SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 1, 2019

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

719

CA 17-00830

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

DYLAN DEUSER, PLAINTIFF-RESPONDENT,

V ORDER

PRECISION CONSTRUCTION & DEVELOPMENT, INC.,
DEFENDANT-APPELLANT,
RYAN BRAUN, ET AL., DEFENDANTS.
(APPEAL NO. 1.)

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

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

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), entered January 17, 2017. The judgment, among other things, awarded plaintiff the sum of $3,486,898.96 as against defendant Precision Construction & Development, Inc.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on July 12 and 17, and August 20, 2018, and filed in the Erie County Clerk’s Office on August 27, 2018,

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

720

CA 17-00831

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

DYLAN DEUSER, PLAINTIFF-APPELLANT,

V ORDER

PRECISION CONSTRUCTION & DEVELOPMENT, INC.,
DEFENDANT-APPELLANT,
RYAN BRAUN, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

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

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

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

Appeals from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), entered March 8, 2017. The judgment dismissed the complaint of plaintiff as against defendant Ryan Braun.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on July 12 and 17, and August 20, 2018, and filed in the Erie County Clerk’s Office on August 27, 2018,

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

721

CA 17-00832

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

DYLAN DEUSER, PLAINTIFF-RESPONDENT,

V ORDER

PRECISION CONSTRUCTION & DEVELOPMENT, INC.,
DEFENDANT-APPELLANT,
RYAN BRAUN, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 3.)

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

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

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered April 7, 2017. The order denied the motion of defendant Precision Construction & Development, Inc. to set aside a jury verdict.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on July 12 and 17, and August 20, 2018, and filed in the Erie County Clerk’s Office on August 27, 2018,

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

891

CA 18-00279

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

ANGELA BOYD, (ALSO KNOWN AS ANGIE BOYD), AS PARENT AND NATURAL GUARDIAN OF DIQUAN J. WARREN, AND AS ADMINISTRATOR OF THE ESTATE OF DIQUAN J. WARREN, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

MAYOR BYRON BROWN, IN HIS OFFICIAL CAPACITY AS MAYOR OF CITY OF BUFFALO, CITY OF BUFFALO, CITY OF BUFFALO COMMON COUNCIL, IN THEIR OFFICIAL CAPACITY, CITY OF BUFFALO DEPUTY COMMISSIONER PARKS & RECREATION ANDREW R. RABB, IN HIS OFFICIAL CAPACITY, AND CITY OF BUFFALO DEPARTMENT OF PARKS & RECREATION, DEFENDANTS-APPELLANTS.

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

GELBER & O'CONNELL, LLC, AMHERST (HERSCHEL GELBER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered September 28, 2017. The order, insofar as appealed from, denied that part of the motion of defendants for summary judgment dismissing the complaint against defendant City of Buffalo.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on August 17, 2018, and filed in the Erie County Clerk's Office on January 11, 2019,

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1000

CA 18-00245

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

DARLENE CLIFFORD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STEPHEN L. KATES, M.D., HIGHLAND HOSPITAL OF ROCHESTER AND UNIVERSITY OF ROCHESTER, DEFENDANTS-RESPONDENTS.

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

BROWN, GRUTTADARO, GAUJEN AND PRATO, LLC, ROCHESTER (JEFFREY S. ALBANESE OF COUNSEL), FOR DEFENDANT-RESPONDENT STEPHEN L. KATES, M.D.

OSBORN, REED & BURKE, LLP, ROCHESTER (KATHLEEN BENESH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS HIGHLAND HOSPITAL OF ROCHESTER AND UNIVERSITY OF ROCHESTER.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered April 20, 2017. The order granted the motion of defendants Highland Hospital of Rochester and University of Rochester and the cross motion of defendant Stephen L. Kates, M.D., 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 and cross motion are denied, and the complaint is reinstated.

Memorandum: Plaintiff commenced this medical malpractice action on December 16, 2013 seeking damages for injuries she allegedly sustained as the result of the negligence of defendant Stephen L. Kates, M.D. in surgically replacing her hip on July 9, 2008. The complaint asserted causes of action for medical malpractice against each defendant and alleged, inter alia, theories of direct and vicarious liability against defendant Highland Hospital of Rochester (Highland), where the operation was performed, and defendant University of Rochester (UR), which employed Kates as of September 1, 2008.

Highland and UR (collectively, hospital defendants) moved and Kates cross-moved for summary judgment dismissing the complaint against them, contending that plaintiff's treatment with Kates ended prior to June 16, 2011—two years and six months before commencement of this action—and that the action was therefore untimely under CPLR

214-a. Defendants argued that the continuous treatment doctrine did not toll the statute of limitations because the requisite trust and confidence between Kates and plaintiff was severed as of January 26, 2011, when Kates last treated plaintiff at a free clinic operated by the hospital defendants. The hospital defendants also contended that they were not vicariously liable for any treatment of plaintiff at the clinic within the applicable limitations period because they neither employed nor controlled any of the treating physicians. Kates further asserted that he was free of negligence because he performed plaintiff's hip surgery within the applicable standard of care.

Plaintiff opposed the motion and cross motion, arguing that the action was timely because her treatment with Kates and the clinic continued until November 26, 2011—less than 2½ years before the action was commenced. Plaintiff further asserted that the hospital defendants were vicariously liable for the malpractice of the clinic's other attending physicians because the hospital defendants established protocols and standards for the clinic. In addition, plaintiff submitted an affirmation from an expert who opined that Kates's surgery and postoperative treatment deviated from the standard of care.

Supreme Court granted the motion and cross motion and dismissed the complaint. The court determined that Kates continuously treated plaintiff from the date of the surgery until January 14, 2009, but that plaintiff failed to establish any continuous treatment after that date because plaintiff did not return to Kates or the clinic for two years, expressed dissatisfaction with Kates's treatment, attempted to get the advice of other doctors, and obtained HIPAA releases for potential litigation. Based on its determination that the continuous treatment tolling period ended on January 14, 2009, the court held that plaintiff's action was untimely commenced on December 16, 2013. In its analysis, the court assumed that plaintiff had asserted theories of vicarious liability against the hospital defendants based only on Kates's alleged malpractice, and it thus did not address plaintiff's claims against those defendants based on their alleged malpractice in connection with plaintiff's treatment at the clinic. The court also did not address whether Kates satisfied the applicable standard of care. Plaintiff appeals, and we reverse.

Preliminarily, we agree with plaintiff that the court incorrectly assumed that she had asserted theories of liability against the hospital defendants based solely on Kates's alleged malpractice. To the contrary, plaintiff consistently maintained throughout this litigation that the hospital defendants were liable both for Kates's alleged malpractice and for any other malpractice stemming from plaintiff's treatment at their free clinic through November 30, 2011, a date well within the applicable limitations period. Those latter claims are indisputably timely, and the court therefore erred in granting the hospital defendants' motion to that extent (*see generally Hill v St. Clare's Hosp.*, 67 NY2d 72, 80-81 [1996]; *Noble v Porter*, 188 AD2d 1066, 1066 [4th Dept 1992]; *Mduba v Benedictine Hosp.*, 52 AD2d 450, 453 [3d Dept 1976]).

The court further erred in granting the motion and cross motion on the ground that the action was time-barred because the continuous treatment tolling period expired on January 14, 2009. "Pursuant to CPLR 214-a, [a]n action for medical . . . malpractice must be commenced within two years and six months of the act, omission or failure complained of . . . However, the statute has a built-in toll that delays the running of the limitations period where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure . . . Under the continuous treatment doctrine, the 2½ year period does not begin to run until the end of the course of treatment, when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint" (*Gomez v Katz*, 61 AD3d 108, 111 [2d Dept 2009] [internal quotation marks omitted]). To apply the continuous treatment doctrine, there must be an "ongoing relationship of trust and confidence between" the plaintiff and physician (*Ushkow v Brodowski*, 244 AD2d 931, 932 [4th Dept 1997]). Ultimately, "[t]he determination whether continuous treatment exists 'must focus on the patient' " (*Lohnas v Luzi* [appeal No. 2], 140 AD3d 1717, 1718 [4th Dept 2016], *affd* 30 NY3d 752 [2018]), and the "continuing 'trust and confidence' of a patient in the physician is, by nature, a question of fact requiring an examination of the unique facts and circumstances of each case" (*Gomez*, 61 AD3d at 115). In determining whether a question of fact exists as to the applicability of the continuous treatment doctrine, the plaintiff's version of the facts must be accepted as true (*see Scribner v Harvey*, 245 AD2d 1120, 1121 [4th Dept 1997]).

Here, although defendants met their initial burden of establishing that more that 2½ years had elapsed between the date of the alleged malpractice and the commencement of the action (*see Hilts v FF Thompson Health Sys., Inc.* [appeal No. 2], 78 AD3d 1689, 1691 [4th Dept 2010]; *Simons v Bassett Health Care*, 73 AD3d 1252, 1254 [3d Dept 2010]), plaintiff raised triable issues of fact in opposition as to whether she intended to end her relationship with Kates on January 14, 2009. Specifically, plaintiff submitted the deposition testimony of Kates in which Kates admitted that he continued to treat plaintiff until at least January 26, 2011. Plaintiff's submissions also established that, while she did indeed look intermittently for another physician to help her with her postoperative complaints, the clinic's free services were her only viable and stable avenue for treatment (*see generally Lohnas*, 140 AD3d at 1718). Indeed, as late as July 2011, plaintiff still had enough confidence in Kates to ask if he would perform corrective hip surgery. Moreover, although plaintiff requested her medical records and consulted with attorneys in 2010, the mere consultation with an attorney to explore a potential malpractice claim does not, by itself, terminate a course of treatment (*see Guarino v Sharzer*, 281 AD2d 188, 189 [1st Dept 2001]). Furthermore, on January 26, 2011, Kates ordered an ultrasound for plaintiff and, on July 27, 2011, plaintiff was seen in the clinic by another physician to evaluate the results of the ultrasound. That physician recommended to plaintiff that she see Kates to discuss those results, and plaintiff testified in her deposition that she was expecting to see Kates after the ultrasound to discuss whether

corrective hip revision surgery was necessary. That testimony further indicates that plaintiff expected her doctor-patient relationship with Kates to continue (*see Lawyer v Albany Med. Ctr. Hosp.*, 246 AD2d 800, 802 [3d Dept 1998]). Thus, even though plaintiff was somewhat disaffected with Kates, the record does not conclusively establish that either plaintiff or Kates regarded the gap in treatment or plaintiff's consultation with counsel as the end of their treatment relationship, and we therefore cannot conclude that the continuous treatment doctrine no longer applied as a matter of law after January 14, 2009 (*see Lohnas*, 140 AD3d at 1718-1719; *Edmonds v Getchonis*, 150 AD2d 879, 881 [4th Dept 1989]).

Furthermore, although the court did not reach this issue, we also conclude that questions of fact exist regarding whether, for purposes of the continuous treatment doctrine, plaintiff's treatment by various other physicians in the clinic should be imputed to Kates (*see Mendrzycki v Cricchio*, 58 AD3d 171, 176 [2d Dept 2008]). Finally, the competing expert affirmations submitted by the parties preclude summary judgment on the issue of whether Kates's treatment of plaintiff satisfied the standard of care (*see generally Crutchfield v Jones*, 132 AD3d 1311, 1311 [4th Dept 2015]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1079

KA 16-00044

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUINNTEZ J. HALL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered October 21, 2015. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the seventh degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts each of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), arising from two sales of cocaine to a confidential informant. Contrary to defendant's contention, County Court properly denied his motion to dismiss the indictment based on an alleged violation of his right to testify before the grand jury. "Pursuant to CPL 190.50 (5) (a), a defendant has a right to be a witness in a grand jury proceeding . . . if, prior to the filing of any indictment . . . in the matter, he serves upon the district attorney of the county a written notice making such request. In order to preserve [that] right[ ] . . . , a defendant must assert [it] at the time and in the manner that the Legislature prescribes . . . The requirements of CPL 190.50 are to be strictly enforced" (*People v Kirk*, 96 AD3d 1354, 1358-1359 [4th Dept 2012], *lv denied* 20 NY3d 1012 [2013] [internal quotation marks omitted]; *see People v Wilkerson*, 140 AD3d 1297, 1299 [3d Dept 2016], *lv denied* 28 NY3d 938 [2016]; *People v Anderson*, 192 AD2d 714, 714 [2d Dept 1993]). Here, even assuming, arguendo, that the email sent by the office of defense counsel to the District Attorney was a writing served in compliance with the statute, we conclude that it does not contain the requisite notice of defendant's

intent to testify before the grand jury. Thus, the record does not establish that defendant complied with the strict requirements of CPL 190.50 (*see People v Clay*, 248 AD2d 180, 180 [1st Dept 1998], *lv denied* 92 NY2d 849 [1998]; *see also People v Perez*, 67 AD3d 1324, 1325 [4th Dept 2009], *lv denied* 13 NY3d 941 [2010]). Defendant's further contention that he was deprived of effective assistance of counsel due to defense counsel's failure to effectuate his intent to testify before the grand jury lacks merit. The Court of Appeals "has repeatedly and consistently held that—even when it is due to attorney error—a '[d]efense counsel's failure to timely facilitate defendant's intention to testify before the [g]rand [j]ury does not, per se, amount to a denial of effective assistance of counsel' " (*People v Hogan*, 26 NY3d 779, 787 [2016]; *see Perez*, 67 AD3d at 1325).

We reject defendant's contention that the court erred in denying his challenges for cause to three prospective jurors. In all three instances, the statements made by the prospective jurors did not indicate that they "possessed 'a state of mind that [was] likely to preclude [them] from rendering an impartial verdict' " (*People v Brown*, 26 AD3d 885, 886 [4th Dept 2006], *lv denied* 6 NY3d 846 [2006]), or that they had "any doubt concerning [their] ability to be fair and impartial" (*People v Odum*, 67 AD3d 1465, 1465 [4th Dept 2009], *lv denied* 14 NY3d 804 [2010], *reconsideration denied* 15 NY3d 755 [2010], *cert denied* 562 US 931 [2010]; *see People v DeFreitas*, 116 AD3d 1078, 1080 [3d Dept 2014], *lv denied* 24 NY3d 960 [2014]; *People v Semper*, 276 AD2d 263, 263 [1st Dept 2000], *lv denied* 96 NY2d 738 [2001]). Consequently, we agree with the People that "the court was not required to seek an assurance that [the prospective jurors] could decide the case impartially" (*People v Ciochenda*, 17 AD3d 248, 249 [1st Dept 2005], *lv denied* 5 NY3d 760 [2005]).

Defendant failed to preserve for our review his contention that the prosecutor committed misconduct during cross-examination. In any event, the prosecutor did not err "during cross[-]examination by using a prior inconsistent statement to impeach . . . defendant's credibility" (*People v Aponte*, 28 AD3d 672, 672 [2d Dept 2006], *lv denied* 7 NY3d 785 [2006]). Although defendant preserved his contention that the prosecutor also committed misconduct by confronting him with his entire criminal record in violation of the court's *Sandoval* ruling, we reject that contention. During his direct examination, defendant could not recall whether he was convicted of six of the seven crimes on which the court ruled he could be questioned. "Where, as here, a defendant's testimony conflicts with evidence precluded by a *Sandoval* ruling, 'the defense "opens the door" on the issue in question, and the [defendant] is properly subject to impeachment by the prosecution's use of the otherwise precluded evidence' " (*People v Lyon*, 77 AD3d 1338, 1338 [4th Dept 2010], *lv denied* 15 NY3d 954 [2010], quoting *People v Fardan*, 82 NY2d 638, 646 [1993]; *see People v Rodriguez*, 85 NY2d 586, 591 [1995]).

Defendant further contends that the court abused its discretion in precluding him from calling a jail deputy to testify that a screening test given three days after the arrest revealed the presence

of drug metabolites in his blood. It is well settled that " '[r]emote acts, disconnected and outside of the crime itself, cannot be separately proved' " (*People v Schulz*, 4 NY3d 521, 529 [2005]). Here, we conclude that, absent any expert testimony connecting the presence of metabolites to defendant's mental state on the day of the incident and arrest, the court did not abuse its discretion in precluding the witness from testifying (*see generally People v Gilchrist*, 98 AD3d 1232, 1233 [4th Dept 2012], *lv denied* 20 NY3d 932 [2012]).

We also reject defendant's contention that the court erred in denying his request for a missing witness charge concerning the confidential informant to whom defendant sold the drugs. Although the witness had material information concerning the transactions and would be expected to give noncumulative testimony favorable to the People, defendant was still required to establish that the witness was available to the People (*see generally People v Durant*, 26 NY3d 341, 347-348 [2015]; *People v Hall*, 18 NY3d 122, 131 [2011]). " 'Availability' is often a question of degree. At one extreme a witness is unavailable if dead, missing or incapacitated. At the other extreme, a witness who is at hand, ready, willing and able to testify, is most obviously available. Difficult cases fall somewhere in between, and trial courts must examine claims of unavailability to determine their merit" (*People v Savinon*, 100 NY2d 192, 198 [2003]). Here, the witness had been subpoenaed and had been available and cooperative with the People until a few days before the trial, when he stopped responding to the officer responsible for communicating with him. A thorough investigation that continued throughout the early parts of the trial established that the witness had relocated to Arkansas without notifying the police. Consequently, "[e]ven if the witness had initially been available to the People and within their control, that situation had changed by the time of trial as the result of the witness's behavior, and there was no basis for the jury to draw any adverse inference against the People from their inability to bring him to court" (*People v Mobley*, 77 AD3d 488, 489 [1st Dept 2010], *lv denied* 15 NY3d 954 [2010]; *see also People v Skaar*, 225 AD2d 824, 824-825 [3d Dept 1996], *lv denied* 88 NY2d 854 [1996]).

Contrary to defendant's further contention, his conviction of counts one and three of the indictment, i.e., the criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree counts alleged to have occurred on January 24, 2015, is supported by legally sufficient evidence. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [jury] on the basis of the evidence at trial, viewed in the light most favorable to the People" (*People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001] [internal quotation marks omitted]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewed in that light, we conclude that the "trial evidence, although largely circumstantial, could lead a rational person to conclude that defendant was the individual who arranged [and committed] the drug sales" (*People v Beard*, 100 AD3d 1508, 1509 [4th Dept 2012]; *see*

People v Smith, 168 AD2d 205, 205 [1st Dept 1990], *lv denied* 78 NY2d 957 [1991]; *see generally Bleakley*, 69 NY2d at 495).

The sentence is not unduly harsh or severe.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1084

CAF 18-00025

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

IN THE MATTER OF SHERIF H. BASHIR,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTINE M. BRUNNER, RESPONDENT-APPELLANT.

SHEILA SULLIVAN DICKINSON, CANANDAIGUA, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Wayne County (Richard M. Healy, J.), entered November 13, 2017 in a proceeding pursuant to Family Court Act article 4. The order, among other things, denied respondent's objections to an order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the second objection and vacating the first ordering paragraph of the order of the Support Magistrate, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Wayne County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 4, respondent mother appeals from an order that, among other things, denied her objections to the order of the Support Magistrate, entered after a hearing, that reduced the amount of petitioner father's child support obligation. Contrary to the mother's contention, Family Court properly denied the mother's first objection to that part of the Support Magistrate's order finding that the mother lived rent-free. It is well settled that " 'deference should be given to the credibility determinations of the [s]upport [m]agistrate, who was in the best position to evaluate the credibility of the witnesses' " (*Matter of DaVolio v DaVolio*, 101 AD3d 1120, 1121 [2d Dept 2012]; *see Matter of Kasprowicz v Osgood*, 101 AD3d 1760, 1761 [4th Dept 2012], *lv denied* 20 NY3d 863 [2013]; *Matter of DeNoto v DeNoto*, 96 AD3d 1646, 1648 [4th Dept 2012]). Here, the Support Magistrate did not credit the mother's testimony that she paid rent when she was able to do so, and the court properly "deferred to the Support Magistrate's findings of fact and credibility determinations" with respect to that issue (*DeNoto*, 96 AD3d at 1648).

Contrary to the mother's further contention, the court properly denied her fourth objection to that part of the Support Magistrate's order imputing income to her as part of the determination whether to reduce the father's support obligation. It is well settled that "[t]he proper amount of support is not determined by a spouse's current economic situation but by a spouse's ability to provide"

(*Matter of Fries v Price-Yablin*, 209 AD2d 1002, 1003 [4th Dept 1994]). Thus, a support magistrate "possess[es] considerable discretion to impute income in fashioning a child support award . . . [, and such an] imputation of income will not be disturbed so long as there is record support for [it]" (*Matter of Muok v Muok*, 138 AD3d 1458, 1459 [4th Dept 2016] [internal quotation marks omitted]). Here, the Support Magistrate imputed income to the mother based on the mother's termination of her employment. Although the mother testified that she was forced to leave her employment so that she could care for the children, whose child care costs she could no longer afford due to the father's temporary failure to pay child support, the Support Magistrate determined that the mother's testimony on that issue was not credible. We perceive "no reason on the record before us to disturb the findings of the Support Magistrate" (*Matter of Natali v Natali*, 30 AD3d 1010, 1012 [4th Dept 2006]).

We agree with the mother, however, that the court erred in denying her second objection to that part of the Support Magistrate's order that, in effect, distributed half of the parties' tax refund to the father by reducing his child support obligation by that amount. We have previously stated that "the jurisdiction of Family Court is generally limited to matters pertaining to child support and custody . . . , and tax deductions or exemptions are not an element of support" (*Warner v Warner*, 94 AD3d 1524, 1525 [4th Dept 2012] [internal quotation marks omitted]). "[T]he father's entitlement to claim the child[ren] as [] dependent[s] for income tax purposes is not an element of support set forth in Family Court Act article 4, and thus the court lacks jurisdiction" to distribute the parties' tax refund (*Matter of John M.S. v Bonni L.R.*, 49 AD3d 1235, 1235 [4th Dept 2008]). Therefore, we modify the order by granting the second objection and vacating the first ordering paragraph of the order of the Support Magistrate, and we remit the matter to Family Court to recalculate the father's child support obligation without regard to the parties' income tax refund.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1092

CA 18-00748

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

TODD SPRING, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF MONROE, MAGGIE BROOKS, AS MONROE COUNTY EXECUTIVE, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

HARRIS, CHESWORTH, JOHNSTONE & WELCH, LLP, ROCHESTER (EUGENE WELCH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James P. Murphy, J.), entered March 29, 2018. The order, insofar as appealed from, denied in part the motion of defendants County of Monroe and Maggie Brooks, as Monroe County Executive, for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendants-appellants is granted in its entirety, and the complaint is dismissed against them.

Memorandum: On a prior appeal, we dismissed the first cause of action, for legal malpractice, and the second cause of action, for negligence, against defendants County of Monroe (County) and Maggie Brooks, as Monroe County Executive, among others, pursuant to CPLR 3211 (*Spring v County of Monroe*, 151 AD3d 1694, 1694-1696 [4th Dept 2017]). We declined, however, to dismiss the defamation cause of action asserted against Brooks, the County, and defendant Karen Fabi (*id.* at 1696-1697). The County and Brooks (collectively, defendants) thereafter moved for summary judgment dismissing the remaining cause of action, for defamation, against them. Defendants appeal from an order insofar as it denied the motion in part with respect to the alleged defamatory statements of Brooks, contending that those statements are covered by both absolute and qualified privilege. We agree with defendants that the court erred in denying the motion in part, and we therefore reverse the order insofar as appealed from.

The relevant facts are not in dispute. Plaintiff was the Executive Health Director/Chief Administrative Officer of defendant Monroe Community Hospital (MCH). In March 2013, the New York State

Department of Health (DOH) received complaints concerning plaintiff's treatment of a patient of MCH and an ensuing DOH investigation concluded that the complaints were substantiated. The County terminated plaintiff from his position on May 10, 2013. That same day, Brooks, as the Monroe County Executive, provided statements to the press that were published in local newspapers. In his complaint, plaintiff challenged the following three statements made by Brooks: (1) " 'As a result of the [C]ounty's own independent, external review, it is apparent that [plaintiff] did not live up to my standards for excellence in care at MCH and we have changed leadership accordingly' "; (2) " 'There was not one moment, one single piece of information that said, "aha, this is it". We took all of that information. We put it together. I decided it was in the best interests of the hospital and the residents to move forward at this time and to replace the executive director' "; and (3) " 'I don't think there's any question that [plaintiff] fell short of our standards of excellence in care that we have at that facility.' " Brooks also wrote the following in a letter to individuals related to or associated with MCH residents: " '[I]t is apparent to me that [plaintiff] did not live up to my standards for excellence in care at MCH.' "

We agree with defendants that the statements were absolutely privileged. The absolute privilege defense affords complete immunity from liability for defamation to " 'an official [who] is a principal executive of State or local government' . . . with respect to statements made during the discharge of those responsibilities about matters which come within the ambit of those duties" (*Clark v McGee*, 49 NY2d 613, 617 [1980]). "The first prong of that test . . . [requires an examination of] the personal position or status of the speaker," and "the second prong . . . requires an examination of the subject matter of the statement and the forum in which it is made in the light of the speaker's public duties" (*Doran v Cohalan*, 125 AD2d 289, 291 [2d Dept 1986], *lv dismissed* 69 NY2d 984 [1987]). We conclude that absolute privilege applies here because Brooks was the Monroe County Executive (*see id.*) and her statements with respect to plaintiff's termination concerned matters involving her official duties. Furthermore, because the investigation and the underlying actions of plaintiff became a matter of public attention and controversy, Brooks's form of communication, i.e., statements to the press, was warranted (*see Kilcoin v Wolansky*, 75 AD2d 1, 10 [2d Dept 1980], *affd* 52 NY2d 995 [1981]; *Schell v Dowling*, 240 AD2d 721, 722 [2d Dept 1997]; *cf. Doran*, 125 AD2d at 291).

Even assuming, arguendo, that the statements were not covered by absolute privilege, we conclude that the defense of qualified privilege applies. "Generally, a statement is subject to a qualified privilege when it is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his [or her] own affairs, in a matter where his [or her] interest is concerned" (*Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 [2007] [internal quotation marks omitted]). Here, defendants satisfied their initial burden by establishing that Brooks made the relevant statements in her role as the Monroe County Executive, thereby

discharging her responsibility to keep the public informed regarding a sensitive issue that had obtained extensive media attention (*see Schell*, 240 AD2d at 722), and thus "the burden shifted to plaintiff[] to raise a triable issue of fact whether the statements were motivated solely by malice" (*Stevenson v Cramer*, 151 AD3d 1932, 1933 [4th Dept 2017] [internal quotation marks omitted]). Plaintiff failed to meet that burden (*see Fiore v Town of Whitestown*, 125 AD3d 1527, 1529 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]; *Schell*, 240 AD2d at 722).

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1107

CA 18-00430

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

LINDA BROWN AND WAYNE BROWN,
PLAINTIFFS-RESPONDENTS,

V ORDER

T-L MARKETPLACE, LLC, DEFENDANT-APPELLANT.

MAURO LILLING NAPARTY LLP, WOODBURY (ANTHONY F. DESTEFANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (BRITTANY L. HANNAH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered December 5, 2017. The order denied the motion of defendant for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 16, 2019,

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1108

CA 18-00261

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

DAVID FLOWERS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HARBORCENTER DEVELOPMENT, LLC, AND M.A. MORTENSON COMPANY, DEFENDANTS-APPELLANTS.

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

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (SAMUEL J. CAPIZZI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered August 24, 2017. The judgment awarded plaintiff money damages upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the award of damages for past and future lost wages, and as modified the judgment is affirmed without costs and a new trial is granted on damages for past and future lost wages only.

Memorandum: Defendants appeal from a judgment awarding plaintiff damages on his claim under Labor Law § 240 (1) following a jury trial. On a prior appeal, we determined, inter alia, that Supreme Court properly granted plaintiff's motion for partial summary judgment on the issue of defendants' liability with respect to Labor Law § 240 (1) (*Flowers v Harborcenter Dev., LLC*, 155 AD3d 1633, 1634 [4th Dept 2017]). Approximately one month prior to the trial on the issue of damages, defendants moved to strike the note of issue and/or stay the trial until they were able to obtain plaintiff's medical records. The court denied defendants' motion, but the court nevertheless ordered plaintiff's counsel to turn over the pertinent records immediately. The case proceeded to trial and the jury returned a verdict in favor of plaintiff, which included an award of damages for past and future lost wages.

Contrary to defendants' contention, the court did not abuse its discretion in denying their motion to strike the note of issue or stay the trial. "The determination whether to adjourn a trial 'is addressed to the discretion of the trial court and should not be interfered with absent a clear abuse thereof' " (*Harper v Han Chang*, 267 AD2d 1011, 1012 [4th Dept 1999]). Here, defendants failed to

establish that there were grounds to vacate the note of issue (*see* 22 NYCRR 202.21 [e]), or to grant a stay (*see* CPLR 2201), inasmuch as the record establishes that an unlimited authorization for the disputed records was provided over one year before the commencement of trial.

We reject defendants' contention that the court abused its discretion in precluding the testimony of defendants' psychiatric expert. "[P]reclusion [of expert testimony] for failure to comply with CPLR 3101 (d) is improper unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party" (*Sisemore v Leffler*, 125 AD3d 1374, 1375 [4th Dept 2015] [internal quotation marks omitted]). Here, the court determined that there was a willful failure to disclose because, prior to jury selection, defendants' attorneys knew that they intended to present testimony from the psychiatric expert, but they did not disclose the expert until the day after jury selection began, which violated the court's directive that defendants disclose an expert as soon as they knew of said expert. Although the record establishes that plaintiff was aware of the possibility that defendants would call an expert psychiatrist, he was prejudiced by the tardiness of the disclosure both because it impaired his ability to discuss the relevant issues during jury selection and because it hamstrung his opportunity to retain an expert psychiatrist of his own. Thus, based on the evidence in the record supporting the court's determination that defendants had engaged in purposeful gamesmanship by withholding the information, and the resulting prejudice to plaintiff, we conclude that the court did not abuse its discretion in precluding the proposed expert testimony (*see Lasher v Albany Mem. Hosp.*, 161 AD3d 1326, 1331-1332 [3d Dept 2018]; *Marwin v Top Notch Constr. Corp.*, 50 AD3d 977, 977-978 [2d Dept 2008]).

We agree with defendants that the court erred in failing to instruct the jury on mitigation of damages insofar as it applied to past and future lost wages (*see Gerbino v Tinseltown USA*, 13 AD3d 1068, 1072 [4th Dept 2004]; *cf*. *Dombrowski v Moore*, 299 AD2d 949, 951 [4th Dept 2002]). Here, plaintiff's physicians unanimously agreed that he was capable of working in a light duty or sedentary setting and, although he did obtain work shortly after being advised by a doctor to seek job training, there is a question, under the circumstances, of whether the part-time job that he took was a reasonable mitigation of his damages. We therefore modify the judgment by vacating the award of damages for lost wages, and we grant a new trial on damages for past and future lost wages only.

In view of our determination, defendants' remaining contentions regarding the court's denial of their posttrial CPLR 4404 motion are academic.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1112

CA 17-01559

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

JENNIFER HAGGERTY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RYAN HAGGERTY, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

WILLIAM R. HITES, BUFFALO, FOR PLAINTIFF-APPELLANT.

RYAN D. HAGGERTY, DEFENDANT-RESPONDENT PRO SE.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from a judgment of the Supreme Court, Erie County (Terrence M. Parker, A.J.), entered June 22, 2017 in a divorce action. The judgment, among other things, granted the parties a divorce and ordered plaintiff to pay $14,000 for defendant's attorneys' fees.

It is hereby ORDERED that the judgment so appealed from is unanimously modified in the exercise of discretion and on the law by vacating the award of $14,000 in attorneys' fees to defendant and as modified the judgment is affirmed without costs.

Memorandum: In appeal No. 1, plaintiff appeals from a judgment of divorce that, among other things, calculated retroactive and prospective child support, distributed the parties' assets and debts, and made an award of attorneys' fees to defendant. In appeal No. 2, plaintiff appeals from an intermediate order addressing issues from a trial on financial matters as well as issues raised in a posttrial motion. Due to the fact that the order in appeal No. 2 is subsumed in the final judgment in appeal No. 1, we conclude that appeal No. 2 must be dismissed (*see Maniscalco v Maniscalco* [appeal No. 2], 109 AD3d 1129, 1129-1130 [4th Dept 2013]; *see generally Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]).

As a preliminary matter, plaintiff contends that Supreme Court erred in permitting the attorney for the child (AFC) to participate in the financial trial. We reject that contention inasmuch as issues of child support were to be determined at that trial (*see generally Macaluso v Macaluso*, 145 AD3d 1295, 1296 [3d Dept 2016]). We further conclude that there is no merit to plaintiff's contention that the court erred in denying her motion to remove the AFC. Plaintiff's " 'unsubstantiated allegations of bias' " were insufficient to support her application to remove the AFC (*Matter of Brooks v Greene*, 153 AD3d

1621, 1622 [4th Dept 2017]).

Plaintiff further contends that she is entitled to a credit for excess child support payments. We reject that contention. "It has long been held that there is a 'strong public policy against restitution or recoupment of support overpayments' . . . and nothing in this record shows it was error to deny that relief" (*Johnson v Chapin*, 12 NY3d 461, 466 [2009], *rearg denied* 13 NY3d 888 [2009]). Contrary to plaintiff's contention, we conclude that the court did not abuse or improvidently exercise its discretion in using the parties' tax returns for the actual years under review as opposed to the tax returns from the year before each year under review inasmuch as the court was being asked to review retroactively the pendente lite award of child support (*see generally* Domestic Relations Law § 240 [1-b] [b] [5] [i]).

We reject plaintiff's challenges to the court's determination concerning prospective child support. Contrary to plaintiff's contentions, the court properly used the parties' most recent tax returns to calculate the amount of future child support (*see generally* Domestic Relations Law § 240 [1-b] [b] [5] [i]), and the presumptively correct amount of child support did not result in an award that was "unjust or inappropriate" (§ 240 [1-b] [f], [g]; *see Matter of Gillette v Gillette*, 8 AD3d 1102, 1103 [4th Dept 2004]; *Veitch v Veitch*, 6 AD3d 1094, 1094 [4th Dept 2004]).

Addressing next issues of equitable distribution, we reject plaintiff's contention that the court's determinations were erroneous. "It is well settled that [e]quitable distribution presents issues of fact to be resolved by the trial court, and its judgment should be upheld absent an abuse of discretion . . . It is also well settled that trial courts are granted substantial discretion in determining what distribution of marital property[—including debt—]will be equitable under all the circumstances" (*Wagner v Wagner*, 136 AD3d 1335, 1336 [4th Dept 2016] [internal quotation marks omitted]). Preliminarily, plaintiff contends that she should have been given a credit for certain marital assets that she contends were dissipated by defendant. Defendant, however, established that he used those particular assets to pay for marital expenses (*see Pudlewski v Pudlewski*, 309 AD2d 1296, 1297 [4th Dept 2003]; *Gonzalez v Gonzalez*, 291 AD2d 373, 374 [2d Dept 2002]). Plaintiff further contends that the court erred in conditioning her ability to claim one of the parties' two children as a dependency exemption for tax purposes on her ability to "remain[] current with her child support obligation for a full calendar year." Given plaintiff's prior failure to pay child support, we conclude that the imposition of such a condition was not an abuse of the court's discretion (*see Rooney v Rooney* [appeal No. 3], 92 AD3d 1294, 1296 [4th Dept 2012], *lv denied* 19 NY3d 810 [2012]; *see generally Agnello v Payne*, 26 AD3d 837, 837 [4th Dept 2006], *lv denied* 7 NY3d 707 [2006]).

The court directed that the "parties' retirements" be divided pursuant to the *Majauskas* formula, but plaintiff contends that we should modify the judgment inasmuch as it was undisputed that she did

not have a retirement plan. We reject that contention. At the hearing, it was established that defendant had two retirement plans, one from his prior military service and one from his then-current employment. The court thus did not err in ordering the division of multiple retirement plans. To the extent that plaintiff did not have a retirement plan, there is nothing to be divided by *Majauskas*, and no need to modify the judgment.

Contrary to plaintiff's further contention, we perceive no basis to modify the court's equitable distribution of the parties' debts. We address specifically the parties' student loans, which totaled over $250,000. The court concluded that each party "utilized education loans to pay for the tuition of his/her graduate program and to cover family expenses during that time." Although "[t]here may be circumstances where equity requires a credit to one spouse for marital property used to pay off the separate debt of one spouse" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 421 [2009]), we conclude that the court did not abuse or improvidently exercise its discretion in directing that each party be responsible for his or her student loan debt (*see Gelb v Brown*, 163 AD2d 189, 194 [1st Dept 1990]; *see also Heydt-Benjamin v Heydt-Benjamin*, 127 AD3d 814, 815 [2d Dept 2015]; *Dashnaw v Dashnaw*, 11 AD3d 732, 734-735 [3d Dept 2004]).

Both plaintiff and defendant sought an award of attorneys' fees, and the court ultimately directed plaintiff to pay $14,000 to defendant's attorney. We agree with plaintiff that the award should be vacated. "The decision to award . . . attorney[s'] fees lies, in the first instance, in the discretion of the trial court and then in the Appellate Division whose discretionary authority is as broad as [that of] the trial court[]" (*O'Brien v O'Brien*, 66 NY2d 576, 590 [1985]). Under the circumstances of this case, where neither party is a "less monied spouse" (Domestic Relations Law § 237 [a]), and plaintiff has significantly more student loan debt than defendant, we conclude in the exercise of our discretion that the award should be vacated and that each party should be responsible for his or her own attorneys' fees. We therefore modify the judgment accordingly.

We have reviewed plaintiff's remaining contention, i.e., that she was denied her right to a fair trial, and we conclude that it lacks merit.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1113

CA 18-00367

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

JENNIFER HAGGERTY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RYAN HAGGERTY, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

WILLIAM R. HITES, BUFFALO, FOR PLAINTIFF-APPELLANT.

RYAN D. HAGGERTY, DEFENDANT-RESPONDENT PRO SE.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Supreme Court, Erie County (Terrence M. Parker, A.J.), entered April 4, 2017 in a divorce action. The order, among other things, directed plaintiff to pay child support to defendant.

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

Same memorandum as in *Haggerty v Haggerty* ([appeal No. 1] — AD3d — [Feb. 1, 2019] [4th Dept 2019]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1116

CA 18-00971

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

ONE FLINT STREET, LLC, AND DHD VENTURES NEW YORK, LLC, PLAINTIFFS,

V MEMORANDUM AND ORDER

EXXON MOBIL CORPORATION, ET AL., DEFENDANTS.

LOUIS ATKIN AND 15 FLINT STREET, INC., THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

MARTIN T. MARKS, THIRD-PARTY DEFENDANT-RESPONDENT.

WOODS OVIATT GILMAN LLP, ROCHESTER (GRETA K. KOLCON OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-APPELLANTS.

PHILLIPS LYTLE LLP, ROCHESTER (MARK J. MORETTI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered January 26, 2018. The order, among other things, granted the motion of third-party defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying third-party defendant's motion in part and reinstating the first and second causes of action in the third-party complaint as asserted by both third-party plaintiffs, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced the underlying action seeking indemnification from defendants for the environmental response conducted by plaintiffs to remediate two parcels of property on Flint Street in the City of Rochester (the property) that were part of the former oil refinery operations of Vacuum Oil Company, a predecessor of Exxon Mobil Corporation and ExxonMobil Oil Corporation (Exxon defendants). In a prior appeal, we concluded, inter alia, that the Exxon defendants are strictly liable, as dischargers under Navigation Law § 181 (1), for the cleanup and removal costs associated with the discharge of petroleum products at the property (*One Flint St., LLC v Exxon Mobil Corp.*, 112 AD3d 1353, 1354 [4th Dept 2013], *lv dismissed* 23 NY3d 998 [2014]). Defendants-third-party plaintiffs Louis Atkin

and 15 Flint Street, Inc. (15 Flint) (collectively, third-party plaintiffs) subsequently commenced this contractual indemnification action against third-party defendant Martin T. Marks seeking, among other things, a declaration that, under a contract in which Atkin conveyed the property to Marks, Marks is obligated to indemnify third-party plaintiffs for any costs incurred with respect to the environmental conditions at the property, including attorney's fees incurred in connection with defending the underlying action and in prosecuting the third-party action. Third-party plaintiffs appeal from an order that granted Marks' motion for summary judgment dismissing the third-party complaint and denied their cross motion for summary judgment on their contractual indemnification causes of action. We modify the order by denying Marks' motion in part and reinstating the first and second causes of action in the third-party complaint as asserted by both third-party plaintiffs.

As a preliminary matter, we note our difficulty in reviewing this case inasmuch as Supreme Court did not set forth its reasoning for its determination.

We agree with third-party plaintiffs that the court erred in granting Marks' motion with respect to their indemnification causes of action. In a case of contract interpretation, the "party seeking summary judgment has the burden of establishing that the construction it favors is the only construction which can be fairly placed thereon" (*Auburn Custom Millwork, Inc. v Schmidt & Schmidt, Inc.*, 148 AD3d 1527, 1529 [4th Dept 2017] [internal quotation marks omitted]; *see Arrow Communications Labs. v Pico Prods.*, 206 AD2d 922, 922-923 [4th Dept 1994]) and, here, Marks failed to meet that burden (*see generally Maven Tech., LLC v Vasile*, 147 AD3d 1377, 1378 [4th Dept 2017]; *Gilpin v Oswego Bldrs., Inc.*, 87 AD3d 1396, 1398 [4th Dept 2011]; *St. Mary v Paul Smith's Coll. of Arts & Sciences*, 247 AD2d 859, 859-860 [4th Dept 1998]).

The purchase contract provided that a "Phase One Environmental report" had been completed on the property and that Marks, the "Buyer" of the property, was in receipt of the environmental report and "approve[d] of same." The contract further provided that Atkin was the "Seller," the property "was not in compliance with federal, state and/or local laws/ordinances," the Buyer agreed to purchase the property "as is," the "Buyer accept[ed] the property as is, with no representations or warranties as to environmental conditions" of the property, and the Buyer "release[d] and indemnifie[d] Seller with respect to any claims as to environmental conditions on or related to the property." Thus, the terms of the contract establish that, prior to entering into the contract, both Atkin and Marks were generally aware of the property's historical environmental contamination by the Exxon defendants and their predecessor, and the language in the indemnification provision, considered in light of the contract as a whole and the circumstances of the sale of the property, clearly and unambiguously expresses the intent of the parties that the Buyer would indemnify the Seller with respect to *any* claims regarding environmental conditions related to the property (*see Bero Family*

Partnership v Elardo, 122 AD3d 1279, 1280-1281 [4th Dept 2014]; *see generally W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *M.J. Peterson Real Estate v Krantz*, 226 AD2d 1079, 1079 [4th Dept 1996]).

We reject the further contention of third-party plaintiffs, however, that the indemnification language in the contract is broad enough to encompass their recovery of attorney's fees to defend the underlying action and to prosecute their third-party action. When a party has no legal duty to indemnify, a contract requiring that the party assume such an obligation must be strictly construed in order to avoid reading into the contract the imposition of a duty that the parties did not intend (*see Levine v Shell Oil Co.*, 28 NY2d 205, 211 [1971]; *Kurek v Port Chester Hous. Auth.*, 18 NY2d 450, 456 [1966]). Inasmuch as the contract does not clearly express that the parties intended that the indemnification provision cover attorney's fees (*see Niagara Frontier Transp. Auth. v Tri-Delta Constr. Corp.*, 107 AD2d 450, 453 [4th Dept 1985], *affd* 65 NY2d 1038 [1985]; *Bero Family Partnership*, 122 AD3d at 1281), we conclude that the court properly granted that part of Marks' motion for summary judgment dismissing third-party plaintiffs' third cause of action (*see Schreiber v Cimato*, 281 AD2d 961, 962 [4th Dept 2001]).

Notwithstanding our conclusion that the court erred in determining that the indemnification provision was inapplicable to the underlying action as a matter of law, we reject third-party plaintiffs' contention that they are entitled to summary judgment on the issue whether Marks is personally liable under the indemnification provision of the contract. Here, the transmittal letter that Marks' attorney sent to Atkin's attorney with the executed contract states that "Martin T. Marks" had executed the contract, the body of the contract identifies Marks as the "Buyer," and all attendant rights and obligations under the contract related to the "Buyer." The contract further provides, however, that Marks signed the contract "on behalf of an entity to be formed," and the parties now disagree whether they intended that Marks be personally bound by the contract's indemnification provision. Although it is well settled that "[a]n individual who acts on behalf of a nonexistent corporation can be held personally liable" (*Production Resource Group L.L.C. v Zanker*, 112 AD3d 444, 445 [1st Dept 2013]; *see J.N.K. Mach. Corp. v TBW, LTD.*, 155 AD3d 1611, 1612 [4th Dept 2017]; *see also Bay Ridge Lbr. Co. v Groenendaal*, 175 AD2d 94, 96 [2d Dept 1991]; *Clinton Invs. Co., II v Watkin*, 146 AD2d 861, 863 [3d Dept 1989]), the determination "[w]hether a person is personally obligated on a preincorporation transaction depends on the intention of the parties" (*Universal Indus. Corp. v Lindstrom*, 92 AD2d 150, 151 [4th Dept 1983]). Inasmuch as the intention of the parties is not clear from the contract, third-party plaintiffs failed to establish that they are entitled to summary judgment on the issue of whether Marks is personally liable under the contract's indemnification provision (*see generally Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Brinson v Kulback's & Assoc.*, 296 AD2d 850, 852 [4th Dept 2002]).

We also reject third-party plaintiffs' contention that they are

entitled to summary judgment on the issue whether 15 Flint is a third-party beneficiary under the contract. We agree with third-party plaintiffs, however, that the court erred insofar as it granted Marks' motion to the extent that he sought summary judgment dismissing the first and second causes of action in the third-party complaint as asserted by 15 Flint. In determining whether a party is an intended beneficiary, "the intention of the promisee is of primary importance, since the promisee procured the promise by furnishing consideration therefor" (*Drake v Drake*, 89 AD2d 207, 209 [4th Dept 1982]). Here, questions of fact exist whether Atkin, "the promisee[,] intend[ed] to give [15 Flint,] the beneficiary[,] the benefit of the promised performance" (*DeLine v CitiCapital Commercial Corp.*, 24 AD3d 1309, 1311 [4th Dept 2005] [internal quotation marks omitted]; *see generally Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 44 [1985]).

Finally, in light of our determination, we do not address the contention of third-party plaintiffs that the court erred in failing to declare the rights of the parties under the contract when it granted Marks' motion for summary judgment dismissing the third-party complaint. Although it generally is improper for a court to simply grant a motion seeking dismissal of a declaratory judgment cause of action rather than declaring the rights of the parties with respect thereto (*see Olinsky v CNA Ins. Cos.*, 261 AD2d 886, 886 [4th Dept 1999]; *Tigue v Commercial Life Ins. Co.*, 219 AD2d 820, 820-821 [4th Dept 1995]), a judgment declaring the rights and obligations of the parties under the contract would be premature inasmuch as there are issues of material fact whether Marks is personally liable to Atkin for contractual indemnification and whether 15 Flint is an intended third-party beneficiary under the contract.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1134

CA 18-00961

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

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

AND MEMORANDUM AND ORDER

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

BLITMAN & KING LLP, SYRACUSE (NATHANIEL G. LAMBRIGHT OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered January 30, 2018 in a proceeding pursuant to CPLR article 75. The order granted the petition seeking a permanent stay of arbitration of a grievance filed by respondent.

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

Memorandum: Petitioner City of Watertown (City) commenced this proceeding pursuant to CPLR article 75 seeking a permanent stay of arbitration of a grievance filed by respondent, the collective bargaining representative for the employees of the City's Fire Department. In its grievance and demand for arbitration, respondent alleged that the City violated, among other things, certain provisions of the parties' collective bargaining agreement (CBA) relating to minimum staffing levels for shifts and regular operations within the Fire Department (staffing provisions). Supreme Court granted the petition, determining that the staffing provisions are unenforceable job security provisions that violate public policy and, therefore, may not be arbitrated. Respondent appeals, and we now reverse.

"It is well settled that, in deciding an application to stay or compel arbitration under CPLR 7503, the court is concerned only with the threshold determination of arbitrability, and not with the merits of the underlying claim" (*Matter of Alden Cent. Sch. Dist. [Alden Cent. Schs. Administrators' Assn.]*, 115 AD3d 1340, 1340 [4th Dept 2014]; *see* CPLR 7501; *Matter of Board of Educ. of Watertown City Sch. Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 142-143 [1999]). In making that determination, the court must conduct a two-part analysis.

First, the court must determine whether "there is any statutory, constitutional or public policy prohibition against arbitration of the grievance" (*Matter of City of Johnstown [Johnstown Police Benevolent Assn.]*, 99 NY2d 273, 278 [2002]). Second, "[i]f no prohibition exists, [the court must then determine] whether the parties in fact agreed to arbitrate the particular dispute by examining their collective bargaining agreement" (*Matter of County of Chautauqua v Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO, County of Chautauqua Unit 6300, Chautauqua County Local 807*, 8 NY3d 513, 519 [2007]; *see Matter of Mariano v Town of Orchard Park*, 92 AD3d 1232, 1233 [4th Dept 2012]).

With respect to the first part of the analysis, we agree with respondent that the court erred in determining that the staffing provisions are not arbitrable on the ground that they are job security provisions subject to the public policy exception to arbitration. "A job security provision insures that, at least for the duration of the agreement, the employee need not fear being put out of a job" (*Matter of Board of Educ. of Yonkers City Sch. Dist. v Yonkers Fedn. of Teachers*, 40 NY2d 268, 275 [1976]). Here, however, the staffing provisions do not purport to guarantee a firefighter his or her employment while the CBA is in effect (*see Matter of City of Lockport [Lockport Professional Firefighters Assn., Inc.]*, 141 AD3d 1085, 1088 [4th Dept 2016]; *cf. Matter of Johnson City Professional Firefighters Local 921 [Village of Johnson City]*, 18 NY3d 32, 36-38 [2011]; *Board of Educ. of Yonkers City Sch. Dist.*, 40 NY2d at 272). Contrary to the City's contention, the staffing provisions do not operate to mandate a total number of firefighters that must be employed; rather, they relate solely to the minimum number of firefighters required to be present during shifts and regular operations (*see Lockport Professional Firefighters Assn., Inc.*, 141 AD3d at 1088). Further, the record establishes that the parties contemplated during their negotiation of the CBA that the staffing provisions were necessary to protect the health, safety and well-being of respondent's members, and, contrary to the City's contention, the staffing provisions are not tantamount to "no-layoff" clauses (*see id.*). We therefore conclude that the court erred in determining that the staffing provisions are job security provisions that are not subject to arbitration.

Inasmuch as there is no prohibition against arbitration here, we address the second part of the analysis, i.e., whether the parties agreed to arbitrate the relevant dispute. Where, as here, the CBA contains a broad arbitration clause, our determination under that part of the analysis "is limited to whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA" (*Matter of City of Watertown [Watertown Professional Firefighters' Assn. Local 191]*, 152 AD3d 1231, 1232-1233 [4th Dept 2017], *lv denied* 30 NY3d 908 [2018] [internal quotation marks omitted]; *see Board of Educ. of Watertown City Sch. Dist.*, 93 NY2d at 143). Because respondent references the staffing provisions in its labor grievance, the grievance "is reasonably related to the general subject matter of the CBA" (*Watertown Professional*

Firefighters' Assn. Local 191, 152 AD3d at 1233; *see Lockport Professional Firefighters Assn., Inc.*, 141 AD3d at 1088). Thus, we conclude that the parties agreed to arbitrate the labor grievance.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1146

KA 16-00793

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN TCHIYUKA, DEFENDANT-APPELLANT.

HUG LAW, PLLC, ALBANY (MATTHEW C. HUG OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered December 22, 2015. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Oneida County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [2] [b]), defendant contends that his plea was induced by a promise of jail time credit that cannot legally be fulfilled. Preliminarily, we note that defendant's contention survives his waiver of the right to appeal (*see People v Bethea*, 133 AD3d 1033, 1034 [3d Dept 2015], *lv denied* 27 NY3d 992 [2016]; *People v Williams*, 84 AD3d 1417, 1418 [2d Dept 2011], *lv denied* 17 NY3d 863 [2011]; *see generally People v Copes*, 145 AD3d 1639, 1639 [4th Dept 2016], *lv denied* 28 NY3d 1182 [2017]). Moreover, although defendant's contention is unpreserved for appellate review (*see People v Williams*, 27 NY3d 212, 219-225 [2016]), we exercise our power to address it as a matter of discretion in the interest of justice (*see e.g. People v Smith*, 160 AD3d 1475, 1475 [4th Dept 2018]; *People v Muhammad*, 132 AD3d 1068, 1069 [3d Dept 2015]).

With respect to the merits, it is undisputed that, as part of his plea bargain, defendant was promised 203 days of jail time credit against the custodial term of his negotiated sentence. As the People correctly concede, however, that promise cannot legally be fulfilled. Penal Law § 70.30 (3) provides that jail time credit "shall not include any time that is credited against the term . . . of any previously imposed sentence," and the 203 days at issue here were already applied by operation of law against an undischarged sentence

previously imposed upon defendant for an unrelated crime (*see* § 70.40 [3] [c] [i]; *Matter of Santora v Sheak*, 120 AD2d 887, 888 [3d Dept 1986]; *see also People v Drake*, 155 AD3d 1584, 1585 [4th Dept 2017]; *Matter of Booker v Laffin*, 98 AD3d 1213, 1213 [3d Dept 2012]). Thus, under the plain language of section 70.30 (3), County Court had no power to promise defendant 203 days of jail time credit against the instant sentence (*see Drake*, 155 AD3d at 1585; *Matter of Blake v Dennison*, 57 AD3d 1137, 1138 [3d Dept 2008], *lv denied* 12 NY3d 710 [2009]). Contrary to the parties' assertions, however, the error in this case is not traceable in any respect to section 70.25 (2-a).

" '[A] guilty plea induced by an unfulfilled promise either must be vacated or the promise honored' " (*People v Collier*, 22 NY3d 429, 433 [2013], *cert denied* 573 US 908 [2014], quoting *People v Selikoff*, 35 NY2d 227, 241 [1974], *cert denied* 419 US 1122 [1975]). " 'The choice rests in the discretion of the sentencing court' and 'there is no indicated preference for one course over the other' " (*id.*). Where, as here, "the originally promised sentence cannot be imposed in strict compliance with the plea agreement, the sentencing court may impose another lawful sentence that comports with the defendant's legitimate expectations" (*id.* at 434). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court either to impose a sentence that comports with defendant's legitimate expectations or to afford defendant an opportunity to withdraw his plea (*see People v Collier*, 79 AD3d 1162, 1163 [3d Dept 2010], *affd* 22 NY3d 429 [2013]; *Drake*, 155 AD3d at 1585). Because defendant is a second violent felony offender, any sentence of imprisonment imposed on remittal must be in "whole or half years" (Penal Law § 70.04 [2]; *see People v VanValkinburgh*, 90 AD3d 1553, 1554 [4th Dept 2011]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1156

CA 18-00554

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

COHEN & LOMBARDO, P.C.,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DANIEL R. CONNORS, JAMES J. NASH,
DEFENDANTS-APPELLANTS-RESPONDENTS,
JONATHAN D. COX, ERIN E. MOLISANI,
CHRISTOPHER R. POOLE, AND MATTHEW A.
LOUISOS, DEFENDANTS-RESPONDENTS.

WEBSTER SZANYI LLP, BUFFALO (D. CHARLES ROBERTS, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

CONNORS LLP, BUFFALO (VINCENT E. DOYLE, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered March 5, 2018. The order granted those parts of the motion of defendants to dismiss the second and fifth through ninth causes of action, and denied those parts of the motion to dismiss the first, third and fourth causes of action and for attorneys' fees, costs and sanctions.

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

Memorandum: Defendants Daniel R. Connors (Connors) and James J. Nash (Nash) were shareholders in plaintiff law firm, and both terminated their respective ownership interests in plaintiff on May 2, 2016. The remaining defendants (collectively, associate defendants) were associate attorneys who resigned from their employment with plaintiff on or about May 3, 2016. Plaintiff commenced this action seeking damages for breach of fiduciary duty, misappropriation, and conspiracy to violate fiduciary duties. In its complaint, plaintiff alleged that, between August 2012 and April 29, 2016, Connors and Nash devised a plan to leave plaintiff and establish a new law firm, taking with them most of plaintiff's civil litigation practice; that Connors and Nash conspired with the associate defendants to carry out this plan; and that, shortly after defendants' departure from plaintiff, several of plaintiff's long-time clients transferred their cases to the new firm established by Connors and Nash. Defendants moved to dismiss the complaint pursuant to CPLR 3211 and 3016 and also sought sanctions, costs, and attorneys' fees pursuant to 22 NYCRR 130-1.1.

Supreme Court granted defendants' motion in part by dismissing the causes of action for conspiracy to violate fiduciary duties against each of the defendants. The court denied the motion with respect to the causes of action against Connors for breach of fiduciary duty and misappropriation and the cause of action against Nash for breach of fiduciary duty and also denied the motion with respect to attorneys' fees, costs, and sanctions. Connors and Nash (collectively, defendants-appellants) appeal and plaintiff cross-appeals. We affirm.

Addressing first the appeal, we reject defendants-appellants' contention that the breach of fiduciary duty causes of action should have been dismissed pursuant to CPLR 3016 (b). " 'To state a claim for breach of fiduciary duty, a plaintiff must allege that the defendant owed him [or her] a fiduciary duty, that the defendant committed misconduct, and that the plaintiff suffered damages caused by that misconduct' " (*Northland E., LLC v J.R. Militello Realty, Inc.*, 163 AD3d 1401, 1402 [4th Dept 2018]). It is well established that " '[a] cause of action sounding in breach of fiduciary duty must be pleaded with particularity under CPLR 3016 (b)' " (*Litvinoff v Wright*, 150 AD3d 714, 715 [2d Dept 2017]). Nonetheless, "the basic test for sufficiency of a pleading still applies, requiring us to [a]ssum[e] every fact alleged by plaintiff to be true, and liberally construe the pleading in plaintiff's favor" (*Serio v Rhulen*, 24 AD3d 1092, 1093 [3d Dept 2005] [internal quotation marks omitted]; *see generally Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-492 [2008]). Here, we conclude that the breach of fiduciary duty causes of action were pleaded with sufficient particularity to survive the motion to dismiss.

Upon construing the complaint liberally and according plaintiff the benefit of every possible favorable inference (*see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we also reject defendants-appellants' contention that the misappropriation cause of action asserted against Connors should be dismissed. "[W]here[, as here,] evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 683 [2d Dept 2017]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Here, we conclude that the issue whether the items allegedly taken by Connors constitute misappropriated material is one of fact "that cannot be resolved on [a pre-answer] motion to dismiss" (*Montrallo v Fritz*, 176 AD2d 1215, 1215 [4th Dept 1991]).

Contrary to defendants-appellants' final contention, we conclude that the court did not abuse its discretion in denying that part of their motion seeking attorneys' fees, costs, and sanctions (*see generally* 22 NYCRR 130-1.1 [a]).

With respect to plaintiff's cross appeal, we conclude that the court properly granted that part of the motion dismissing each of the causes of action for conspiracy to violate fiduciary duties. First, those causes of action against defendants-appellants are duplicative of the breach of fiduciary duty causes of action asserted against them (*see Herman v Herman*, 122 AD3d 506, 506-507 [1st Dept 2014]; *Danahy v Meese*, 84 AD2d 670, 672 [4th Dept 1981]). Next, with respect to the associate defendants, while it is true that " 'New York does not recognize civil conspiracy to commit a tort as an independent cause of action' " (*Piatt v Horsley*, 108 AD3d 1188, 1189 [4th Dept 2013]), "[a]llegations of conspiracy are permitted . . . to connect the actions of separate defendants with an otherwise actionable tort" (*Transit Mgt., LLC v Watson Indus., Inc.*, 23 AD3d 1152, 1155-1156 [4th Dept 2005]). Such a conspiracy claim "may be asserted where . . . there are allegations of a primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury" (*Great Lakes Motor Corp. v Johnson,* 156 AD3d 1369, 1371-1372 [4th Dept 2017] [internal quotation marks omitted]). Here, however, the complaint merely recites those elements and fails to assert any supporting factual allegations with respect to the associate defendants' "overt act[s] in furtherance of the agreement" and "intentional participation in the furtherance of a plan or purpose" (*id.* [internal quotation marks omitted]). Thus, even applying the requisite liberal construction to the complaint, we conclude that the court properly dismissed the conspiracy causes of action against each of the associate defendants.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1159

CA 18-00853

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

BAHMAN BAVIFARD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID CAPRETTO, DEFENDANT-RESPONDENT.

WAYNE C. FELLE, P.C., WILLIAMSVILLE, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (JOHN P. GAUGHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered September 8, 2017. The order granted 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 denying the motion in part and reinstating the second cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained when he was trampled by defendant's two horses, who broke free while plaintiff was assisting defendant in hitching the horses to a cart. Supreme Court granted defendant's motion for summary judgment dismissing the complaint, and plaintiff appeals.

Initially, we reject plaintiff's contention that the court erred in granting the motion with respect to the first cause of action, for common-law negligence. " '[W]hen harm is caused by a domestic animal, its owner's liability is determined *solely* by application of the rule' . . . of strict liability for harm caused by a domestic animal whose owner knows or should have known of the animal's vicious propensities" (*Petrone v Fernandez*, 12 NY3d 546, 550 [2009], quoting *Bard v Jahnke*, 6 NY3d 592, 599 [2006]; *see Krieger v Cogar*, 83 AD3d 1552, 1552-1553 [4th Dept 2011]; *Vichot v Day*, 80 AD3d 851, 852 [3d Dept 2011]). Under the circumstances presented here, the exception to that rule, as set forth in *Hastings v Sauve* (21 NY3d 122, 125-126 [2013]), does not apply.

We agree with plaintiff, however, that the court erred in granting the motion with respect to the second cause of action, for strict liability based on the horses' vicious propensities, and we

therefore modify the order accordingly. "Vicious propensities include the 'propensity to do any act that might endanger the safety of the persons and property of others in a given situation' " (*Collier v Zambito*, 1 NY3d 444, 446 [2004], quoting *Dickson v McCoy*, 39 NY 400, 403 [1868]). In support of his motion, defendant submitted plaintiff's deposition transcript, wherein plaintiff testified that, prior to plaintiff's injury, defendant stated that "once the horses are kept inside . . . they go crazy in the winter." Thus, defendant's own submissions raise triable issues of fact whether his horses " 'had vicious propensities and, if so, whether [he] knew or should have known of those propensities' " (*Arrington v Cohen*, 150 AD3d 1695, 1696 [4th Dept 2017]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1160

CA 17-02201

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

SAMUEL J. PASCERI AND VIRGINIA PASCERI,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TIMOTHY KELEHER, NANCEY KELEHER, DEFENDANTS,
AND BIELMEIER BUILDERS, INC., DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

MUSCATO, DIMILLO & VONA, LLP, LOCKPORT (P. ANDREW VONA OF COUNSEL),
FOR PLAINTIFFS-APPELLANTS.

WALSH, ROBERTS & GRACE LLP, BUFFALO (MARK P. DELLA POSTA OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Sara Sheldon, A.J.), entered September 20, 2017. The judgment dismissed the complaint against defendant Bielmeier Builders, Inc., upon a jury verdict.

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

Same memorandum as in *Pasceri v Keleher* ([appeal No. 2] — AD3d — [Feb. 1, 2019] [4th Dept 2019]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1161

CA 17-02202

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

SAMUEL J. PASCERI AND VIRGINIA PASCERI,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TIMOTHY KELEHER, NANCEY KELEHER,
DEFENDANTS-RESPONDENTS,
BIELMEIER BUILDERS, INC., DEFENDANT.
(APPEAL NO. 2.)

MUSCATO, DIMILLO & VONA, LLP, LOCKPORT (P. ANDREW VONA OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (TODD C. BUSHWAY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Niagara County (Sara Sheldon, A.J.), entered September 26, 2017. The judgment dismissed the complaint against defendants Timothy Keleher and Nancey Keleher upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the posttrial motion is granted in part, the verdict is set aside in part, the amended complaint against defendants Timothy Keleher and Nancey Keleher is reinstated and a new trial is granted against those defendants.

Memorandum: Plaintiffs commenced this premises liability action seeking damages for injuries that Samuel J. Pasceri (plaintiff) sustained when he fell through an opening in the first floor of a residence being constructed for defendants Timothy Keleher and Nancey Keleher and landed on his back on the cement basement floor. Defendant Bielmeier Builders, Inc. (Bielmeier, Inc.) was either the construction manager or the general contractor on the construction project. Following a trial, the jury returned a verdict finding that neither Bielmeier, Inc. nor the Kelehers were negligent, that plaintiff was negligent and that his negligence was the sole cause of the accident. Pursuant to CPLR 4404 (a), plaintiffs moved to set aside the verdict as contrary to the weight of the evidence. Supreme Court denied the motion. In appeal No. 1, plaintiffs appeal from the judgment entered in favor of Bielmeier, Inc. and, in appeal No. 2, plaintiffs appeal from the judgment entered in favor of the Kelehers. In each appeal, plaintiffs contend that the verdict is against the weight of the evidence and that the court erred in denying their

posttrial motion. We conclude that the judgment in appeal No. 1 should be affirmed but that the judgment in appeal No. 2 should be reversed.

As a preliminary matter, we reject the Kelehers' contention that plaintiffs' contentions are not properly preserved for our review. Contrary to the Kelehers' assertion, plaintiffs do not contend that the verdict is internally inconsistent, which is a contention that must be preserved for appellate review by " 'object[ing] to the verdict on that ground before the jury [is] discharged' " (*Krieger v McDonald's Rest. of N.Y., Inc.*, 79 AD3d 1827, 1828 [4th Dept 2010], *lv dismissed* 17 NY3d 734 [2011]). Rather, plaintiffs contend that the verdict is against the weight of the evidence presented at trial, a contention that was preserved for our review by plaintiffs' posttrial motion to set aside the verdict on that ground (*cf. Homan v Herzig* [appeal No. 2], 55 AD3d 1413, 1413-1414 [4th Dept 2008]).

With respect to the merits, "[i]t is well established that [a] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence" (*Wentland v E.A. Granchelli Devs., Inc.* [appeal No. 2], 145 AD3d 1623, 1623 [4th Dept 2016] [internal quotation marks omitted]; *see Krieger*, 79 AD3d at 1828; *see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). In appeal No. 1, whether Bielmeier, Inc. acted as a construction manager or general contractor, it could be liable for a dangerous condition on the property only if it had control over the work site *and* either created the dangerous condition or had notice of it (*see generally Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1248 [4th Dept 2013]; *Barends v Louis P. Ciminelli Constr. Co., Inc.*, 46 AD3d 1412, 1413 [4th Dept 2007]). We conclude that the verdict finding that Bielmeier, Inc. was not negligent is supported by the weight of the evidence inasmuch as the evidence at trial established that Bielmeier, Inc. did not create the dangerous condition, i.e., the hole in the floor obscured by cardboard, or have actual or constructive notice of it.

With respect to appeal No. 2, however, we conclude that the verdict finding that the Kelehers were not negligent is against the weight of the evidence. "A defendant stands liable in negligence only for breach of a duty of care owed to the plaintiff" (*Sanchez v State of New York*, 99 NY2d 247, 252 [2002]), and a " '[a] landowner must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk' " (*Basso v Miller*, 40 NY2d 233, 241 [1976]). It is well established that "[a] landowner is liable for a dangerous or defective condition on his or her property when the landowner 'created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it' " (*Anderson v Weinberg*, 70 AD3d 1438, 1439 [4th Dept 2010]; *see Cook v Sutton*, 254 AD2d 821, 821 [4th Dept 1998]).

Here, the court instructed the jury that it must find Timothy Keleher negligent if it decided that plaintiff's "presence was foreseeable and that Timothy Keleher created an unsafe condition by placing a piece of cardboard over the stairway opening to the basement. On the other hand if [it found] that [plaintiff's] presence was not foreseeable or that Timothy Keleher did not create the unsafe condition, then [it must find] find the Kelehers were not negligent." Timothy Keleher admitted at trial that he covered the hole, which measured several feet in width and length, with a sheet of cardboard in an effort to preserve the heat in the basement, where he was working. It was undisputed at trial that covering such a hole with cardboard created an unsafe condition. The evidence at trial further established that plaintiff's presence at the property was foreseeable inasmuch as both Timothy Keleher and plaintiff testified that plaintiff stated that he would return to the property later that day. The fact that plaintiff may have returned later than was expected does not, in our view, render it unforeseeable that he would come back to the residence. Moreover, contrary to the Kelehers' contention, the fact that plaintiff was allegedly "aware of the condition did not relieve [them] of [their] duty to maintain the [premises] in a reasonably safe condition" (*Headley v M&J L.P.*, 70 AD3d 1312, 1313 [4th Dept 2010]). Rather, such awareness " 'bears only on the injured person's comparative fault' " (*Ahern v City of Syracuse*, 150 AD3d 1670, 1671 [4th Dept 2017]; *see Headley*, 70 AD3d at 1313).

Inasmuch as plaintiff's presence was foreseeable, the risk of serious injury was great and the burden of avoiding the risk minimal, we conclude that a finding that the Kelehers were not negligent could not have been reached on any fair interpretation of the evidence. We therefore reverse the judgment in appeal No. 2, grant plaintiffs' posttrial motion in part, set aside the verdict in part, reinstate the amended complaint against Timothy Keleher and Nancey Keleher, and remit the matter for a new trial against them.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1185

CA 18-00696

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

PHILIP G. SPELLANE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SENTIL NATARAJAN AND COLLEEN NATARAJAN,
DEFENDANTS-APPELLANTS.

PHETERSON SPATORICO LLP, ROCHESTER (DERRICK A. SPATORICO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (JOHN A. MANCUSO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered July 21, 2017. The order, inter alia, granted that part of the motion of plaintiff for summary judgment on the issue of liability.

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

Memorandum: In this action for breach of contract, defendants appeal from an order that, inter alia, granted that part of plaintiff's motion for summary judgment on the issue of liability and ordered an inquest on damages, denied that part of plaintiff's motion seeking to dismiss the affirmative defenses raised in defendants' answer, and denied defendants' cross motion for summary judgment dismissing the complaint. We affirm.

In April 2015, defendants entered into a contract with plaintiff to purchase real property owned by plaintiff for $390,000. The contract set a proposed closing date of July 1, 2015, and provided that, at any time after that proposed closing date, any party who completed his or her pre-closing obligations under the contract was permitted to declare that time was of the essence and "set forth a specific time for closing on a day that is at least seven (7) calendar days after delivery of the Time is of the Essence Notice to [the] other party." Among other things, the contract required plaintiff to deliver to defendants certain closing documents at least 15 calendar days prior to the closing date to allow defendants enough time to review the title before closing. Plaintiff delivered the closing documents to defendants on July 15, 2015, and thereby completed his pre-closing obligations under the contract. On July 23, 2015, plaintiff sent a letter to defendants declaring that time was of the

essence and setting a closing date of August 3, 2015. On that date, plaintiff appeared and was ready, willing, and able to close. Neither defendants nor their attorney, however, appeared for the closing. Plaintiff eventually sold the property to a different buyer in February 2016 for $345,000. Thereafter, plaintiff brought this action against defendants seeking to recover actual and consequential damages resulting from their breach.

We reject defendants' contention that plaintiff was required to wait until the 15-day title review period elapsed before he could set a date for the closing. "It is well settled that a contract must be read as a whole to give effect and meaning to every term . . . Indeed, [a] contract should be interpreted in a way [that] reconciles all [of] its provisions, if possible" (*O'Brien & Gere, Inc. of N. Am. v G.M. McCrossin, Inc.*, 148 AD3d 1804, 1805 [4th Dept 2017] [internal quotation marks omitted]; *see Maven Tech., LLC v Vasile*, 147 AD3d 1377, 1378 [4th Dept 2017]). "To be entitled to summary judgment, the moving party has the burden of establishing that its construction of the [contract] is the only construction [that] can fairly be placed thereon" (*O'Brien*, 148 AD3d at 1805 [internal quotation marks omitted]). Here, defendants' interpretation of the contract as requiring that, during the 15-day title review period, plaintiff refrain from scheduling a date for the closing that would occur after that period elapsed, contradicts the plain language of the contract. Plaintiff met his burden of establishing that the contract expressly permitted a party who had fulfilled his or her pre-closing obligations to schedule a time of the essence closing at any time after July 1, 2015, as long as that party set the time of the essence closing at least seven calendar days from the date when notice was delivered to the other party. Plaintiff fulfilled his pre-closing obligation when he delivered the closing documents to defendants on July 15, 2015 and, on July 23, 2015, plaintiff scheduled the closing for August 3, 2015, which was after the 15-day title review period elapsed, and was at least seven days after the time of the essence notice was delivered to defendants.

We reject defendants' further contention that the August 3, 2015 closing date was unreasonable as a matter of law because it was only one business day after the expiration of the 15-day title review period. Although the law permits a buyer reasonable time in which to tender performance when a contract for the sale of real property does *not* make time of the essence (*see Revital Realty Group, LLC v Ulano Corp.*, 112 AD3d 902, 904 [2d Dept 2013]), time was of the essence here. Thus, by the express terms of the contract, plaintiff was permitted to set the time of the essence closing for any day after the expiration of the 15-day title review period and at least seven days after the delivery of notice to defendants.

Furthermore, inasmuch as defendants failed to seek summary judgment on their affirmative defense that plaintiff could not recover consequential damages, defendants' contention that plaintiff should be estopped from seeking consequential damages is raised for the first time on appeal and is therefore not properly before us (*see Stransky v DiPalma*, 137 AD3d 1734, 1736 [4th Dept 2016]; *see generally Ciesinski*

v Town of Aurora, 202 AD2d 984, 985 [4th Dept 1994]).

Finally, in the absence of a cross appeal from that part of the order denying plaintiff's motion insofar as it sought summary judgment on the amount of damages, we decline plaintiff's request that we grant summary judgment with respect to the amount of damages (*see Cleere v Frost Ridge Campground, LLC*, 155 AD3d 1645, 1647 [4th Dept 2017]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1196

CAF 16-01180

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

IN THE MATTER OF EDWARD M., ELAJJA M.,
KEVIYA M., AND WADE M.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

AJJA M., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered May 31, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, terminated placement of the subject children with the Onondaga County Department of Children and Family Services.

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

Same memorandum as in *Matter of Lakeya P.* ([appeal No. 2] — AD3d — [Feb. 1, 2019] [4th Dept 2019]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1197

CAF 16-01443

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

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

V MEMORANDUM AND ORDER

AJJA M., RESPONDENT-APPELLANT,
EDWARD M., AND ONONDAGA COUNTY DEPARTMENT OF
CHILDREN AND FAMILY SERVICES,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL), FOR RESPONDENT-RESPONDENT ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES.

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

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered May 31, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner sole legal and physical custody of Wade M. and Edward M.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph to the extent that it delegates authority to petitioner to determine the duration and frequency of respondent Ajja M.'s supervised visitation with the children and vacating the sixth ordering paragraph, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In appeal No. 1, respondent mother appeals from an order that, inter alia, terminated the placement of the four subject children with the Onondaga County Department of Children and Family Services (DCFS), which is the petitioner in appeal No. 1 and a respondent in appeal Nos. 2 and 3. In appeal No. 2, the mother appeals from an order that, inter alia, granted sole legal and physical custody of the youngest two subject children to petitioner Lakeya P., their aunt. In appeal No. 3, the mother appeals from an order that, inter alia, granted sole legal and physical custody of the oldest two subject children to petitioner Denise E., their great aunt.

The mother's contention in appeal No. 1 that Family Court erred by imposing in two prior permanency orders concurrent and contradictory permanency goals—i.e., directing that DCFS "concurrently" plan for the goal of permanent placement of the children with a relative as well as for the goal of reunification with the mother—is not properly before us inasmuch as the mother did not appeal from those permanency orders (*see generally Matter of Amollyah B. [Tiffany R.]*, 161 AD3d 1558, 1558 [4th Dept 2018]; *Matter of Arkadian S. [Crystal S.]*, 130 AD3d 1457, 1458 [4th Dept 2015], *lv dismissed* 26 NY3d 995 [2015]). We therefore dismiss the appeal from the order in appeal No. 1 (*see generally Pethick v Pethick*, 90 AD3d 1696, 1696 [4th Dept 2011]; *Abasciano v Dandrea*, 83 AD3d 1542, 1542-1543 [4th Dept 2011]).

With respect to appeal Nos. 2 and 3, we reject the mother's contention that the court erred in denying her attorney's request for an adjournment when the mother failed to appear for the last day of trial. "It is well settled that the determination whether to grant a request for an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*Matter of Sanchez v Alvarez*, 151 AD3d 1869, 1869 [4th Dept 2017]). Here, the mother's attorney requested an adjournment on the ground that the mother was being evicted from her apartment and thus could not appear in court that day. The mother's caseworker, however, testified that the eviction had been pending for some time, and the attorney conceded that it did not appear that marshals had actually been dispatched to remove the mother from her apartment. In light of those facts, and the mother's history of leaving while the proceedings were in progress, we conclude that the court did not abuse its discretion in denying the request for an adjournment (*see Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1747 [4th Dept 2011]; *Matter of Sanaia L. [Corey W.]*, 75 AD3d 554, 555 [2d Dept 2010]).

We also reject the mother's contention that the record did not support a finding of extraordinary circumstances necessary to justify an award of custody to a nonparent. "It is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981 [4th Dept 1998]; *see Matter of Braun v Decicco*, 117 AD3d 1453, 1454 [4th Dept 2014], *lv dismissed in part and denied in part* 24 NY3d 927 [2014]). A determination that extraordinary circumstances exist may be based on, inter alia, a parent's failure to address serious mental health issues (*see Matter of Thomas v Armstrong*, 144 AD3d 1567, 1568 [4th Dept 2016], *lv denied* 28 NY3d 916 [2017]; *Matter of Johnson v Streich-McConnell*, 66 AD3d 1526, 1527 [4th Dept 2009]).

Here, in determining that extraordinary circumstances existed, the court relied on the circumstances underlying the initial finding of neglect, including that the mother suffered from acute depression and reported suicidal thoughts but refused treatment and that, after the children's subsequent removal by DCFS, she admitted that her

untreated mental health conditions made her incapable of caring for the children. The court further found that, in the nearly two years since the children's removal, the mother had "wholly failed" to "participate and progress" in needed mental health services. After reviewing the record, we conclude that the court properly determined that petitioners in appeal Nos. 2 and 3 (petitioners) met their burden of establishing the existence of extraordinary circumstances (*see Thomas*, 144 AD3d at 1568).

We agree, however, with the mother that the court erred in granting her only so much supervised contact as was "deemed appropriate" by petitioners. The court is "required to determine the issue of visitation in accord with the best interests of the children and fashion a schedule that permits a noncustodial parent to have frequent and regular access" (*Matter of Aida B. v Alfredo C.*, 114 AD3d 1046, 1049 [3d Dept 2014]). "In so doing, the court may not delegate its authority to make such decisions to a party" (*id.*), which the court did here by delegating to petitioners its authority to set a supervised visitation schedule. We therefore modify the orders in appeal Nos. 2 and 3 accordingly and remit the matter to Family Court to determine the supervised visitation schedule.

Finally, we agree with the mother that the court erred in ordering that any petition filed by the mother to modify or enforce the custody orders must have a judge's permission to be scheduled. "Public policy mandates free access to the courts" (*Matter of Shreve v Shreve*, 229 AD2d 1005, 1006 [4th Dept 1996]), and it is error to restrict such access without a finding that the restricted party "engaged in meritless, frivolous, or vexatious litigation, or . . . otherwise abused the judicial process" (*Matter of Otrosinka v Hageman*, 144 AD3d 1609, 1611 [4th Dept 2016]). Here, it is undisputed that the mother had not commenced any frivolous proceedings. In the absence of such a finding, it was error for the court to restrict the mother's access to the court, and we thus modify the orders in appeal Nos. 2 and 3 by vacating the sixth ordering paragraph of each order (*see id.*; *Matter of Schermerhorn v Quinette*, 28 AD3d 822, 823 [3d Dept 2006]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1198

CAF 16-01629

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

IN THE MATTER OF DENISE E., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

AJJA M., RESPONDENT-APPELLANT,
EDWARD M., AND ONONDAGA COUNTY DEPARTMENT OF
CHILDREN AND FAMILY SERVICES,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 3.)

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL), FOR RESPONDENT-RESPONDENT ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES.

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

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered May 31, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner sole legal and physical custody of Elajja M. and Keviya M.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph to the extent that it delegates authority to petitioner to determine the duration and frequency of respondent Ajja M.'s supervised visitation with the children and vacating the sixth ordering paragraph, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the same memorandum as in *Matter of Lakeya P.* ([appeal No. 2] — AD3d — [Feb. 1, 2019] [4th Dept 2019]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1207

CA 18-00412

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

AMARJIT SINGH, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

STEUBEN COUNTY INDUSTRIAL DEVELOPMENT AGENCY, B&H RAIL CORP., FORMERLY KNOWN AS COHOCTON VALLEY RAIL CORP. (A WHOLLY OWNED SUBSIDIARY OF LIVONIA, AVON & LAKEVILLE RAILROAD CORP.), DEFENDANTS-APPELLANTS-RESPONDENTS, AND STEUBEN COUNTY, DEFENDANT-RESPONDENT.

HARRIS BEACH PLLC, BUFFALO (TRISTAN D. HUJER OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT STEUBEN COUNTY INDUSTRIAL DEVELOPMENT AGENCY.

HARTER SECREST & EMERY LLP, ROCHESTER (A. PAUL BRITTON OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT B&H RAIL CORP., FORMERLY KNOWN AS COHOCTON VALLEY RAIL CORP. (A WHOLLY OWNED SUBSIDIARY OF LIVONIA, AVON & LAKEVILLE RAILROAD CORP.).

LAW OFFICE OF RICHARD P. URDA, ITHACA (RICHARD P. URDA OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

BARCLAY DAMON LLP, ELMIRA (JEREMY J. HOURIHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals and cross appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered June 28, 2017. The order, among other things, granted the motion of defendant Steuben County to dismiss the complaint against it and granted the cross motion of plaintiff for summary judgment on the issue of liability against the remaining defendants.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on October 19, 24 and 29, and November 2, 2018, and filed in the Steuben County Clerk’s Office on November 14, 2018,

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1208

CA 18-00260

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

DONNA POWELL, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

CENTRAL NEW YORK REGIONAL TRANSPORTATION AUTHORITY, RESPONDENT-RESPONDENT, ET AL., RESPONDENT.

MCMAHON, KUBLICK & SMITH, P.C., SYRACUSE (W. ROBERT TAYLOR OF COUNSEL), FOR CLAIMANT-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (SAMANTHA L. MILLIER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Spencer J. Ludington, A.J.), entered September 23, 2016. The order denied the application of claimant for leave to serve a late notice of claim.

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

Memorandum: In this action seeking damages for personal injuries that she allegedly sustained while exiting a bus owned and operated by Central New York Regional Transportation Authority (respondent), claimant appeals from an order that denied her application for leave to serve a late notice of claim. We affirm.

A notice of claim must be served within 90 days after the claim accrues, although a court may grant leave extending that time (*see* General Municipal Law § 50-e [1] [a]; [5]). The decision whether to grant such leave requires "consideration of all relevant facts and circumstances," including the "nonexhaustive list of factors" in section 50-e (5) (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). The three main factors are "whether the claimant has shown a reasonable excuse for the delay, whether the [respondent] had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the [respondent]" (*Matter of Friend v Town of W. Seneca*, 71 AD3d 1406, 1407 [4th Dept 2010]; *see generally* § 50-e [5]). Although "the presence or absence of any single factor is not determinative, one factor that should be accorded great weight is whether the [public corporation] received actual knowledge of the facts constituting the claim in a timely manner" (*Matter of Szymkowiak v New York Power*

Auth., 162 AD3d 1652, 1654 [4th Dept 2018] [internal quotation marks omitted]), including knowledge of the injuries or damages claimed (*see Santana v Western Regional Off-Track Betting Corp.*, 2 AD3d 1304, 1305 [4th Dept 2003], *lv denied* 2 NY3d 704 [2004]). The claimant bears the burden of demonstrating that the respondent had actual timely knowledge (*see Szymkowiak*, 162 AD3d at 1654). Absent a "clear abuse" of the court's broad discretion, "the determination of an application for leave to serve a late notice of claim will not be disturbed" (*Matter of Hubbard v County of Madison*, 71 AD3d 1313, 1315 [3d Dept 2010] [internal quotation marks omitted]).

Here, claimant failed to meet her burden of demonstrating that respondent had actual knowledge of the incident, including knowledge of claimant's injuries, within 90 days of the accident. Indeed, the record establishes that claimant did not say anything to the bus driver when the accident allegedly occurred and that it was not obvious that she was injured (*cf. generally Matter of Ragland v New York City Hous. Auth.*, 201 AD2d 7, 11 [2d Dept 1994]). Claimant's only communication with respondent about the incident within the statutory period was an anonymous telephone call that she made to respondent's general phone number, during which she did not indicate that an accident had occurred or describe her injuries (*see Kennedy v Oswego City Sch. Dist.*, 148 AD3d 1790, 1791 [4th Dept 2017]). In addition, her untimely notice of claim incorrectly identified the date on which the accident allegedly occurred. Finally, claimant became aware shortly after the incident that she was injured (*cf. Shane v Cent. N.Y. Regional Transp. Auth.*, 79 AD3d 1820, 1821 [4th Dept 2010]), and we reject her contention that the nature of her injuries, including a torn meniscus and a bone contusion, constituted a reasonable excuse for failing to comply with the notice of claim requirement (*cf. Matter of Heredia v New York City Health & Hosps. Corp.*, 159 AD3d 663, 664 [1st Dept 2018]). Consequently, Supreme Court did not abuse its discretion in denying her application for leave to serve a late notice of claim.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1214

KA 16-01905

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES C. DEAN, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered September 21, 2016. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (SORA) (Correction Law § 168 *et seq.*) after a conviction of, inter alia, four counts of sodomy in the first degree. Defendant contends that he was denied a fair SORA hearing because Supreme Court failed to consider medical records, which allegedly cast doubt upon his guilt of the underlying crimes, as evidence of a mitigating factor warranting a downward departure to a level two risk. Even assuming, arguendo, that defendant preserved his contention for our review (*see generally People v Quigley*, 163 AD3d 1463, 1463 [4th Dept 2018]), we conclude that it lacks merit. The record demonstrates that the court considered the relevant medical records and concluded that they did not cast doubt upon his guilt. Moreover, "[f]acts previously proven at trial or elicited at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence and shall not be relitigated" at a SORA hearing (Correction Law § 168-n [3]; *see People v Law*, 94 AD3d 1561, 1562 [4th Dept 2012], *lv denied* 19 NY3d 809 [2012]). Thus, defendant was precluded from using the medical records to establish at the SORA hearing his claim of innocence inasmuch as his guilt had been proven at trial.

Contrary to defendant's further contention, we conclude that defense counsel was not ineffective in purportedly failing to request that the court consider the medical records in support of his

application for a downward departure because such a request had " 'little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Price*, 129 AD3d 1484, 1484-1485 [4th Dept 2015], *lv denied* 26 NY3d 970 [2015]).

We agree with defendant, however, that the court failed to comply with Correction Law § 168-n (3), requiring the court to set forth the findings of fact and conclusions of law upon which it based its determination (*see People v Flax*, 71 AD3d 1451, 1451-1452 [4th Dept 2010]). Although the court provided a list of the risk factors for which defendant was assessed points and held that defendant failed to rebut the presumption that he is a level three risk, the court did not provide the findings of fact or conclusions of law supporting its denial of defendant's request for a downward departure. We therefore hold the case, reserve decision, and remit the matter to Supreme Court for compliance with Correction Law § 168-n (3) (*see People v Long*, 81 AD3d 1432, 1433 [4th Dept 2011]; *People v Cullen*, 53 AD3d 1105, 1106 [4th Dept 2008]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1220

CAF 16-02198

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

IN THE MATTER OF SARAH ALGER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RYAN JACOBS, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

TYSON BLUE, MACEDON, FOR RESPONDENT-APPELLANT.

SUSAN GRAY, CANANDAIGUA, FOR PETITIONER-RESPONDENT.

MARYBETH D. BARNET, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Stephen D. Aronson, A.J.), entered July 27, 2016 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner and the subject child.

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

Memorandum: In appeal No. 1, respondent father appeals from an order of protection, directing him to stay away from petitioner mother and the parties' child, which was issued upon a finding that he committed a family offense. In appeal No. 2, the father appeals from an order that granted the mother's custody and visitation petition and awarded her sole custody of the child. In both appeals, the father's sole contention is that Family Court erred in denying his motion to dismiss the petitions for lack of subject matter jurisdiction. We reject the father's contention.

Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Domestic Relations Law art 5-A), a New York court has jurisdiction to make an initial child custody determination under very limited circumstances, none of which apply here (*see* § 76 [1] [a]-[d]). Nevertheless, section 76-c states in relevant part that New York courts have "temporary emergency jurisdiction if the child is present in this state and . . . it is necessary in an emergency to protect the child, a sibling or parent of the child" (§ 76-c [1]). Contrary to the father's contention, the court properly determined that it had temporary emergency jurisdiction over both proceedings. Inasmuch as it is undisputed that the child was present in New York State when the mother filed the petitions and both proceedings fit

within the UCCJEA's broad definition of child custody proceedings (*see* § 75-a [4]; *see generally Matter of Bridget Y. [Kenneth M.Y.]*, 92 AD3d 77, 86 [4th Dept 2011], *appeal dismissed* 19 NY3d 845 [2012]), the only real issue is whether there was an emergency within the meaning of section 76-c (1).

As the mother correctly contends, Domestic Relations Law § 76-c (1) applies to emergencies involving parents. The UCCJEA specifically notes that it was enacted with the intent of, inter alia, protecting victims of domestic violence (*see* § 75 [2]). Indeed, section 76-c was rephrased from " 'it is necessary in an emergency to protect the child' " to " 'it is necessary in an emergency to protect the child, a sibling or *parent of the child*' " (Unified Ct Sys Mem in Support, Bill Jacket, L 2001, ch 386 [emphasis added]). Thus, "the legislative history of the [UCCJEA] makes clear that the expansion of the statute to include danger to a parent is reflective of 'an increased awareness and understanding of domestic violence' " (*Matter of Callahan v Smith*, 23 AD3d 957, 958 [3d Dept 2005]).

We further agree with the mother and the Attorney for the Child that the allegations in the petitions were sufficient to establish the requisite emergency, i.e., they allege acts of physical violence perpetrated by the father against the mother, resulting in her hospitalization in an intensive care unit for several days (*see e.g. Matter of Pamela N. v Aaron A.*, 159 AD3d 452, 452 [1st Dept 2018], *lv dismissed* 31 NY3d 1073 [2018]; *Matter of Rodriguez v Rodriguez*, 118 AD3d 1011, 1011-1012 [2d Dept 2014]; *Matter of Tin Tin v Thar Kyi*, 92 AD3d 1293, 1293 [4th Dept 2012], *lv denied* 19 NY3d 802 [2012]; *cf. Matter of Ozdemir v Riley*, 101 AD3d 884, 885 [2d Dept 2012]; *Matter of Hearne v Hearne*, 61 AD3d 758, 759 [2d Dept 2009]).

We reject the father's contention that there was no emergency in effect at the exact moment the mother filed the petitions. Although the father was incarcerated in Florida at the time the petition in appeal No. 2 was filed and thus posed no immediate threat to the mother's physical safety, the mother, who had been hospitalized for several days and suffered significant injuries, including a subdural hematoma, had no knowledge regarding when the father would be released. The mother therefore relocated to New York to be with family, who could help her with the then 11-month-old child, and to be safe in the event the father was released.

The father further contends that the court should have dismissed the petitions on the ground that New York was an inconvenient forum (*see* Domestic Relations Law § 76-f). The inconvenient forum statute applies only *after* it is determined that a court has subject matter jurisdiction. Indeed, inconvenient forum is a basis for the court to "decline to exercise its jurisdiction" (§ 76-f [1]). Inasmuch as the father's motion was limited to issues of subject matter jurisdiction, we conclude that the father has failed to preserve his contention for our review (*cf. Matter of Eldad LL. v Dannai MM.*, 155 AD3d 1336, 1338

[3d Dept 2017]), and we decline to address it.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1221

CAF 16-02199

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

IN THE MATTER OF SARAH ALGER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RYAN JACOBS, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

TYSON BLUE, MACEDON, FOR RESPONDENT-APPELLANT.

SUSAN GRAY, CANANDAIGUA, FOR PETITIONER-RESPONDENT.

MARYBETH D. BARNET, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Stephen D. Aronson, A.J.), entered August 1, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

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

Same memorandum as in *Matter of Alger* ([appeal No. 1] — AD3d — [Feb. 1, 2019] [4th Dept 2019]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1227

CA 18-00737

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

MICHELE KOZMINSKI, NOW KNOWN AS MICHELE KIBLING,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE A. KOZMINSKI, DEFENDANT-APPELLANT.

LEVITT & GORDON, ESQS., NEW HARTFORD (DEAN L. GORDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered October 23, 2017. The order, inter alia, determined that defendant is responsible for the undergraduate expenses incurred by the eldest daughter of the parties.

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

Memorandum: The parties were divorced in 2011. Plaintiff wife thereafter moved for, inter alia, an order interpreting the parties' divorce settlement agreement with respect to their respective responsibilities for their eldest daughter's educational expenses. After a hearing, Supreme Court determined that the agreement obligated defendant husband to pay all of the eldest daughter's undergraduate and graduate expenses, except for certain loans that plaintiff took out in her own name. Consequently, the court ordered defendant to pay the eldest daughter's outstanding undergraduate debt, which amounted to $57,418.96. Defendant appeals, and we now affirm.

The disputed portion of the agreement provides that defendant "will pay 100% of the . . . tuition, room, board and books for both children until they complete the degree they are currently in and so long as they are in a full time program or until such time as they reach the age of [25] years, which ever comes first." At the time of the agreement's execution, the eldest daughter had completed her undergraduate degree and was enrolled in a graduate program. We reject defendant's contention that the agreement's language obligated him to pay only for the eldest daughter's graduate program, not her outstanding undergraduate debt. As the court properly concluded, the plain language of the agreement reflects defendant's undertaking to pay for all – i.e., "100%" – of his children's educational expenses through and including – i.e., "until" – the completion of the program in which they were "currently" enrolled. Such expenses necessarily include the undergraduate debt incurred by the eldest daughter (*see*

Matter of Yorke v Yorke, 83 AD3d 951, 952 [2d Dept 2011]; *Matter of Kent v Kent*, 29 AD3d 123, 134 [1st Dept 2006]).

Contrary to defendant's contention, the court's interpretation of the agreement does not render superfluous the "complete the degree they are currently enrolled in" language. Such language sets an outer limit on defendant's obligation to pay for educational expenses, i.e., defendant need not pay for any educational expenses incurred *after* the completion of the respective child's current degree program. This language does not, however, limit defendant's obligation to pay for any educational expenses incurred by the children *before* the completion of their current degree program. Nor, contrary to defendant's further contention, is the court's interpretation of the disputed provision in any way inconsistent with a separate provision of the settlement agreement by which plaintiff is responsible for any post-divorce loans taken out in her own name. Indeed, the court did not order defendant to pay for or reimburse plaintiff for any post-divorce loans taken out in her own name in contravention of the separate provision of the agreement.

Finally, while it is an "established principle of contract law that any ambiguity or dual meaning attributable to the words of a contract should be interpreted most strictly against the drafter" (*Dimino v Dimino*, 91 AD2d 1185, 1185 [4th Dept 1983], *appeal dismissed* 59 NY2d 968 [1983]), here, plaintiff's attorney testified without contradiction that the disputed language "came from" defendant. Thus, inasmuch as defendant had a "voice in the selection of [the contractual] language" (*67 Wall St. Co. v Franklin Natl. Bank*, 37 NY2d 245, 249 [1975]), there is no basis to construe any ambiguity in that language against plaintiff (*see Science Applications Intl. Corp. v State of New York*, 60 AD3d 1257, 1259 [3d Dept 2009]; *Citibank, N.A. v 666 Fifth Ave. Ltd. Partnership*, 2 AD3d 331, 331 [1st Dept 2003]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1229

CA 18-00953

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

GREGORY RITTER AND GAIL RITTER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

FORT SCHUYLER MANAGEMENT CORPORATION,
DEFENDANT-RESPONDENT.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MARTHA L. BERRY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered August 16, 2017. The order granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Defendant leased a portion of a public university campus from the State of New York and, consistent with defendant's purpose of facilitating the development of a construction project on the campus, it subsequently subleased the property to nonparty Economic Development Growth Enterprises Corporation (EDGE). EDGE, in turn, entered a construction contract by which it hired nonparty Jersen Construction Group, LLC (Jersen) to perform certain work on the project. Plaintiffs commenced this Labor Law and common-law negligence action against defendant seeking damages for injuries allegedly sustained by Gregory Ritter (plaintiff), who was employed by Jersen, while he was working on the project. Supreme Court granted defendant's motion for summary judgment dismissing the complaint. As limited by their brief, plaintiffs appeal from the order to the extent that it granted those parts of the motion seeking dismissal of the Labor Law §§ 240 (1) and 241 (6) claims. We affirm.

It is well established that, for purposes of Labor Law §§ 240 (1) and 241 (6) liability, "the term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a [party] 'who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for [its] benefit' " (*Scaparo v Village of Ilion*, 13 NY3d 864, 866 [2009], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). " '[The

owner] is the party who, as a practical matter, has the right to hire or fire subcontractors and to insist that proper safety practices are followed' " (*Guryev v Tomchinsky*, 87 AD3d 612, 614 [2d Dept 2011], *affd* 20 NY3d 194 [2012]; *see Sweeting v Board of Coop. Educ. Servs.*, 83 AD2d 103, 114 [4th Dept 1981], *lv denied* 56 NY2d 503 [1982]). Thus, "[t]he key factor in determining whether a non-titleholder is an 'owner' is the 'right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or nonexercise of control' " (*Ryba v Almeida*, 27 AD3d 718, 719 [2d Dept 2006], quoting *Copertino*, 100 AD2d at 567; *see Guryev*, 87 AD3d at 614; *Sweeting*, 83 AD2d at 114).

Contrary to plaintiffs' contention, we conclude that defendant met its initial burden of establishing that it was not an owner for purposes of Labor Law §§ 240 (1) and 241 (6). Defendant's submissions established that "it was 'an out-of-possession lessee of the property [that] neither contracted for nor supervised the work that brought about the injury, and had no authority to exercise any control over the specific work area that gave rise to plaintiff's injuries' " (*Crespo v Triad, Inc.*, 294 AD2d 145, 146 [1st Dept 2002]). In his affidavit, Jersen's project manager averred that defendant was neither a party to nor involved with the negotiation of the construction contract between EDGE and Jersen; the project manager never saw any employees or representatives of defendant on site during the project; Jersen employees were not permitted to take orders from anyone other than an authorized Jersen representative; and defendant had no authority or control over Jersen employees working on the project. Those averments are consistent with the construction contract, which defined EDGE as the "[o]wner" and Jersen as the "[c]ontractor," and provided that Jersen, as the "[c]ontractor," was solely responsible for instituting and supervising all safety precautions and protections. Contrary to plaintiffs' contention, the mere fact that the sublease between defendant and EDGE required defendant's approval of the plans and specifications for the project work does not raise a material issue of fact where, as here, defendant did not contract to have the project work performed and the sublease "did not vest [defendant] with authority to 'determine which contractors to hire, . . . control the [project] work or . . . insist that proper safety practices [be] followed' " (*Guryev*, 20 NY3d at 200; *see Wendel v Pillsbury Corp.*, 205 AD2d 527, 528-529 [2d Dept 1994]; *Bach v Emery Air Frgt. Corp.*, 128 AD2d 490, 491 [2d Dept 1987]).

Inasmuch as plaintiffs failed to raise a material issue of fact in opposition to the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), the court properly determined that defendant was entitled to summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims. In light of our determination, we do not address plaintiffs' remaining contentions.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1230

TP 18-00920

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

IN THE MATTER OF ROCHESTER INSTITUTE OF TECHNOLOGY, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS, RESPONDENT-PETITIONER, AND EILEEN LIEB, RESPONDENT.

THE WOLFORD LAW FIRM, LLP, ROCHESTER (MARY E. SHEPARD OF COUNSEL), FOR PETITIONER-RESPONDENT.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (AARON M. WOSKOFF OF COUNSEL), FOR RESPONDENT-PETITIONER.

Proceeding pursuant to CPLR article 78 and Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Ann Marie Taddeo, J.], entered February 22, 2016) to review a determination of respondent-petitioner New York State Division of Human Rights. The determination found that petitioner-respondent had unlawfully discriminated against respondent Eileen Lieb on the basis of her disability.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is dismissed, the cross petition is granted insofar as it seeks confirmation of the determination, and petitioner-respondent is directed to pay to the Comptroller of the State of New York the sum of $5,000 for a civil fine and penalty, with interest at the rate of 9% per annum commencing October 15, 2015.

Memorandum: Petitioner-respondent (petitioner) commenced this proceeding pursuant to CPLR article 78 and Executive Law § 298 seeking to annul the determination of respondent-petitioner New York State Division of Human Rights (SDHR) that assessed a $5,000 civil penalty, with statutory interest accruing from the date of SDHR's final determination, October 15, 2015, based on an adjudication that petitioner subjected respondent Eileen Lieb to discrimination on the basis of disability by improperly prorating her pay increase because she had previously been out of work on disability leave. SDHR filed a cross petition seeking to confirm and enforce the determination.

Initially, we note that this matter was properly transferred to us from Supreme Court pursuant to CPLR 7804 (g) because it initially

involved a substantial evidence question as specified by CPLR 7803 (4). The parties subsequently settled with respect to the substantial evidence question, however, leaving only petitioner's challenge to the civil penalty. Although there is no remaining substantial evidence question, we address the merits of the issue raised by petitioner in the interest of judicial economy (*see Matter of Panek v Bennett*, 38 AD3d 1251, 1252 [4th Dept 2007]).

We reject petitioner's contention that SDHR's imposition of a civil penalty was excessive and arbitrary and capricious. It is well settled that "[j]udicial review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law . . . [A] penalty must be upheld unless it is 'so disproportionate to the offense as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law" (*Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001], *rearg denied* 96 NY2d 854 [2001]; *see Matter of Stellar Dental Mgt. LLC v New York State Div. of Human Rights*, 162 AD3d 1655, 1658 [4th Dept 2018]). Here, SDHR's award of a civil fine and penalty of $5,000 is not shocking to our sense of fairness (*see Matter of County of Erie v New York State Div. of Human Rights*, 121 AD3d 1564, 1566 [4th Dept 2014]).

We further reject petitioner's contention that we should toll the statutory interest on the civil fine and penalty that was provided in the determination. Although petitioner contends that allowing interest to accrue from the date of SDHR's final determination would penalize petitioner for SDHR's delay in filing the administrative record, "interest is not a penalty," and instead "represents the cost of having the use of another person's money for a specified period" (*Matter of Aurecchione v New York State Div. of Human Rights*, 98 NY2d 21, 27 [2002] [internal quotation marks omitted]). Thus, petitioner, " 'who has actually had the use of the money, has presumably used the money to its benefit and, consequently, has realized some profit, tangible or otherwise, from having it in hand' " (*id.*, quoting *Love v State of New York*, 78 NY2d 540, 545 [1991]). Consequently, statutory interest on the $5,000 civil penalty shall accrue, as provided in the determination, from October 15, 2015.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1236

KA 17-00747

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DON P. SIPP, 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 March 13, 2017. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [4]), defendant contends that the conviction is not supported by legally sufficient evidence that the victim sustained a serious physical injury. Contrary to the People's contention, defendant's challenge to the sufficiency of the evidence is preserved for our review inasmuch as defendant raised that deficiency during his motion for a trial order of dismissal, and thus the issue was "specifically confronted and resolved" by County Court (*People v Feingold*, 7 NY3d 288, 290 [2006]). Nevertheless, when the evidence is viewed in the light most favorable to the People (*see People v Reed*, 22 NY3d 530, 534 [2014], *rearg denied* 23 NY3d 1009 [2014]), "a rational person could conclude that the trial evidence was legally sufficient" to establish a serious physical injury (*People v Smith*, 6 NY3d 827, 829 [2006], *cert denied* 548 US 905 [2006]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]), i.e., serious and protracted disfigurement to the victim's face (*see* § 10.00 [10]; *People v Coote*, 110 AD3d 485, 485 [1st Dept 2013], *lv denied* 22 NY3d 1198 [2014]; *see also People v Manigualt*, 145 AD3d 1428, 1429 [4th Dept 2016], *lv denied* 29 NY3d 950 [2017]; *People v Reitz*, 125 AD3d 1425, 1425-1426 [4th Dept 2015], *lv denied* 26 NY3d 934 [2015], *reconsideration denied* 26 NY3d 1091 [2015]; *cf. People v McKinnon*, 15 NY3d 311, 316 [2010]).

Contrary to defendant's further contention, the court did not err in refusing to charge the jury on the lesser included offense of assault in the third degree (Penal Law § 120.00 [2]). Based on the number and sizes of the scars to her face, there is no reasonable view

of the evidence that would support a finding that the victim sustained only a physical injury as opposed to a serious physical injury (*see* CPL 300.50 [1]; *People v Richardson*, 57 AD3d 410, 410 [1st Dept 2008], *lv denied* 12 NY3d 787 [2009]; *cf. People v Trombley*, 97 AD3d 903, 903-904 [3d Dept 2012]; *see generally People v Glover*, 57 NY2d 61, 63 [1982]).

Defendant also contends that he was denied a fair trial when evidence of uncharged crimes was admitted at trial without a *Ventimiglia* hearing or curative instructions. As defendant correctly concedes, his contention is not preserved for our review (*see People v Hogue*, 133 AD3d 1209, 1210 [4th Dept 2015], *lv denied* 27 NY3d 1152 [2016]; *People v Mediak*, 217 AD2d 961, 962 [4th Dept 1995], *lv denied* 87 NY2d 848 [1995]). In any event, we conclude that defendant was not denied a fair trial inasmuch as the fleeting reference to prior "physical altercations" between defendant and the victim was admissible as "necessary background information on the nature of the relationship" (*People v Dorm*, 12 NY3d 16, 19 [2009]; *see Hogue*, 133 AD3d at 1211); there was no evidence that defendant's possession of hunting items or a muzzle-loader was illegal (*see People v Humphrey*, 109 AD3d 1173, 1174 [4th Dept 2013], *lv denied* 24 NY3d 1044 [2014]; *People v Hucks*, 292 AD2d 833, 833 [4th Dept 2002], *lv denied* 98 NY2d 697 [2002]); and a peripheral reference to defendant's possession of a marihuana plant "does not warrant any corrective action in the interest of justice" (*People v Chaplin*, 134 AD3d 1148, 1152 [3d Dept 2015], *lv denied* 27 NY3d 1067 [2016]).

Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we reject defendant's contention that he was denied meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Finally, we conclude that the sentence is not unduly harsh or severe.

All concur except CARNI and DEJOSEPH, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent because we disagree with the majority's conclusion that County Court did not err in refusing to charge the jury on the lesser included offense of assault in the third degree (Penal Law § 120.00 [2]). Upon viewing the evidence in the light most favorable to defendant (*see People v Rivera*, 23 NY3d 112, 120-121 [2014]), we conclude that there is a reasonable view of the evidence of the victim's scars to support a finding that the victim sustained only physical injury and not serious physical injury (*see id.* at 121; *People v Trombley*, 97 AD3d 903, 903-904 [3d Dept 2012]). Consequently, we vote to reverse the judgment and grant a new trial on count four of the indictment (*see generally People v Van Norstrand*, 85 NY2d 131, 136 [1995]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1240

KA 15-01663

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE PARSONS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES 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 Monroe County Court (James J. Piampiano, J.), entered February 13, 2015. The order denied the CPL 440.10 motion of defendant after a hearing.

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

Memorandum: Defendant was previously convicted after a jury trial of murder in the second degree (Penal Law § 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [former (2)]), and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]), arising from an incident involving a shooting in August 2001. He appealed, and this Court affirmed (*People v Parsons*, 13 AD3d 1099 [4th Dept 2004], *lv denied* 4 NY3d 801 [2005], *reconsideration denied* 4 NY3d 855 [2005]). In January 2009, defendant moved in County Court (Geraci, J.) to vacate the judgment of conviction pursuant to CPL 440.10 (1) (c) and (h), alleging that the prosecutor knowingly presented false, material evidence at the trial and that the judgment was obtained in violation of his due process rights. The court denied the motion without a hearing. This Court reversed and remitted the matter for a hearing on defendant's motion (*People v Parsons*, 114 AD3d 1154 [4th Dept 2014]). Defendant now appeals by permission of this Court from an order denying his motion after a hearing. Contrary to defendant's contention, we conclude that County Court (Piampiano, J.) properly denied the motion.

Defendant contends that the court erred in denying the motion because he established that, at the time of the trial, the prosecutor knew that a witness had testified falsely before the grand jury and at trial and that the prosecutor failed to meet his *Brady* obligation to

provide defendant with notice of that allegedly false testimony. We reject that contention and conclude that defendant failed to meet his "burden of proving by a preponderance of the evidence every fact essential to support the motion" (CPL 440.30 [6]). In support of his motion, defendant submitted two affidavits of a witness who averred that he testified falsely at trial and that, prior to trial, he had informed the trial prosecutor that his anticipated trial testimony would be false. Although the witness repeated that claim when he testified at the hearing on defendant's motion, certain details of his testimony differed significantly from those provided in his affidavits, including details concerning how and to whom the witness admitted providing false testimony. Following the hearing, the court concluded that the witness was not credible based on, inter alia, his demeanor on the stand, the discrepancies between his testimony and the affidavits he provided, and his inherent lack of credibility. We conclude that the court "was entitled to determine, in view of the [evidence], that [the witness's] testimony was simply not credible . . . A hearing court's credibility determinations are 'entitled to great weight' in light of its opportunity to see the witnesses, hear the testimony, and observe demeanor" (*People v Thibodeau*, 151 AD3d 1548, 1552 [4th Dept 2017], *affd* 31 NY3d 1155 [2018]).

We also reject defendant's contention that the court erred in denying his request to introduce evidence of his innocence. Defendant's claim of actual innocence "was not raised in the motion and thus is not properly before us" (*People v Swift*, 66 AD3d 1439, 1440 [4th Dept 2009], *lv denied* 13 NY3d 911 [2009], *reconsideration denied* 14 NY3d 845 [2010]; *see People v Hamilton*, 115 AD3d 12, 20 [2d Dept 2014]). In any event, it "is well settled that 'actual innocence' means factual innocence, not mere legal insufficiency of evidence of guilt (*see Bousley v United States*, 523 US 614, 623-624 [1998]), and must be based upon reliable evidence which was not presented at the trial (*see Schlup v Delo*, 513 US [298,] 324 [1995]). The standard of proof generally applied is proof of actual innocence by clear and convincing evidence" (*Hamilton*, 115 AD3d at 23; *see People v Alsaifullah*, 162 AD3d 1483, 1486 [4th Dept 2018], *lv denied* 32 NY3d 1062 [2018]). Here, some of the excluded evidence was presented at defendant's trial and the remainder, including the testimony of the witness, did not establish actual innocence.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1241

KA 13-02245

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARLAND BARR, DEFENDANT-APPELLANT.

CATHERINE H. JOSH, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered November 15, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Defendant contends that his guilty plea was not knowingly, voluntarily, and intelligently entered because, at the time of the plea, County Court did not advise him that he would be sentenced as a second violent felony offender and failed to advise him of the right to a hearing to challenge the predicate felony statement. Although that contention survives defendant's valid waiver of the right to appeal (*see People v Irby*, 158 AD3d 1050, 1051 [4th Dept 2018], *lv denied* 31 NY3d 1014 [2018]), defendant failed to preserve his contention for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction on those grounds (*see id.*; *see generally People v Conceicao*, 26 NY3d 375, 381 [2015]), and we decline to exercise our power to review his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant further contends that the court failed to make an appropriate inquiry into his request for substitution of counsel. Initially, we note that defendant's contention is encompassed by his plea and his valid waiver of the right to appeal except to the extent that the contention implicates the voluntariness of the plea (*see People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]). In any event, "defendant abandoned his request for new counsel when he 'decid[ed] . . . to plead guilty while still being

represented by the same attorney' " (*People v Guantero*, 100 AD3d 1386, 1387 [4th Dept 2012], *lv denied* 21 NY3d 1004 [2013]; *see People v Tyes*, 160 AD3d 1447, 1448 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]). To the extent that defendant alleges ineffective assistance of counsel, that contention does not survive the plea and valid waiver of the right to appeal because defendant has not demonstrated that any allegedly ineffective assistance of counsel infected the plea bargaining process or that defendant entered the plea because of his attorney's allegedly poor performance (*see Tyes*, 160 AD3d at 1447).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1244

CAF 17-01983

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

IN THE MATTER OF WILLIAM F.G.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LISA M.B., RESPONDENT-APPELLANT.

SARA E. ROOK, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.

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

SARA E. ROOK, ROCHESTER, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

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

Appeals from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered June 23, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that petitioner's wife may supervise his visits with the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother and the Attorney for the Child (AFC) appeal from an order that, inter alia, granted petitioner father's petition to modify a prior order of custody and visitation by naming the father's new wife as the supervisor of his visitation with the subject children and permitting him to designate the location of visitation, including his own home. We reverse.

We note that the prior order, which was entered upon stipulation by the parties after the father was convicted of sexually abusing their then-four-year-old daughter, granted sole legal and physical custody of the children to the mother; required the father's visitation to be supervised by either his therapist, who specializes in sexual abuse, or the maternal grandmother of the children; and specified that visitation was to occur at a location mutually agreed upon by the father and the grandmother.

Preliminarily, we agree with the mother that Family Court erred in drawing a negative inference against her based on her failure to testify at the hearing. The mother had no relevant testimony to offer inasmuch as she had no personal knowledge of the allegations in the modification petition, i.e., the father's completion of sex offender treatment, his compliance with the terms of his probation, his visits with the children, and his marriage to his new wife. Thus, we conclude that a negative inference against the mother was unwarranted because she did not "withhold[] evidence in [her] possession or control that would be likely to support [her] version of the case" (*Noce v Kaufman*, 2 NY2d 347, 353 [1957]; *see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]).

We further agree with the mother and the AFC that the father failed to meet his burden, as the party seeking modification of the prior order, of demonstrating a sufficient change in circumstances since the time of the stipulation to warrant an inquiry into the best interests of the children (*see Matter of McKenzie v Polk*, 166 AD3d 1529, 1529 [4th Dept 2018]; *Matter of Jones v Laird*, 119 AD3d 1434, 1434 [4th Dept 2014], *lv denied* 24 NY3d 908 [2014]). Although the court correctly identified in its decision the applicable standard for modification of an existing custody and visitation order and referenced several circumstances that generally may support a court's finding of a sufficient change in circumstances, the court failed to make express findings relative to the change in circumstances alleged by the father in his petition. Notwithstanding that failure, "we have the authority to 'review the record to ascertain whether the requisite change in circumstances existed' " (*Matter of Allen v Boswell*, 149 AD3d 1528, 1528 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]; *see Matter of Greene v Kranock*, 160 AD3d 1476, 1476 [4th Dept 2018]).

Upon our independent review of the record, we conclude that the father failed to establish the requisite change in circumstances (*see Matter of Avola v Horning*, 101 AD3d 1740, 1740-1741 [4th Dept 2012]). The father's employment, his lack of a criminal history other than the sexual abuse of his child, his completion of sex offender treatment, his lack of a history with Child Protective Services, and his lack of a mental health diagnosis do not constitute a change in circumstances because those circumstances existed at the time of the parties' stipulation (*cf. Matter of Chittick v Farver*, 279 AD2d 673, 675 [3d Dept 2001]). Although the father's marriage, new home, and diagnosis with sleep apnea are changes that have occurred since the time of the stipulation, those changes to the father's personal circumstances do not " 'reflect[] a real need for change to ensure the best interest[s] of the child[ren]' " (*Matter of Isler v Johnson*, 118 AD3d 1504, 1505 [4th Dept 2014]).

Further, we conclude that, under the circumstances of this case, the children's alleged desire to spend additional time with the father also does not constitute the requisite change in circumstances. Initially, we note that the father's petition did not seek additional time with the children, rather, it sought to change the location of visitation and to have the father's new wife replace the maternal grandmother as visitation supervisor. Even crediting the father's

assertion that the children have expressed a desire to spend additional time with him, we conclude that the " 'established custodial arrangement should not be changed solely to accommodate the desires of the child[ren]' " (*Matter of Betro v Carbone*, 50 AD3d 1583, 1584 [4th Dept 2008]; *see Matter of Porter v Nesbitt*, 74 AD3d 1786, 1787 [4th Dept 2010]; *cf. Matter of Miller v Shaw*, 160 AD3d 743, 744 [2d Dept 2018]), particularly where, as here, the children are unaware that visitation with the father has been supervised by their grandmother for the last five years because the father was convicted of sexually abusing the daughter and is a registered sex offender.

Even assuming, arguendo, that the father met his threshold burden of demonstrating a change in circumstances sufficient to justify a best interests analysis, we agree with the mother and the AFC that there is no sound and substantial basis in the record to support the court's determination that the children's best interests warranted replacing the visitation supervisor, their grandmother, with the father's new wife and permitting the father to select any location for his visits with the children (*see generally Matter of Lara v Sullivan*, 108 AD3d 1238, 1239-1240 [4th Dept 2013], *lv dismissed in part and denied in part* 22 NY3d 949 [2013]; *Matter of Fox v Fox*, 93 AD3d 1224, 1225 [4th Dept 2012]). "Generally, a court's determination regarding custody and visitation issues, based on a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside" except where, as here, it lacks an evidentiary basis in the record (*Matter of Stilson v Stilson*, 93 AD3d 1222, 1223 [4th Dept 2012] [internal quotation marks omitted]; *see Matter of McCarthy v Kriegar*, 162 AD3d 1563, 1564 [4th Dept 2018]).

The record establishes that the maternal grandmother has a long history of successfully facilitating positive interaction between the children and the father while providing meaningful protection to the children. The grandmother had been supervising the father's weekly visits with the children in her home since 2013. The visits lasted between four and eight hours; the grandmother provided crafts and projects for the father to enjoy with the children during the visits; and the father and the children participated in a variety of activities together, such as swimming in the grandmother's pool, watching movies, playing board games, reading, and playing imaginary games. With the grandmother's supervision, the father and the children have eaten meals together and have gone to restaurants to eat with the father's new wife. There were no issues with the grandmother's supervision of the father's visits until the father brought his new wife to the grandmother's home, unannounced, for his routine visit with the children, and the grandmother refused to allow the father's wife into her home. That same day, however, the grandmother brought the children to a restaurant so they could eat with the father and his new wife and visit with them both. In addition, the grandmother testified at the hearing that she would be willing to allow the father's wife into her home as long as she had notice; the grandmother also stated that she would be willing to supervise visits at the father's home. Thus, we conclude that, in light of the five years during which the grandmother successfully

supervised visitation, the isolated incident involving the grandmother's unwillingness to allow the father's wife into her home did not warrant modifying the prior order to replace the grandmother with the father's wife as the visitation supervisor.

In addition, the record establishes that the father's wife would supervise her husband's visits with his children through a very different lens than would the grandmother, whose allegiance is to the children. The testimony of the father's wife demonstrates that she did not know the details of the sexual abuse committed by the father against his daughter; rather, her understanding was that "the incident occurred when he was sleeping and he had inappropriate contact with his daughter." Thus, she believed that he did not intentionally engage his daughter in sexual contact and that the sexual abuse occurred accidentally while the father was asleep. Based on the above and given the father's conviction of sexually abusing the daughter, we conclude that the court's determination that it is in the best interests of the children for the father's wife to supervise visitation at his home or any other location he chooses lacks a sound and substantial basis in the record. We therefore reverse the order and dismiss the petition.

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1252

CA 18-00427

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

REMET CORPORATION, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ESTATE OF JAMES R. PYNE, KATHERINE B. PYNE, INDIVIDUALLY, AND AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE, AND AS TRUSTEE OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE, EDWARD R. WIEHL, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE, AND AS TRUSTEE OF THE TRUST ESTABLISHED UNDER PARAGRAPH THIRD OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE, AND J.P. MORGAN ESCROW SERVICES, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), AND TROUTMAN SANDERS, CHICAGO, ILLINOIS, FOR PLAINTIFF-APPELLANT.

NEIL M. GINGOLD, FAYETTEVILLE, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered May 25, 2017. The order, among other things, denied plaintiff's cross motion for partial summary judgment.

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

Same memorandum as in *Remet Corp. v Estate of Pyne* ([appeal No. 2] — AD3d — [Feb. 1, 2019] [4th Dept 2019]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1253

CA 18-00428

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

REMET CORPORATION, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ESTATE OF JAMES R. PYNE, KATHERINE B. PYNE, INDIVIDUALLY, AND AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE, AND AS TRUSTEE OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE, EDWARD R. WIEHL, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE, AND AS TRUSTEE OF THE TRUST ESTABLISHED UNDER PARAGRAPH THIRD OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE, AND J.P. MORGAN ESCROW SERVICES, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), AND TROUTMAN SANDERS, CHICAGO, ILLINOIS, FOR PLAINTIFF-APPELLANT.

NEIL M. GINGOLD, FAYETTEVILLE, FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered October 3, 2017. The judgment, among other things, granted defendants' motion for partial summary judgment.

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

Memorandum: We affirm the order in appeal No. 1 and the judgment in appeal No. 2 for reasons stated in the decisions at Supreme Court. We add only that plaintiff improperly contends, for the first time on appeal, that it is entitled under the provisions of Section 8.1 (a) (ii) of the operative Purchase and Sale Agreement to indemnification for the attorneys' fees it has incurred in prosecuting this action for indemnification (*Remet Corp. v Estate of Pyne*, 26 NY3d 58 [2015]; *see generally Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). "It is well settled that '[a]n appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had those theories or questions been presented in the court of first instance' " (*Ciesinski*, 202 AD2d at 985). Here, there is a possibility that defendants, through either proof or legal countersteps, could have refuted or overcome plaintiff's newly raised theory of recovery had it been presented at

the appropriate time (*see Oram*, 206 AD2d at 840; *Ciesinski*, 202 AD2d at 985).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1298

CAF 17-00348

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

IN THE MATTER OF ANNABELLA C.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SANDRA C., RESPONDENT-APPELLANT.

HOPPE & ASSOCIATES, INC., BUFFALO (KELI ILES-HERNANDEZ OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

DAVID E. BLACKLEY, LOCKPORT, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered February 3, 2017 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order which adjudged that she neglected the subject child. The mother's sole contention on appeal is that Family Court erred in failing to dismiss the neglect petition pursuant to Family Court Act § 1051 (c). That contention is not preserved for our review because the mother never moved for that relief (*see Matter of Malachi H. [Dequisa H.]*, 125 AD3d 478, 478 [1st Dept 2015]; *Matter of Josee Louise L.H. [DeCarla L.]*, 121 AD3d 492, 493 [1st Dept 2014], *lv denied* 24 NY3d 913 [2015]). In any event, that contention is without merit.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1323

CAF 17-02179

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

IN THE MATTER OF GABRIELL H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

KAYLEE T., RESPONDENT-APPELLANT.

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

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

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RICHARD L. SULLIVAN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered August 11, 2017 in a proceeding pursuant to Family Court Act article 10. The order denied respondent's motion to dismiss the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Nicholas B.*, 26 AD3d 764, 764 [4th Dept 2006]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1324

CA 18-01052

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

MICHAEL P. GARRETT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

1030 EAST GENESEE COMPANY, LLC,
DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

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

JOHN J. FROMEN, ATTORNEYS AT LAW, P.C., BUFFALO (THOMAS J. GRILLO, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered October 24, 2017. The order, insofar as appealed from, denied the motion of defendant 1030 East Genesee Company, LLC, for summary judgment dismissing the complaint against it.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained when he fell in an allegedly icy parking lot owned by defendant-appellant (defendant). Defendant now appeals from an order that, inter alia, denied its motion for summary judgment dismissing the complaint against it. We affirm. Supreme Court properly denied the motion because defendant failed to meet its initial burden of establishing that its agent's snow removal efforts did not create or exacerbate the icy conditions that allegedly caused plaintiff's fall (*see Morris v Home Depot USA*, 152 AD3d 669, 670-671 [2d Dept 2017]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1329

CA 18-01163

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

IN THE MATTER OF CATHLEEN SEEBALD,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
ROSWELL PARK CANCER INSTITUTE CORPORATION,
RESPONDENTS-RESPONDENTS.

LAW OFFICE OF LINDY KORN, PLLC, BUFFALO (CHARLES L. MILLER, II, OF COUNSEL), FOR PETITIONER-APPELLANT.

WILDER & LINNEBALL, LLP, BUFFALO (CHRISTOPHER S. NICKSON OF COUNSEL), FOR RESPONDENT-RESPONDENT ROSWELL PARK CANCER INSTITUTE CORPORATION.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 5, 2017 in a proceeding pursuant to CPLR article 78 and Executive Law § 298. The judgment, among other things, dismissed the petition in its entirety.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 and Executive Law § 298 seeking to annul the determination of respondent New York State Division of Human Rights (SDHR) that there was no probable cause to believe that petitioner's employer, respondent Roswell Park Cancer Institute Corporation (Roswell), engaged in an unlawful discriminatory practice against her. Petitioner appeals from a judgment confirming that determination and dismissing the petition. We affirm.

Initially, we reject petitioner's contention that we must determine whether substantial evidence supports SDHR's determination. "Where, as here, SDHR renders a determination of no probable cause without holding a hearing, the appropriate standard of review is whether the probable cause determination was arbitrary and capricious or lacked a rational basis" (*Matter of Sullivan v New York State Div. of Human Rights*, 160 AD3d 1395, 1396 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of McDonald v New York State Div. of Human Rights*, 147 AD3d 1482, 1482 [4th Dept 2017]; *Matter of Smith v New York State Div. of Human Rights*, 142 AD3d 1362, 1363 [4th Dept 2016], *lv denied* 30 NY3d 913 [2018]). We also reject petitioner's further contention that SDHR was required to hold a hearing on her

complaint before making a probable cause determination. SDHR "has the discretion to determine the method to be used in investigating a [complaint], and a hearing is not required in all cases" (*McDonald*, 147 AD3d at 1482 [internal quotation marks omitted]; *see Smith*, 142 AD3d at 1363; *Matter of Napierala v New York State Div. of Human Rights*, 140 AD3d 1746, 1747 [4th Dept 2016]). Here, the record establishes that petitioner "had a full and fair opportunity to present her case and that [SDHR's] investigation was neither abbreviated nor one-sided" (*Kim v New York State Div. of Human Rights*, 107 AD3d 434, 434 [1st Dept 2013], *lv denied* 21 NY3d 866 [2013]; *see Napierala*, 140 AD3d at 1747), and "the conflicting evidence before SDHR did not create a material issue of fact that warranted a formal hearing" (*Matter of Hall v New York State Div. of Human Rights*, 137 AD3d 1583, 1584 [4th Dept 2016]; *see McDonald*, 147 AD3d at 1483).

Finally, petitioner contends that SDHR's determination of no probable cause lacks a rational basis and is arbitrary and capricious. It is well established that "[p]robable cause exists only when, after giving full credence to [petitioner's] version of the events, there is some evidence of unlawful discrimination . . . There must be a *factual* basis in the evidence sufficient to warrant a cautious [person] to believe that discrimination had been practiced" (*McDonald*, 147 AD3d at 1483 [internal quotation marks omitted]; *see Napierala*, 140 AD3d at 1747; *Matter of Mambretti v New York State Div. of Human Rights*, 129 AD3d 1696, 1697 [4th Dept 2015], *lv denied* 26 NY3d 909 [2015]). In addition, our standard of review is an "extremely deferential one: The courts cannot interfere [with an administrative tribunal's exercise of discretion] unless there is *no rational basis* for [its] exercise . . . or the action complained of is arbitrary and capricious, a test which chiefly relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is *without foundation in fact*" (*Matter of Beck-Nichols v Bianco*, 20 NY3d 540, 559 [2013] [internal quotation marks omitted]). Here, Supreme Court properly concluded that SDHR's determination that there was no probable cause to believe that Roswell discriminated against petitioner is not arbitrary or capricious, and it has a rational basis in the record (*see McDonald*, 147 AD3d at 1483; *Napierala*, 140 AD3d at 1747).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1350

CA 18-01000

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

NATHAN M. ZIVERTS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SULLIVAN O. WUNDERLICH, DEFENDANT-APPELLANT.

BARTH SULLIVAN BEHR, SYRACUSE (DANIEL CARTWRIGHT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 10, 2018. The order denied 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 this action to recover damages for personal injuries sustained by plaintiff as the result of a motor vehicle collision, defendant appeals from an order that denied his motion to dismiss the complaint for lack of personal jurisdiction based on improper service of process. Defendant contends that Supreme Court erred in determining that he waived that objection pursuant to CPLR 3211 (e) by failing to move for judgment on that ground within 60 days of serving his answer inasmuch as he demonstrated undue hardship justifying an extension of the 60-day period. We reject that contention and affirm.

It is undisputed that defendant was not properly served with the complaint. Defendant nevertheless learned of the action and interposed an answer, raising lack of personal jurisdiction based on improper service as an affirmative defense. Having done so, his failure to move for judgment on that ground within 60 days of serving his answer amounted to a waiver of that objection, notwithstanding that plaintiff had remaining time to effect proper service pursuant to CPLR 306-b, unless defendant demonstrated an undue hardship justifying an extension of the 60-day period (*see* CPLR 3211 [e]). Here, defendant offered no reason why he could not have moved for judgment within the 60-day period. Thus, we conclude that the court properly denied defendant's motion (*see* CPLR 3211 [e]; *Doe v D'Angelo*, 154 AD3d 1300, 1301 [4th Dept 2017]; *Anderson & Anderson, LLP-Guangzhou v*

Incredible Invs. Ltd., 107 AD3d 1520, 1521 [4th Dept 2013]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1351

CA 17-02048

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

LEEANN B. HOFFNER, PLAINTIFF-APPELLANT,

V ORDER

DAVID E. NELSON, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

WILLIAM MATTAR, P.C., ROCHESTER (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KRISTIN L. NORFLEET OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered August 9, 2017. The order denied the motion of plaintiff to set aside a jury verdict.

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1352

CA 18-00263

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

LEEANN B. HOFFNER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID E. NELSON, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

WILLIAM MATTAR, P.C., ROCHESTER (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KRISTIN L. NORFLEET OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered September 11, 2017. The judgment awarded costs and disbursements to defendant.

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

Memorandum: In an action to recover damages for personal injuries, plaintiff appeals from a judgment entered upon a jury verdict finding that she did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of a motor vehicle accident. We affirm.

Plaintiff contends that Supreme Court erred in denying her motion for a directed verdict pursuant to CPLR 4401 on the issue of serious injury because the unrefuted expert testimony established that the accident aggravated a preexisting back injury. We reject that contention. It is well established that a defendant may overcome an allegation of serious injury by demonstrating that the plaintiff's injury was preexisting (*see generally Pommells v Perez*, 4 NY3d 566, 572 [2005]). Although the two expert witnesses who testified on behalf of plaintiff each opined that plaintiff's leg pain and weakness were causally related to the accident, the jury was not required to accept their opinions to the exclusion of facts disclosed during cross-examination (*see Cooper v Nestoros*, 159 AD3d 1365, 1366 [4th Dept 2018]; *Quigg v Murphy*, 37 AD3d 1191, 1193 [4th Dept 2007]). " 'Indeed, a jury is at liberty to reject an expert's opinion if it finds the facts to be different from those which formed the basis for the opinion or if, after careful consideration of all the evidence in the case, it disagrees with the opinion' " (*Quigg*, 37 AD3d at 1193; *see Cooper*, 159 AD3d at 1366). Here, plaintiff's surgeon testified on

cross-examination that plaintiff failed to disclose her history of leg pain related to her preexisting back problems and that such information would have been important. Furthermore, the examining physician called by plaintiff as a witness repeatedly testified that he based his opinion in part on the conclusions reached by the surgeon. Based upon the evidence presented, we conclude that there is a rational process by which the jury could have found in favor of defendant (*see Bolin v Goodman*, 160 AD3d 1350, 1351 [4th Dept 2018]; *cf. Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]).

We also reject plaintiff's contention that the court erred in denying her motion to set aside the verdict. Because the jury was at liberty to reject the expert testimony, we cannot say that the evidence so preponderated in favor of plaintiff that the verdict is against the weight of the evidence (*see McMillian v Burden*, 136 AD3d 1342, 1343 [4th Dept 2016]; *see also Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1366

CA 18-01312

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

ROBIN EASLEY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MOUNT OLIVE BAPTIST CHURCH, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (BETHANY A. RUBIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 7, 2017. The order granted the motion of defendant Mount Olive Baptist Church for summary judgment and dismissed the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated against defendant Mount Olive Baptist Church.

Memorandum: Plaintiff was injured when the heel of her shoe allegedly got caught in a sidewalk crack outside a building in the City of Buffalo owned by defendant-respondent (defendant). Plaintiff appeals from an order granting defendant's motion for summary judgment dismissing the complaint against it. We reverse.

Defendant contended on its motion that it lacked constructive notice of the alleged sidewalk defect and that, in any event, the alleged defect was trivial and/or open and obvious. Defendant's moving papers, however, identified triable issues of fact regarding its constructive notice of the alleged defect (*see generally Villano v Strathmore Terrace Homeowners Assn., Inc.*, 76 AD3d 1061, 1062 [2d Dept 2010]). Defendant's moving papers also raised triable issues of fact regarding the triviality of the sidewalk's alleged defect (*see Gotay v New York City Hous. Auth.*, 127 AD3d 693, 695-696 [2d Dept 2015]; *Seivert v Kingpin Enters., Inc.*, 55 AD3d 1406, 1407 [4th Dept 2008]; *see generally Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77-84 [2015]). Moreover, contrary to defendant's contention, " '[t]he fact that a dangerous condition is open and obvious does not negate the duty to maintain premises in a reasonably safe condition, but, rather, bears only on the injured person's comparative fault' "

(*Jaques v Brez Props., LLC*, 162 AD3d 1665, 1667 [4th Dept 2018]). We therefore agree with plaintiff that Supreme Court erred in granting defendant's motion.

Plaintiff's remaining contention is academic in light of our determination.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1398

KA 17-01098

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEAN P. MCLAUGHLIN, DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered June 3, 2015. The judgment convicted defendant, after a nonjury trial, of failure to register an Internet identifier (two counts).

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

Memorandum: On appeal from a judgment convicting him after a nonjury trial of two counts of failure to register an Internet identifier (Correction Law § 168-f [4]), defendant contends that the conviction is not supported by legally sufficient evidence. We disagree. "Even assuming, arguendo, that the People were required to establish that defendant knowingly or intentionally failed to comply with the requirements of the Sex Offender Registration Act" (*People v Willis*, 79 AD3d 1739, 1740 [4th Dept 2010], *lv denied* 16 NY3d 864 [2011]; *see People v Haddock*, 48 AD3d 969, 970-971 [3d Dept 2008], *lv dismissed* 12 NY3d 854 [2009]), we conclude that the evidence, viewed in the light most favorable to the People (*see People v Gordon*, 23 NY3d 643, 649 [2014]), is legally sufficient to meet that requirement.

Pursuant to Correction Law § 168-f (4), a convicted sex offender such as defendant must timely register all "[I]nternet identifiers that such offender uses" with the Division of Criminal Justice Services (DCJS). The statute defines Internet identifiers as "electronic mail addresses and designations used for the purposes of chat, instant messaging, social networking or other similar [I]nternet communication" (§ 168-a [18]). Here, there is ample evidence in the record from which County Court could have reasonably concluded that defendant, identifying himself by the screen and display names charged in the indictment, used certain instant messaging and social media application software to communicate with a 12-year-old boy, and that defendant did not provide either the screen name or the display name to DCJS. Thus, for each count, there is "[a] valid line of reasoning and permissible inferences which could lead a rational person to the

conclusion reached by the [factfinder] on the basis of the evidence at trial" (*People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1399

KA 15-00813

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVON S. MACON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered February 11, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), defendant contends that County Court abused its discretion in refusing to grant him youthful offender status. Initially, we note that the court did not explicitly address the threshold issue whether defendant was an eligible youth despite his conviction of an armed felony (*see* CPL 720.10 [2] [a] [ii]; [3]). We conclude, however, that the court implicitly resolved the threshold issue of eligibility in defendant's favor (*see People v Stitt*, 140 AD3d 1783, 1784 [4th Dept 2016], *lv denied* 28 NY3d 937 [2016]). Here, even assuming, arguendo, that defendant was eligible for youthful offender status, we conclude that the court did not abuse its discretion in refusing to grant him that status (*see People v Lewis*, 128 AD3d 1400, 1400 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]). In addition, we perceive no basis for exercising our own discretion in the interest of justice to adjudicate defendant a youthful offender (*see id.* at 1400-1401; *cf. People v Amir W.*, 107 AD3d 1639, 1640-1641 [4th Dept 2013]), or to reduce the sentence (*see* CPL 470.15 [6] [b]). Contrary to defendant's contention, the agreed-upon sentence is not

unduly harsh or severe.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1400

KA 17-01375

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHAD WELLINGTON, DEFENDANT-APPELLANT.

DANIEL M. GRIEBEL, TONAWANDA, FOR DEFENDANT-APPELLANT.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (MICHELLE K. FASSETT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), rendered June 22, 2017. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Contrary to defendant's contention, the record establishes that he knowingly, intelligently, and voluntarily waived his right to appeal, and that he understood that the right to appeal is separate and distinct from the rights automatically forfeited by pleading guilty (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *People v Moore*, 158 AD3d 1312, 1312 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *People v Moore*, 140 AD3d 1684, 1684-1685 [4th Dept 2016], *lv denied* 28 NY3d 934 [2016]).

Defendant further contends that he was denied effective assistance of counsel based on, inter alia, an alleged conflict of interest. To the extent that defendant's contention survives his guilty plea and valid waiver of the right to appeal (*see People v Cooper*, 79 AD3d 1684, 1685 [4th Dept 2010], *lv denied* 16 NY3d 857 [2011]; *see also People v Jacques*, 79 AD3d 1812, 1812 [4th Dept 2010], *lv denied* 16 NY3d 896 [2011]), we conclude that it lacks merit (*see Cooper*, 79 AD3d at 1685; *see also People v Collins*, 129 AD3d 1676, 1676-1677 [4th Dept 2015], *lv denied* 26 NY3d 1038 [2015]; *see generally People v Sanchez*, 21 NY3d 216, 223 [2013]). Finally, defendant's contention that County Court erred in denying his request for substitution of counsel "is encompassed by the plea and the waiver of the right to appeal except to the extent that the contention implicates the voluntariness of the plea" (*People v Morris*, 94 AD3d

1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]). In any event, defendant abandoned that request when he "decid[ed] . . . to plead guilty while still being represented by the same attorney" (*id.* [internal quotation marks omitted]; *see People v Kates*, 162 AD3d 1627, 1629 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1401

KA 16-01429

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE EVERSON, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered February 5, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Defendant's conviction arises out of the seizure from his apartment of, inter alia, a loaded .38 caliber handgun and 103 bags of heroin during the execution of a search warrant. Defendant shared the apartment with his two young children and their mother.

Defendant contends that his conviction is not supported by legally sufficient evidence inasmuch as the People failed to establish that he had constructive possession of either the gun or the drugs. That contention is preserved for our review, however, only with respect to the criminal possession of a weapon count inasmuch as defendant did not argue in his motion for a trial order of dismissal that there was legally insufficient evidence to establish the element of possession under the criminal possession of a controlled substance count (*see People v Gray*, 86 NY2d 10, 19 [1995]).

In reviewing the legal sufficiency of the evidence, we must "determine whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the

light most favorable to the People" (*People v Williams*, 84 NY2d 925, 926 [1994]; *see People v Boyd*, 145 AD3d 1481, 1482 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]). "To meet their burden of proving defendant's constructive possession of the [gun], the People had to establish that defendant exercised dominion or control over [the gun] by a sufficient level of control over the area in which [it was] found" (*People v Lawrence*, 141 AD3d 1079, 1082 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016] [internal quotation marks omitted]; *see* Penal Law § 10.00 [8]).

Contrary to defendant's contention, there is legally sufficient evidence that he exercised dominion or control over the area in which the gun was found and thus constructively possessed it, notwithstanding that the area was accessible to other people (*see People v Tuff*, 156 AD3d 1372, 1375 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]). Exclusive access is not required to sustain a finding of constructive possession (*see id.*), and "several individuals may constructively possess an object simultaneously, provided each individual exercises dominion and control over the object or the area in which the object is located" (*Boyd*, 145 AD3d at 1482 [internal quotation marks omitted]). Here, the gun was found wrapped in baby clothing, having fallen from a playpen inside the apartment where defendant resided with his toddlers. Thus, the evidence "went beyond defendant's mere presence in the residence at the time of the search and established 'a particular set of circumstances from which a jury could infer possession' of the contraband" (*People v McGough*, 122 AD3d 1164, 1166 [3d Dept 2014], *lv denied* 24 NY3d 1220 [2015], quoting *People v Bundy*, 90 NY2d 918, 920 [1997]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to both crimes is not against the weight of the evidence (*see generally* CPL 470.15 [5]; *People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Stephenson*, 104 AD3d 1277, 1278 [4th Dept 2013], *lv denied* 21 NY3d 1020 [2013], *reconsideration denied* 23 NY3d 1025 [2014]).

Contrary to defendant's contention, his sentence is not unduly harsh or severe. Finally, we have considered defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1403

KA 15-01596

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNNY BOYDE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JOHNNY BOYDE, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered July 21, 2015. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: Defendant was previously convicted upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [2]), sexual abuse in the second degree (§ 130.60 [2]), and endangering the welfare of a child (§ 260.10 [1]), but on a prior appeal this Court reversed the judgment of conviction, vacated the plea, and remitted the matter to County Court for further proceedings on the indictment (*People v Boyde*, 122 AD3d 1302, 1302-1303 [4th Dept 2014]). Upon remittal, defendant pleaded guilty to sexual abuse in the first degree (§ 130.65 [2]) in satisfaction of the remaining charges, and he was sentenced to time served. Defendant now appeals, in appeal No. 1, from the judgment of conviction rendered as a result of that plea. In appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of failure to register as a sex offender (Correction Law §§ 168-f [4]; 168-t).

At the outset, we note that, in appeal No. 2, defendant challenges only the court's risk level determination. It is well settled that "[a] SORA determination is not part of a judgment upon a criminal conviction and may not be reviewed on an appeal from a judgment on a criminal conviction" (*People v Kelemen*, 44 AD3d 687, 687 [2d Dept 2007], *lv dismissed* 10 NY3d 804 [2008]; *see People v Kearns*, 95 NY2d 816, 817 [2000]). Therefore, inasmuch as defendant "has raised no issue that may be decided on an appeal from the judgment" of

conviction (*Kelemen*, 44 AD3d at 687), we dismiss appeal No. 2 (*see generally People v Janowsky*, 162 AD3d 1699, 1699 [4th Dept 2018]).

In appeal No. 1, we reject defendant's contention in his pro se supplemental brief that his double jeopardy rights were violated because he was prosecuted on the same charges after his prior successful appeal. Where, as here, a defendant is convicted in criminal proceedings that "are subsequently nullified by a court order which restores the action to its pre-pleading status . . . , the nullified proceedings do not bar further prosecution of such offense under the same accusatory instrument" (CPL 40.30 [3]; *see generally People v Jackson*, 20 NY2d 440, 446 [1967], *cert denied* 391 US 928 [1968]).

Defendant contends in his main brief in appeal No. 1 that the sentence is illegal because it does not include a mandatory period of postrelease supervision. Initially, we reject the People's assertion that the contention is moot. "Where the plea bargain includes a sentence which is illegal because the minimum imposed is less than that required by law, . . . the proper remedy is to vacate the sentence and afford the defendant, having been denied the benefit of the bargain, the opportunity to withdraw the plea" (*People v Martin*, 278 AD2d 743, 744 [3d Dept 2000]; *see People v Ciccarelli*, 32 AD3d 1175, 1176 [4th Dept 2006]). Consequently, if defendant's sentence is illegal, he would be entitled to withdraw his plea. The record, however, is insufficient for us to address the merits of defendant's contention (*see People v Minemier*, 124 AD3d 1408, 1409 [4th Dept 2015]). Although defendant is correct that it is illegal for a court to impose a determinate term of incarceration without also imposing a period of postrelease supervision (*see generally People v Williams*, 14 NY3d 198, 217 [2010], *cert denied* 562 US 947 [2010]), there is no requirement that postrelease supervision be imposed where a defendant is sentenced to a definite term of incarceration (*compare* Penal Law §§ 70.02 [3] [c]; 70.80 [3], [4] [a] [iii]; [6] *with* §§ 70.00 [4]; 70.02 [2] [b]; 70.80 [4] [c]). Here, defendant had been in custody for several years in both state prison and county jail, but the court merely imposed a sentence of time served without specifying a length of time or whether it was a definite or determinate sentence. Therefore, we hold the case, reserve decision, and remit the matter to County Court for clarification of the sentence imposed.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1404

KA 17-01053

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNNY BOYDE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

JOHNNY BOYDE, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, A.J.), rendered February 21, 2017. The judgment convicted defendant, upon his plea of guilty, of failure to register as a sex offender.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Boyde* ([appeal No. 1] — AD3d — [Feb. 1, 2019] [4th Dept 2019]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1406

KA 16-01000

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ASAD R. HIXON, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JULIE BENDER FISKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered December 5, 2014. The judgment convicted defendant, upon his plea of guilty, of aggravated vehicular assault and assault in the third degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of one count of aggravated vehicular assault (Penal Law § 120.04-a [4]) and three counts of assault in the third degree (§ 120.00 [2]). The record establishes that defendant knowingly, intelligently, and voluntarily waived his right to appeal and that he understood that the right to appeal is separate and distinct from the rights automatically forfeited by a guilty plea (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *People v Blarr* [appeal No. 1], 149 AD3d 1606, 1606 [4th Dept 2017], *lv denied* 29 NY3d 1123 [2017]). The valid waiver of the right to appeal encompasses defendant's challenges to the factual sufficiency of the plea allocution and the severity of the sentence (*see People v Johnson*, 60 AD3d 1496, 1496 [4th Dept 2009], *lv denied* 12 NY3d 926 [2009]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1413

CA 18-01110

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

THE BANK OF NEW YORK MELLON, FORMERLY KNOWN AS THE BANK OF NEW YORK AS SUCCESSOR TRUSTEE FOR JPMORGAN CHASE BANK, N.A., AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATE HOLDERS OF EQUITY ONE ABS, INC. MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2004-3, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES C. SIMMONS, DEFENDANT-APPELLANT, PEOPLE OF THE STATE OF NEW YORK, ET AL., DEFENDANTS.

THE LAW OFFICE OF JAMES C. SIMMONS, EAST AMHERST (JAMES C. SIMMONS OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREENBERG TRAURIG, LLP, NEW YORK CITY (LEAH N. JACOB OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered August 31, 2017. The order, among other things, granted plaintiff's motion for summary judgment.

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

Memorandum: In this residential foreclosure action, we reject the contention of James C. Simmons (defendant) that Supreme Court erred in granting plaintiff's motion for, inter alia, summary judgment on the complaint and an order of reference and in denying defendant's pro se cross motion for, inter alia, summary judgment dismissing the complaint. "It is well settled that a plaintiff moving for summary judgment in a mortgage foreclosure action establishes its prima facie case by submitting a copy of the mortgage, the unpaid note and evidence of default" (*Bank of N.Y. Mellon v Anderson*, 151 AD3d 1926, 1927 [4th Dept 2017]; *see Green Planet Servicing, LLC v Martin*, 141 AD3d 892, 893 [3d Dept 2016]; *Wells Fargo Bank, N.A. v Deering*, 134 AD3d 1468, 1469 [4th Dept 2015]). Here, plaintiff met its initial burden by submitting, among other things, a copy of the mortgage, the unpaid note, and an affidavit of indebtedness demonstrating that defendant defaulted on his monthly installments by failing to tender payment within 30 days of the due date (*see generally Bank of N.Y. Mellon*, 151 AD3d at 1927). Even "[v]iewing, as we must, the evidence of the nonmoving party as true and granting [him] every favorable

inference" (*Hartford Ins. Co. v General Acc. Group Ins. Co.*, 177 AD2d 1046, 1047 [4th Dept 1991]), we conclude that, in opposition to the motion, defendant failed "to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action" (*Lawler v KST Holdings Corp.*, 115 AD3d 1196, 1198-1199 [4th Dept 2014], *lv dismissed* 24 NY3d 989 [2014] [internal quotation marks omitted]; *see JPMorgan Chase Bank, N.A. v Bussone*, 136 AD3d 1342, 1342 [4th Dept 2016]).

We have reviewed defendant's remaining contentions and conclude that they lack merit.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1424

KA 14-01179

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY C. STENDARDO, III, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered March 6, 2014. The judgment convicted defendant, upon his plea of guilty, of possessing a sexual performance by a child.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of one count of possessing a sexual performance by a child (Penal Law § 263.16) in satisfaction of an indictment charging him with 40 counts of that crime. Pursuant to the terms of the plea agreement, County Court sentenced defendant to a 10-year term of probation. Defendant contends that, as a result of brain damage that he allegedly sustained, his plea was not knowingly and voluntarily entered. Because defendant did not move to withdraw the plea or to vacate the judgment of conviction on that ground, his contention is not preserved for our review (*see People v Brown*, 115 AD3d 1204, 1205 [4th Dept 2014], *lv denied* 23 NY3d 1060 [2014]; *People v Davis*, 45 AD3d 1357, 1357-1358 [4th Dept 2007], *lv denied* 9 NY3d 1005 [2007]).

Contrary to defendant's contention, this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) "inasmuch as nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea" (*People v Lewandowski*, 82 AD3d 1602, 1602 [4th Dept 2011]). In any event, we note that the court conducted further inquiry to ensure that the plea was knowingly and voluntarily entered (*see Lopez*, 71 NY2d at 666; *People v Wilkes*, 160 AD3d 1491, 1492 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]). Indeed, during the plea colloquy, the court specifically addressed the issues relating to defendant's cognitive functioning, as referenced in the

preplea investigation report prepared by the Probation Department, and, in response to the court's inquiries, both defendant and defense counsel indicated that defendant's medical condition did not affect his ability to understand the proceedings.

We also reject defendant's contention that defense counsel was ineffective for failing to advise him of the mental disease or defect defense under Penal Law § 40.15 because there is no indication in the record that he suffered from a mental disease or defect as defined in that statute. Based on our review of the record, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Indeed, despite seemingly strong evidence of guilt on all 40 counts of the indictment, defense counsel negotiated a plea agreement whereby defendant was permitted to plead guilty to only one count and was sentenced to a term of probation, rather than a term of incarceration.

Finally, because there is no indication in the record that defendant suffered from a mental disease or defect as defined in Penal Law § 40.15, we reject defendant's contention that the court was obligated to advise him of that potential defense during the plea colloquy.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1426

KA 16-00806

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN D. SZATANEK, DEFENDANT-APPELLANT.

MICHAEL G. CIANFARANO, OSWEGO, FOR DEFENDANT-APPELLANT.

STEVEN D. SZATANEK, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Oswego County (James W. McCarthy, J.), rendered February 10, 2016. 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 unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). The conviction arose from the drowning death of a 17-year-old girl, previously unknown to defendant, who had been on vacation with her family. At trial, a witness testified that he saw defendant and the victim arguing in the water near the beach where the body was later recovered. The Medical Examiner testified that the victim's injuries were consistent with being held underwater and were not consistent with accidental drowning. Furthermore, defendant's girlfriend testified that defendant suffered a scratch on his chest near his neck, and a forensic scientist testified that material recovered from under the victim's fingernails matched defendant's DNA profile and that the odds of the DNA profile of an unrelated man matching the material recovered from the victim are one in 8,621. A corrections officer testified that, while in jail, defendant confessed that he killed the victim, and an inmate who was housed in a cell adjacent to defendant's cell testified that he overheard defendant say that he drowned a woman and deserved to spend the rest of his life in prison. Defendant testified that he found a suicide note on the beach near the victim's belongings, but acknowledged that he never mentioned any purported suicide note when he gave a prior statement to the police. Defendant, in his testimony, also admitted to disposing of some of the victim's belongings, including her purse, offering unlikely explanations for why he had done so.

Defendant contends in his main brief that the conviction is based on legally insufficient evidence. We reject that contention. As a preliminary matter, contrary to the People's assertion, defendant preserved his contention for our review (*see generally People v Gray*, 86 NY2d 10, 19 [1995]). Nevertheless, we conclude that, "[v]iewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference, as we must" (*People v Bay*, 67 NY2d 787, 788 [1986]), the evidence is legally sufficient to establish that defendant intentionally killed the victim (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Additionally, 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 reject defendant's further contention in his main brief that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

In his main and pro se supplemental briefs, defendant contends that he was denied a fair trial due to prosecutorial misconduct. Defendant failed to preserve his contention for our review, however, because he "either failed to object to the alleged [improprieties], or failed to request curative instructions or move for a mistrial when [Supreme C]ourt sustained his objection[]" (*People v Tolbert*, 283 AD2d 930, 931 [4th Dept 2001], *lv denied* 96 NY2d 908 [2001]; *see People v Goodson*, 144 AD3d 1515, 1516 [4th Dept 2016], *lv denied* 29 NY3d 949 [2017]). In any event, the allegedly improper remarks were " 'either a fair response to defense counsel's summation or fair comment on the evidence' " (*People v Easley*, 124 AD3d 1284, 1285 [4th Dept 2015], *lv denied* 25 NY3d 1200 [2015]).

Defendant further contends in his main brief that he was denied a fair trial because the Medical Examiner was permitted to testify that, in his opinion, the victim's death was a "homicide." That contention is not preserved for our review because the court provided a curative instruction that, in the absence of an objection or a motion for a mistrial, "must be deemed to have corrected the error to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944 [1994]; *see People v Marvin*, 162 AD3d 1744, 1745 [4th Dept 2018], *lv denied* 32 NY3d 1066 [2018]). In any event, although it was improper for the Medical Examiner to opine that the victim's death was a homicide (*see People v Campanella*, 100 AD3d 1420, 1421 [4th Dept 2012], *lv denied* 20 NY3d 1060 [2013]; *cf. People v Every*, 146 AD3d 1157, 1166 [3d Dept 2017], *affd* 29 NY3d 1103 [2017]), we conclude that any error in permitting the testimony is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Contrary to defendant's additional contention in his main brief, the sentence is not unduly harsh or severe.

Defendant further contends in his pro se supplemental brief that he was denied his Sixth Amendment right to counsel when the court allowed him to decide, against the professional judgment of his counsel, not to request a mistrial as the remedy for the Medical Examiner's improper testimony. We agree. "It is well established

that a defendant, 'having accepted the assistance of counsel, retains authority only over certain fundamental decisions regarding the case' such as 'whether to plead guilty, waive a jury trial, testify in his or her own behalf or take an appeal' " (*People v Colon*, 90 NY2d 824, 825-826 [1997]; *see People v Henley*, 145 AD3d 1578, 1580 [4th Dept 2016], *lv denied* 29 NY3d 998 [2017], *reconsideration denied* 29 NY3d 1080 [2017]). Defense counsel has ultimate decision-making authority over matters of trial strategy, including the decision whether to request a mistrial (*see People v Hogan*, 26 NY3d 779, 786 [2016], citing *People v Ferguson*, 67 NY2d 383, 390 [1986]). Here, defense counsel explained to the court that he recommended that defendant move for a mistrial, but that defendant instructed him not to do so. The court then addressed defendant directly and confirmed that defendant wished to proceed with trial. Thus, the court " 'denied [defendant] the expert judgment of counsel to which the Sixth Amendment entitles him' " (*Henley*, 145 AD3d at 1581, quoting *People v Colville*, 20 NY3d 20, 32 [2012]). Nevertheless, we conclude that the error is harmless (*see generally Crimmins*, 36 NY2d at 237).

Insofar as defendant also contends in his pro se supplemental brief that he received ineffective assistance because counsel failed to object to the alleged instances of prosecutorial misconduct, his contention lacks merit because the prosecutor did not engage in any improprieties (*see People v Eckerd*, 161 AD3d 1508, 1509 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]; *cf. People v Reed*, 163 AD3d 1446, 1448 [4th Dept 2018], *lv denied* 32 NY3d 1067 [2018]). Finally, we have considered defendant's remaining contentions in his pro se supplemental brief, and we conclude that none warrants reversal or modification of the judgment.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1427

KA 15-02163

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASPAR S. THOMAS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered February 10, 2015. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree (five counts).

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 five counts of robbery in the second degree (Penal Law § 160.10 [1]; [2] [a], [b]). Defendant's contention that the prosecutor improperly impeached his testimony at trial based on his pretrial silence is not preserved for our review because defense counsel failed to make a specific objection on that ground (*see People v Materon*, 276 AD2d 718, 719 [2d Dept 2000], *lv denied* 95 NY2d 966 [2000]). 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]). Defendant further contends that the prosecutor's impeachment of other defense witnesses and his remarks in summation were improper under *People v Dawson* (50 NY2d 311 [1980]). Defendant's contention is not preserved for our review because he never objected during the relevant cross-examination of the defense witnesses (*see People v Pilgrim*, 146 AD3d 478, 479 [1st Dept 2017], *lv denied* 29 NY3d 1085 [2017]; *People v McGee*, 17 AD3d 485, 486 [2d Dept 2005], *lv denied* 5 NY3d 765 [2005]) or during the prosecutor's closing argument (*see People v Butler*, 214 AD2d 1014, 1015 [4th Dept 1995], *lv denied* 86 NY2d 791 [1995], *reconsideration denied* 89 NY2d 920 [1996]). In any event, his contention is without merit. In *Dawson*, the Court of Appeals held that a prosecutor may cross-examine a defense witness concerning his or her failure to come forward with exculpatory information at an earlier date provided that a proper foundation has been laid (*id.*, 50 NY2d at 321). The prosecutor here laid the proper foundation (*see*

People v Garner, 52 AD3d 1329, 1329-1330 [4th Dept 2008], *lv denied* 11 NY3d 788 [2008]; *People v Floyd*, 45 AD3d 1457, 1459 [4th Dept 2007], *lv denied* 10 NY3d 811 [2008]), and defendant does not contend otherwise. Defendant contends instead that Supreme Court erred in failing to "call a bench conference to ascertain whether the witness[es] refrained from speaking under the advice of defense counsel" (*Dawson*, 50 NY2d at 323). Inasmuch as defendant never requested such a bench conference, we conclude that there was no error (*see People v Hall*, 52 AD3d 734, 735 [2d Dept 2008], *lv denied* 11 NY3d 832 [2008]). Additionally, there is nothing in the record indicating that the witnesses refrained from speaking under the advice of defense counsel (*see People v Felipe*, 66 AD3d 919, 920 [2d Dept 2009], *lv denied* 14 NY3d 800 [2010]). Defendant's further contention that the prosecutor failed to act in "good faith" under *Dawson* is also without merit (*id.*, 50 NY2d at 323). The prosecutor's remarks in summation were fair comment on the testimony of the witnesses (*see People v Blake*, 158 AD2d 348, 349 [1st Dept 1990]).

We reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to preserve the above contentions for our review. Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence.

We agree with defendant, however, that the court erred in failing to determine whether he should be afforded youthful offender status (*see generally People v Rudolph*, 21 NY3d 497, 501 [2013]). Where, as here, the defendant has been convicted of an armed felony offense, the court is required "to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3)" (*People v Middlebrooks*, 25 NY3d 516, 527 [2015]). If "the court determines that one or more of the CPL 720.10 (3) factors are present, and the defendant is therefore an eligible youth, the court then 'must determine whether . . . the eligible youth is a youthful offender' " (*id.* at 528). Inasmuch as the court failed to follow the procedure set forth in *Middlebrooks*, we hold the case, reserve decision, and remit the matter to Supreme Court to make and state for the record "a determination of whether defendant is a youthful offender" (*Rudolph*, 21 NY3d at 503; *see People v Quinones*, 129 AD3d 1699, 1700 [4th Dept 2015]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1433

CAF 17-00524

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

IN THE MATTER OF AMIRACLE R., SOLOMON R., SERENITY M. AND ISAIAH M.

---------- MEMORANDUM AND ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

ELIZABETH H., RESPONDENT-APPELLANT.

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

LAUREN CREIGHTON, BUFFALO, FOR PETITIONER-RESPONDENT.

MINDY L. MARRANCA, BUFFALO, ATTORNEY FOR THE CHILDREN.

DOMINIC PAUL CANDINO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered February 7, 2017 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject children and placed them 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 a fact-finding and dispositional order that, inter alia, adjudged that she neglected her four children. We agree with the mother that the propriety of the fact-finding part of the order is properly before us. Although the dispositional part of the order was entered on consent and has expired, the mother "may nevertheless challenge the . . . neglect adjudication because it 'constitutes a permanent stigma to a parent and it may, in future proceedings, affect a parent's status' " (*Matter of Matthew B.*, 24 AD3d 1183, 1183 [4th Dept 2005]; *see Matter of Anthony L. [Lisa P.]*, 144 AD3d 1690, 1691 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]). We further agree with the mother that, contrary to the contentions of the Attorneys for the Children, the mother did not default with respect to the fact-finding part of the order. The mother appeared at the two-day fact-finding hearing, during which petitioner called three witnesses to testify and then rested its case. Although the mother failed to appear at the next hearing date, we conclude that there was no default under the circumstances because, on that date, Family Court merely issued its determination that, based on

the testimony presented, petitioner established that the mother neglected the children (*see Matter of Savanna G. [Danyelle M.]*, 118 AD3d 1482, 1482 [4th Dept 2014]).

We disagree with the mother, however, that petitioner failed to establish by a preponderance of the evidence that she neglected the children (*see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). " '[E]vidence of mental illness, alone, does not support a finding of neglect, [but] such evidence may be part of a neglect determination when the proof further demonstrates that a respondent's condition creates an imminent risk of physical, mental or emotional harm to a child' " (*Matter of Chance C. [Jennifer S.]*, 165 AD3d 1593, 1594 [4th Dept 2018]). Here, the testimony established that the mother was mentally ill and that, although she voluntarily sought treatment, she missed many follow-up appointments after doing so. Because of her admitted delusions and paranoia, she often stayed in her home with the shades drawn and refused to let her children go outside. She reported that her second oldest child did most of the cooking for the family because the mother was too depressed to do so, and that she yelled at the children and called them names to keep from hitting them. The mother also admitted being irritable and having a violent past and, based on the testimony, she continued to exhibit such behavior when she screamed at and threatened a caseworker for petitioner in front of the children and struck the youngest child during a psychiatric assessment. We therefore conclude that petitioner met its burden of establishing that the children's physical, mental or emotional conditions were in imminent danger of becoming impaired due to the mother's mental illness (*see Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1403 [4th Dept 2016]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1434

CAF 18-00082

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

IN THE MATTER OF ASHANTE H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MEKO H., SR., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 26, 2017 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights to the subject child.

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

Memorandum: In these consolidated appeals, respondent father appeals from three orders by which Family Court, inter alia, revoked a suspended judgment entered upon the father's admission that he had permanently neglected the three subject children and terminated his parental rights. It is well established that, "[i]f the court determines by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights" (*Matter of Ronald O.*, 43 AD3d 1351, 1352 [4th Dept 2007]). Contrary to the father's contention, we conclude that there is a sound and substantial basis in the record to support the court's determination that he failed to comply with the terms of the suspended judgment and that it is in the children's best interests to terminate his parental rights (*see Matter of Joseph M., Jr. [Joseph M., Sr.]*, 150 AD3d 1647, 1648 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017]; *Matter of Amanda M. [George M.]*, 140 AD3d 1677, 1678 [4th Dept 2016]; *Matter of Davontay Peter H. [Makeba H.]*, 127 AD3d 405, 405 [1st Dept 2015], *lv denied* 25 NY3d 911 [2015]). Contrary to the father's further contention, petitioner was not obligated to wait until the suspended judgment expired before filing its motion seeking revocation thereof (*see Matter of Jenna D. [Paula D.]*, 165 AD3d 1617, 1618 [4th Dept 2018]; *Matter of Dah'Marii G. [Cassandra G.]*, 156 AD3d 1479, 1480 [4th

Dept 2017]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1435

CAF 18-00083

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

IN THE MATTER OF DEVANTE H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MEKO H., SR., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 26, 2017 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights to the subject child.

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

Same memorandum as in *Matter of Ashante H.* ([appeal No. 1] — AD3d — [Feb. 1, 2019] [4th Dept 2019]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1436

CAF 18-00084

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

IN THE MATTER OF MEKO H., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MEKO H., SR., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 26, 2017 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights to the subject child.

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

Same memorandum as in *Matter of Ashante H.* ([appeal No. 1] — AD3d — [Feb. 1, 2019] [4th Dept 2019]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1455

CAF 18-00182

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

IN THE MATTER OF MATTHEW S., JR., AND MAKAILA S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MATTHEW S., RESPONDENT-APPELLANT.

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

KATHERINE E. MEIER-DAVIS, BUFFALO, FOR PETITIONER-RESPONDENT.

JOHN L. TRIGILIO, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered January 10, 2018 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 children.

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

Memorandum: Respondent father appeals from an order terminating his parental rights with respect to the subject children based on a finding of permanent neglect, and freeing the children for adoption. Contrary to the father's contention, Family Court did not abuse its discretion in denying his request for a suspended judgment. A suspended judgment "is a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311 [1992]; *see Matter of Danaryee B. [Erica T.]*, 151 AD3d 1765, 1766 [4th Dept 2017]; *Matter of James P. [Tiffany H.]*, 148 AD3d 1526, 1527 [4th Dept 2017], *lv denied* 29 NY3d 908 [2017]; *see also* Family Ct Act § 633), and "is only appropriate where the parent has clearly demonstrated that [he or she] deserve[s] another opportunity to show that [he or she has] the ability to be a fit parent" (*Matter of Illion RR. [Rachael SS.]*, 154 AD3d 1126, 1128 [3d Dept 2017], *lv denied* 30 NY3d 908 [2018] [internal quotation marks omitted]). The determination of whether to grant a suspended judgment must be based solely on the best interests of the child (*see* § 631).

Here, " 'there was no evidence that [the father] had a realistic, feasible plan to care for the children' " (*Matter of Nicholas B. [Eleanor J.]*, 83 AD3d 1596, 1598 [4th Dept 2011], *lv denied* 17 NY3d 705 [2011]; *see Matter of Sean W. [Brittany W.]*, 87 AD3d 1318, 1319

[4th Dept 2011], *lv denied* 18 NY3d 802 [2011]), and the court's determination that, even if given more time, the father was not likely to change sufficiently to enable him to parent the children is entitled to great deference (*see Matter of Brendan S.*, 39 AD3d 1189, 1190 [4th Dept 2007]; *Matter of Danielle N.*, 31 AD3d 1205, 1205 [4th Dept 2006]; *Matter of Michael V.*, 279 AD2d 668, 669 [3d Dept 2001], *lv denied* 96 NY2d 709 [2001]). We therefore conclude that the minimal progress made by the father in the weeks preceding the dispositional hearing " 'was not sufficient to warrant any further prolongation of the [children's] unsettled familial status' " (*James P.*, 148 AD3d at 1527; *see Matter of Jose R.*, 32 AD3d 1284, 1285 [4th Dept 2006], *lv denied* 7 NY3d 718 [2006]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1460

CA 18-01037

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

JOSEPH BURNS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARCELLUS LANES, INC., DEFENDANT-APPELLANT.

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

GOLDBLATT & ASSOCIATES, P.C., MOHEGAN LAKE (KENNETH B. GOLDBLATT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered April 10, 2018. The order, insofar as appealed from, denied that part of the motion of defendant seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action and granted the cross motion of plaintiff for summary judgment on liability pursuant to Labor Law § 240 (1).

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained while removing snow and ice from the roof of a building owned by defendant after he fell from the bucket of a backhoe being used to lift him to the roof. Defendant appeals from an order that, inter alia, denied that part of its motion for summary judgment seeking dismissal of the Labor Law § 240 (1) cause of action, and granted plaintiff's cross motion for summary judgment with respect to liability on the Labor Law § 240 (1) cause of action. We affirm.

Labor Law § 240 (1) "applies where an employee is engaged 'in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' " (*Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]). We conclude that, contrary to defendant's contention, the removal of snow and ice from the roof of a commercial building, under these circumstances, constitutes a form of "cleaning," thereby bringing it within the ambit of Labor Law § 240 (1) (*see Nephew v Barcomb*, 260 AD2d 821, 823 [3d Dept 1999]; *see also Wicks v Trigen-Syracuse Energy Corp.*, 64 AD3d 75, 79 [4th Dept 2009]).

We reject defendant's contention that plaintiff was not injured by an elevation-related risk within the scope of Labor Law § 240 (1).

Plaintiff established the necessary elements for liability under section 240 (1) by submitting evidence that he suffered "harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [emphasis omitted]), and defendant did not raise a question of material fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Zarnoch v Luckina*, 112 AD3d 1336, 1337 [4th Dept 2013]).

Finally, contrary to defendant's contention, we conclude that plaintiff is entitled to summary judgment irrespective of whether his injuries were caused by the fall itself or by being struck by the backhoe in the moments immediately following the fall. "To establish a prima facie case plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the risk of some injury from defendants' conduct was foreseeable" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]). "Thus, a plaintiff merely has to demonstrate that he or she was injured when an elevation-related safety device failed to perform its function to support and secure him from injury" (*Ortega v City of New York*, 95 AD3d 125, 128 [1st Dept 2012]). Here, the safety equipment provided to plaintiff did not prevent him from falling; thus, the core objective of Labor Law § 240 (1) was not met (*see Gordon*, 82 NY2d at 561). Plaintiff's injury was a normal and foreseeable consequence of the failure of the safety equipment (*see id*. at 562; *see also Van Eken v Consolidated Edison Co. of N.Y.*, 294 AD2d 352, 353 [2d Dept 2002]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1478

CA 18-01314

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

CHERYL HELM AND DEAN HELM,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SUNG-HOON YANG, M.D., DEFENDANT-APPELLANT.

HIRSCH & TUBIOLO, P.C., ROCHESTER (NICHOLAS J. REEDER OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE LAW OFFICE OF CHARLES E. LUCENO, VALHALLA (CHARLES E. LUCENO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered December 4, 2017. The order denied the motion of defendant to strike the complaint and dismiss the action.

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

Memorandum: In this action seeking damages for alleged medical malpractice, defendant appeals from an order denying his motion, inter alia, to strike the complaint as a sanction for spoliation of evidence. We affirm.

"Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126" (*Rodman v Ardsley Radiology, P.C.*, 80 AD3d 598, 598 [2d Dept 2011]). Here, defendant did not meet his burden of establishing that plaintiffs negligently lost or intentionally destroyed evidence. Plaintiffs signed out the subject mammography films from St. James Mercy Hospital in the fall of 2011 and provided them to Highland Breast Imaging shortly thereafter for the purpose of continuing treatment. Plaintiffs represent that they were not in possession of the films at any time after providing them to Highland Breast Imaging, and the parties were unable to locate the films during discovery. Under the circumstances and on the current record, "it cannot be presumed that the plaintiffs are the parties responsible for the disappearance of the [mammography] films or, more importantly, that the films were discarded by the plaintiffs in an effort to frustrate discovery" (*Payano v Milbrook Props., Ltd.*, 39 AD3d 518, 519 [2d Dept 2007]; *cf. Burke v Queen of Heaven R.C. Elementary Sch.*, 151 AD3d 1608, 1609 [4th Dept 2017]). Thus, Supreme Court did not abuse its discretion in denying defendant's motion.

We have considered defendant's remaining contentions and we conclude that they do not require modification or reversal of the order.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

1482

CA 18-01076

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

JOSEPH M. DINAPOLI, PLAINTIFF-RESPONDENT,

V ORDER

CITY OF LACKAWANNA, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

ANTONIO SAVAGLIO, CITY ATTORNEY, LACKAWANNA, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Supreme Court, Erie County (Donna M. Siwek, J.), dated August 18, 2017. The judgment, among other things, awarded plaintiff the sum of $30,000 as against defendant City of Lackawanna.

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

2

TP 18-01368

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

IN THE MATTER OF WILLIE DAVIS, PETITIONER,

V ORDER

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

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered June 29, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

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KA 15-01497

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAIINE E. POINDEXTER, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered June 16, 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: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). We reject defendant's contention that the plea was not voluntarily, knowingly, and intelligently entered. Even assuming, arguendo, that defendant's statements triggered a duty by County Court to conduct a further inquiry to ensure that the plea was knowing and voluntary (*see People v Lopez*, 71 NY2d 662, 666 [1988]), we conclude that the court "properly conducted such an inquiry and that defendant's responses to the court's subsequent questions removed [any] doubt about [his] guilt" (*People v Vogt*, 150 AD3d 1704, 1705 [4th Dept 2017] [internal quotation marks omitted]). Defendant's remaining contention that the court abdicated its sentencing discretion to the People is without merit. The court never indicated that it was bound by the People's sentence promise (*cf. People v Farrar*, 52 NY2d 302, 305 [1981]; *People v Dupont*, 164 AD3d 1649, 1650 [4th Dept 2018]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

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KA 17-00268

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON J. KESTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered March 31, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the second degree (Penal Law § 140.25 [2]). To the extent that defendant's challenge to the effectiveness of defense counsel is properly before us, that challenge is without merit because counsel did not take a position adverse to him at sentencing with respect to a potential motion to withdraw the guilty plea (*see People v Adams*, 66 AD3d 1355, 1356 [4th Dept 2009], *lv denied* 13 NY3d 858 [2009]; *People v Mohomed*, 52 AD3d 1262, 1263 [4th Dept 2008], *lv denied* 11 NY3d 791 [2008]; *see also People v Bethany*, 144 AD3d 1666, 1669 [4th Dept 2016], *lv denied* 29 NY3d 996 [2017], *cert denied* — US —, 138 S Ct 1571 [2018]). To the contrary, defense counsel merely conveyed defendant's own decision to forgo such a motion, and counsel's assessment of the potential merits thereof served to underscore the rationality of defendant's decision in that regard. Finally, although the People correctly concede that defendant's waiver of his right to appeal "this conviction" does not foreclose his challenge to the severity of his sentence (*see People v Maracle*, 19 NY3d 925, 927-928 [2012]), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 17-01831

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

IN THE MATTER OF THE ADOPTION OF A CHILD
IDENTIFIED AS J.C.J.

AVONELL M. AND SENEQUE M.,
PETITIONERS-RESPONDENTS,

V ORDER

ROBERT J., RESPONDENT-APPELLANT.

ADAM H. VANBUSKIRK, AUBURN, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Surrogate's Court, Oneida County (Louis P. Gigliotti, S.), entered February 1, 2017. The order determined that the consent of respondent to adoption is not necessary.

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

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OP 18-00645

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

IN THE MATTER OF SHAWN JAMES COFFEE, PETITIONER,

V MEMORANDUM AND ORDER

HON. VICTORIA M. ARGENTO, ACTING SUPREME COURT JUDGE, MONROE COUNTY, MICHAEL DOLLINGER, ESQ., ASSISTANT DISTRICT ATTORNEY, MONROE COUNTY, AND MICHAEL C. LOPEZ, ESQ., PUBLIC DEFENDER'S OFFICE, MONROE COUNTY, RESPONDENTS.

SHAWN JAMES COFFEE, PETITIONER PRO SE.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (MATTHEW D. BROWN OF COUNSEL), FOR RESPONDENTS MICHAEL DOLLINGER, ESQ., ASSISTANT DISTRICT ATTORNEY, MONROE COUNTY, AND MICHAEL C. LOPEZ, ESQ., PUBLIC DEFENDER'S OFFICE, MONROE COUNTY.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) for a writ of prohibition.

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

Memorandum: In 2014, a judgment was rendered convicting petitioner upon a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), and we affirmed that judgment on direct appeal (*People v Coffee*, 151 AD3d 1837 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]). Petitioner now brings this original CPLR article 78 proceeding in the nature of prohibition seeking dismissal of the indictment on, inter alia, the ground that he was denied the right to appear and testify before the grand jury. The petition must be dismissed as time-barred because it was filed well beyond the four-month statute of limitations for a writ of prohibition (*see* CPLR 217 [1]; *Matter of Holtzman v Marrus*, 74 NY2d 865, 866 [1989]; *see generally Matter of Doorley v DeMarco*, 106 AD3d 27, 33 [4th Dept 2013]). In any event, a petitioner is not entitled to the extraordinary remedy of a writ of prohibition where, as here, there is "an adequate 'ordinary' remedy," i.e., a direct appeal (*Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 147 [1983], *cert denied* 464 US 993 [1983]; *see Matter of Dale v Burns*, 103 AD3d 1243, 1244-1245 [4th Dept 2013], *appeal dismissed* 21 NY3d 968 [2013]; *see*

generally Matter of O'Neill v Beisheim, 39 NY2d 924, 925 [1976]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-01465

PRESENT: WHALEN, P.J., CENTRA, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF JOHN LIPSITZ,
PETITIONER-APPELLANT,

V ORDER

UBF FACULTY-STUDENT HOUSING CORP.,
RESPONDENT-RESPONDENT.

DOLCE PANEPINTO, P.C., BUFFALO (SEAN E. COONEY OF COUNSEL), FOR PETITIONER-APPELLANT.

HODGSON RUSS LLP, BUFFALO (BENJAMIN M. ZUFFRANIERI, JR., OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 6, 2018 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-01471

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

DAVE FERGUSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NATIONAL GYPSUM SERVICES COMPANY,
DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (DANIEL R. MAGUIRE OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (ETHAN W. COLLINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered June 29, 2018. 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, an employee of nonparty Remedy Intelligent Staffing, LLC (Remedy), commenced this action seeking damages for injuries he allegedly sustained while working at defendant's facility. We agree with defendant that Supreme Court erred in denying its motion seeking summary judgment dismissing the complaint.

Defendant met its initial burden on the motion by establishing that plaintiff was a special employee of defendant and thus that his action against defendant is barred by the exclusive remedy provision of the Workers' Compensation Law. It is well settled that "a general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]). "[A] person's categorization as a special employee is usually a question of fact"; however, a "determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact" (*id.* at 557-558). Here, defendant demonstrated that it exercised "complete and exclusive control over the manner, details and ultimate results of plaintiff's work" (*Leone v Miller Hardwood Co.*, 254 AD2d 734, 734 [4th Dept 1998]; *see Lesanti v Harmac*

Indus., 175 AD2d 664, 664-665 [4th Dept 1991]); that Remedy "was not present at the job site and had no right to direct, supervise or control plaintiff's work" (*Rucci v Cooper Indus.*, 300 AD2d 1078, 1079 [4th Dept 2002]); that defendant provided plaintiff with all the training and materials necessary for plaintiff to perform his job (*see id.*); and that defendant "had the authority to fire plaintiff with respect to his employment at its job site" (*id.*). Plaintiff failed to raise a triable issue of fact in opposition to the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-01379

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

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

V MEMORANDUM AND ORDER

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

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

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

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

Appeals from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 15, 2018. The order, among other things, denied in part the motion of defendant Kaleida Health, doing business as DeGraff Memorial Hospital for summary judgment and denied in its entirety the motion of defendant Dr. Venkateswara R. Kolli for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant Dr. Venkateswara R. Kolli in part and dismissing the second cause of action against him, and granting that part of the motion of defendant Kaleida Health, doing business as DeGraff Memorial Hospital, with respect to the second cause of action and dismissing that cause of action against it, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action asserting causes of action for medical malpractice and lack of informed consent. Defendants separately moved for summary judgment dismissing the complaint against them, and they now appeal from an order that, inter alia, denied the motions except as to the negligent hiring, supervision and credentialing claim against defendant Kaleida Health, doing business as DeGraff Memorial Hospital.

We agree with plaintiffs that defendants failed to demonstrate

their entitlement to judgment as a matter of law dismissing in its entirety the first cause of action, for medical malpractice (*see Kleinman v North Shore Univ. Hosp.*, 148 AD3d 693, 694 [2d Dept 2017]). Thus, although Supreme Court properly denied the motions to that extent, the court should have done so without regard to the sufficiency of plaintiffs' opposing papers (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). We agree with defendants, however, that they separately established their entitlement to judgment as a matter of law dismissing the second cause of action, for lack of informed consent, and that plaintiffs failed to raise a triable issue of fact in opposition (*see Harris v Saint Joseph's Med. Ctr.*, 128 AD3d 1010, 1013 [2d Dept 2015]). The court therefore erred in denying defendants' motions to that extent, and we modify the order accordingly. Finally, we reject plaintiffs' contention, raised as an alternative ground for affirmance, that the court abused its discretion in considering defendants' motions notwithstanding their untimeliness (*see Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 128-129 [2000]).

Defendants' remaining contentions are academic.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-00590

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

JOSEPH L. VIRKLER, PLAINTIFF-RESPONDENT,

V ORDER

CARRIE B. VIRKLER, DEFENDANT-APPELLANT.

ALDERMAN AND ALDERMAN, SYRACUSE (RICHARD B. ALDERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

ASSAF & SIEGAL PLLC, ALBANY (DAVID M. SIEGAL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Lewis County (Hugh A. Gilbert, J.), entered June 19, 2017. The judgment, inter alia, directed plaintiff to pay child support to defendant.

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

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KA 17-02056

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYAN A. JORDAN, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered October 2, 2017. 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 reversed on the law, the plea is vacated, and the matter is remitted to Niagara County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). As defendant contends and the People correctly concede, vacatur of the plea and reversal of the judgment of conviction are required because County Court failed to properly advise defendant, at the time of the plea, of the period of postrelease supervision that would be imposed at sentencing (*see People v Turner*, 24 NY3d 254, 259 [2014]; *People v Catu*, 4 NY3d 242, 245 [2005]; *People v Jordan*, 67 AD3d 1406, 1407-1408 [4th Dept 2009]). Although defendant also contends that his waiver of the right to appeal is invalid, we note that resolution of that issue "is of no moment inasmuch as defendant's contention with respect to postrelease supervision would survive even a valid waiver of the right to appeal" (*Jordan*, 67 AD3d at 1408). In light of our determination, we need not address defendant's remaining contention.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

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KA 16-01986

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ELLA M. COTTON, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CATHERINE A. WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered February 3, 2016. The judgment convicted defendant, upon her plea of guilty, of assault in the second degree and grand larceny in the fourth degree (two counts).

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

29

KA 15-01057

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMEN K. BALKUM, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered April 24, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that he is entitled to vacatur of the plea or reduction of the sentence to the term of incarceration allegedly promised during the plea proceeding because County Court failed to fulfill its sentencing promise. Although that contention survives defendant's valid waiver of the right to appeal (*see People v Feher*, 165 AD3d 1610, 1610 [4th Dept 2018]; *People v Carlton*, 2 AD3d 1353, 1353-1354 [4th Dept 2003], *lv denied* 1 NY3d 625 [2004]) and even assuming, arguendo, that preservation was not required under the circumstances of this case (*see generally People v Williams*, 27 NY3d 212, 219-225 [2016]; *People v McAlpin*, 17 NY3d 936, 938 [2011]), we conclude that defendant's contention lacks merit. Here, as part of the plea agreement accepted by defendant, the court promised to impose a determinate term of incarceration of either five or six years. Although the court indicated during the plea proceeding that it was inclined to sentence defendant to the five-year term even in light of defendant's criminal history of which the court was already aware, the court expressly retained discretion to determine which term would be "appropriate in light of the subsequent presentence report or information obtained from other reliable sources" (*People v Selikoff*, 35 NY2d 227, 238 [1974], *cert denied* 419 US 1122 [1975]). Indeed, the court specified that its discretionary sentencing determination would involve an evaluation of defendant's

history, educational and employment background, any involvement with alcohol or drugs, and other pertinent information. Inasmuch as the court exercised its discretion in sentencing defendant to the six-year term based on the information in the presentence report regarding those circumstances, we conclude that "there was no . . . unfulfilled sentencing promise" (*Carlton*, 2 AD3d at 1354).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-01511

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

JOSEPH BITTINGER, JR. AND LINDA BITTINGER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ERIE INSURANCE COMPANY, DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JAMES GRABER OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE WESTMAN LAW FIRM, JAMESTOWN (JAMES E. WESTMAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered May 16, 2018. The order denied defendant's motion to dismiss the action.

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

Memorandum: Defendant appeals from an order denying its motion, inter alia, to dismiss the action based on plaintiffs' failure to timely comply with defendant's demand for service of a complaint pursuant to CPLR 3012 (b). We agree with defendant that Supreme Court erred in denying the motion. It is well settled that, "[t]o avoid dismissal for failure to timely serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012 (b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a meritorious cause of action" (*Berges v Pfizer, Inc.*, 108 AD3d 1118, 1119 [4th Dept 2013] [internal quotation marks omitted]; *see McIntosh v Genesee Val. Laser Ctr.*, 121 AD3d 1560, 1560 [4th Dept 2014], *lv denied* 25 NY3d 911 [2015]; *Dunlop v Saint Leo the Great R.C. Church*, 109 AD3d 1120, 1120-1121 [4th Dept 2013], *lv denied* 22 NY3d 858 [2013]). Here, even assuming, arguendo, that plaintiffs showed a meritorious cause of action, we conclude that they failed to provide any excuse for the delay in serving their complaint, and thus dismissal of the action is required (*see JL Collier Corp. v Wells Fargo Bank, N.A.*, 127 AD3d 1026, 1027 [2d Dept 2015]; *Dunlop*, 109 AD3d at 1121; *Fasano v J.C. Penney Corp.*, 59 AD3d 1102, 1102 [4th Dept 2009]). Plaintiffs' contention that defendant has not been prejudiced or harmed by the delay is irrelevant. "The absence of any reasonable excuse for plaintiffs' delay is determinative; there is no requisite that prejudice be shown before a motion to dismiss is granted in a

case of this nature" (*Verre v Rosas*, 47 NY2d 795, 796 [1979]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

43

CA 18-01702

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

MAREANNE J. MIKOLAJCZYK, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF MELVIN MIKOLAJCZYK, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

DANIEL J. PATTERSON, D.O., JEFFREY P. STEINIG, M.D., SOUTH TOWNS SURGICAL ASSOCIATES, P.C, DEFENDANTS-RESPONDENTS, AND CATHOLIC HEALTH SYSTEM, DOING BUSINESS AS MERCY HOSPITAL OF BUFFALO, DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, BUFFALO (JASON T. BRITT OF COUNSEL), FOR DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MELISSA L. ZITTEL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered December 18, 2017. The order, among other things, denied the motion of defendant Catholic Health System, doing business as Mercy Hospital of Buffalo, for leave to amend its answer.

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

48

KA 18-00490

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMONE M. CLAYTON, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered December 18, 2017. The judgment convicted defendant, upon her plea of guilty, of attempted murder in the second degree.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that her waiver of the right to appeal is invalid. We reject that contention inasmuch as "Supreme Court did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea . . . and the court engaged defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Flinn*, 162 AD3d 1761, 1761 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018] [internal quotation marks omitted]). Defendant's valid waiver of the right to appeal encompasses her contention that the sentence is unduly harsh and severe (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

49

KA 17-01611

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH D. LOMBARDO, DEFENDANT-APPELLANT.

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

JOSEPH D. LOMBARDO, DEFENDANT-APPELLANT PRO SE.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered November 28, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted course of sexual conduct against a child in the first degree (Penal Law §§ 110.00, 130.75 [1] [a]). Contrary to defendant's contention in his main brief, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses defendant's challenge in his main and pro se supplemental briefs to the severity of his sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

52

KA 15-00308

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAREN J. WINSTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered January 29, 2015. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of criminal contempt in the second degree (Penal Law § 215.50 [3]) arising from her violation of an order of protection in favor of the victim. We affirm.

Contrary to defendant's contention, we conclude that County Court properly permitted the People to introduce evidence of certain prior bad acts by defendant involving the victim pursuant to *Molineux* because "[t]he evidence was relevant as [necessary] 'background material to enable the jury to understand . . . defendant's relationship with the [victim] and to explain the issuance of [the] order of protection' " (*People v Delaney*, 138 AD3d 1420, 1420-1421 [4th Dept 2016], *lv denied* 28 NY3d 928 [2016]; *see People v Anderson*, 120 AD3d 1548, 1548-1549 [4th Dept 2014], *lv denied* 24 NY3d 1042 [2014]; *People v Long*, 96 AD3d 1492, 1493 [4th Dept 2012], *lv denied* 19 NY3d 1027 [2012]; *see generally People v Dorm*, 12 NY3d 16, 19 [2009]). Additionally, the evidence "was relevant to establish defendant's motive and intent in committing the crimes charged . . . and to establish that defendant's violation of the order of protection was neither innocent nor inadvertent" (*People v Pytlak*, 99 AD3d 1242, 1242-1243 [4th Dept 2012], *lv denied* 20 NY3d 988 [2012]; *see People v Serrano*, 164 AD3d 1658, 1659 [4th Dept 2018], *lv denied* — NY3d — [Dec. 11, 2018]; *Long*, 96 AD3d at 1493).

Contrary to defendant's further contention, we conclude that, "[a]lthough the court arguably could have better recited its discretionary balancing of the probity of such evidence against its potential for prejudice . . . , viewing the record in its entirety, the court conducted the requisite balancing test" (*People v Lawrence*, 141 AD3d 1079, 1081 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016] [internal quotation marks omitted]; *see People v Holmes*, 104 AD3d 1288, 1290 [4th Dept 2013], *lv denied* 22 NY3d 1041 [2013]). Moreover, the court properly determined that the probative value of the evidence outweighed its potential for prejudice (*see Serrano*, 164 AD3d at 1659; *Pytlak*, 99 AD3d at 1243).

As defendant correctly concedes, she did not preserve for our review her contention that the court erred in failing to provide limiting instructions with respect to the *Molineux* evidence (*see Serrano*, 164 AD3d at 1659), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, defendant failed to preserve for our review her further evidentiary challenge to portions of the victim's testimony (*see People v Mitchell*, 144 AD3d 1598, 1599 [4th Dept 2016]), 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: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

82

CAF 17-00703

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

IN THE MATTER OF CHRISTOPHER P., MARIA P.,
SOFIA P., AND ANGELO P.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

JESSICA P., RESPONDENT,
AND ANTHONY P., RESPONDENT-APPELLANT.

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

KRISTOPHER STEVENS, WATERTOWN, FOR PETITIONER-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered March 28, 2017 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the subject children are neglected.

It is hereby ORDERED that the appeal from the order insofar as it concerns disposition is unanimously dismissed (*see Matter of Makia S. [Catherine S.]*, 134 AD3d 1445, 1445 [4th Dept 2015]) and the order is affirmed without costs.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

84

CA 18-01592

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

U.S. BANK TRUST, N.A., AS TRUSTEE FOR
LSF9 MASTER PARTICIPATION TRUST,
PLAINTIFF-APPELLANT,

V ORDER

KARI DAVIS, ET AL., DEFENDANTS,
AND GUARDIAN PRESERVATION, LLC,
DEFENDANT-RESPONDENT.

RAS BORISKIN, LLC, WESTBURY (CHRIS LESTAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SANDRA S. POLAND DEMARS, ALBANY, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered October 24, 2017. The order denied the motion of plaintiff for, inter alia, leave to serve an amended complaint.

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

91

TP 18-00194

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

IN THE MATTER OF ECHO WESTLEY DIXON, PETITIONER,

V MEMORANDUM AND ORDER

GOV. ANDREW M. CUOMO, ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ET AL., RESPONDENTS.

ECHO WESTLEY DIXON, PETITIONER PRO SE.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered January 23, 2018) to review a determination of respondent Anthony Annucci, Acting Commissioner, New York State Department of Corrections and Community Supervision. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Memorandum: Petitioner commenced this proceeding, which includes, inter alia, a cause of action seeking to annul the determination of Anthony Annucci, Acting Commissioner of the New York State Department of Corrections and Community Supervision (respondent), made after a tier III hearing, that petitioner violated inmate rule 113.24 (7 NYCRR 270.2 [B] [14] [xiv] [drug use]). Supreme Court entered an order in November 2017 dismissing all of the other causes of action in the petition, and entered a further order in December 2017 denying petitioner's motion for leave to reargue the November order. Petitioner filed a notice of appeal with respect to those orders and sought review in the Court of Appeals, which issued an order transferring that appeal to this Court (*Dixon v Cuomo*, 30 NY3d 1086, 1086 [2018]), but petitioner has not filed a record or taken any steps to perfect that appeal in this Court. Thereafter, Supreme Court, pursuant to CPLR 7804 (g), transferred that part of the petition seeking review of the inmate disciplinary proceeding to this Court.

In his brief to this Court, however, petitioner challenges only the dismissal of the other causes of action. Inasmuch as this transferred proceeding concerns only the determination that petitioner violated the inmate rule at issue, and petitioner does not raise any arguments with respect thereto in his brief to this Court, his "challenge to [that] determination is deemed abandoned" (*Matter of Lamage v Bezio*, 74 AD3d 1676, 1676 [3d Dept 2010]; *see Matter of Alvarez v Fischer*, 94 AD3d 1404, 1405 [4th Dept 2012]), and the proceeding must be dismissed.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

98

KA 17-00365

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. SAMPSON, JR., DEFENDANT-APPELLANT.

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

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

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

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20). Defendant's contention that there were defects in County Court's arraignment procedure was forfeited by his guilty plea (*see People v Judd*, 111 AD3d 1421, 1422 [4th Dept 2013], *lv denied* 23 NY3d 1039 [2014]; *see generally People v Konieczny*, 2 NY3d 569, 574-575 [2004]). We agree with defendant that his waiver of the right to appeal is invalid, for reasons stated in defendant's prior appeal from a separate conviction that involved the same appeal waiver (*People v Sampson*, 149 AD3d 1486, 1486-1487 [4th Dept 2017]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

99

KA 17-00509

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD MAY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 3, 2017. The judgment convicted defendant, upon his plea of guilty, of arson in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of arson in the fourth degree (Penal Law § 150.05 [1]), defendant contends that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence. We reject that contention. The record establishes that defendant violated the plea agreement by lying to the probation department during the presentence investigation. "[B]ecause [Supreme Court] advised defendant of the maximum sentence that could be imposed upon [a violation of the plea agreement], 'the waiver by defendant of the right to appeal encompasses [his] further contention that the enhanced sentence is unduly harsh or severe' " (*People v VanDeViver*, 56 AD3d 1118, 1119 [4th Dept 2008], *lv denied* 11 NY3d 931 [2009], *reconsideration denied* 12 NY3d 788 [2009]; *see People v Espino*, 279 AD2d 798, 800 [3d Dept 2001]; *cf. People v Johnson*, 14 NY3d 483, 487 [2010]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

102

TP 18-01401

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

IN THE MATTER OF CENTERS FOR SPECIALTY CARE AT WATERFRONT CENTER, PETITIONER,

V ORDER

NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT.

COWART DIZZIA LLP, NEW YORK CITY (JENNIFER J. NEARY OF COUNSEL), FOR PETITIONER.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Diane Y. Devlin, J.], entered August 1, 2018) to review a determination of respondent. The determination found that respondent was without jurisdiction to review the denial of the application for Medicaid benefits.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed for reasons stated in the decision of respondent New York State Department of Health.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

112

KA 17-00357

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL W. JOHNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered April 19, 2016. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of robbery in the second degree (Penal Law § 160.10 [2] [b]). We reject defendant's contention that the waiver of the right to appeal is not valid. Supreme Court engaged defendant "in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Marshall*, 144 AD3d 1544, 1545 [4th Dept 2016] [internal quotation marks omitted]). Defendant's contention that the court should have explained that certain issues survive a waiver of the right to appeal is without merit inasmuch as " '[n]o particular litany is required for an effective waiver of the right to appeal' " (*People v Fisher*, 94 AD3d 1435, 1435 [4th Dept 2012], *lv denied* 19 NY3d 973 [2012]; *see People v Kemp*, 94 NY2d 831, 833 [1999]; *People v Durodoye*, 113 AD3d 1130, 1131 [4th Dept 2014]). The valid waiver of the right to appeal forecloses our review of defendant's contention that the sentence is unduly harsh and severe (*see generally People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]). Defendant's challenge to the legality of a resentence imposed on a violation of probation is not properly before us because defendant did not take an appeal from the resentence (*see People v Kuras*, 49 AD3d 1196, 1197

[4th Dept 2008], *lv denied* 10 NY3d 866 [2008]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

113

KA 17-00359

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL W. JOHNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered April 19, 2016. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Scholz*, 125 AD3d 1492, 1492 [4th Dept 2015], *lv denied* 25 NY3d 1077 [2015]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

114

KA 17-00493

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KHALIL DUNAWAY, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered September 27, 2016. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree, robbery in the first degree (two counts), criminal possession of a weapon in the second degree (two counts) and resisting arrest.

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

115

KA 17-02228

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUENTIN Z. GEE, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered October 2, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]) and that he understood " 'that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Dames*, 122 AD3d 1336, 1336 [4th Dept 2014], *lv denied* 25 NY3d 1162 [2015]). The valid waiver of the right to appeal forecloses defendant's challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

116

KA 16-00731

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE J. PRUITT, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Stephen D. Aronson, A.J.), rendered February 11, 2016. The judgment convicted defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree (two counts) and driving while intoxicated as a misdemeanor (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts each of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [i]) and driving while intoxicated as a misdemeanor (§§ 1192 [2], [3]; 1193 [1] [b] [i]). Defendant was sentenced to, inter alia, a term of local incarceration and a fine of $1,500. Contrary to defendant's contention, the fine is not unduly harsh or severe. Defendant's further contention that the fine constitutes cruel and unusual punishment is unpreserved for appellate review, and we decline to address it as a matter of discretion in the interest of justice (*see People v Abruzzese*, 30 AD3d 219, 220 [1st Dept 2006], *lv denied* 7 NY3d 784 [2006]; *see generally* CPL 470.15 [3] [c]; *People v Pena*, 28 NY3d 727, 730 [2017]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

118

KA 16-02333

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DYQUANN M. TUCKER, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered June 17, 2015. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). Defendant contends that the guilty plea was not entered knowingly, intelligently, or voluntarily because County Court failed to advise him that he was forfeiting his right to have the court rule on his suppression motion or any other pretrial motions. Defendant did not move to withdraw his guilty plea or vacate the judgment of conviction on that ground and thus failed to preserve his contention for our review (*see People v Williams*, 27 NY3d 212, 221-222 [2016]; *People v Williams*, 124 AD3d 1285, 1285 [4th Dept 2015], *lv denied* 25 NY3d 1078 [2015]). The " 'narrow exception' " to the preservation rule does not apply here inasmuch as defendant did not say anything during the plea colloquy that "cast significant doubt on his guilt, or otherwise called into question the voluntariness of his plea" (*People v Gause*, 133 AD3d 1367, 1367 [4th Dept 2015], *lv denied* 27 NY3d 997 [2016], quoting *People v Lopez*, 71 NY2d 662, 666 [1988]).

In any event, defendant's contention is without merit. "[T]rial courts are not required to engage in any particular litany during an allocution in order to obtain a valid guilty plea in which defendant waives a plethora of rights" (*People v Moissett*, 76 NY2d 909, 910-911 [1990]; *see People v Sougou*, 26 NY3d 1052, 1054-1055 [2015]). Here, in addition to advising defendant of his *Boykin* rights (*see Boykin v Alabama*, 395 US 238, 243 [1969]), the court confirmed with defendant that he understood the terms of the plea offer, that he was satisfied with his counsel's representation, and that he was not coerced into

accepting the plea. Reviewing "the record as a whole and the circumstances of the plea in its totality" (*Sougou*, 26 NY3d at 1055), we conclude that the plea was knowing, intelligent, and voluntary (*see People v Roulette*, 55 AD3d 394, 395 [1st Dept 2008], *lv denied* 11 NY3d 930 [2009]; *People v Whitehurst*, 291 AD2d 83, 86 [3d Dept 2002], *lv denied* 98 NY2d 642 [2002]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

121

KA 16-01191

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH BRIGGS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered May 23, 2016. The judgment convicted defendant, upon his plea of guilty, of 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 his plea of guilty, of robbery in the third degree (Penal Law § 160.05). As the People correctly concede, defendant did not validly waive his right to appeal because, although he signed a written appeal waiver form, County Court did not conduct an oral colloquy to ensure the voluntariness of that waiver (*see People v Myers*, 145 AD3d 1596, 1596-1597 [4th Dept 2016], *affd* 32 NY3d 18 [2018]). Defendant's challenges to the restitution order are unpreserved for appellate review, however, and we decline to address them as a matter of discretion in the interest of justice (*see People v Patrick*, 125 AD3d 1053, 1054 [3d Dept 2015], *lv denied* 25 NY3d 991 [2015]; *People v Jones*, 108 AD3d 1206, 1207 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013]; *see generally People v Horne*, 97 NY2d 404, 414 n 3 [2002]). Contrary to defendant's contention, his particular challenges to the restitution order do not implicate the legality of his sentence (*see People v Callahan*, 80 NY2d 273, 281 [1992]). Moreover, in the absence of a request for a restitution hearing, the court's failure to conduct such a hearing does not constitute a mode of proceedings error (*see Horne*, 97 NY2d at 414 n 3; *Callahan*, 80 NY2d at 281; *cf. People v Consalvo*, 89 NY2d 140, 146 [1996]). Finally, defendant's contention that defense counsel was ineffective in failing to challenge the restitution order "cannot be resolved without reference to matter outside the record" and must therefore be raised pursuant to CPL

article 440 (*People v Posner*, 100 AD3d 805, 808 [2d Dept 2012]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

135

KA 16-02252

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS MANGIONE, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered November 29, 2016. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order classifying him as a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). The Board of Examiners of Sex Offenders (Board) assessed a score of 30 points against defendant, making him a presumptive level one risk, but recommended an upward departure to a level two risk based on the existence of aggravating factors. Supreme Court agreed with the Board's recommendation. As defendant correctly concedes, his contention that the record does not contain clear and convincing evidence establishing the existence of the aggravating factors is unpreserved. In any event, that contention lacks merit and, contrary to defendant's further contention, the court properly concluded that the aggravating factors outweighed defendant's mitigating circumstances (*see People v Tatner*, 149 AD3d 1595, 1595-1596 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]; *People v Guyette*, 140 AD3d 1555, 1556 [3d Dept 2016]; *see generally People v Perez*, 158 AD3d 1070, 1071 [4th Dept 2018], *lv denied* 31 NY3d 905 [2018]).

We reject defendant's additional contention that he was denied effective assistance of counsel. "It is well established that '[a] defendant is not denied effective assistance of . . . counsel merely because counsel does not make a motion or argument that has little or no chance of success' " (*People v Greenfield*, 126 AD3d 1488, 1489 [4th Dept 2015], *lv denied* 26 NY3d 903 [2015], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). Here, although

defendant contends that his assigned counsel was ineffective for, inter alia, failing to challenge the aggravating factors listed by the Board, the record establishes that there was no colorable basis for making such a challenge. We have considered defendant's remaining contentions and conclude that none warrants modification or reversal of the order.

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

137

KA 16-01313

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD J. FLAGG, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered January 22, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and attempted criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and attempted criminal possession of a weapon in the second degree (§§ 110.00, 265.03 [3]), defendant contends that he did not validly waive his right to appeal and that his sentence is unduly harsh and severe. The record establishes that his waiver of the right to appeal was knowing, intelligent and voluntary (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *People v Colon*, 122 AD3d 1309, 1309 [4th Dept 2014], *lv denied* 25 NY3d 1200 [2015]), and the valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

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KA 17-00206

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LORENZO ARLINE, DEFENDANT-APPELLANT.

REEVE BROWN PLLC, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered June 15, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted promoting prison contraband in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [2]). Although defendant's contention that the plea was not knowingly, intelligently and voluntarily entered survives his waiver of the right to appeal (*see People v Gill*, 149 AD3d 1597, 1597 [4th Dept 2017], *lv denied* 29 NY3d 1127 [2017]), defendant failed to move to withdraw his guilty plea or to vacate the judgment of conviction on that ground and thus failed to preserve that contention for our review (*see People v Morrison*, 78 AD3d 1615, 1616 [4th Dept 2010], *lv denied* 16 NY3d 834 [2011]). 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 [3] [c]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

150

KA 17-00361

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS S. WEBER, 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 judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 19, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted robbery 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 his plea of guilty of two counts of attempted robbery in the third degree (Penal Law §§ 110.00, 160.05). Contrary to defendant's contention, we conclude that "[t]he plea colloquy and the written waiver of the right to appeal signed [and acknowledged in County Court] by defendant demonstrate that [he] knowingly, intelligently and voluntarily waived the right to appeal, including the right to appeal the severity of the sentence" (*People v Pierce*, 151 AD3d 1964, 1965 [4th Dept 2017], *lv denied* 30 NY3d 952 [2017] [internal quotation marks omitted]; *see People v Lindsay*, 162 AD3d 1647, 1648 [4th Dept 2018], *lv denied* 32 NY3d 939 [2018]). Defendant's valid waiver of the right to appeal forecloses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

153

KA 17-02223

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAYLA M. DAMON, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered November 20, 2017. The judgment convicted defendant, upon her plea of guilty, of rape in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of rape in the second degree (Penal Law § 130.30 [1]). Defendant validly waived her right to appeal, and that waiver forecloses her challenge to the severity of her sentence (*see People v Alfiere*, 156 AD3d 1445, 1445-1446 [4th Dept 2017], *lv denied* 31 NY3d 980 [2018]). Finally, we note that the "certificate of disposition" incorrectly states that County Court assessed only a $325 "surcharge" at sentencing. In fact, the court assessed a $300 mandatory surcharge, a $50 DNA databank fee, a $25 crime victim assistance fee, a $50 sex offender registration fee, and a $1,000 supplemental sex offender victim fee, and the certificate must be amended accordingly (*see People v Cutaia*, 167 AD3d 1534, 1536 [4th Dept 2018]).

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

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TP 18-01635

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

IN THE MATTER OF MAURICE BURGESS, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered September 5, 2018) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

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

173

KA 15-01806

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TERRANCE M. ELLISON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered May 12, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Entered: February 1, 2019

Mark W. Bennett
Clerk of the Court

MOTION NO. (130/99) KA 98-00738. -- THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JULIO NIEVES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CARNI, DEJOSEPH, AND TROUTMAN, JJ. (Filed Feb. 1, 2019.)

MOTION NO. (20/05) KA 02-02732. -- THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V DYVON MCKINNON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND WINSLOW, JJ. (Filed Feb. 1, 2019.)

MOTION NO. (55/07) KA 04-02539. -- THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V KYLE E. MILLER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal, specifically, whether the adjudication under the Sex Offender Registration Act here was barred by res judicata. Upon our review of the motion papers, we conclude that counsel’s representation was not constitutionally adequate. The order of February 2, 2007 is vacated and this Court will consider the appeal de novo (*see People v LeFrois*, 151 AD2d 1046 [4th Dept 1989]). Defendant is directed to file and serve his records and briefs with this Court on or before May 31, 2019. PRESENT: SMITH, J.P., PERADOTTO, CURRAN, AND WINSLOW, JJ. (Filed Feb. 1, 2019.)

MOTION NO. (386/15) KA 08-00886. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LAZARUS CLYBURN-DAWSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND DEJOSEPH, JJ. (Filed Feb. 1, 2019.)

MOTION NO. (1301/15) KA 12-00569. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V GUILLERMO TORRES, III, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Feb. 1, 2019.)

MOTION NO. (711/17) KA 17-00100. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DEVIN GRIFFIN, ALSO KNOWN AS DEVIN D. GRIFFIN, SR., DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND CURRAN, JJ. (Filed Feb. 1, 2019.)

MOTION NO. (481/18) KA 13-00469. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BENJAMIN D. POHL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND TROUTMAN, JJ. (Filed Feb. 1, 2019.)

MOTION NO. (898/18) CAF 18-00514. -- IN THE MATTER OF TYMOTHY M. PARMENTER, PETITIONER-APPELLANT, V JULIE E. NASH, RESPONDENT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT:

SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Feb. 1, 2019.)

MOTION NO. (1002/18) CA 16-01853. -- NICK'S GARAGE, INC., PLAINTIFF-APPELLANT, V GEICO INDEMNITY COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, GEICO GENERAL INSURANCE COMPANY, AND GEICO CASUALTY INSURANCE COMPANY, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed Feb. 1, 2019.)

MOTION NO. (1003/18) CA 16-01854. -- JEFFREY'S AUTO BODY, INC., PLAINTIFF-APPELLANT, V GEICO INDEMNITY COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, GEICO GENERAL INSURANCE COMPANY, AND GEICO CASUALTY INSURANCE COMPANY, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed Feb. 1, 2019.)

MOTION NO. (1104/18) CA 17-02002. -- RICHARD H. WARNER, INDIVIDUALLY, AND AS GUARDIAN OF MARY DOROTHY WARNER, AN INCAPACITATED PERSON, CLAIMANT-APPELLANT, V STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 098768.) (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND WINSLOW, JJ. (Filed Feb. 1, 2019.)

MOTION NO. (1105/18) CA 17-02003. -- RICHARD H. WARNER, AS EXECUTOR OF THE ESTATE OF MARY DOROTHY WARNER, DECEASED, CLAIMANT-APPELLANT, V STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 105712.) (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND WINSLOW, JJ. (Filed Feb. 1, 2019.)

MOTION NO. (1106/18) CA 17-02004. -- RICHARD H. WARNER, INDIVIDUALLY, AND AS GUARDIAN OF MARY DOROTHY WARNER, AN INCAPACITATED PERSON, CLAIMANT-APPELLANT, V STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 098768.) RICHARD H. WARNER, AS EXECUTOR OF THE ESTATE OF MARY DOROTHY WARNER, DECEASED, CLAIMANT-APPELLANT, V STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 105712.) (APPEAL NO. 3.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND WINSLOW, JJ. (Filed Feb. 1, 2019.)