).

In light of our determination, defendant's remaining contention with respect to proximate cause is academic.

Entered: March 23, 2018 Mark W. Bennett
Clerk of the Court

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

175
KA 15-01656
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARTIN M. CAREY, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (MELANIE J. BAILEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered January 8, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree, menacing in the second degree and petit larceny.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts by reversing that part convicting defendant of petit larceny and dismissing count three of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), menacing in the second degree (§ 120.14 [1]), and petit larceny (§ 155.25). Defendant contends that County Court erred in failing to charge the jury on the defense of justification because there is a reasonable view of the evidence in which he threatened only ordinary physical force in the incident that formed the basis for the counts of criminal possession of a weapon in the third degree and menacing in the second degree, and that he was justified in doing so in response to threats made by the victim. That contention is unpreserved for our review, inasmuch as defendant did not make that specific argument in his request for a justification instruction (*see generally People v Hamilton*, 116 AD3d 614, 614 [1st Dept 2014], *lv denied* 23 NY3d 1037 [2014]; *People v Davis*, 111 AD3d 1302, 1303 [4th Dept 2013], *lv denied* 22 NY3d 1137 [2014]). In any event, we conclude that defendant's contention is without merit. "[T]here are no circumstances when justification . . . can be a defense to the crime of criminal possession of a weapon" (*People v Pons*, 68 NY2d 264, 267 [1986]). With respect to the menacing count, the evidence establishes that defendant swung a knife at the victim, which constitutes the use of deadly physical force (*see People v Kerley*, 154 AD3d 1074, 1075 [3d Dept 2017], *lv denied* — NY3d — [Jan.

30, 2018]; *People v Taylor*, 140 AD3d 1738, 1739 [4th Dept 2016]; *People v Haynes*, 133 AD3d 1238, 1239 [4th Dept 2015], *lv denied* 27 NY3d 998 [2016]), and there is thus no reasonable view of the evidence in which his conduct was justified (*see People v Jones*, 142 AD3d 1383, 1384 [4th Dept 2016], *lv denied* 28 NY3d 1073 [2016]; *People v Richardson*, 115 AD3d 617, 618 [1st Dept 2014], *lv denied* 23 NY3d 1041 [2014]).

Defendant further contends, with respect to the petit larceny count, that the court erred in instructing the jury on the theory of larceny by trick inasmuch as the evidence did not support such an instruction. Defendant objected to the jury instruction on the theory of larceny by trick only on the ground that such theory was not alleged in the indictment or a bill of particulars, and thus he failed to preserve his present contention for our review (*see People v Kendricks*, 23 AD3d 1119, 1119 [4th Dept 2005]; *see generally People v Medina*, 18 NY3d 98, 104 [2011]). In addition, defendant failed to preserve for our review his contention that the evidence is legally insufficient to support a conviction of petit larceny under the theory of larceny by trick inasmuch as he moved for a trial order of dismissal with respect to that count only on the ground that the People failed to establish that money was taken from the victim or that defendant exercised dominion and control over the money (*see generally People v Gray*, 86 NY2d 10, 19 [1995]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Nevertheless, viewing the evidence in light of the elements of petit larceny as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we agree with defendant that the verdict finding him guilty of that crime is against the weight of the evidence. Defendant was convicted of larceny pursuant to the common-law theory of larceny by trick, which occurs "where the owner of the property was induced to part with possession, but not title, due to some trick or artifice by the wrongdoer who subsequently misappropriates the property" (*People v Churchill*, 47 NY2d 151, 155 [1979]; *see People v Norman*, 85 NY2d 609, 618 n 3 [1995]). Here, the verdict is contrary to the weight of the evidence with respect to whether defendant used some trick or artifice to obtain property from the victim. We therefore modify the judgment by reversing that part convicting defendant of petit larceny and dismissing that count of the indictment.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

181
KA 15-00946
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY M. DAVIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered July 30, 2014. The judgment convicted defendant, upon a jury verdict, 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 case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict 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 [3]). For reasons stated in the codefendant's appeal (*see People v Clay*, 147 AD3d 1499, 1499-1500 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]), we conclude that Supreme Court, following a separate suppression hearing that established the same material facts as those established during the hearing in connection with the codefendant, properly refused to suppress tangible evidence seized by the police after an incident in which an officer and his partner approached a parked vehicle that was occupied by defendant, the codefendant, and two other people.

We agree with defendant, however, that the court erred in summarily denying his motion to preclude the identification testimony of the officer and his partner in the absence of notice pursuant to CPL 710.30 (1) (b). "When the People intend to offer at trial 'testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such,' the [People are] require[d] . . . to notify the defense of such intention within 15 days after arraignment and before trial" (*People v Pacquette*, 25 NY3d 575, 578-

579 [2015], quoting CPL 710.30 [1] [b]). As is evident from the language of CPL 710.30, "the statute contemplates . . . two distinct pretrial 'viewings' of a defendant by an eyewitness. First is the witness's actual *observation* of a defendant either at the time or place of commission of the crime or some other occasion relevant to the case. This is the observation, relevant to and probative of a defendant's guilt or innocence, which forms the basis for the witness's prospective trial testimony. Second, there is a separate, [prosecution- or] police-initiated, *identification* procedure, such as a lineup, showup or photographic array, which takes place subsequent to the observation forming the basis for the witness's trial testimony and prior to the trial . . . [T]his is the occasion where the witness points at a defendant and says, 'That's the one' " (*People v Peterson*, 194 AD2d 124, 128 [3d Dept 1993], *lv denied* 83 NY2d 856 [1994]).

The procedure contemplated by the statute is simple: "[t]he People serve their notice upon defendant, the defendant has an opportunity to move to suppress and the court may hold a *Wade* hearing . . . If the People fail to provide notice, the prosecution may be precluded from introducing such evidence at trial" (*Pacquette*, 25 NY3d at 579; *see People v Boyer*, 6 NY3d 427, 431 [2006]). "The purpose of the notice requirement is twofold: it provides the defense with 'an opportunity, prior to trial, to investigate the circumstances of the [evidence procured by the state] and prepare the defense accordingly' and 'permits an orderly hearing and determination of the issue of the fact . . . thereby preventing the interruption of trial to challenge initially the admission into evidence of the [identification]' " (*Pacquette*, 25 NY3d at 579, quoting *People v Briggs*, 38 NY2d 319, 323 [1975]). "Thus, the statute contemplates '*pretrial* resolution of the admissibility of identification testimony where it is alleged that an improper procedure occurred' " (*id.*, quoting *People v Rodriguez*, 79 NY2d 445, 452 [1992]).

Here, the People provided a blank CPL 710.30 notice to defendant and, in response to that part of his omnibus motion seeking preclusion, asserted that "[t]here were no identification procedures which would require a CPL 710.30 notice." The record before us establishes, however, that the officer and his partner may have engaged in showup identification procedures undertaken "at the deliberate direction of the State" that required notice pursuant to CPL 710.30 (*People v Newball*, 76 NY2d 587, 591 [1990]; *see Pacquette*, 25 NY3d at 577-580; *People v Hayes*, 162 AD2d 410, 410 [1st Dept 1990], *lv denied* 78 NY2d 1011 [1991]; *cf. People v Gissendanner*, 48 NY2d 543, 552 [1979]; *Peterson*, 194 AD2d at 128-129). The evidence at the suppression hearing established that defendant fled from the front passenger seat of the parked vehicle and was unsuccessfully pursued by the officer, and that the officer knew defendant was apprehended because the officer saw defendant after he was later taken into custody by a third officer. The record further indicates, and the People do not dispute, that, after defendant was arrested and brought to the police station by the third officer at the officer's direction, the officer identified defendant as the front seat passenger who fled from the parked vehicle. Additionally, contrary to the People's

contention, in the absence of a hearing on the identification issue, the record is insufficient to support the conclusion that the partner did not perform an identification procedure. Indeed, the record supports the inference that the partner accompanied the officer back to the police station, had some subsequent interaction with defendant at that location, and also could have performed a procedure identifying defendant as the individual he observed earlier during the incident.

Although the People contend that any police station identifications were merely confirmatory, and it appears from the record that the officer and his partner may have been familiar with defendant prior to the subject incident, we are precluded from affirming on that ground inasmuch as the court did not rule on that issue (*see* CPL 470.15 [1]; *People v Ingram*, 18 NY3d 948, 949 [2012]; *People v LaFontaine*, 92 NY2d 470, 473-474 [1998], *rearg denied* 93 NY2d 849 [1999]; *People v Gambale*, 150 AD3d 1667, 1670 [4th Dept 2017]).

Based upon the foregoing, we conclude that the issue whether the officer and his partner engaged in identification procedures at the police station and, if so, whether any such identifications were merely confirmatory, must be resolved after a hearing, which we note was repeatedly requested by defense counsel during argument on the motion to preclude (*see People v Castagna*, 196 AD2d 879, 880 [2d Dept 1993]; *Hayes*, 162 AD2d at 410; *People v Baron*, 159 AD2d 710, 711 [2d Dept 1990]). We thus hold the case, reserve decision, and remit the matter to Supreme Court for a hearing to determine whether the officer and his partner engaged in identification procedures at the police station within the purview of CPL 710.30 and, if so, whether such identifications were merely confirmatory.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

183
CAF 16-00582
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF DESEANTE L.R.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

FEMI R., RESPONDENT-APPELLANT.

IN THE MATTER OF DILAN P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

FEMI R., RESPONDENT-APPELLANT.

IN THE MATTER OF DAKARI M.K.R.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

FEMI R., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

AMBER R. POULOS, BUFFALO, FOR PETITIONER-RESPONDENT.

TRENEEKA CUSACK, BUFFALO, ATTORNEY FOR THE CHILD.

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

DEAN S. PULEO, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered December 28, 2015 in proceedings pursuant to Family Court Act article 10. The order found Dilan P. and Dakari M.K.R. to be abused and Deseante L.R. to be derivatively abused.

It is hereby ORDERED that said appeal from the order insofar as it concerns Deseante L.R. and Dakari M.K.R. is unanimously dismissed and the order is affirmed without costs.

Memorandum: In appeal No. 1, respondent mother appeals from an order in these proceedings pursuant to Family Court Act article 10 in

which Family Court found that the mother abused two of her children and derivatively abused her third child. The mother consented to the placement of the youngest child in the home of a relative and, in appeal Nos. 2 and 3, the mother appeals from orders of disposition that placed the two older children in the custody of petitioner. We note at the outset that the mother's appeal from the order in appeal No. 1 must be dismissed insofar as it concerns the two older children inasmuch as the appeals from the dispositional orders with respect to the two older children in appeal Nos. 2 and 3 bring up for review the propriety of the fact-finding order with respect to those children (*see Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]).

We reject the mother's contention in all three appeals that the evidence is legally insufficient to support the court's findings that she abused and derivatively abused the subject children. It is well established that petitioner has the burden of establishing by a preponderance of the evidence that the mother abused the children (*see Matter of Philip M.*, 82 NY2d 238, 243-244 [1993]). Here, petitioner met that burden with respect to the youngest child by presenting the testimony of its caseworker and an expert nurse practitioner, which established that the youngest child sustained injuries as a result of the mother hitting him with an electrical cord (*see Matter of Charity M. [Warren M.]* [appeal No. 2], 145 AD3d 1615, 1616 [4th Dept 2016]). The nurse practitioner also testified that, based on her experience, the wounds were not accidental and, contrary to the mother's contention, the wounds could not have been caused by another child.

We further reject the mother's contention that the court abused its discretion in permitting the nurse practitioner to testify with respect to the cause of the youngest child's injuries. A nurse practitioner is permitted to testify based on his or her expertise in that field " 'derived from either formal training or long observation and *actual* experience' " (*People v Munroe*, 307 AD2d 588, 591 [3d Dept 2003], *lv denied* 100 NY2d 644 [2003]; *see People v Owens*, 70 AD3d 1469, 1470 [4th Dept 2010], *lv denied* 14 NY3d 890 [2010]), and may testify concerning the circumstances in which an injury of abuse may have occurred (*see generally Matter of April WW. [Kimberly WW.]*, 133 AD3d 1113, 1116 [3d Dept 2015]). Similarly, we reject the mother's contention that the court abused its discretion in permitting the caseworker, who had undergone training in identifying injuries and their causes, to give expert testimony that a mark on one of the children raised concerns that the injury was inflicted with a cord or a belt (*see generally id.*; *People v Stabell*, 270 AD2d 894, 895 [4th Dept 2000], *lv denied* 95 NY2d 80 [2000]).

Petitioner also established by a preponderance of the evidence that the middle child was an abused child by submitting evidence that there were "old-looking" scars on his body, and evidence concerning the mother's conduct toward the other two children, which supports the inference that the mother caused the scars on the middle child's body (*see generally Charity M.*, 145 AD3d at 1616).

Finally, we conclude that petitioner established by a preponderance of the evidence that the oldest child was derivatively abused based on the evidence that the mother abused the other two children (*see Matter of Dayanara V. [Carlos V.]*, 101 AD3d 411, 412 [1st Dept 2012]; *Matter of Wyquanza J. [Lisa J.]*, 93 AD3d 1360, 1361 [4th Dept 2012]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

184

CAF 16-00583

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

IN THE MATTER OF DESEANTE L.R.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

FEMI R., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

AMBER R. POULOS, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered March 4, 2016 in a proceeding pursuant to Family Court Act article 10. The order placed the subject child in the custody of petitioner.

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

Same memorandum as in *Matter of Deseante L.R.* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

185
CAF 16-00584
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF DAKARAI M.K.R.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

FEMI R., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

AMBER R. POULOS, BUFFALO, FOR PETITIONER-RESPONDENT.

DEAN S. PULEO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered March 4, 2016 in a proceeding pursuant to Family Court Act article 10. The order placed the subject child in the custody of petitioner.

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

Same memorandum as in *Matter of Deseante L.R.* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

191
CA 17-01429
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, CURRAN, AND WINSLOW, JJ.

RANDAL D. SMITH AND ALICIA SMITH,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

SAFECO INSURANCE COMPANY OF AMERICA,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

LAW OFFICES OF GUSTAVE J. DETRAGLIA, JR., UTICA (MICHELE E. DETRAGLIA OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (JONATHAN SCHAPP OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered May 22, 2017. The order denied plaintiffs' motion for, in essence, partial summary judgment on liability with respect to the breach of contract cause of action against defendant Safeco Insurance Company of America and granted the cross motion of defendant Safeco Insurance Company of America for summary judgment dismissing the amended complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the cross motion of defendant Safeco Insurance Company of America is denied and the amended complaint against it is reinstated, and plaintiffs' motion is granted, and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following memorandum: Plaintiffs commenced this action against, inter alia, Safeco Insurance Company of America (defendant) seeking to recover insurance proceeds after their home was damaged by water following a water main break on their street. In their amended complaint, plaintiffs asserted a cause of action against defendant for breach of contract, and thereafter moved for, in essence, partial summary judgment on liability with respect to that cause of action by seeking a determination that "[defendant] must cover [plaintiffs'] loss." Defendant cross-moved for summary judgment dismissing the amended complaint against it on the ground that plaintiffs' loss was subject to a policy exclusion related to certain kinds of water damage, including damage caused by "surface water." We conclude that Supreme Court erred in granting defendant's cross motion and denying plaintiffs' motion.

In support of their motion, plaintiffs submitted a copy of their

insurance policy from defendant as well as a copy of defendant's letter denying coverage on the ground that the damage to plaintiffs' property was caused by surface water. We conclude that plaintiffs established as a matter of law that their home was not damaged by surface water, and we therefore reverse the order, deny the cross motion, reinstate the amended complaint against defendant, grant plaintiff's motion, and remit the matter to Supreme Court for a hearing on damages (*see Gallo v Travelers Prop. Cas.*, 21 AD3d 1379, 1381 [4th Dept 2005]).

"An insurance agreement is subject to principles of contract interpretation" (*Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]), and "[a]ny . . . exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]; *see Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d 302, 306-307 [2009]). Inasmuch as the term "surface water" is not defined in the policy, "we afford that term its 'plain and ordinary meaning' " (*Gallo*, 21 AD3d at 1380). We have previously defined surface water as " 'the accumulation of natural precipitation on the land and its passage thereafter over the land until it either evaporates, is absorbed by the land or reaches stream channels' " (*Casey v General Acc. Ins. Co.*, 178 AD2d 1001, 1002 [4th Dept 1991], quoting *Drogen Wholesale Elec. Supply v State of New York*, 27 AD2d 763, 763 [3d Dept 1967]; *cf. Tsai v Liberty Mut. Ins. Co.*, 2015 WL 6550769, *6 [Tex App, Oct. 29, 2015]). We thus conclude that, under the clear and unambiguous terms of the policy, the water that entered the plaintiffs' residence was not surface water, and defendant therefore erroneously denied coverage under that policy exclusion.

Contrary to defendant's contention, the fact that the policy stated that the overall water damage exclusion applied "whether the water damage [was] caused by or result[ed] from human or animal forces or any act of nature" does not require a different result. That statement follows the entire list of events for which the water damage exclusion applied, which included both acts of nature and human forces, and does not change the definition of "surface water" as that term has been defined by this Court.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

194
TP 17-01292
PRESENT: WHALEN, P.J., CENTRA, CARNI, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF COVERCO, INC., PETITIONER,

V   MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT,
RESPONDENT.

SCHRÖDER, JOSEPH & ASSOCIATES, LLP, BUFFALO (LINDA H. JOSEPH OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [E. Jeannette Ogden, J.], entered June 16, 2017) to annul a determination of respondent. The determination denied petitioner's 2014 application for certification as a women-owned business enterprise.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination denying its 2014 application for certification as a woman-owned business enterprise (*see generally* 5 NYCRR 144.2). Petitioner contends that the determination that it failed to meet certain criteria used to determine whether a business is eligible to be certified as a woman-owned business enterprise was arbitrary and capricious because respondent failed to adhere to its determination in 2010 that granted petitioner such status, and failed to provide a sufficient explanation for failing to adhere to the prior determination. "Absent such an explanation, failure to conform to agency precedent will . . . require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made" (*Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 520 [1985]). Here, however, petitioner did not meet its initial burden of establishing that "the same information was before respondent[] on both occasions" with respect to the eligibility criteria on which respondent based its determination (*Matter of Northeastern Stud Welding Corp. v Webster*, 211 AD2d 889, 890 [3d Dept 1995]). Thus, petitioner has not established that "respondent[] failed to follow precedent when confronted with 'essentially the same facts' " (*id.*, quoting *Charles A. Field Delivery*

Serv., 66 NY2d at 517).

Contrary to petitioner's further contention, viewing the record as a whole (*see Matter of C.W. Brown Inc. v Canton*, 216 AD2d 841, 842 [3d Dept 1995]), we conclude that respondent's determination is supported by substantial evidence inasmuch as petitioner failed to establish its eligibility with respect to ownership and control criteria set forth in 5 NYCRR 144.2 (a) (1), (b) (1) and (c) (2) (*see id.* at 842-843; *Northeastern Stud Welding Corp.*, 211 AD2d at 890-891).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

218

KAH 17-00592

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JOHN A.J. HINSPETER, II, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DALE A. ARTUS, SUPERINTENDENT, ATTICA CORRECTIONAL
FACILITY, RESPONDENT-RESPONDENT.

JOHN A.J. HINSPETER, II, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered February 6, 2017 in a habeas corpus proceeding. The judgment denied petitioner's "motion to compel."

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus. His initial petition and a subsequent motion for leave to reargue were denied. He then filed a "motion to compel," which was denied in an order from which he now appeals. Because petitioner "failed to allege any new facts or to demonstrate a change in the law," his motion to compel was in fact a motion to reargue, which has no application to a judgment determining a special proceeding, and from which no appeal lies in any event (*People ex rel. Hinton v Graham*, 66 AD3d 1402, 1402 [4th Dept 2009], *lv denied* 13 NY3d 934 [2010], *rearg denied* 14 NY3d 795 [2010]; *see People ex rel. Seals v New York State Dept. of Corr. Servs.*, 32 AD3d 1262, 1263 [4th Dept 2006]). Moreover, petitioner's substantive claims are not properly raised in a petition for a writ of habeas corpus inasmuch as they "could have been raised on direct appeal or in a proceeding pursuant to CPL article 440" (*People ex rel. Frederick v Superintendent, Auburn Corr. Facility*, 156 AD3d 1468, 1468 [4th Dept 2017]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

231
CA 17-01186
PRESENT: WHALEN, P.J., SMITH, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF VILLAGE OF FREDONIA,
PETITIONER-APPELLANT-RESPONDENT,

V   MEMORANDUM AND ORDER

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, VILLAGE OF FREDONIA UNIT
6313 OF LOCAL 807,
RESPONDENT-RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

HORTON LAW PLLC, ORCHARD PARK (SCOTT P. HORTON OF COUNSEL), FOR
PETITIONER-APPELLANT-RESPONDENT.

FESSENDEN, LAUMER & DEANGELO, PLLC, JAMESTOWN (CHARLES S. DEANGELO OF
COUNSEL), FOR RESPONDENT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered April 17, 2017 in a proceeding pursuant to CPLR article 75. The order, among other things, dismissed the petition to stay arbitration.

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

Same memorandum as in *Matter of Village of Fredonia v Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, Vil. of Fredonia Unit 6313 of Local 807* ([appeal No. 2] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018   Mark W. Bennett
                                                                  Clerk of the Court

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

232
CA 17-01187
PRESENT: WHALEN, P.J., SMITH, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF JASON JAKUBOWICZ AND CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000 AFSCME, VILLAGE OF FREDONIA UNIT 6313 OF LOCAL 807, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

VILLAGE OF FREDONIA, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

HORTON LAW PLLC, ORCHARD PARK (SCOTT P. HORTON OF COUNSEL), FOR RESPONDENT-APPELLANT.

FESSENDEN, LAUMER & DEANGELO, PLLC, JAMESTOWN (CHARLES S. DEANGELO OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered April 17, 2017 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

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

Memorandum: Village of Fredonia (Village), the petitioner in appeal No. 1 and the respondent in appeal No. 2, appeals, and Civil Service Employees Association, Inc., Local 1000, AFSCME, Village of Fredonia Unit 6313 of Local 807 (Union), the respondent in appeal No. 1 and a petitioner in appeal No. 2, cross-appeals from an order in appeal No. 1 that dismissed the Village's CPLR article 75 petition seeking a stay of arbitration and denied the Union's cross motion to compel arbitration. In appeal No. 2, the Village appeals from a judgment in which Supreme Court granted a subsequent CPLR article 78 petition brought by the Union and petitioner Jason Jakubowicz and ordered that Jakubowicz be fully reinstated to his former employment with full back pay and benefits retroactive to the date of his termination.

We first address appeal No. 2. The Village, as limited by its brief, contends that a commercial driver's license is a minimum qualification for Jakubowicz's position as a Mechanic II in the Village and that his failure to maintain such minimum qualification required the termination of his employment. We reject that contention. The Mechanic II position in the Village requires, inter

alia, "[p]ossession, at time of appointment and during service in this classification, of a valid NYS Motor Vehicle Operator's license appropriate for the type of vehicles which the employee may from time to time operate." " '[B]oth due process and fundamental fairness require that a qualification or requirement of employment be expressly stated in order for an employer to bypass the protections afforded by the Civil Service Law or a collective bargaining agreement and summarily terminate an employee' " (*Butkowski v Kiefer*, 140 AD3d 1755, 1756 [4th Dept 2016]). Here, the requirement of a commercial driver's license is not "expressly stated" (*id.*). Furthermore, while "an employee charged with failing to possess a minimum qualification of his or her position is only entitled to notice of the charge and the opportunity to contest it" (*Matter of Carr v New York State Dept. of Transp.*, 70 AD3d 1110, 1111 [3d Dept 2010]), the Village here offered Jakubowicz a hearing "to afford [him] the opportunity to present information to the Village why [he] should not be administratively terminated from employment." There is no dispute that a hearing was never held. For the above reasons, we conclude that the court properly determined that Jakubowicz's termination was arbitrary and capricious (*see* CPLR 7803 [3]).

In view of our determination in appeal No. 2, we dismiss as academic the appeal from the order in appeal No. 1 (*see generally McCabe v CSX Transp., Inc.*, 27 AD3d 1150, 1151 [4th Dept 2006]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

247
KA 15-00928
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONNELL D. WILSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered April 10, 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 appeal Nos. 1, 2, and 3, defendant appeals from three judgments convicting him upon his pleas of guilty during a single plea proceeding to one count in each of three indictments of, respectively, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), sex trafficking (§ 230.34 [1] [a]), and attempted kidnapping in the second degree (§§ 110.00, 135.20). After County Court was notified with respect to the judgment in appeal No. 2 that the sentence imposed on count 14 of the second indictment for sex trafficking was unlawful, the prosecutor and the court agreed to allow defendant to withdraw his plea to that count and instead to plead guilty to an amended count of attempted sex trafficking in order to allow the imposition of a sentence within the range of the originally agreed-upon aggregate sentence. During a second plea proceeding, however, count 3 of the second indictment alleging sex trafficking related to a different victim—which had previously been dismissed as a result of a superseding indictment (*see* CPL 200.80)—was purportedly amended to allege attempted sex trafficking at the prosecutor's suggestion, and the court elicited defendant's plea of guilty to that purported amended count. Inasmuch as defendant was permitted to withdraw his plea in appeal No. 2 and re-entered a plea of guilty to a different crime, resulting in the judgment in appeal No. 4, the judgment in appeal No. 2 was vacated and the sentence thereon superseded (*see People v Fusco*, 105 AD3d 1148, 1148 [3d Dept 2013]). Thus, defendant's appeal from the judgment of

conviction in appeal No. 2 must be dismissed as moot (*see People v Pimental*, 189 AD2d 788, 788 [2d Dept 1993]; *see generally People v Thagard*, 115 AD3d 1314, 1315 [4th Dept 2014]).

Furthermore, we conclude in appeal No. 4 that the court erred in eliciting defendant's plea of guilty to attempted sex trafficking under the purported amended count 3 of the second indictment because of the previous dismissal of the underlying count (*see People v Shampine*, 31 AD3d 1163, 1164 [4th Dept 2006]; *see generally People v Davison*, 63 AD3d 1537, 1538 [4th Dept 2009], *lv denied* 13 NY3d 795 [2009]; *People v Flock*, 30 AD3d 611, 611-612 [2d Dept 2006], *lv denied* 7 NY3d 788 [2006]). Inasmuch as " '[a] valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution' " (*People v Dumay*, 23 NY3d 518, 522 [2014], quoting *People v Dreyden*, 15 NY3d 100, 103 [2010]; *see generally* CPL 200.10; *People v Casey*, 66 AD3d 1128, 1129 [3d Dept 2009]), and the court lacked authority to amend a previously dismissed count and elicit defendant's plea thereto, the judgment of conviction in appeal No. 4 must be reversed and the plea vacated (*see Davison*, 63 AD3d at 1538; *Shampine*, 31 AD3d at 1164).

We agree with defendant in appeal Nos. 1 and 3 that his purported waiver of the right to appeal is not valid inasmuch as "the perfunctory inquiry made by [County] Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Beaver*, 128 AD3d 1493, 1494 [4th Dept 2015] [internal quotation marks omitted]). Although "[a] detailed written waiver can supplement a court's on-the-record explanation of what a waiver of the right to appeal entails, . . . a written waiver does not, standing alone, provide sufficient assurance that the defendant is knowingly, intelligently and voluntarily giving up his or her right to appeal" (*People v Banks*, 125 AD3d 1276, 1277 [4th Dept 2015], *lv denied* 25 NY3d 1159 [2015] [internal quotation marks omitted]). Here, although defendant signed such a written waiver, "the record establishes that County Court did not sufficiently explain the significance of the appeal waiver or ascertain defendant's understanding thereof" (*id.*; *see People v Welcher*, 138 AD3d 1481, 1482 [4th Dept 2016], *lv denied* 28 NY3d 938 [2016]; *cf. People v Ramos*, 7 NY3d 737, 738 [2006]). We thus conclude that, "despite defendant's execution of a written waiver of the right to appeal, he did not knowingly, intelligently or voluntarily waive his right to appeal as the record fails to demonstrate a full appreciation of the consequences of such waiver" (*People v Elmer*, 19 NY3d 501, 510 [2012] [internal quotation marks omitted]).

In appeal Nos. 1 and 3, defendant contends that, because he did not recite the elements of the crimes to which he pleaded guilty and gave monosyllabic responses to the court's questions during the plea allocution, the plea colloquy does not establish that he understood the nature of those crimes and thus casts doubt upon the voluntariness of his plea. Defendant's contentions "are actually addressed to the factual sufficiency of the plea allocution, and defendant failed to preserve them for our review by moving to withdraw the plea or to

vacate the judgment of conviction" (*People v Hawkins*, 94 AD3d 1439, 1440 [4th Dept 2012], *lv denied* 19 NY3d 974 [2012]; *see People v Lopez*, 71 NY2d 662, 665 [1988]). Defendant's further contention in appeal Nos. 1 and 3 that the court erred in consolidating the indictments was forfeited by his guilty plea (*see People v Rodriguez*, 238 AD2d 150, 151 [1st Dept 1997], *lv denied* 90 NY2d 897 [1997]; *see generally People v Hansen*, 95 NY2d 227, 230-231 [2000]). Finally, we reject defendant's contention in appeal Nos. 1 and 3 that the concurrent sentences are unduly harsh and severe.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

248
KA 15-00929
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONNELL D. WILSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered April 10, 2015. The judgment convicted defendant, upon his plea of guilty, of sex trafficking.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Wilson* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

249
KA 15-00930
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONNELL D. WILSON, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered April 10, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted kidnapping in the second degree.

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

Same memorandum as in *People v Wilson* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

250
KA 16-00792
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONNELL D. WILSON, DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered January 8, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted sex trafficking.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Jefferson County Court for further proceedings on indictment No. 171-14.

Same memorandum as in *People v Wilson* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

251
KA 16-02331
PRESENT: SMITH, J.P., CENTRA, PERADOTTO, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLAUDE E. ZIRBEL, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered December 6, 2016. The judgment revoked defendant’s sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed and as modified the judgment is affirmed, and the matter is remitted to Cayuga County Court for resentencing.

Memorandum: In 2011, defendant pleaded guilty to driving while intoxicated (DWI) as a class D felony and aggravated unlicensed operation of a motor vehicle in the first degree, and he was sentenced to concurrent indeterminate terms of imprisonment of 1⅓ to 4 years, to be followed by five years of probation. With respect to the probation portion of the sentence, County Court also imposed the condition of an ignition interlock device. After serving a full four years, defendant violated his probation when he was caught in possession of alcohol during a home visit by his parole officer. Defendant admitted to the violation, his probation was revoked, and then he was restored to probation with credit for the time already served on probation, with all other conditions remaining the same. Over a year later, defendant was again brought before the court for a violation of probation after he was arrested for, inter alia, aggravated unlicensed operation of a motor vehicle in the first degree, felony driving while intoxicated, refusal to take a breath test, and operating a vehicle without an ignition interlock device. The People, noting that this was defendant’s second violation, requested the maximum prison sentence for the violation, i.e., 2⅓ to 7 years of imprisonment.

At subsequent appearances, defense counsel took the position that, because defendant “maxed out his underlying time,” he could not

then be sentenced to additional prison time for the probation violation. He further argued that the period of probation or conditional discharge set forth in Penal Law § 60.21, pursuant to which he was sentenced, "is exclusively for purposes of monitoring the ignition interlock device." The People disagreed, arguing that defendant "did not max out his time, because he got less than the maximum the first time around. He only got one and [a] third to four. He was facing, on a D felony, two and [a] third to seven. So it's [the People's] position that he can get the two and a third to seven at this point in time." The court agreed with the People and sentenced defendant to 2⅓ to 7 years of imprisonment, to be followed by five years of probation. Defendant appeals.

We agree with defendant that the court lacked the authority to sentence him to more prison time after his initial term of imprisonment was completed (*see People v Coon*, 156 AD3d 105, 106-110 [3d Dept 2017]).

The facts of *Coon* are nearly indistinguishable from those herein. In *Coon*, the defendant pleaded guilty to felony DWI and was sentenced to a definite jail term of one year, followed by three years of conditional discharge, pursuant to Penal Law § 60.21. After defendant served his entire prison term and while he was under the conditional discharge, defendant admitted to violating the conditional discharge by operating a vehicle without an ignition interlock device (*id.* at 106). County Court revoked defendant's conditional discharge and sentenced him to "an additional term of imprisonment of 2 to 6 years 'for [the] initial conviction of [DWI],' to be followed by three years of conditional discharge" (*id.*). The Third Department modified the judgment by vacating the sentence and remitted the matter to County Court for resentencing. The Third Department held that, "where [the defendant] has already served and completed the one-year definite sentence imposed for the DWI conviction, County Court was not authorized to impose an additional term of imprisonment upon his violation of the conditional discharge terms" (*id.* at 107). In reaching that conclusion, the Third Department noted that "[t]he statutory framework governing sentencing does not cover these factual circumstances," and there were "no corresponding statutes or amendments to already existing statutes that delineated the types of sanctions that courts could impose in a case such as this one" (*id.* at 108-109).

While here defendant was sentenced to an indeterminate term of imprisonment followed by probation instead of a definite jail term followed by a conditional discharge, we conclude that those distinctions are immaterial. Defendant served the maximum term of imprisonment imposed, i.e., four years on his sentence of 1⅓ to 4 years, and we conclude that he cannot be subjected to additional prison time under the guise of a sentence based on a probation or conditional discharge violation when, in fact, he was resentenced for the initial offense. We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing. In light of our determination, we do not address defendant's remaining

contention.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

258
CA 17-01750
PRESENT: SMITH, J.P., CENTRA, PERADOTTO, DEJOSEPH, AND CURRAN, JJ.

MARIE L. MCINTYRE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD F. SALLUZZO, DEFENDANT-APPELLANT.

LAW OFFICES OF THERESA J. PULEO, SYRACUSE (LEIGH A. LIEBERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF WILLIAM M. BORRILL, NEW HARTFORD (KATHRYN F. HARTNETT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered November 29, 2016. The order denied in part defendant's motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion with respect to the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d) and dismissing the complaint to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries she sustained when the vehicle she was driving was rear-ended by a vehicle driven by defendant. Defendant moved for summary judgment dismissing the complaint, asserting, inter alia, that plaintiff did not sustain a serious injury within the meaning of the three categories alleged by her (*see* Insurance Law § 5102 [d]). Supreme Court granted defendant's motion only with respect to plaintiff's claim for economic loss in excess of basic economic loss, and defendant appeals.

We agree with defendant that the court erred in denying that part of his motion with respect to the 90/180-day category, and we therefore modify the order accordingly. Defendant met his initial burden on the motion with respect to that category by submitting plaintiff's deposition and employment records, which indicated no difficulties with eating, dressing, or bathing, and established that plaintiff returned to work shortly after the accident and was working full-time with no restrictions approximately 30 days after the accident (*see Robinson v Polasky*, 32 AD3d 1215, 1216 [4th Dept 2006]). Plaintiff failed to raise a triable issue of fact with respect to that category (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), inasmuch as the limitations upon which plaintiff relied,

e.g., inability to ride a golf cart or to garden, do not establish that she was limited in "substantially all" of her daily activities (Insurance Law § 5102 [d]; *see generally Licari v Elliott*, 57 NY2d 230, 236 [1982]).

We further conclude, however, that the court properly denied defendant's motion with respect to the remaining two categories of serious injury alleged by plaintiff, i.e., the permanent consequential limitation of use and significant limitation of use categories. Although the physician who examined plaintiff on behalf of defendant indicated range of motion limitations of approximately 16% or less, which could be considered insignificant or inconsequential (*see e.g. Waldman v Dong Kook Chang*, 175 AD2d 204, 204 [2d Dept 1991]), he failed to explain the basis for his calculations, such as the basis for his opinion as to what constitutes a "normal" cervical range of motion. Thus, his conclusions were speculative and insufficient to meet defendant's burden of establishing that plaintiff's limitations were inconsequential or insignificant (*see id.*). Even assuming, arguendo, that defendant met his burden with respect to permanency, we conclude that plaintiff raised an issue of fact by the affirmation of her treating physician, who stated that her injuries had entered a chronic state (*see Cook v Peterson*, 137 AD3d 1594, 1596 [4th Dept 2016]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

265
CA 17-01209
PRESENT: SMITH, J.P., CENTRA, PERADOTTO, DEJOSEPH, AND CURRAN, JJ.

MOHAWK VALLEY WATER AUTHORITY,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT,
AND NEW YORK STATE CANAL CORPORATION,
DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, ALBANY (STUART F. KLEIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered March 3, 2017. The judgment, inter alia, granted the motion of plaintiff for partial summary judgment seeking certain declaratory relief.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying plaintiff's motion in its entirety and vacating the declaration, and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff diverts water from the Hinckley Reservoir (Reservoir) in Oneida County to provide drinking water in the Utica area, the initial authority for which derives from a 1917 agreement. In 2005, plaintiff commenced an action seeking a declaration that it could draw water from the Reservoir at a rate of 75 cubic feet per second. That action culminated in an appeal before this Court, and we concluded, inter alia, that there were triable issues of fact precluding summary judgment (*Mohawk Val. Water Auth. v State of New York* [appeal No. 2], 78 AD3d 1513 [4th Dept 2010], *lv denied* 17 NY3d 702 [2011]). The parties thereafter began settlement negotiations, which eventually culminated in the execution of a Final Settlement Agreement (FSA). In paragraph (1) of the FSA, the parties agreed that a 2012 operating diagram (OD) would govern the water level at which defendants were required to maintain the Reservoir for plaintiff's use, but defendant New York State Canal Corporation (Canal Corporation), which directly operates the reservoir on behalf of defendant State of New York, would deviate from the OD during times of extreme drought and as necessary to maintain a water level of at least 1,182 feet. In paragraph (3) (B), the parties agreed that the

Reservoir would be maintained at a "normal operating range" of 1,195 feet or above, except in conditions of unusual drought, during which conditions it would be impossible to maintain that "target" elevation.

When Canal Corporation failed to maintain the water level of the Reservoir at 1,195 feet, plaintiff commenced this action alleging that defendants violated the FSA by failing to maintain the Reservoir at 1,195 feet or above during periods in which there was no unusual drought. Plaintiff sought, inter alia, a declaration that the FSA provides plaintiff with the right to have the Reservoir maintained at 1,195 feet or above, except during conditions of unusual drought, as well as a finding of contempt for defendants' failure to do so. Plaintiff moved for partial summary judgment with respect to the declaratory relief sought, and defendants cross-moved for summary judgment dismissing the amended complaint. Supreme Court granted plaintiff's motion to the extent of declaring that defendants were obligated "to use best efforts" to maintain the Reservoir at a level at or above 1,195 feet, and to deviate from the OD "from time to time" as necessary to that end. Canal Corporation appeals. We modify the order by denying plaintiff's motion in its entirety.

Contrary to plaintiff's contention, we conclude that the FSA is ambiguous with respect to Canal Corporation's obligation, if any, to maintain the Reservoir at 1,195 feet or above. Language in a written agreement is ambiguous if it is "reasonably susceptible of more than one interpretation" (*Maven Tech., LLC v Vasile*, 147 AD3d 1377, 1378 [4th Dept 2017] [internal quotation marks omitted]). Furthermore, when interpreting a contract, "[t]he entire contract must be reviewed and '[p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby' " (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009]). Viewing the language of the FSA as a whole, we conclude that it would be reasonable to interpret it as requiring either that defendants are bound to comply with the OD except in periods of extreme or unusual drought, at no time allowing the Reservoir to fall below 1,182 feet, or as requiring that defendants must deviate from the OD whenever necessary to maintain the "target" water level of 1,195 feet.

Contrary to the contentions of both plaintiff and Canal Corporation, the extrinsic evidence presented does not clarify this ambiguity. Where, as here, "ambiguity or equivocation exists and the extrinsic evidence presents a question of credibility or a choice among reasonable inferences, the case should not be resolved by way of summary judgment" (*Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 77 [4th Dept 1980]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

273
KA 17-00154
PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEAN REED, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MICHAEL L. D'AMICO, BUFFALO (PHILLIP A. MODRZYNSKI 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 (M. William Boller, A.J.), rendered April 21, 2014. The judgment convicted defendant upon his plea of guilty of, inter alia, assault in the third degree and criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of, inter alia, assault in the third degree (Penal Law § 120.00 [1]) and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). We reject defendant's contentions that he was illegally detained by the police and that Supreme Court should have suppressed all evidence seized from him and all statements made by him as fruit of the poisonous tree.

It is well settled that the forcible detention of a person requires "a reasonable suspicion that [the person detained] has committed, is committing or is about to commit a felony or misdemeanor" (*People v De Bour*, 40 NY2d 210, 223 [1976]; *see* CPL 140.50 [1]). "Reasonable suspicion is the quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*People v Cantor*, 36 NY2d 106, 112-113 [1975]), and a detention based on reasonable suspicion "will be upheld so long as the intruding officer can point to 'specific and articulable facts which, along with any logical deductions, reasonably prompted th[e] intrusion' " (*People v Brannon*, 16 NY3d 596, 602 [2011], quoting *Cantor*, 36 NY2d at 113).

In this case, an " 'identified citizen-informant' " informed law

enforcement officers that a 17-year-old girl had not been in contact with her family for several days and had been seen, that day, in the company of defendant and with injuries indicative of a recent assault (*People v Hogue*, 133 AD3d 1209, 1213 [4th Dept 2015], *lv denied* 27 NY3d 1152 [2016]). Although the informant, the minor's grandmother, did not personally observe the minor's injuries, she had spoken with others who had, and she was aware of prior alleged incidents of violence involving defendant and the minor. "As a general rule, hearsay is admissible at a suppression hearing" (*People v Edwards*, 95 NY2d 486, 491 [2000]; *see* CPL 710.60 [4]) and, where, as here, "police action requires reasonable suspicion rather than probable cause, a lesser showing with respect to an informant's reliability and basis of knowledge suffices" (*People v Brown*, 288 AD2d 152, 152 [1st Dept 2001], *lv denied* 97 NY2d 727 [2002]). Once contact with the minor was established, law enforcement officers asked her to send a photograph of herself to confirm her location and that she was safe. Her refusal to do so only added to the suspicion that she had been assaulted and might not be in defendant's company voluntarily. After police officers located defendant, they had reasonable suspicion to detain him to investigate the allegations that he had assaulted the minor (*see Hogue*, 133 AD3d at 1213; *Brown*, 288 AD2d at 152). We thus conclude that the evidence seized from and the statements made by defendant following his lawful detention are not subject to suppression as fruit of the poisonous tree.

Entered: March 23, 2018 Mark W. Bennett
Clerk of the Court

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

274
KA 16-01139
PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEAN REED, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MICHAEL L. D'AMICO, BUFFALO (PHILLIP A. MODRZYNSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (M. William Boller, A.J.), dated May 9, 2016. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant upon his plea of guilty of, inter alia, assault in the third degree and criminal possession of a controlled substance in the third degree (two counts).

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Erie County, for a hearing pursuant to CPL 440.30 (5).

Memorandum: Defendant appeals from an order denying his CPL article 440 motion to vacate a judgment convicting him upon his plea of guilty of, inter alia, assault in the third degree (Penal Law § 120.00 [1]) and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). He contends that Supreme Court should have granted the motion and vacated the judgment on the ground that testimony given at the suppression hearing was false, and the prosecutor knew that such testimony was false. He further contends that the prosecutor failed to disclose exculpatory evidence.

The court denied the motion on the ground that the issues raised by defendant had either been decided in a prior CPL article 440 motion (*see* CPL 440.10 [3] [b]), or could have been raised in that prior motion (*see* CPL 440.10 [3] [c]). Although a court may refuse to consider issues that were or could have been raised in prior postjudgment motions, we nevertheless "exercise our discretion to reach the merits" (*People v Pett*, 148 AD3d 1524, 1524 [4th Dept 2017]; *see People v Pinto*, 133 AD3d 787, 790 [2d Dept 2015], *lv denied* 27

NY3d 1004 [2016]; *see generally People v Hamilton*, 115 AD3d 12, 21 [2d Dept 2014]), and we conclude that the court erred in denying the motion without a hearing. We therefore reverse the order and remit the matter for a hearing pursuant to CPL 440.30 (5).

While investigating an alleged assault, law enforcement officers sought to obtain the location of defendant and a minor whom the officers believed had been assaulted by defendant. In order to do so, the officers "pinged" a cell phone used by the minor earlier that day. At the suppression hearing, a law enforcement officer testified that the phone that had been "pinged" belonged to the minor. Based on that testimony, the court determined that defendant lacked standing to challenge the police conduct of pinging the cell phone.

In support of his CPL article 440 motion, defendant submitted police reports wherein the officer who had testified at the suppression hearing (testifying officer) stated that law enforcement officers were "pinging" a phone that belonged to defendant. Defendant further submitted affidavits from the minor and her grandmother, who had sought the aid of law enforcement, indicating that the minor's phone had broken days before the police action and that they had informed the testifying officer and prosecutor of that fact either the day on which the police pinged the cell phone or, at the very least, at some date before the suppression hearing. Indeed, the minor averred that she had testified before the grand jury that her phone had broken and that defendant's cell phone was the only phone that she and defendant had used during the relevant time period. Defendant contends that the minor's grand jury testimony constituted exculpatory evidence that was not disclosed to the defense despite a specific request therefor.

It is well settled that prosecutors have the duty "not only to disclose exculpatory or impeaching evidence but also to correct the knowingly false or mistaken material testimony of a prosecution witness" (*People v Colon*, 13 NY3d 343, 349 [2009], *rearg denied* 14 NY3d 750 [2010]). Defendant has submitted credible documentary evidence establishing that the testifying officer's testimony at the suppression hearing was false and that the prosecutor knew or should have known that the testimony was false (*see* CPL 440.10 [1] [c]; *cf. People v Passino*, 25 AD3d 817, 818-819 [3d Dept 2006], *lv denied* 6 NY3d 816 [2006]; *People v Latella*, 112 AD2d 321, 323 [2d Dept 1985]; *see generally People v Washington*, 128 AD3d 1397, 1398-1399 [4th Dept 2015]). Moreover, defendant has submitted credible documentary evidence establishing that the prosecutor failed to disclose material, exculpatory evidence (*see People v Fuentes*, 12 NY3d 259, 263 [2009], *rearg denied* 13 NY3d 766 [2009]; *People v Gayden* [appeal No. 2], 111 AD3d 1388, 1389 [4th Dept 2013]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

287
CA 17-01850
PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

JULIE E. PASEK, INDIVIDUALLY AND AS POWER OF ATTORNEY FOR JAMES G. PASEK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CATHOLIC HEALTH SYSTEM, INC., MERCY HOSPITAL OF BUFFALO, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

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

HARRIS BEACH PLLC, BUFFALO (ADAM M. LYNCH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 17, 2017. The order denied the motion of plaintiff to compel certain disclosure.

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

Memorandum: Plaintiff, individually and as power of attorney for her husband, James G. Pasek (Pasek), commenced this medical malpractice action seeking damages for injuries sustained by Pasek, who was admitted to Mercy Hospital of Buffalo (defendant) for mitral valve repair surgery in February 2014. Complications ensued during the hospitalization that caused Pasek to go into cardiac arrest, which required emergency surgery and resulted in permanent physical and cognitive impairments. Plaintiff sought an investigation by the Department of Health (DOH), and plaintiff was thereafter advised by the DOH that it had cited defendant "for failing to inform Pasek or his family of 'the unintentional disconnection of [heart-lung machine] tubing' while he was en route to the operating room for emergency surgery" (*Matter of Pasek v New York State Dept. of Health*, 151 AD3d 1250, 1251 [3d Dept 2017]). Plaintiff thereafter moved to compel defendant to produce any reports pertaining to the incident.

We conclude that Supreme Court, following an in camera review, did not abuse its discretion in denying plaintiff's motion with respect to disclosure of the document at issue, entitled "occurrence event summary report" (hereafter, report) (*see generally Voss v Duchmann*, 129 AD3d 1697, 1698 [4th Dept 2015]). Defendant met its burden of establishing that the information contained in the report

was " 'generated in connection with a quality assurance review function pursuant to Education Law § 6527 (3) or a malpractice prevention program pursuant to Public Health Law § 2805-j' " (*Learned v Faxton-St. Luke's Healthcare*, 70 AD3d 1398, 1399 [4th Dept 2010]). Thus, the information contained in the report is expressly exempted from disclosure under CPLR article 31 pursuant to the confidentiality conferred on information gathered by defendant in accordance with Education Law § 6527 (3) and Public Health Law § 2805-m (*see DiCostanzo v Schwed*, 146 AD3d 1044, 1045-1046 [3d Dept 2017]; *Kivlehan v Waltner*, 36 AD3d 597, 599 [2d Dept 2007]; *Powers v Faxton Hosp.*, 23 AD3d 1105, 1106 [4th Dept 2005]). Contrary to plaintiff's contention that the privilege is "negated" because the report purportedly contains information that was improperly omitted from Pasek's medical records, it is well settled that "information which is privileged is not subject to disclosure no matter how strong the showing of need or relevancy" (*Lilly v Turecki*, 112 AD2d 788, 789 [4th Dept 1985]; *see Cirale v 80 Pine St. Corp.*, 35 NY2d 113, 117-118 [1974]). Indeed, the purpose of the privilege "is 'to enhance the objectivity of the review process' and to assure that medical review [or quality assurance] committees 'may frankly and objectively analyze the quality of health services rendered' by hospitals . . . , and thereby improve the quality of medical care" (*Logue v Velez*, 92 NY2d 13, 17 [1998]; *see Lilly*, 112 AD2d at 788).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

291

CA 17-01614

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

IN THE MATTER OF JAMES L. MICHEL, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF LACKAWANNA, RESPONDENT-RESPONDENT.

GROSS SHUMAN P.C., BUFFALO (HARRY J. FORREST OF COUNSEL), FOR PETITIONER-APPELLANT.

HODGSON RUSS LLP, BUFFALO (MICHAEL B. RISMAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John F. O'Donnell, J.), entered January 9, 2017 in a proceeding pursuant to CPLR article 78. The judgment denied the motion of petitioner for summary judgment.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to reinstate the compensation and benefits to which he allegedly was entitled pursuant to a contract between the parties. Thereafter, he moved for summary judgment on the ground that he was unlawfully denied the procedural protections due to him under section 75 of the Civil Service Law. Supreme Court properly denied the motion. Section 75 provides that certain civil servants "shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges" (§ 75 [1]). It is well settled that the statute "prescribes the procedures for removal of a protected employee charged with delinquencies in the performance of his [or her] job" (*Mandelkern v City of Buffalo*, 64 AD2d 279, 281 [4th Dept 1978]; *see Matter of New York State Off. of Children & Family Servs. v Lanterman*, 14 NY3d 275, 282 [2010]). Here, it is undisputed that petitioner did not engage in any conduct that would have subjected him to allegations of incompetence or misconduct. Thus, we conclude that section 75 of the Civil Service Law is inapplicable (*see generally Lanterman*, 14 NY3d at 282-283; *cf. Matter of Butkowski v Kiefer*, 140 AD3d 1755, 1755-1756 [4th Dept 2016]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

299

KA 15-00970

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN CONWAY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered May 11, 2015. The judgment convicted defendant upon a jury verdict of, inter alia, attempted murder in the second degree and conspiracy in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and conspiracy in the second degree (§ 105.15). The conviction arises out of defendant's attempt to kill, by shooting and repeatedly stabbing him, the husband of defendant's paramour.

We reject defendant's contention that County Court erred in discharging a deaf sworn juror and replacing that juror with an alternate. After making reasonable but unsuccessful attempts to obtain the services of a sign language interpreter, the court properly exercised its discretion in determining that the deaf juror was unavailable for continued service (*see People v Newton*, 144 AD3d 1617, 1617 [4th Dept 2016], *lv denied* 28 NY3d 1187 [2017]), and that an adjournment would not enable the court to obtain the services of an interpreter but would only needlessly delay the trial (*see People v Jeanty*, 94 NY2d 507, 517 [2000], *rearg denied* 95 NY2d 849 [2000]; *People v Jones*, 253 AD2d 665, 665 [1st Dept 1998], *lv denied* 92 NY2d 983 [1998], *reconsideration denied* 92 NY2d 1050 [1999]). Defendant failed to preserve for our review his contention that discharging the deaf juror was contrary to Judiciary Law § 390 (1), as amended in 2015, which became effective several months after jury selection in defendant's trial (*see* L 2015, ch 272, § 1). We decline to exercise our power to review that contention as a matter of discretion in the

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

We agree with defendant that the court erred in allowing the People to introduce in evidence the photograph of a handgun taken with a camera that had been seized by the police from defendant's storage unit. Prior to trial, the prosecutor unequivocally stated that nothing seized from the storage unit would be offered at trial, and defense counsel was entitled to rely upon that statement when she argued in her opening statement that the People had no evidence tying defendant to a gun (*see generally People v Shaulov*, 25 NY3d 30, 34-35 [2015]). Nevertheless, we conclude that the error in admitting the photograph in evidence is harmless inasmuch as the evidence of guilt is overwhelming and there is no significant probability that defendant would have been acquitted had it not been for that error (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant failed to preserve for our review his contention that the court improperly precluded him from calling a police detective as an expert witness (*see generally People v Mejia*, 221 AD2d 182, 182 [1st Dept 1995], *lv denied* 87 NY2d 975 [1996]). Indeed, defense counsel stated that she did not plan to call the detective and the court never made any ruling on the detective's qualification to testify as an expert (*see generally People v Hazzard*, 129 AD3d 1598, 1600 [4th Dept 2015], *lv denied* 26 NY3d 968 [2015]). 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]).

The court properly refused to suppress statements made by defendant after he advised the officer conducting the interrogation that he had a lawyer on an unrelated charge. Contrary to defendant's contention, that statement, standing alone, did not constitute an unequivocal invocation of the right to counsel (*see People v Henry*, 111 AD3d 1321, 1321-1322 [4th Dept 2013], *lv denied* 23 NY3d 1021 [2014]; *People v Balkum*, 71 AD3d 1594, 1596 [4th Dept 2010], *lv denied* 14 NY3d 885 [2010]). In any event, any error in admitting the statement must be deemed harmless (*see People v Young*, 153 AD3d 1618, 1619 [4th Dept 2017], *lv denied* 30 NY3d 1065 [2017]).

Viewing the evidence in light of the elements of the crimes of attempted murder and conspiracy as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict finding defendant guilty of those crimes is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, the sentence is not unduly harsh or severe.

Entered: March 23, 2018 Mark W. Bennett
Clerk of the Court

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

309
TP 17-01551
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF RANDOLPH SCOTT, 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 (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered August 30, 2017) to review a determination of respondent. The determination placed petitioner in involuntary protective custody.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging the determination, following a hearing, that placed him in involuntary protective custody ([IPC] *see* 7 NYCRR 330.2 [b]). Contrary to petitioner’s contention, we conclude that substantial evidence supports the determination that he was at risk of imminent harm if he returned to the general inmate population, and thus his placement in IPC was warranted (*see id.*; *Matter of Nichols v Mann*, 156 AD2d 774, 774 [3d Dept 1989]). The Hearing Officer was in the best position to assess the credibility and reliability of the confidential inmate witness, and we perceive no basis for disturbing his assessment in that regard (*see Matter of Williams v Fischer*, 18 NY3d 888, 890 [2012]; *Matter of Porter v Annucci*, 156 AD3d 1430, 1430 [4th Dept 2017]; *see also Matter of Thomas v Fischer*, 99 AD3d 1071, 1071-1072 [3d Dept 2012]).

Petitioner failed to raise in his administrative appeal his contentions concerning the allegedly inadequate assistance provided by his employee assistant, and thus petitioner failed to exhaust his administrative remedies with respect thereto (*see Matter of Stokes v Goord*, 270 AD2d 900, 900 [4th Dept 2000], *appeal dismissed and lv*

denied 95 NY2d 824 [2000]). This Court therefore has no authority to address those contentions (*see Matter of Polanco v Annucci*, 136 AD3d 1325, 1325 [4th Dept 2016]; *Stokes*, 270 AD2d at 900).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

319
KA 15-00743
PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES E. ROGERS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Spencer J. Ludington, A.J.), rendered November 6, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted assault 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 assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). We agree with defendant that his waiver of the right to appeal is not valid inasmuch as County Court conflated the right to appeal with those rights automatically forfeited by the guilty plea (*see People v Hawkins*, 94 AD3d 1439, 1439-1440 [4th Dept 2012], *lv denied* 19 NY3d 974 [2012]). Thus, the record fails to establish 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 People v Bradshaw*, 18 NY3d 257, 264 [2011]).

With respect to the merits of the appeal, even assuming, arguendo, that defendant's contention that some of the proceedings were electronically recorded and later transcribed in violation of Judiciary Law § 295 survives his guilty plea (*see generally People v Harrison*, 85 NY2d 794, 796-797 [1995]), we conclude that the contention is unpreserved for our review inasmuch as defendant did not object to the court's use of the electronic recording device and the absence of a stenographer (*see People v Clark*, 142 AD3d 1339, 1340 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]). In any event, defendant did not satisfactorily demonstrate that he was prejudiced in taking his appeal such that reversal is warranted (*see People v Wanass*, 55 Misc 3d 97, 100 [App Term, 1st Dept 2017]). We further

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

Defendant has failed to preserve his remaining contentions for our review, and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

325

KA 17-01595

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL PETRANGELO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered May 23, 2016. 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 modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for resentencing in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [2]). County Court imposed a split sentence of 90 days of local incarceration and a term of probation of unspecified length. Contrary to defendant's contention, the record establishes that he validly waived his right to appeal (*see People v Ripley*, 94 AD3d 1554, 1554 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]; *People v Wagoner*, 6 AD3d 985, 986 [3d Dept 2004]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and we are thereby foreclosed from reaching his suppression claims (*see People v Sanders*, 25 NY3d 337, 342 [2015]). Defendant's challenge to the voluntariness of his plea is not preserved for our review, and the narrow exception to the preservation requirement does not apply (*see People v Leach*, 26 NY3d 1154, 1154 [2016]; *People v Lopez*, 71 NY2d 662, 666 [1988]).

Although not raised by the parties, we note that the judgment must be modified by vacating the sentence and the matter must be remitted to County Court for resentencing because the court did not specify the length of the term of probation (*see People v Sacco*, 294 AD2d 452, 453 [2d Dept 2002]; *see generally* CPL 380.20; Penal Law §§ 60.01 [2] [d]; 65.00 [3] [a] [i]). Thus, defendant's challenge to

his sentence is academic.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

331
CA 17-01818
PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF ASSOCIATED GENERAL CONTRACTORS OF NYS, LLC, BARRETT PAVING MATERIALS, INC., BOTHAR CONSTRUCTION, LLC, CCI COMPANIES, INC., COLD SPRING CONSTRUCTION CO., HANSON AGGREGATES, NEW YORK, LLC, SLATE HILL CONSTRUCTORS, INC., TIOGA CONSTRUCTION CO., INC., AND VECTOR CONSTRUCTION CORP., PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

NEW YORK STATE THRUWAY AUTHORITY, JOANNE M. MAHONEY, IN HER OFFICIAL CAPACITY AS CHAIR OF NEW YORK STATE THRUWAY AUTHORITY BOARD OF DIRECTORS, AND BILL FINCH, IN HIS OFFICIAL CAPACITY AS ACTING EXECUTIVE DIRECTOR OF NEW YORK STATE THRUWAY AUTHORITY, RESPONDENTS-DEFENDANTS-RESPONDENTS.

COUCH WHITE, LLP, ALBANY (JENNIFER K. HARVEY OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered May 15, 2017 in a hybrid CPLR article 78 proceeding and declaratory judgment action. The judgment, insofar as appealed from, sua sponte dismissed the petition/complaint.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed in the exercise of discretion without costs and the petition/complaint is reinstated.

Memorandum: In this hybrid CPLR article 78 proceeding and declaratory judgment action, petitioners-plaintiffs (petitioners) appeal from a judgment in which Supreme Court, inter alia, sua sponte dismissed the petition/complaint (petition). We agree with petitioners that the court improvidently exercised its discretion in sua sponte dismissing the petition. “[U]se of the [sua sponte] power of dismissal must be restricted to the most extraordinary circumstances” (*Matter of Sheive v Holley Volunteer Fire Co.*, 145 AD3d 1584, 1584 [4th Dept 2016] [internal quotation marks omitted]). No

such extraordinary circumstances are present in this case. Contrary to the court's determination, "a party's lack of standing does not constitute a jurisdictional defect and does not warrant sua sponte dismissal of a complaint" (*HSBC Bank USA, N.A. v Taher*, 104 AD3d 815, 817 [2d Dept 2013]; *see U.S. Bank N.A. v Emmanuel*, 83 AD3d 1047, 1048-1049 [2d Dept 2011]). We therefore reverse the judgment insofar as appealed from in the exercise of discretion and reinstate the petition (*see generally Webb v Zogaria*, 295 AD2d 924, 924 [4th Dept 2002]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

334
TP 17-01844
PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF ERIE COUNTY SHERIFF'S POLICE BENEVOLENT ASSOCIATION, INC., AND GREGORY MCCARTHY, PETITIONERS,

V MEMORANDUM AND ORDER

COUNTY OF ERIE AND TIMOTHY B. HOWARD, SHERIFF OF ERIE COUNTY, RESPONDENTS.

BARTLO, HETTLER, WEISS & TRIPI, KENMORE (PAUL D. WEISS OF COUNSEL), FOR PETITIONERS.

THE MACHELOR LAW FIRM, AMHERST (KRISTEN M. MACHELOR OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [Mark J. Grisanti, A.J.], entered October 20, 2017) to review a determination denying the application of petitioner Gregory McCarthy for benefits pursuant to General Municipal Law § 207-c.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding challenging the determination following a hearing that Gregory McCarthy (petitioner), a deputy sheriff, was not injured in the line of duty and, thus, is not entitled to disability benefits under General Municipal Law § 207-c. The Hearing Officer issued a report recommending that petitioner's application for such benefits be denied on the ground that there is no causal link between petitioner's alleged cervical injury and his slip and fall, which occurred during a training exercise two years prior to his claim for benefits. Contrary to petitioners' contention, we see no basis to disturb the Hearing Officer's determination denying the benefits.

Initially, we note that Supreme Court erred in transferring the proceeding to this Court pursuant to CPLR 7804 (g) on the ground that the petition raised a substantial evidence issue. "Respondent's determination was not 'made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law' (CPLR 7803 [4]). Rather, the determination was the result of a hearing conducted pursuant to the terms of the collective bargaining agreement" (*Matter*

of Ridge Rd. Fire Dist. v Schiano, 41 AD3d 1219, 1220 [4th Dept 2007]; *see Matter of Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO v New York State Unified Ct. Sys.*, 138 AD3d 1444, 1444 [4th Dept 2016]). Nevertheless, in the interest of judicial economy, we consider the merits of the petition (*see Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO*, 138 AD3d at 1444-1445).

Despite the fact that the petition raises a substantial evidence issue, our review of this administrative determination is limited to whether the determination "was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). A determination "is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts . . . An agency's determination is entitled to great deference . . . and, [i]f the [reviewing] court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (*Matter of Thompson v Jefferson County Sheriff John P. Burns*, 118 AD3d 1276, 1277 [4th Dept 2014] [internal quotation marks omitted]).

Petitioners do not contend that the Hearing Officer's determination is affected by an error of law and, viewing the administrative record as a whole, we conclude that the determination is not arbitrary and capricious or an abuse of discretion. In order to establish eligibility for benefits pursuant to General Municipal Law § 207-c, a petitioner must "prove a direct causal relationship between job duties and the resulting illness or injury" (*Matter of White v County of Cortland*, 97 NY2d 336, 340 [2002]). Here, the Hearing Officer's determination that petitioner's injury is not causally related to the work-related slip and fall is not arbitrary and capricious or an abuse of discretion. Although petitioners presented evidence to the contrary, "[t]he Hearing Officer was entitled to weigh the parties' conflicting medical evidence and to assess the credibility of the witnesses, and '[w]e may not weigh the evidence or reject [the Hearing Officer's] choice where the evidence is conflicting and room for a choice exists' " (*Matter of Clouse v Allegany County*, 46 AD3d 1381, 1382 [4th Dept 2007]; *see Matter of Erie County Sheriff's Police Benevolent Assn., Inc. v County of Erie*, 153 AD3d 1657, 1658 [4th Dept 2017]; *Matter of Childs v City of Little Falls*, 109 AD3d 1148, 1149 [4th Dept 2013]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

348
CAF 17-00990
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF JOHN E. REYNOLDS, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TANYA EVANS, RESPONDENT-RESPONDENT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MOLLIE A. DAPOLITO OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered November 30, 2016 in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's objections to the order of the Support Magistrate dismissing his petition to modify a New Jersey child support order.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the objections are granted and the petition is reinstated, and the matter is remitted to Family Court, Ontario County, for further proceedings on the petition.

Memorandum: In this proceeding pursuant to Family Court Act article 4, petitioner father appeals from an order of Family Court that denied his objections to the order of the Support Magistrate dismissing his petition to modify a New Jersey child support order. The father and respondent mother, the biological parents of the subject child, previously resided in New Jersey with the child, and a New Jersey court issued a child support order in 2001. The mother and child thereafter relocated to Tennessee, and the father relocated to New York. In 2004, the New Jersey child support order was registered in New York for purposes of enforcement. In 2016, the father filed the instant petition in New York seeking a downward modification of his child support obligation. We agree with the father that the Support Magistrate erred in dismissing the petition based on lack of subject matter jurisdiction, and thus that the court erred in denying his objections to the Support Magistrate's order.

In order to modify an out-of-state child support order under the Uniform Interstate Family Support Act ([UIFSA] Family Ct Act art 5-B), the order must be registered in New York and, in relevant part, the following conditions must be present: "(i) neither the child, nor the obligee who is an individual, nor the obligor resides in the issuing state; (ii) a petitioner who is a nonresident of this state seeks modification; and (iii) the respondent is subject to the personal

jurisdiction of the tribunal of this state" (§ 580-611 [a] [1]). Although the New Jersey child support order was registered in New York, the father is the petitioner and he is a resident of New York. Therefore, under the UIFSA, the father could not properly bring the petition for modification of the New Jersey child support order in New York. The father could, however, properly bring the petition for modification in New York under the Full Faith and Credit for Child Support Orders Act ([FFCCSOA] 28 USC § 1738B; *see generally Matter of Bowman v Bowman*, 82 AD3d 144, 146-148 [3d Dept 2011]). Under the FFCCSOA, a New York court may modify an out-of-state child support order if "the court has jurisdiction to make such a child support order pursuant to [28 USC § 1738B] subsection (i)" and, in relevant part, "the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual contestant" (28 USC § 1738B [e] [1], [2] [A]). Here, neither the parties nor the child continued to reside in New Jersey, and New Jersey therefore ceased to have continuing, exclusive jurisdiction (*see* Family Ct Act § 580-205 [a] [1]; 28 USC § 1738B [d]).

Although the UIFSA and the FFCCSOA "have complementary policy goals and should be read in tandem" (*Matter of Spencer v Spencer*, 10 NY3d 60, 65-66 [2008]), the UIFSA and the FFCCSOA conflict when applied to these facts, and we conclude that the FFCCSOA preempts the UIFSA here. The FFCCSOA "is so comprehensive in scope that it is inferable that Congress intended to fully occupy the field of its subject matter" (*Bowman*, 82 AD3d at 149 [internal quotation marks omitted]). We therefore reverse the order, grant the objections and reinstate the petition, and we remit the matter to Family Court for further proceedings thereon.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

349
CAF 16-01836
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF ALIYAH M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LYNNISE M., RESPONDENT-APPELLANT,
AND ANTHONY A., RESPONDENT.
(APPEAL NO. 1.)

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

NATALIE M. STUTZ, BUFFALO, FOR PETITIONER-RESPONDENT.

AYOKA A. TUCKER, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 8, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the subject child was an abused child and placed respondent-appellant under the supervision of 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 10, respondent mother appeals from seven orders that adjudged that the subject children were abused children and placed the mother under petitioner's supervision. We conclude at the outset that the appeal from the order in appeal No. 2 must be dismissed. The record reflects that Family Court vacated the order at issue in that appeal because the subject child had turned 18 prior to the conclusion of the proceedings (*see Matter of Alissia E.C. [Angelo B.]*, 104 AD3d 1269, 1269 [4th Dept 2013]).

With respect to the remaining appeals, we reject the mother's contention that the court improperly relied on inadmissible hearsay in reaching its determination. Initially, the court acknowledged that the out-of-court statements attributed by witnesses to the mother's adult daughter constituted hearsay, but expressly stated in its decision that it had not considered those statements for the truth of the matter asserted therein (*see Matter of Weekley v Weekley*, 109 AD3d 1177, 1178 [4th Dept 2013]). Further, the out-of-court statements attributed to the child who allegedly was sexually abused by the mother's boyfriend were sufficiently corroborated under Family Court

Act § 1046 (a) (vi) and therefore were properly considered by the court (*see Matter of Nicole V.*, 71 NY2d 112, 118-119 [1987]).

We further conclude that, contrary to the mother's contention, the court did not abuse its discretion in qualifying a witness for petitioner as an expert "in his capacity as a mental health counselor as well as . . . [based on] his expertise in the skill of forensic mental health as it pertains to sexual abuse" (*see generally Matter of Pringle v Pringle*, 296 AD2d 828, 829 [4th Dept 2002]). The court properly considered the witness's history of " '[l]ong observation and actual experience' " in addition to his academic credentials (*Price v New York City Hous. Auth.*, 92 NY2d 553, 559 [1998]).

Finally, the mother's remaining contentions are improperly raised for the first time on appeal and therefore are not preserved for our review (*see Matter of Jaydalee P. [Codilee R.]*, 156 AD3d 1477, 1477 [4th Dept 2017]; *see generally Earsing v Nelson*, 212 AD2d 66, 72 [4th Dept 1995]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

350
CAF 16-01837
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF DEONTE M.M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LYNNISE M., RESPONDENT-APPELLANT,
AND ANTHONY A., RESPONDENT.
(APPEAL NO. 2.)

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

NATALIE M. STUTZ, BUFFALO, FOR PETITIONER-RESPONDENT.

AYOKA A. TUCKER, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 8, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the subject child was an abused child and placed respondent-appellant under the supervision of petitioner.

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

Same memorandum as in *Matter of Aliyah M.* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

351
CAF 16-01838
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF DASHAUN L.A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LYNNISE M., RESPONDENT-APPELLANT,
AND ANTHONY A., RESPONDENT.
(APPEAL NO. 3.)

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

NATALIE M. STUTZ, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 8, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the subject child was an abused child and placed respondent-appellant under the supervision of petitioner.

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

Same memorandum as in *Matter of Aliyah M.* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

352
CAF 16-01839
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF ANIYA I.S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ANTHONY A., RESPONDENT,
AND LYNNISE M., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

NATALIE M. STUTZ, BUFFALO, FOR PETITIONER-RESPONDENT.

PAMELA THIBODEAU, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 8, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the subject child was an abused child and placed respondent-appellant under the supervision of petitioner.

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

Same memorandum as in *Matter of Aliyah M.* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

353
CAF 16-01840
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF RAHKEIM A. AND NYLA S.A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LYNNISE M., RESPONDENT-APPELLANT,
AND ANTHONY A., RESPONDENT.
(APPEAL NO. 5.)

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

NATALIE M. STUTZ, BUFFALO, FOR PETITIONER-RESPONDENT.

PAMELA THIBODEAU, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 8, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the subject children were abused children and placed respondent-appellant under the supervision of petitioner.

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

Same memorandum as in *Matter of Aliyah M.* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

354
CAF 16-01841
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ.

IN THE MATTER OF LANIASA N.A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LYNNISE M., RESPONDENT-APPELLANT,
AND ANTHONY A., RESPONDENT.
(APPEAL NO. 6.)

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

NATALIE M. STUTZ, BUFFALO, FOR PETITIONER-RESPONDENT.

PAMELA THIBODEAU, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 8, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the subject child was an abused child and placed respondent-appellant under the supervision of petitioner.

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

Same memorandum as in *Matter of Aliyah M.* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

355
CAF 16-01842

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

IN THE MATTER OF DARYN W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LYNNISE M., RESPONDENT-APPELLANT,
AND ANTHONY A., RESPONDENT.
(APPEAL NO. 7.)

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

NATALIE M. STUTZ, BUFFALO, FOR PETITIONER-RESPONDENT.

PAMELA THIBODEAU, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 8, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the subject child was an abused child and placed respondent-appellant under the supervision of petitioner.

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

Same memorandum as in *Matter of Aliyah M.* ([appeal No. 1] — AD3d — [Mar. 23, 2018] [4th Dept 2018]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

357

CA 17-01457

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

EPK PROPERTIES, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PFOHL BROTHERS LANDFILL SITE STEERING COMMITTEE, NIAGARA MOHAWK POWER CORPORATION AND TOWN OF CHEEKTOWAGA, DEFENDANTS-RESPONDENTS.

THE KNOER GROUP, PLLC, BUFFALO (CHANEL T. MCCARTHY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (KEVIN M. HOGAN OF COUNSEL), FOR DEFENDANT-RESPONDENT PFOHL BROTHERS LANDFILL SITE STEERING COMMITTEE.

BARCLAY DAMON LLP, ALBANY (YVONNE E. HENNESSEY OF COUNSEL), FOR DEFENDANT-RESPONDENT NIAGARA MOHAWK POWER CORPORATION.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JOHN T. KOLAGA OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF CHEEKTOWAGA.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered November 9, 2016. The order granted the respective motions of defendants to dismiss the complaint against them.

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

Memorandum: Plaintiff commenced this action seeking damages and injunctive relief based on its allegations that defendants were responsible for damage to its property as a result of the artificial diversion of water onto its property. Plaintiff asserted causes of action for negligence, nuisance and trespass. Defendants each moved for dismissal of the complaint against them, contending, inter alia, that plaintiff's causes of action were time-barred. Supreme Court granted the respective motions, and we now affirm.

Defendant Niagara Mohawk Power Corporation (NiMo) owns a strip of land that runs along the eastern border of plaintiff's property. To the east of the NiMo parcel is the Pfohl Brothers Landfill (Landfill), which had been remediated in 2001 and 2002 pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (42 USC 9601 *et seq.*). Defendant Pfohl Brothers Landfill Site Steering Committee oversaw the design and construction of the remedial

action, which included a surface water management program to "channel[] [water] away from adjacent residences and streets." According to the remedial plan, the surface water was to be directed toward an existing wetland and, ultimately, to a nearby creek. Defendant Town of Cheektowaga was required to implement an operation and maintenance plan in accordance with New York State Department of Environmental Conservation requirements.

In 2006, plaintiff purchased its property and, in 2007 and 2010, requested determinations from the United States Army Corps of Engineers (USACE) concerning whether a proposed development on its property would disturb federal wetlands. By letter dated June 15, 2010, the USACE informed plaintiff that the conditions on the property had "changed substantially," requiring a new delineation of federal wetland boundaries. Plaintiff commenced this action on July 24, 2014, alleging that this would eliminate any beneficial use of the property.

As an initial matter, we note that plaintiff does not challenge the court's dismissal of the negligence cause of action and is deemed to have abandoned any issue with respect to that dismissal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). On the merits, we conclude that the court properly determined that the causes of action for nuisance and trespass are time-barred.

"An action to recover damages for injury to property must be commenced within three years of the date of the injury" (*Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1031 [2013], *rearg denied* 23 NY3d 934 [2014]; *see* CPLR 214 [4]), and "[t]he cause of action accrues 'when the damage [is] apparent' " (*Russell v Dunbar*, 40 AD3d 952, 953 [2d Dept 2007]; *see Wild v Hayes*, 68 AD3d 1412, 1414-1415 [3d Dept 2009]; *Cranesville Block Co. v Niagara Mohawk Power Corp.*, 175 AD2d 444, 446 [3d Dept 1991]). Defendants established that the nuisance and trespass causes of action accrued, at the latest, in June 2010, which is when plaintiff received the information from the USACE and the damage to its property was apparent (*see Russell*, 40 AD3d at 953; *Alamio v Town of Rockland*, 302 AD2d 842, 844 [3d Dept 2003]).

Plaintiff contends that, because the water flows continually onto its property, the torts are continuous in nature and, as a result, plaintiff's causes of action for nuisance and trespass are not time-barred. We reject that contention. Courts will apply the continuing wrong doctrine in cases of " 'nuisance or continuing trespass where the harm sustained by the complaining party *is not exclusively traced to the day when the original objectionable act was committed*' " (*Capruso v Village of Kings Point*, 23 NY3d 631, 639 [2014] [emphasis added]; *see Lizza Indus., Inc.*, 22 NY3d at 1031-1032). Here, plaintiff's allegations establish that its damages may be traced to a specific, objectionable act, i.e., the implementation of the remedial plan. Where, as here, there is an original, objectionable act, "the accrual date does not change as a result of continuing consequential damages" (*New York Seven-Up Bottling Co. v Dow Chem. Co.*, 96 AD2d 1051, 1052 [2d Dept 1983], *affd* 61 NY2d 828 [1984]; *cf. Bloomingdales, Inc. v New York City Tr. Auth.*, 13 NY3d 61, 65-66 [2009]). Inasmuch

as the damage to the property became apparent at the latest in June 2010 and the damage is traceable to an original objectionable act, plaintiff's nuisance and trespasses causes of action are time-barred and were properly dismissed. As a result of the dismissal of plaintiff's substantive causes of action, plaintiff's demand for injunctive relief was also properly dismissed (*see Town of Macedon v Village of Macedon*, 129 AD3d 1639, 1641 [4th Dept 2015]).

Based on our determination, we do not address plaintiff's remaining contentions or the alternative theories for affirmance raised by defendants.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

361

CA 17-01554

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

LORNA FORBES, AS EXECUTOR OF THE ESTATE OF HUGH FORBES, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CARIS LIFE SCIENCES, INC., CARIS DIAGNOSTICS, INC., MIRACA LIFE SCIENCES, INC., AND MIRACA HOLDING GROUP, INC., DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, SYRACUSE (AARON M. SCHIFFRIK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered November 21, 2016. The order denied defendants' motion to dismiss the amended 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 amended complaint is dismissed.

Memorandum: Plaintiff, as executor of the estate of Hugh Forbes (decedent), commenced this action asserting causes of action for fraudulent concealment, fraud, and medical malpractice arising from defendants' misdiagnosis of decedent's cutaneous T-cell lymphoma (hereafter, cancer). Plaintiff alleged in the amended complaint that decedent was suffering from a skin condition that included lesions and presented to a dermatologist in late September 2010. The dermatologist performed a skin biopsy that was then sent to defendants' laboratory for diagnostic examination (hereafter, first biopsy). Defendants subsequently generated a dermatopathology report dated October 4, 2010 indicating that the pathology was suggestive of psoriasis rather than cancer, but that additional sampling could be appropriate if the lesions persisted or new lesions arose. Decedent continued to treat with the dermatologist on at least 16 occasions until May 2012, during which time decedent's condition worsened, including the development of new lesions. In early February 2013, decedent was admitted to a hospital that performed a biopsy and thereafter diagnosed decedent with cancer.

The hospital also requested recuts of the first biopsy from defendants. After examining the recuts, the hospital prepared a

report confirming that the cancer diagnosed by the hospital in February 2013 was present in the first biopsy performed in September 2010. The hospital sent a copy of its report dated March 8, 2013 to defendants, thereby providing them with notice of their misdiagnosis. Plaintiff alleged that defendants therefore knew about the misdiagnosis at that time and failed to disclose it to decedent or the dermatologist.

Plaintiff further alleged that, in early March 2014, plaintiff's attorney requested from defendants reports and recuts of the first biopsy. In response to the request, defendants performed a review pursuant to its internal procedures and prepared an addendum in April 2014 indicating that, contrary to the diagnosis in the original dermatopathology report, there was cancer present in the first biopsy. On April 23, 2014, defendants provided to plaintiff's attorney the original dermatopathology report and recuts, but failed to disclose the addendum even though defendants sent a copy thereof to the dermatologist. Plaintiff alleged that defendants fraudulently concealed and withheld the addendum from plaintiff's attorney, who did not see the addendum until the dermatologist's deposition was conducted in February 2016 in conjunction with a separate action commenced by decedent.

Defendants moved to dismiss the amended complaint pursuant to CPLR 3211 (a) (5) and (7), and Supreme Court denied the motion. We reverse.

We agree with defendants that plaintiff's medical malpractice cause of action is time-barred. Although the legislature recently amended CPLR 214-a to provide, as relevant here, that an action based upon the alleged negligent failure to diagnose cancer may be commenced within 2½ years of when the plaintiff knew or reasonably should have known of the alleged negligent act or omission (*see* CPLR 214-a), the amendment is not effective for the dates of the alleged negligent acts and omissions in this case (*see* L 2018, ch 1, § 2). Plaintiff was thus required to commence her medical malpractice action within 2½ years of defendants' act or omission in misdiagnosing decedent's cancer in the October 4, 2010 dermatopathology report following their diagnostic examination of the first biopsy (*see* CPLR former 214-a; *Cummins v Marchetti*, 17 AD3d 1160, 1160-1161 [4th Dept 2005]; *McClurg v State of New York*, 204 AD2d 999, 1000-1001 [4th Dept 1994], *lv denied* 84 NY2d 806 [1994]). Inasmuch as the applicable limitations period expired on April 4, 2013 and plaintiff did not commence this action until May 3, 2016, the medical malpractice cause of action is untimely (*see Cummins*, 17 AD3d at 1160-1161).

Defendants further contend that plaintiff failed to state a cause of action for fraud or fraudulent concealment, and that they are not estopped from invoking the statute of limitations against plaintiff's medical malpractice cause of action. We agree. "The elements of a cause of action for fraud in connection with charges of medical malpractice are 'knowledge on the part of the physician of the fact of his [or her] malpractice and of [the] patient's injury in consequence thereof, coupled with a subsequent intentional, material

misrepresentation by [the physician] to [the] patient known by [the physician] to be false at the time it was made, and on which the patient [justifiably] relied to his [or her] damage' " (*Abraham v Kosinski*, 305 AD2d 1091, 1092 [4th Dept 2003], quoting *Simcuski v Saeli*, 44 NY2d 442, 451 [1978]). "The damages resulting from the fraud must be separate and distinct from those generated by the alleged malpractice" (*id.* [internal quotation marks omitted]). Additionally, "a defendant may be estopped to plead the [s]tatute of [l]imitations where [the] plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Simcuski*, 44 NY2d at 448-449). However, "without more, concealment by a physician or failure to disclose his [or her] own malpractice does not give rise to a cause of action in fraud or deceit separate and different from the customary malpractice action, thereby entitling the plaintiff to bring his [or her] action within the longer period limited for such claims" (*id.* at 452).

Here, plaintiff alleged that defendants knew about the misdiagnosis when the hospital sent its report dated March 8, 2013 and that defendants fraudulently concealed the misdiagnosis by failing to disclose it to decedent or the dermatologist, which deprived decedent of an opportunity to commence a timely action for medical malpractice. That allegation is insufficient to state a cause of action for fraud or fraudulent concealment and to estop defendants from asserting its statute of limitations defense inasmuch as plaintiff "fail[ed] to set forth a misrepresentation beyond defendants' failure to disclose their own malpractice" (*Atton v Bier*, 12 AD3d 240, 241 [1st Dept 2004]; *see Plain v Vassar Bros. Hosp.*, 115 AD3d 922, 923 [2d Dept 2014]). Contrary to plaintiff's related allegation, we conclude that defendants' purported violation of certain notification requirements pursuant to the federal Clinical Laboratory Improvement Amendments of 1988 (Pub L 100-578, 102 US Stat 2903 [100th Cong, 2d Sess, Oct. 31, 1988], amending 42 USC § 263a) and the regulations promulgated thereunder (42 CFR part 493), which do not create a private cause of action, cannot form a basis for liability against defendants (*see Wood v Schuen*, 760 NE2d 651, 658-659 [Ind Ct App 2001], *transfer denied* 783 NE2d 692 [Ind 2002]; *see also Jewell v Pinson*, 2005 WL 2105417, *4-6 [Mich Ct App 2005], *lv denied* 474 Mich 1111, 711 NW2d 749 [2006]).

Plaintiff further alleged that, despite preparing the addendum indicating that there was cancer present in the first biopsy in response to the request of plaintiff's attorney and sending that document to the dermatologist, defendants fraudulently concealed and withheld the addendum from plaintiff's attorney in late April 2014. We conclude that this allegation is insufficient to state a cause of action sounding in fraud because plaintiff cannot allege damages from the purported misrepresentation that are separate and distinct from those generated by the misdiagnosis. Inasmuch as decedent had been properly diagnosed with cancer a year prior to this purported misrepresentation, he "neither pursued ineffective or inappropriate treatment nor elected not to pursue appropriate treatment in reliance on the alleged fraudulent concealment . . . , and thus he was not 'deprived . . . of the opportunity for cure' " (*Abraham*, 305 AD2d at 1092; *see Ross v Community Gen. Hosp. of Sullivan County*, 150 AD2d

838, 841-842 [3d Dept 1989]; *cf. Simcuski*, 44 NY2d at 451-452). Morever, the statute of limitations on the medical malpractice cause of action had already expired when defendants failed to send the addendum to plaintiff's attorney in late April 2014 and, therefore, plaintiff cannot invoke the doctrine of equitable estoppel against defendants on that basis because the purported misrepresentation could not have prevented her from timely filing the action (*see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552-553 [2006]; *Clark v Ravikumar*, 90 AD3d 971, 972-973 [2d Dept 2011]). Based upon the foregoing, we conclude that the court erred in denying defendants' motion.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

363

CA 17-01248

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

JONATHAN R. GUSTKE,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN T. NICKERSON, BRIAN H. FOLEY,
DEFENDANTS-RESPONDENTS,
MARY BETH LIPOME AND MARY A. HOURT,
DEFENDANTS-RESPONDENTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (DAVID M. GOODMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT MARY BETH LIPOME.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JEFFREY BAASE OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT MARY A. HOURT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (MARK A. FORDEN OF COUNSEL), FOR DEFENDANT-RESPONDENT JONATHAN T. NICKERSON.

ADAMS & KAPLAN, WILLIAMSVILLE (KEVIN J. GRAFF OF COUNSEL), FOR DEFENDANT-RESPONDENT BRIAN H. FOLEY.

Appeal and cross appeals from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered April 11, 2017. The order, among other things, granted the motions of defendants Jonathan T. Nickerson and Brian H. Foley seeking 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 that part of plaintiff's cross motion on the issue of defendant Mary Beth Lipome's negligence with respect to the chain-reaction accident and granting the cross motion of defendant Mary Beth Lipome in part and dismissing the complaint against her insofar as it relates to the accident between defendant Mary A. Hourt and plaintiff, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the vehicle he was operating was involved in a chain-reaction motor vehicle accident, following which he was struck by a vehicle while on foot. All of the parties were driving on

South Cayuga Road in Amherst, New York, and plaintiff and defendants Jonathan T. Nickerson and Brian H. Foley were stopped in the northbound lane at the intersection with Coventry Road. Plaintiff was waiting for an opening in traffic in the opposite direction so he could make a left turn onto Coventry Road. Soon thereafter, a vehicle driven by defendant Mary Beth Lipome rear-ended Foley's vehicle, which caused a chain-reaction collision with Nickerson's vehicle and then plaintiff's vehicle. Plaintiff turned his vehicle onto Coventry Road and parked and Nickerson, Foley, and Lipome pulled off to the side on South Cayuga Road. Plaintiff called his father and told him that he had been in an accident and that he was going to check on the other drivers and exchange insurance information. He exited his vehicle and began walking back toward the other drivers on South Cayuga Road when he was struck by a vehicle driven by defendant Mary A. Hourt. Plaintiff has no memory of the accidents. Defendants each moved/cross-moved for summary judgment dismissing the complaint against them, and plaintiff cross-moved for partial summary judgment on the issue of negligence and, in the alternative, to compel discovery. Supreme Court granted the motions of Nickerson and Foley, denied the motion and cross motion of the remaining defendants, and granted that part of plaintiff's cross motion seeking to compel discovery except with respect to Nickerson and Foley. Plaintiff appeals, and Hourt and Lipome cross-appeal.

Contrary to plaintiff's contention on appeal, the court properly granted the motions of Nickerson and Foley. "[I]n multiple-car, chain-reaction accidents the courts have recognized that the operator of a vehicle which has come to a complete stop and is propelled into the vehicle in front of it as a result of being struck from behind is not negligent inasmuch as the operator's actions cannot be said to be the proximate cause of the injuries resulting from the collision" (*Mohamed v Town of Niskayuna*, 267 AD2d 909, 910 [3d Dept 1999]). Here, both Nickerson and Foley established their entitlement to summary judgment inasmuch as they both came to a complete stop before Lipome's vehicle rear-ended Foley's vehicle, which was then propelled into Nickerson's vehicle, and, in opposition, plaintiff failed to raise a triable issue of fact (*see Zielinski v Van Pelt* [appeal No. 2], 9 AD3d 874, 875-876 [4th Dept 2004]; *Piazza v D'Anna*, 6 AD3d 1161, 1162 [4th Dept 2004]).

We agree with plaintiff, however, that he is entitled to partial summary judgment on negligence to the extent that Lipome's vehicle rear-ended Foley's vehicle, thereby starting the chain-reaction accident. We therefore modify the order accordingly. " '[T]he rearmost driver in a chain-reaction collision bears a presumption of responsibility' " (*Ferguson v Honda Lease Trust*, 34 AD3d 356, 357 [1st Dept 2006]), and "[i]t is well established that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate, [nonnegligent] explanation for the accident" (*Barron v Northtown World Auto*, 137 AD3d 1708, 1709 [4th Dept 2016] [internal quotation marks omitted]). Here, plaintiff met his initial burden of demonstrating that Lipome was negligent in rear-ending Foley's

vehicle, which undisputedly caused the chain-reaction accident. Lipome has not provided any nonnegligent explanation for the collision and, indeed, it appears from the record that Lipome essentially admitted that she was at fault for rear-ending Foley's vehicle.

With respect to Lipome's cross appeal, we agree with plaintiff that the court properly denied Lipome's cross motion to the extent it relates to the chain-reaction accident inasmuch as there are triable issues of fact whether at least some of plaintiff's alleged injuries were caused by that accident (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We agree with Lipome, however, that she is entitled to partial summary judgment dismissing the complaint against her insofar as it relates to the accident between plaintiff and Hourt, and we therefore further modify the order accordingly. Lipome's negligence in the chain-reaction accident "did nothing more than to furnish the condition or give rise to the occasion by which [plaintiff's] injury was made possible and which was brought about by the intervention of a new, independent and efficient cause" (*Serrano v Gilray*, 152 AD3d 1164, 1165 [4th Dept 2017], *lv denied* 30 NY3d 904 [2017] [internal quotation marks omitted]), i.e., plaintiff's conduct in walking back to the accident scene. Prior to plaintiff's accident with Hourt, the situation resulting from the initial rear-end accident " 'was a static, completed occurrence,' . . . [and] '[t]he risk undertaken by plaintiff' [in walking back to the rear-end accident scene] was created by himself" (*id.*).

Contrary to Hourt's contention on her cross appeal, the court properly denied her motion inasmuch as she failed to meet her initial burden of establishing that the alleged negligence of plaintiff was the sole proximate cause of the accident and that her " 'alleged negligence, if any, did not contribute to the happening of the accident' " (*Burkhart v People, Inc.*, 106 AD3d 1535, 1536 [4th Dept 2013]). Specifically, Hourt failed to establish in support of her motion that plaintiff "suddenly darted out" into traffic or that she complied with her "duty to see that which through the proper use of [her] senses [she] should have seen" (*id.* [internal quotation marks omitted]; *see Benetatos v Comerford*, 78 AD3d 750, 752 [2d Dept 2010]).

Entered: March 23, 2018 Mark W. Bennett
Clerk of the Court

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

369

KA 16-00951

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY R. BROOKS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered April 18, 2016. The judgment convicted defendant, upon a jury verdict, of attempted robbery in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted robbery in the third degree (Penal Law §§ 110.00, 160.05). We reject defendant's contention that Supreme Court erred in charging the jury on attempted robbery in the third degree as a lesser included offense of robbery in the third degree. "A lesser [included] offense must be submitted to the jury if (1) it is actually a lesser included offense of the greater charge, and (2) the jury is 'warranted in finding that the defendant committed the lesser but not the greater crime' . . . , i.e., there is a 'reasonable view of the evidence' to support such a finding" (*People v Cabassa*, 79 NY2d 722, 728-729 [1992], *cert denied sub nom. Lind v New York*, 506 US 1011 [1992], quoting *People v Glover*, 57 NY2d 61, 64 [1982]; *see* CPL 300.50 [1]). Contrary to defendant's contention, there is a reasonable view of the trial evidence, which included testimony and surveillance footage of the incident, to support a finding by the jury that defendant attempted to steal property forcibly from a loss prevention officer at a Tops Market, but did not succeed in doing so (*see generally People v Leon*, 227 AD2d 925, 926 [4th Dept 1996]).

We reject defendant's further contention that the court erred in denying his challenge for cause to a prospective juror. "CPL 270.20 (1) (b) provides that a party may challenge a potential juror for cause if the juror 'has a state of mind that is likely to preclude him

[or her] from rendering an impartial verdict based upon the evidence adduced at the trial' " (*People v Harris*, 19 NY3d 679, 685 [2012]). Here, "nothing that [the prospective juror] said raised a serious doubt as to her ability to render an impartial verdict" (*People v Fowler-Graham*, 124 AD3d 1403, 1403 [4th Dept 2015], *lv denied* 25 NY3d 1072 [2015]; *see People v DeFreitas*, 116 AD3d 1078, 1079-1080 [3d Dept 2014], *lv denied* 24 NY3d 960 [2014]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

372

KA 14-00395

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

DAVID J. STEINMETZ, JR., DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM 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 October 30, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal mischief in the third degree (Penal Law § 145.05 [2]). We reject defendant's contention that his waiver of the right to appeal is invalid. Defendant signed a plea agreement that required him to waive his right to appeal, and County Court's "plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that 'the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Kulyeshie*, 71 AD3d 1478, 1478 [4th Dept 2010], *lv denied* 14 NY3d 889 [2010]; *see People v Bryant*, 28 NY3d 1094, 1095-1096 [2016]). Even assuming, arguendo, that defendant's challenges to his *Alford* plea survive his valid waiver of appeal, we conclude that those challenges are unpreserved for our review because defendant failed to raise them as part of a motion to withdraw his plea or to vacate the judgment of conviction (*see People v Miller*, 87 AD3d 1303, 1303-1304 [4th Dept 2011], *lv denied* 18 NY3d 926 [2012]; *People v Sherman*, 8 AD3d 1026, 1026 [4th Dept 2004], *lv denied* 3 NY3d 681 [2004]), and this case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]; *People v Rivers*, 145 AD3d 1591, 1592 [4th Dept 2016], *lv denied* 29 NY3d 952 [2017]). Finally, to the extent that defendant's ineffective assistance of counsel contention survives his *Alford* plea and waiver of the right to appeal, we conclude that it is without merit inasmuch as the record before us establishes that defendant was

afforded meaningful representation (*see People v Blarr* [appeal No. 1], 149 AD3d 1606, 1606 [4th Dept 2017], *lv denied* 29 NY3d 1123 [2017]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

375
CA 17-01662
PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

ANGELA L. DARNLEY AND RONALD R. DARNLEY, II,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

DIANE L. RANDAZZO, DEFENDANT-APPELLANT-RESPONDENT,
ET AL., DEFENDANTS.

LAW OFFICE OF JOHN WALLACE, BUFFALO (ALYSON C. CULLITON OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ANDREW J. CONNELLY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 21, 2017. The order denied the motion of defendant Diane L. Randazzo for summary judgment dismissing the complaint against her and denied the cross motion of plaintiffs for partial summary judgment on the issue of negligence.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Angela L. Darnley (plaintiff) in two automobile accidents, only one of which is at issue on this appeal. The accident at issue occurred on May 4, 2013 on Niagara Falls Boulevard, which has two northbound lanes, two southbound lanes, and a center turning lane, which is where the accident occurred. Diane L. Randazzo (defendant) was traveling northbound and entered the center turning lane so that she could make a left turn into a plaza. Plaintiff was exiting a business parking lot and intended to turn left, heading southbound. Traffic was heavy, and the drivers of two vehicles that were in the northbound lanes stopped and waved plaintiff forward. When plaintiff proceeded forward, her vehicle struck defendant's vehicle. Defendant moved for summary judgment dismissing the complaint against her, and plaintiffs cross-moved for partial summary judgment on the issue of negligence. Supreme Court denied both the motion and cross motion, and defendant now appeals and plaintiffs cross-appeal.

We conclude that the court properly denied the motion. Defendant met her initial burden by establishing that plaintiff was negligent in failing to yield the right-of-way, and that there was nothing defendant could have done to avoid the accident. "Because plaintiff

was entering the roadway from a parking lot, she was required to yield the right-of-way to defendant's vehicle regardless of whether it was in the curb lane . . . or in the center turn lane" (*Rose v Leberth*, 128 AD3d 1492, 1493 [4th Dept 2015]; *see* Vehicle and Traffic Law § 1143). Defendant also met her initial burden of establishing that she was not negligent in the operation of her vehicle. She testified at her deposition that she had traveled about only 20 feet in the turning lane before colliding with plaintiff's vehicle and that she was only a car length away from where she was intending to make a left turn. She testified that she was driving slowly and never saw plaintiff's vehicle prior to the impact. Defendant "thus met her initial burden on the motion by establishing as a matter of law that the sole proximate cause of the accident was [plaintiff's] failure to yield the right-of-way to her" (*Rose*, 128 AD3d at 1493 [internal quotation marks omitted]; *see Limardi v McLeod*, 100 AD3d 1375, 1375 [4th Dept 2012]).

In opposition to the motion, however, plaintiffs raised a triable issue of fact whether defendant was negligent in the operation of her vehicle (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In particular, plaintiffs raised an issue of fact whether defendant violated Vehicle and Traffic Law § 1126 (c), which provides that drivers may travel in a center turning lane "for such distance as is required for safety in preparing to turn left." Plaintiffs contended that defendant was using the center turning lane to bypass the stopped traffic, and they submitted the affidavit of their expert, who examined the accident scene and determined that, at the time of the accident, defendant was 161 feet away from where she would make a left turn. The expert's determination of distance thus supported plaintiffs' contention and contradicted defendant's deposition testimony that she was only a car length away from where she intended to turn. Plaintiffs' submissions were therefore sufficient to raise an issue of fact whether defendant was negligent in traveling in the center turning lane for a distance greater than "is required for safety in preparing to turn left" (*id.*).

The court likewise properly denied plaintiffs' cross motion. Plaintiffs failed to meet their initial burden of establishing as a matter of law that plaintiff's actions were not a contributing cause of the accident. Plaintiffs submitted plaintiff's deposition testimony, which established that plaintiff failed to yield the right-of-way to defendant (*see* Vehicle and Traffic Law § 1143; *see generally Sauter v Calabretta*, 90 AD3d 1702, 1703 [4th Dept 2011]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

380

CA 17-00080

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

IN THE MATTER OF JEFF BRISBANE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered November 10, 2016 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his CPLR article 78 petition seeking to annul the Parole Board’s determination denying his request for release to parole supervision. The Attorney General has advised this Court that, subsequent to that denial and during the pendency of this appeal, petitioner reappeared before the Parole Board in January 2018, at which time he was given an “ ‘open date’ ” for release. In view of that reappearance, this appeal must be dismissed as moot (*see Matter of Hill v Annucci*, 149 AD3d 1540, 1541 [4th Dept 2017]; *Matter of Dobranski v Alexander*, 69 AD3d 1091, 1091 [4th Dept 2010]). Contrary to petitioner’s contention, the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: March 23, 2018 Mark W. Bennett
Clerk of the Court

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

382
CA 17-01301
PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF CAMPAIGN FOR BUFFALO HISTORY
ARCHITECTURE & CULTURE, INC.,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, THE CROSBY COMPANY, AND
ELLICOTT DEVELOPMENT CO.,
RESPONDENTS-DEFENDANTS-RESPONDENTS.

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR
PETITIONER-PLAINTIFF-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (JESSICA M. LAZARIN OF
COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT CITY OF BUFFALO.

Appeal from a partial order and judgment (one paper) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered September 21, 2016 in a hybrid CPLR article 78 proceeding and declaratory judgment action. The partial order and judgment denied the petition/complaint with respect to respondent-defendant Ellicott Development Co.

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

Memorandum: The challenge of petitioner-plaintiff (petitioner) to the determination of the Common Council of respondent-defendant City of Buffalo is moot because petitioner did not seek any injunctive relief from this Court during the pendency of this appeal, and the subject building has been demolished (*see Citizens for St. Patrick's v City of Watervliet City Council*, 126 AD3d 1159, 1160 [3d Dept 2015]; *Solow v Imre Beauty Salon*, 34 AD2d 901, 901 [1st Dept 1970]; *see also Lubelle v Rochester Preserv. Bd.*, 158 AD2d 975, 976 [4th Dept 1990], *lv denied* 75 NY2d 710 [1990]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]). This appeal must therefore be dismissed.

Contrary to petitioner's contention, "the exception to the mootness doctrine does not apply because '[t]here is a realistic likelihood that the issues presented here will recur [in other cases] with an adequately developed record and with a timely opportunity for review' " (*Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 2 NY3d 727, 730 [2004]; *see*

generally Hearst Corp., 50 NY2d at 714-715).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

383
CA 17-01288
PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

RENEE Y. PHILLIPS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TIMOTHY SAVAGE, DEFENDANT-RESPONDENT.

KEVIN GAUGHAN, BUFFALO, FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF JOHN WALLACE, BUFFALO (BETSY F. VISCO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered April 11, 2017. The order granted the motion of defendant to dismiss the complaint.

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

Memorandum: In November 2016, plaintiff commenced this action alleging that defendant's negligence caused a motor vehicle accident in which she was injured. The accident occurred in October 2014 in Buffalo. Defendant moved to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (5), asserting that, in January 2016, plaintiff in exchange for $25,000 had executed a general release stating, inter alia, that defendant was released and forever discharged from any liability of any kind related to the accident. Supreme Court granted the motion, and we affirm.

"Where, as here, the language of a release is clear and unambiguous, the signing of a release is a jural act binding on the parties" (*Marlowe v Muhlnickel*, 294 AD2d 830, 831 [4th Dept 2002] [internal quotation marks omitted]; *see Booth v 3669 Delaware*, 242 AD2d 921, 921-922 [4th Dept 1997], *affd* 92 NY2d 934 [1998]; *Mangini v McClurg*, 24 NY2d 556, 563 [1969]). "[A] general release is governed by principles of contract law" (*Mangini*, 24 NY2d at 562) and " 'should not be set aside unless plaintiff demonstrates duress, illegality, fraud, or mutual mistake' " (*Schroeder v Connelly*, 46 AD3d 1439, 1440 [4th Dept 2007]; *see Mangini*, 24 NY2d at 563). "Strong policy considerations favor the enforcement of [release] agreements" (*Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 383 [1993]), and "[a] release 'should never be converted into a starting point for . . . litigation except under circumstances and under rules which would render any other result a grave injustice' " (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276

[2011]). Inasmuch as plaintiff has failed to allege or set forth any grounds to invalidate the release, the terms thereof bar this action, and thus the court properly granted the motion. "At best, plaintiff[] ha[s] established a mere unilateral mistake . . . with respect to the meaning and effect of the release. Such a mistake does not constitute an adequate basis for invalidating a clear, unambiguous and validly executed release" (*Booth*, 242 AD2d at 922).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

390
KA 16-01377
PRESENT: SMITH, J.P., CENTRA, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COREY D. DANIELS, DEFENDANT-APPELLANT.

AARON P. MICHEAU, WEBSTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered February 19, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of one count of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). During the plea colloquy, defendant admitted to possessing cocaine with the intent to sell, but he denied that he sold the cocaine. After County Court stated that it would not accept his plea, it again asked defendant whether he sold the cocaine, and defendant answered "yes." Defendant informed that court, however, that he was pleading guilty only because he could "no longer go forward to proceed to trial with the level of corruption and maliciousness being used to prosecute" him. The court nevertheless accepted his plea.

Although defendant never moved to withdraw his guilty plea, this case falls within the exception to the preservation requirement that was carved out by the Court of Appeals in *People v Lopez* (71 NY2d 662, 666 [1988]), which permits appellate review of the sufficiency of a plea allocution despite the absence of such a motion, where the recitation of facts elicited during the plea allocution "clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea." Under such circumstances, if

the court fails to conduct "further inquiry to ensure that [the] defendant understands the nature of the charge and that the plea is intelligently entered . . . , the defendant may challenge the sufficiency of the allocution on direct appeal, notwithstanding that a formal postallocution motion was not made" (*id.*).

Here, defendant's statements throughout the plea proceeding called his guilt into question and suggested that his plea was not voluntary. After defendant denied selling the cocaine, the court did not conduct any further inquiry other than to reiterate that, without an admission of guilt, there could be no plea. Indeed, the court "failed to inform defendant that, if what he said was true, he was not guilty of the crime charged and to ask him whether, under those circumstances, he still wished to plead guilty" (*People v Davis*, 176 AD2d 1236, 1237 [4th Dept 1991]). Moreover, the court failed to make any further inquiry into defendant's statement that he believed that he was being compelled to plead guilty. Thus, considering the plea allocution as a whole, we conclude that the court failed to ensure that the plea was knowing, intelligent and voluntary (*see People v Aleman*, 43 AD3d 756, 757 [1st Dept 2007]). We therefore reverse the judgment, vacate defendant's plea, and remit the matter to County Court for further proceedings on the indictment.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

391

KA 17-01130

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JAMES CATOR, DEFENDANT-RESPONDENT.

VALERIE G. GARDNER, DISTRICT ATTORNEY, PENN YAN (MICHAEL TANTILLO OF COUNSEL), FOR APPELLANT.

TIFFANY M. SORGEN, CONFLICT DEFENDER, CANANDAIGUA, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Yates County Court (Jason L. Cook, J.), dated April 10, 2017. The order, inter alia, granted the motion of defendant for suppression of evidence and statements.

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

Memorandum: The People appeal from an order that, inter alia, suppressed physical evidence, as well as statements made by defendant. In February 2016, an Ontario County Sheriff's Deputy drove to defendant's home to discuss a matter unrelated to this case. As the deputy pulled onto defendant's street, he observed an "hysterical" woman waving and pointing at a black sedan that was entering the roadway from a driveway. Without speaking to her, the deputy activated the overhead lights of his patrol vehicle and stopped the black sedan. Its driver, defendant, subsequently failed a field sobriety test and made statements to another officer, and a blood draw indicated that he was intoxicated. Thereafter, defendant was indicted on two counts of aggravated driving while intoxicated (Vehicle and Traffic Law § 1192 [2-a] [a], [b]), and one count each of driving while intoxicated (§ 1192 [3]) and endangering the welfare of a child (Penal Law § 260.10 [1]).

Contrary to the People's contention, County Court properly suppressed the physical evidence and statements. 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 Robinson*, 122 AD3d 1282, 1283 [4th Dept 2014]). We conclude that the actions of the "hysterical" woman, without more, did not provide the deputy with reasonable suspicion to justify the stop of the vehicle (*see People v*

Reyes, 69 AD3d 523, 526-527 [1st Dept 2010], *appeal dismissed* 15 NY3d 863 [2010]; *cf. People v Rosa*, 67 AD3d 440, 440 [1st Dept 2009], *lv denied* 14 NY3d 773 [2010]; *People v Gardner*, 16 AD3d 117, 117 [1st Dept 2005], *lv denied* 4 NY3d 853 [2005]). We note that, although the police may also stop a vehicle where there is probable cause to believe that its driver committed a traffic violation (*see People v Robinson*, 97 NY2d 341, 349 [2001]; *People v East*, 119 AD3d 1370, 1371 [4th Dept 2014]), here, the deputy testified at the suppression hearing that he had not witnessed such a violation before he initiated the stop by activating his overhead lights.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

392
KA 15-01821
PRESENT: SMITH, J.P., CENTRA, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMIE R. GALARZA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered July 8, 2014. The judgment convicted defendant, upon a jury verdict, of manslaughter 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 a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that the evidence is not legally sufficient with respect to the issue of intent, and that it is not legally sufficient to disprove his justification defense beyond a reasonable doubt. We reject those contentions. 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 disprove defendant's justification defense . . . , and to establish that he intended to cause serious physical injury when he stabbed the victim" in the neck and torso with a knife (*People v Williams*, 134 AD3d 1572, 1573 [4th Dept 2015]). Indeed, we note that the victim was stabbed between 13 and 16 times, and the witnesses agree that defendant was the first person to use a weapon, while the victim was unarmed. 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 further conclude that the jury did not fail "to give the evidence the weight it should be accorded when it determined that he intended to cause serious physical injury . . . and when it rejected his justification defense" (*People v Ford*, 114 AD3d 1273, 1275 [4th Dept 2014], *lv denied* 23 NY3d 962 [2014]), and thus the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that Supreme Court erred in

refusing to suppress statements that he made to a police officer while the officer was transporting him, and while the officer was with defendant when he was examined at the hospital. The evidence at the hearing establishes that those statements were spontaneous, i.e., they were "in no way the product of an interrogation environment, [or] the result of express questioning or its functional equivalent" (*People v Harris*, 57 NY2d 335, 342 [1982], *cert denied* 460 US 1047 [1983] [internal quotation marks omitted]; *see People v Rivers*, 56 NY2d 476, 480 [1982], *rearg denied* 57 NY2d 775 [1982]; *People v Dawson*, 149 AD3d 1569, 1570-1571 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]).

Finally, the sentence is not unduly harsh or severe.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

406

KA 15-02021

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEONARD GLOWACKI, DEFENDANT-APPELLANT.

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

LEONARD GLOWACKI, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered October 1, 2015. The judgment convicted defendant, upon his plea of guilty, of aggravated vehicular homicide and driving while intoxicated, a class E felony.

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 aggravated vehicular homicide (Penal Law § 125.14 [1]) and driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [2]; 1193 [1] [c] [i] [A]). Contrary to the contention in defendant's main and pro se supplemental briefs, the record establishes that defendant knowingly, voluntarily and intelligently waived his right to appeal (*see People v Taggart*, 124 AD3d 1362, 1362 [4th Dept 2015]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses defendant's challenge to the severity of his sentence (*see Lopez*, 6 NY3d at 255; *People v Hidalgo*, 91 NY2d 733, 737 [1998]). Defendant further contends in his pro se supplemental brief that he was denied effective assistance of counsel at sentencing. Even assuming, arguendo, that defendant's contention survives his guilty plea and valid waiver of the right to appeal, "we conclude that defendant's challenges to counsel's conduct at sentencing do not warrant reversal or modification of the judgment[] of conviction" (*People v McFarley*, 144 AD3d 1521, 1522 [4th Dept 2016]).

We note that the uniform sentence and commitment form contains an inaccurate citation to Penal Law § 125.15 for aggravated vehicular homicide rather than the correct citation, Penal Law § 125.14. The uniform sentence and commitment form must therefore be amended to

correct that clerical error (*see People v Cruz*, 144 AD3d 1494, 1495 [4th Dept 2016]; *People v Hawkins*, 70 AD3d 1389, 1389 [4th Dept 2010], *lv denied* 14 NY3d 888 [2010]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

408

KA 17-00956

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES DAVIS, DEFENDANT-APPELLANT.

CHARLES A. MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (AMANDA L. CASSELMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered March 23, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted menacing a police officer or peace officer.

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 menacing a police officer or peace officer (Penal Law §§ 110.00, 120.18), defendant contends that the indictment must be dismissed because the prosecutor failed to inform the grand jury of defendant's request pursuant to CPL 190.50 (6) to call witnesses to the incident giving rise to the charges in the indictment. Contrary to the People's assertion, we conclude that defendant's contention "concerns the integrity of the grand jury proceeding . . . , and it therefore survives defendant's guilty plea" (*People v Rigby*, 105 AD3d 1383, 1383 [4th Dept 2013], *lv denied* 21 NY3d 1019 [2013]; *cf. People v McCommons*, 119 AD3d 1085, 1085 n [3d Dept 2014]; *see generally People v Hill*, 5 NY3d 772, 773 [2005], *affg* 8 AD3d 1076 [4th Dept 2004]). Nevertheless, defendant's contention is without merit inasmuch as the prosecutor properly informed the grand jury of his request to call the witnesses (*see* CPL 190.50 [6]; *Rigby*, 105 AD3d at 1383-1384). The record establishes that defendant requested in writing that the grand jury cause certain persons to be called as witnesses, and that the prosecutor read defendant's request to the grand jury and afforded the grand jury the opportunity to determine whether it wanted to hear testimony from those persons. "By pleading guilty, defendant forfeited his further contention that the indictment should be dismissed because the prosecutor failed to introduce exculpatory evidence before the grand jury" (*Rigby*, 105 AD3d at 1384).

Finally, we reject defendant's challenge to the legality and the severity of the sentence. County Court imposed the legal minimum sentence for a class E felony committed by a second felony offender (*see* Penal Law §§ 70.06 [3] [e]; [4] [b]; 110.05 [6]; 120.18) and, therefore, there is no basis for the exercise of our authority to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]; *People v Barber*, 106 AD3d 1533, 1533-1534 [4th Dept 2013]; *People v Furman*, 294 AD2d 848, 849 [4th Dept 2002], *lv denied* 98 NY2d 696 [2002]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

409
KA 17-00396

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID MAY, DEFENDANT-APPELLANT.

JOHN A. HERBOWY, ROME, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), rendered February 17, 2017. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20). Defendant failed to preserve for our review his contention that the guilty plea was not knowingly, intelligently, and voluntarily entered inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction on the grounds advanced on appeal (*see* CPL 470.05 [2]; *People v Landry*, 132 AD3d 1351, 1351 [4th Dept 2015], *lv denied* 26 NY3d 1089 [2015]; *People v Wilson*, 117 AD3d 1476, 1477 [4th Dept 2014]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant's contention that the superior court information is jurisdictionally defective is not properly before us. "The [information] was superseded by the indictment to which defendant pleaded guilty, and he therefore may not challenge" the information on appeal (*People v Anderson*, 90 AD3d 1475, 1477 [4th Dept 2011], *lv denied* 18 NY3d 991 [2012]; *see People v Mitchell*, 132 AD3d 1413, 1416 [4th Dept 2015], *lv denied* 27 NY3d 1072 [2016]).

Defendant's contention that defense counsel was ineffective in failing to communicate with him " 'involve[s] matters outside the record on appeal and therefore must be raised by way of a motion pursuant to CPL article 440' " (*People v Rausch*, 126 AD3d 1535, 1536 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]). Finally, defendant's

sentence is not unduly harsh or severe.

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

410
KA 17-01591
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CARNI, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC S. ALLEN, DEFENDANT-APPELLANT.

XAVIER AND ASSOCIATES, P.C., ALBANY (MICHAEL C. VISCOSI 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 March 14, 2017. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, as a class E felony.

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 driving while intoxicated (Vehicle and Traffic Law § 1192 [3]). Contrary to defendant's contention, by pleading guilty, he forfeited his right to claim that he was deprived of a speedy trial under CPL 30.30 (*see People v Walter*, 138 AD3d 1479, 1479 [4th Dept 2016], *lv denied* 27 NY3d 1141 [2016]). Defendant could not validly reserve his right to appellate review of his statutory speedy trial claim "by obtaining the consent of the prosecutor and the approval of [County Court] at the time the plea [was] entered" (*People v O'Brien*, 56 NY2d 1009, 1010 [1982]; *see People v Perez*, 51 AD3d 824, 824 [2d Dept 2008], *lv denied* 11 NY3d 740 [2008]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

412
KA 15-00115
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CARNI, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

KEION L. PETERSON, DEFENDANT-APPELLANT.

KIMBERLY J. CZAPRANSKI, FAIRPORT, 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. Defendant was charged along with three others with various offenses based on allegations that they were in a vehicle and possessed, inter alia, an assault weapon. We previously concluded in the appeal of a codefendant that the evidence was not legally sufficient to support his conviction based on his possession of the same weapon under the same circumstances, inasmuch as the evidence did not support a finding of constructive possession of the weapon and the statutory presumption of possession set forth in Penal Law § 265.15 (3) did not apply (*People v Willingham*, 158 AD3d 1158, — [4th Dept 2018]). Thus, for the reasons stated in our decision in the codefendant's appeal (*id.* at —), we conclude that defendant's conviction is also not supported by legally sufficient evidence. We therefore reverse the judgment and dismiss the indictment.

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

Entered: March 23, 2018   Mark W. Bennett
                                                                                      Clerk of the Court

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

417
CAF 17-00208
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CARNI, AND DEJOSEPH, JJ.

IN THE MATTER OF JOSHUA W., JR.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

JOSHUA W., SR., RESPONDENT-APPELLANT.

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

WENDY G. PETERSON, OLEAN, FOR PETITIONER-RESPONDENT.

STEVEN J. LORD, FRANKLINVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered January 5, 2017 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption. Contrary to the father's contention, petitioner established " 'by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between [the father] and the child' " (*Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1149-1150 [4th Dept 2014], *lv denied* 23 NY3d 901 [2014]; *see* § 384-b [3] [g] [i]; [7] [a]). Among other things, petitioner arranged for the father's psychological examination, facilitated supervised visitation between the father and the child, attempted unsupervised visits, and provided referrals for various services.

Furthermore, "[a]lthough [the father] participated in [some of] the services offered by petitioner, [he] failed to address successfully the problems that led to the removal of the child[ ] and continued to prevent [his] safe return" (*Matter of Joanna P. [Patricia M.]*, 101 AD3d 1751, 1752 [4th Dept 2012], *lv denied* 20 NY3d 863 [2013] [internal quotation marks omitted]; *see Matter of Christian C.-B. [Christopher V.B.]*, 148 AD3d 1775, 1777 [4th Dept 2017], *lv denied* 29

NY3d 917 [2017]; *Matter of Nicholas B. [Eleanor J.]*, 83 AD3d 1596, 1597 [4th Dept 2011], *lv denied* 17 NY3d 705 [2011]). While the father completed parenting classes and a domestic violence class, he did not successfully complete mental health treatment or addiction and substance abuse treatment, and evidence that he was " 'inconsistently applying the knowledge and benefits [he] obtained from the services provided [and] arguing with various service providers and professionals' sufficiently supported a finding that [he] failed to articulate a realistic plan for the child[ ]'s return to [his] care" (*Matter of Gerald G. [Orena G.]*, 91 AD3d 1320, 1321 [4th Dept 2012], *lv denied* 19 NY3d 801 [2012]). The record contains no evidence that the father "provide[d] any 'realistic and feasible' alternative to having the child[ ] remain in foster care until the [father]'s release from prison," which "supports a finding of permanent neglect" (*Matter of Gena S. [Karen M.]* [appeal No. 1], 101 AD3d 1593, 1594 [4th Dept 2012], *lv dismissed* 21 NY3d 975 [2013]; *see* Social Services Law § 384-b [7] [c]; *Alex C., Jr.*, 114 AD3d at 1150).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

419
CAF 17-00918

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

IN THE MATTER OF BONFRIDA F. KAKWAYA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH TWINAMATSIKO, RESPONDENT-APPELLANT,
AND ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENT-RESPONDENT.

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

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

ARLENE H. BRADSHAW, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered July 26, 2016 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole legal and physical custody of the subject children to petitioner.

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

Memorandum: Petitioner mother commenced these proceedings seeking primary physical custody of the two subject children, and an order enforcing her visitation rights as set forth in a prior custody order entered on the stipulation of the parties. Respondent father appeals from an order that, inter alia, granted the mother sole legal and physical custody of the subject children and directed that the father have significant visitation. We note at the outset that the father does not "dispute that there was a sufficient change in circumstances since the prior order, and thus the issue before us is whether [Family Court] properly determined that the best interests of the children would be served by a change in" custody (*Matter of Golda v Radtke*, 112 AD3d 1378, 1378 [4th Dept 2013]).

Contrary to the father's contention, "the deterioration of the parties' relationship and their inability to coparent renders the existing joint custody arrangement unworkable" (*Matter of York v Zullich*, 89 AD3d 1447, 1448 [4th Dept 2011]; *see Matter of Warren v Miller*, 132 AD3d 1352, 1353 [4th Dept 2015]). We reject the father's further contention that the court erred in granting the mother sole

custody of the children. The court's custody determination, which was "based in large part upon the court's firsthand assessment of the character and credibility of the parties, is entitled to great deference" (*Matter of Thayer v Thayer*, 67 AD3d 1358, 1359 [4th Dept 2009]), and we perceive no basis to disturb the court's determination where, as here, it is supported by a sound and substantial basis in the record (*see Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744 [4th Dept 2010]).

Finally, the father failed to preserve for our review his contention that the court erred in failing to conduct a *Lincoln* hearing inasmuch as he did not request such a hearing (*see Matter of Greeley v Tucker*, 150 AD3d 1646, 1647 [4th Dept 2017]; *Matter of Thillman v Mayer*, 85 AD3d 1624, 1625 [4th Dept 2011]). "In any event, based on the child[ren]'s young age[s], we perceive no abuse of discretion in the court's failure to conduct a *Lincoln* hearing" (*Thillman*, 85 AD3d at 1625).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

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

426
CA 17-01610
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CARNI, AND DEJOSEPH, JJ.

CARTER HALL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MCDONALD'S CORPORATION, MACDO FOODS, INC.,
MCDONALD'S USA, LLC, HARRY SCHATMEYER, III,
AND DARRIN GLASS, DEFENDANTS-RESPONDENTS.

GRECO TRAPP, PLLC, BUFFALO (DUANE D. SCHOONMAKER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LITTLER MENDELSON, P.C., FAIRPORT (JESSICA F. PIZZUTELLI OF COUNSEL), FAIRPORT, FOR DEFENDANTS-RESPONDENTS MCDONALD'S CORPORATION AND MCDONALD'S USA, LLC.

LECLAIR RYAN, A PROFESSIONAL CORPORATION, ROCHESTER (CHRISTINA L. SHIFTON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MACDO FOODS, INC., HARRY SCHATMEYER, III AND DARRIN GLASS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered November 14, 2016. The order granted the respective motions of defendants to dismiss the complaint against them.

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

Memorandum: Plaintiff commenced this action seeking damages based on his allegedly improper termination as a manager of several McDonald's restaurants operated by defendant Macdo Foods, Inc. under franchise agreements with defendants McDonald's Corporation and McDonald's USA, LLC. Supreme Court properly granted defendants' respective motions to dismiss the complaint against them for failure to state a cause of action. On a CPLR 3211 (a) (7) motion to dismiss, "[w]e accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). As the court properly determined, New York does not recognize a cause of action for unfair discharge. Indeed, it is well established that, "where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason," (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 300 [1983]), with exceptions not applicable

here (*see e.g.* Executive Law § 296). Contrary to plaintiff's contention, "[t]ort causes of action alleging . . . prima facie tort 'cannot be allowed in circumvention of the unavailability of a tort claim for wrongful discharge or the contract rule against liability for discharge of an at-will employee' " (*Rich v CooperVision, Inc.*, 198 AD2d 860, 861 [4th Dept 1993], quoting *Murphy*, 58 NY2d at 304; *see Ingle v Glamore Motor Sales, Inc.*, 73 NY2d 183, 188-189 [1989]; *Peterec-Tolino v Harap*, 68 AD3d 1083, 1084 [2d Dept 2009]).

Entered: March 23, 2018

Mark W. Bennett
Clerk of the Court

MOTION NO. (1274/17) KA 13-01173. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TRELLIS PRESSLEY, DEFENDANT-APPELLANT. -- Motion for reargument be and the same hereby is granted and, upon reargument, the memorandum and order entered December 22, 2017 (156 AD3d 1384) is amended by deleting the ordering paragraph and substituting the following ordering paragraph "that the case is held, decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum:" and by adding the following paragraph after the second paragraph of the memorandum:

"We further agree with defendant that the court erred in requiring him to proceed pro se on the People's motion to compel him to submit to a buccal swab for DNA testing (*see People v Smith*, 30 NY3d 626, 628-629 [2017]). Contrary to the People's contention, the court's error cannot be deemed harmless, inasmuch as the evidence apart from the DNA evidence is not overwhelming, and there is a reasonable possibility that the error contributed to the conviction (*cf. Wardlaw*, 6 NY3d at 559; *see generally People v Austin*, 30 NY3d 98, 106 [2017]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court for further proceedings on the People's motion following the assignment of counsel to represent defendant thereon."

The motion is otherwise denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND CURRAN, JJ. (Filed Mar. 23, 2018.)