SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS IN ATTORNEY DISCIPLINARY MATTERS

NOVEMBER 15, 2013

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

868

KA 11-00188

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LESTER P. IRVING, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE 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 2, 2010. The judgment convicted defendant, upon a jury verdict, of aggravated criminal contempt and assault in the third degree.

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

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

906

CA 13-00083

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

VILLAGE OF LOWVILLE,
PLAINTIFF-PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF LEWIS,
DEFENDANT-RESPONDENT-RESPONDENT.

HRABCHAK, GEBO & LANGONE, P.C., WATERTOWN (MARK G. GEBO OF COUNSEL), FOR PLAINTIFF-PETITIONER-APPELLANT.

RICHARD J. GRAHAM, COUNTY ATTORNEY, LOWVILLE, FOR DEFENDANT-RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated memorandum decision and order) of the Supreme Court, Lewis County (Hugh A. Gilbert, J.), entered August 10, 2012. The judgment, among other things, dismissed the complaint-petition.

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

Memorandum: As limited by its notice of appeal, plaintiff-petitioner (plaintiff) appeals from that part of a judgment denying plaintiff's request for specific performance of a tax exemption agreement, as asserted in the second cause of action, and dismissing the complaint-petition. We note at the outset that, although plaintiff also sought a declaration, Supreme Court properly did not grant such relief where, as here, plaintiff "has an adequate, alternative remedy in another form of action, such as breach of contract" (*Apple Records v Capitol Records*, 137 AD2d 50, 54).

In 1998 the parties executed a written agreement (Exemption Agreement) in which defendant-respondent (defendant) agreed to grant plaintiff a tax exemption for its water treatment facility property pursuant to RPTL 406 (3). The Exemption Agreement provided that plaintiff would receive a tax exemption for "so long as the [water treatment facility property] is used for a public purpose satisfying the requirements of [RPTL 406]." The Exemption Agreement further provided that an amendment to RPTL 406 (3), some "other legislative change," or a final court order subjecting the property to taxation shall modify the obligations of the parties to comply with such amendment, legislative change or court order. In 2011, after conducting a study of its tax exemption policies, defendant's Board of

Legislators (County Board) passed a resolution (2011 resolution) to phase out all tax exemptions for municipal water and sewage treatment facilities, including the tax exemption with respect to plaintiff's facility under the Exemption Agreement. In 2012, the County Board voted on a resolution that would grant an exemption solely to plaintiff while continuing to phase out the exemptions for all other municipalities, but the resolution did not pass.

With respect to plaintiff's cause of action for specific performance of the Exemption Agreement, we agree with the court that the County Board's adoption of the 2011 resolution phasing out all tax exemptions for municipal water and sewage treatment facilities constituted a "legislative change" within the meaning of the Exemption Agreement. The County Board is a legislative body that exercises defendant's power "through a local law or resolution duly adopted by the board" (County Law § 153 [1]; *see* § 150-a [1]), and the Exemption Agreement specifically provides that a legislative change shall modify the obligations of the parties to comply with such legislative change. We therefore affirm the judgment insofar as appealed from.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

912

CA 12-02090

PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ.

LEE-ANN DEERING, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE THRUWAY AUTHORITY AND NEW YORK STATE DEPARTMENT OF TRANSPORTATION, DEFENDANTS-RESPONDENTS.

LAW OFFICE OF WILLIAM MATTAR, P.C., WILLIAMSVILLE (APRIL J. ORLOWSKI OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PAUL GROENWEGEN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Court of Claims (Jeremiah J. Moriarty, III, J.), entered January 9, 2012. The order denied the motion of claimant for permission to file a late claim.

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

Memorandum: In a proposed action to recover damages for injuries she allegedly sustained in a motor vehicle accident, claimant appeals from a January 2012 order denying her motion for permission to file a late claim pursuant to Court of Claims Act § 10 (6). That order was entered "without prejudice" to a further application by claimant. The Attorney General has informed this Court that the Court of Claims, by an August 2013 order, granted claimant permission to file a late claim. Because the August 2013 order affords claimant "all the relief she seeks and . . . thus renders the appeal moot" (*Matter of Dye v Bernier*, 104 AD3d 1102, 1102), this appeal must be dismissed (*see Matter of Gasparro v Edwards*, 85 AD3d 1222, 1222 n; *see generally Matter of Cucinella v New York City Tr. Auth.*, 82 AD3d 1453, 1454).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

921

KA 09-02629

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK WOODWORTH, DEFENDANT-APPELLANT.

GENESEE VALLEY LEGAL AID, GENESEO (KELLEY PROVO OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered September 9, 2009. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree, assault in the second degree as a sexually motivated felony, attempted assault in the second degree as a sexually motivated felony, unlawful imprisonment in the first degree and coercion in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of sexual abuse in the first degree (Penal Law § 130.65 [1]), assault in the second degree as a sexually motivated felony (§§ 120.05 [2]; 130.91), attempted assault in the second degree as a sexually motivated felony (§§ 110.00, 120.05 [1]; 130.91), unlawful imprisonment in the first degree (§ 135.10) and coercion in the first degree (§ 135.65 [1]). We conclude that defendant waived his contention that the People failed to establish venue with respect to those crimes inasmuch as he did not request a jury charge on improper venue (*see People v Greenburg*, 89 NY2d 553, 556; *People v Cornell*, 17 AD3d 1010, 1011, *lv denied* 5 NY3d 805).

We reject defendant's further contention that County Court improperly admitted in evidence expert testimony regarding rape trauma syndrome. Such testimony is admissible "to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand" (*People v Carroll*, 95 NY2d 375, 387). Here, the expert testimony regarding rape trauma syndrome was admitted to explain why the victim may not have immediately reported the crimes, and the expert "did not attempt to impermissibly prove that the charged crimes occurred" (*see id.*).

Contrary to defendant's contention, we conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The jury's resolution of credibility issues is entitled to great weight, and there is no indication in the record that the jury failed to give the evidence the weight it should be accorded (*see People v Kelley*, 46 AD3d 1329, 1331, *lv denied* 10 NY3d 813).

Defendant's contention that the prosecutor improperly vouched for the credibility of the victim during summation is not preserved for our review because he failed to object to the allegedly improper comments during summation (*see People v Williams*, 46 NY2d 1070, 1071). Defendant also failed to preserve for our review his contention that the prosecutor improperly impeached a prosecution witness (*see People v Cruz*, 23 AD3d 1109, 1110, *lv denied* 6 NY3d 811). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that the court improperly admitted in evidence photographs that had been enhanced by the People. We reject that contention. At trial, the People laid a proper foundation by authenticating the photographs (*see People v Marra*, 96 AD3d 1623, 1625-1626, *affd* 21 NY3d 979; *People v Patterson*, 93 NY2d 80, 84). Additionally, the photographs were relevant with respect to the nature and extent of the victim's injuries, and their sole purpose was not " 'to arouse the emotions of the jury and to prejudice . . . defendant' " (*People v Davis*, 67 AD3d 1397, 1397, *lv denied* 13 NY3d 938, quoting *People v Pobliner*, 32 NY2d 356, 370, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905*; see People v Wright*, 107 AD3d 1398, 1400). Defendant failed to preserve for our review his contention that a ring, which had been altered while in the People's possession, was improperly admitted in evidence (*see People v Butts*, 254 AD2d 823, 823), and we decline to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also contends that the court's instruction to the jury improperly shifted the burden of proof to defendant. That contention is not preserved for our review because defendant did not object to the court's charge (*see People v Shutter*, 163 AD2d 871, 871) and, in any event, that contention is without merit (*see generally People v Castrechino*, 24 AD3d 1267, 1267-1268, *lv denied* 6 NY3d 810). We also reject defendant's contention that his adjudication as a persistent violent felony offender was unconstitutional (*see generally People v Quinones*, 12 NY3d 116, 125-131, *cert denied* 558 US 821).

Finally, we have reviewed defendant's contention in his pro se supplemental brief and conclude that it is without merit.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

999

CA 13-00066

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

LEONARD EDWARDS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DONALD DEVINE AND CATHOLIC DIOCESE OF BUFFALO,
ALSO KNOWN AS ROMAN CATHOLIC DIOCESE OF BUFFALO,
DEFENDANTS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (KARA M. ADDELMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

TERRANCE C. BRENNAN, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered May 16, 2012. The order, inter alia, denied the motion of defendants for summary judgment dismissing the complaint and granted the cross motion of plaintiff for bifurcation of the trial.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendants' motion in part and dismissing the complaint insofar as the complaint, as amplified by the bill of particulars, alleges that plaintiff sustained a serious injury to his neck and back under the permanent consequential limitation of use and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d) and that plaintiff sustained a serious injury under the significant disfigurement and 90/180-day categories of serious injury within the meaning of section 5102 (d), and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when the vehicle in which he was a passenger was rear-ended by a vehicle driven by defendant Donald Devine and owned by defendant Catholic Diocese of Buffalo, also known as Roman Catholic Diocese of Buffalo. Plaintiff alleged that, as a result of the motor vehicle accident, he sustained injuries to his neck, back and shoulder. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of the significant disfigurement, permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of serious injury as defined in Insurance Law § 5102 (d). Plaintiff cross-moved for bifurcation of the trial. Supreme Court denied the motion and granted the cross

motion. Defendants appeal.

With respect to the motion, we note at the outset that, contrary to defendants' contention, the court did not abuse its discretion in considering the papers submitted by plaintiff in opposition to the motion even though they were not timely served. Plaintiff offered a valid excuse for the brief delay, and defendants were not prejudiced by the late service inasmuch as they were able to submit a reply affidavit (*see* CPLR 2004, 2214 [c]; *Bucklaew v Walters*, 75 AD3d 1140, 1141; *see also Payne v Buffalo Gen. Hosp.*, 96 AD3d 1628, 1629). Regarding the merits, we conclude that defendants met their initial burden on the motion with respect to the asserted categories of serious injury by offering " 'persuasive evidence that plaintiff's alleged pain and injuries were related to a preexisting condition' " (*Kwitek v Seier*, 105 AD3d 1419, 1420, quoting *Carrasco v Mendez*, 4 NY3d 566, 580). For example, defendants submitted the report of a physician who examined plaintiff on behalf of defendants, wherein the physician concluded that plaintiff suffered only minor strains and sprains as a result of the accident and that plaintiff had since recovered from those injuries.

We further conclude that plaintiff's submissions in opposition to the motion failed to raise triable issues of fact whether plaintiff's neck or back injuries were causally related to the accident at issue, and we therefore modify the order by granting defendant's motion to the extent that plaintiff's action is predicated on those injuries. Although plaintiff submitted the affidavit of the physician who treated him for his back and neck injuries, that affidavit was "purely speculative and thus insufficient to raise an issue of fact as to causation" because the physician began treating plaintiff after the accident and "did not review plaintiff's pre-accident medical records" (*id.* at 1421). Additionally, while plaintiff reported to the physician that he did not have any preexisting cervical spine problems, that statement is belied by the evidence in plaintiff's medical records that he had a history of extensive degenerative disc disease and spondylosis that predated the accident.

Plaintiff also failed to raise a triable issue of fact whether, as a result of the accident, he sustained a serious injury to his shoulder under the significant disfigurement and 90/180-day categories, and we therefore further modify the order by granting defendants' motion to that extent. Regarding the significant disfigurement category, defendants met their burden of establishing that the scar on plaintiff's shoulder was the result of surgery that predated the accident, and plaintiff failed to submit proof that the surgery he alleges was necessary because of the accident exacerbated the scar (*see Kilmer v Strek*, 35 AD3d 1282, 1282-1283). Regarding the 90/180-day category, plaintiff failed to submit any evidence demonstrating that his usual and customary daily activities were curtailed as a result of shoulder injuries sustained in the subject accident and not as a result of his preexisting shoulder injuries (*see generally LaBeef v Baitsell*, 104 AD3d 1191, 1192).

We conclude, however, that the court properly denied the motion with respect to the permanent consequential limitation of use and significant limitation of use categories insofar as they related to plaintiff's shoulder injury because plaintiff raised a triable issue of fact whether the accident caused him to sustain a serious injury to his shoulder under those categories. In opposition to the motion, plaintiff submitted the affidavit of the physician who treated him for his shoulder injuries both before and after the accident, wherein the physician opined that the accident caused pain and joint problems in his right shoulder, requiring continuing treatment and surgery. "It is well established that conflicting expert opinions may not be resolved on a motion for summary judgment" (*Fonseca v Cronk*, 104 AD3d 1154, 1155 [internal quotation marks omitted]). We therefore conclude that plaintiff raised a triable issue of fact whether there was a causal relationship between plaintiff's shoulder limitations and the subject accident.

With respect to the cross motion, we conclude that, contrary to defendants' contention, the court properly ordered that the trial be bifurcated. Because liability encompasses both the issues of negligence and serious injury (*see Ruzycki v Baker*, 301 AD2d 48, 51), however, we note that plaintiff's request on the cross motion to "try [the] liability aspect of the case" before the "medical testimony" was in fact a request to try the issues of negligence before the issue of serious injury. The court properly granted the cross motion. "Judges are encouraged to order a bifurcated trial . . . where it appears that bifurcation may assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action" (22 NYCRR 202.42 [a]) and, here, separating the issue of negligence from the issues relating to the medical testimony will simplify those issues.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1037

CA 13-00227

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

IN THE MATTER OF THOMAS GREGORY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK EXECUTIVE DEPARTMENT, DIVISION OF CRIMINAL JUSTICE SERVICES, SEAN M. BYRNE, ACTING COMMISSIONER, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS.

THOMAS GREGORY, PLAINTIFF-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered May 24, 2012. The judgment granted the motion of defendant New York Executive Department, Division of Criminal Justice Services, Sean M. Byrne, Acting Commissioner for summary judgment declaring that plaintiff is required to register as a sex offender pursuant to Correction Law § 168-f.

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

Memorandum: Petitioner (hereafter, plaintiff) commenced this CPLR article 78 proceeding, which was thereafter converted to a declaratory judgment action by Supreme Court, contending that he was not required to register as a sex offender pursuant to Correction Law § 168-f. On a prior appeal from an order in his SORA classification proceeding determining that he was a level one risk, this Court vacated plaintiff's risk level determination, concluding that the People's 11-year delay in notifying him that he was required to register as a sex offender was "so outrageously arbitrary as to constitute [a] gross abuse of governmental authority" (*People v Gregory*, 71 AD3d 1559, 1560 [internal quotation marks omitted]). Thereafter, defendant New York Executive Department, Division of Criminal Justice Services (Division) notified plaintiff that he was still required to register as a sex offender, and this action ensued. Plaintiff now appeals from a judgment that, inter alia, granted the Division's motion for summary judgment declaring that he is required to register as a sex offender pursuant to Correction Law § 168-f. We affirm.

Contrary to plaintiff's contention, this Court previously vacated only his risk level classification (*Gregory*, 71 AD3d at 1560). Our prior order thus eliminated the requirement of community notification (*see* Correction Law § 168-d [3]), but did not disturb plaintiff's obligation to register as a sex offender with the Division (*see* §§ 168-f [2]; 168-i). Plaintiff was required to register as a sex offender as a result of his 1991 conviction (*see* § 168-a [1]), and he remained obligated to register for a period of 20 years (*see* § 168-h [1]; *see also People v Kindred*, 71 AD3d 1418, 1418).

In view of our determination, we do not address plaintiff's remaining contentions.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1042

CA 13-00084

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

IN THE MATTER OF AN APPLICATION FOR A SUBSEQUENT RETENTION ORDER PURSUANT TO CPL 330.20 IN RELATION TO S.J., RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, PETITIONER-RESPONDENT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR RESPONDENT-APPELLANT.

S. J., RESPONDENT-APPELLANT PRO SE.

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

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Monroe County Court (Vincent M. Dinolfo, J.), dated August 6, 2012 in a proceeding pursuant to CPL 330.20 (9). The order determined that respondent is mentally ill and authorized the Commissioner of the New York State Office of Mental Health to continue to retain respondent in a nonsecure facility for care and treatment until July 2, 2013.

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

Memorandum: In this proceeding under CPL 330.20, respondent appeals from an order determining that he is mentally ill (*see* CPL 330.20 [1] [d]), and authorizing the Commissioner of the New York State Office of Mental Health to continue to retain him in a nonsecure facility for care and treatment until July 2, 2013. We dismiss the appeal as moot. The order has expired by its own terms and was superseded by an order subsequently entered, and the issues raised are not sufficiently substantial or novel to warrant invoking the exception to the mootness doctrine (*see Matter of David C.*, 69 NY2d 796, 798; *Matter of Zheng Z. [South Beach Psychiatric Ctr.]*, 68 AD3d 886, 887).

Even assuming, arguendo, that the exception to the mootness doctrine applies, we conclude that a fair interpretation of the evidence supports County Court’s determination (*see Matter of*

Rabinowitz v James M., 63 AD3d 481, 481).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1044

CA 13-00090

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

NIAGARA FOODS, INC., BENLEY REALTY CO. AND
THE CHARTER OAK FIRE INSURANCE COMPANY,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

FERGUSON ELECTRIC SERVICE COMPANY, INC.,
DEFENDANT-RESPONDENT-APPELLANT,
AND TEGG CORPORATION, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

LAW OFFICES OF ROBERT A. STUTMAN, P.C., NEW YORK CITY AND BRANDT, ROBERSON & BRANDT, P.C., LOCKPORT (CAROL R. FINOCCHIO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (JOSEPH H. EMMINGER, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered October 16, 2012. The order granted the motion of defendant Tegg Corporation for summary judgment dismissing the first amended complaint against it, granted those parts of the motion of defendant Ferguson Electric Service Company, Inc., for summary judgment dismissing the causes of action for negligence and strict products liability and otherwise denied the motion of defendant Ferguson Electric Service Company, Inc.

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

Memorandum: This action arises out of a fire that caused significant property damage to a four-story industrial building in the Village of Middleport in Niagara County. During the relevant time period, plaintiffs Niagara Foods, Inc. (Niagara) and Benley Realty Co. (Benley) both occupied the building, and Benley was the owner. Plaintiff The Charter Oak Fire Insurance Company (Charter Oak) seeks subrogation for the payments it made as a result of the subject fire. In appeal No. 1, plaintiffs appeal and defendant Ferguson Electric Service Company, Inc. (Ferguson) cross-appeals from an order that granted the motion of defendant Tegg Corporation (Tegg) for summary judgment dismissing the first amended complaint in its entirety

against Tegg and that granted in part Ferguson's motion for summary judgment dismissing, as relevant on appeal, the negligence cause of action against it. In appeal No. 2, Ferguson appeals from an order that, upon reargument, denied its motion to the extent that it sought summary judgment dismissing the remaining cause of action, for breach of contract, against it. We note at the outset that Ferguson's cross appeal from the order in appeal No. 1 must be dismissed because the order in appeal No. 2 superseded the original order insofar as it granted leave to reargue the prior motion with respect to the cause of action for breach of contract and, upon reargument, adhered to the prior decision concerning that cause of action (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985).

In appeal No. 1, we reject plaintiffs' contention that Supreme Court erred in granting those parts of defendants' respective motions for summary judgment dismissing the negligence cause of action. "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated . . . This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389; *see Bristol-Myers Squibb, Indus. Div. v Delta Star*, 206 AD2d 177, 179-180). Plaintiffs cannot maintain their tort cause of action because Ferguson, which had a contract with Niagara, owed no legal duty that is independent of the contract (*see generally Bristol-Myers Squibb*, 206 AD2d at 179-180). Moreover, "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party," such as Benley (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138).

In addition, even assuming, arguendo, that the negligence cause of action is viable with respect to Ferguson, we conclude that it was properly dismissed against Tegg. That cause of action as against Tegg was premised solely upon its status as a franchisor of Ferguson, inasmuch as Tegg had neither a contract nor a direct relationship with any of the plaintiffs. "The mere existence of a franchise agreement is insufficient to impose vicarious liability on the franchisor for the acts of its franchisee; there must be a showing that the franchisor exercised control over the day-to-day operations of its franchisee" (*Martinez v Higher Powered Pizza, Inc.*, 43 AD3d 670, 671). Here, the record establishes that Tegg did not exercise "control over the day-to-day operations of" Ferguson (*id.*).

In appeal No. 2, we agree with Ferguson that the court erred, upon reargument, in denying its motion for summary judgment dismissing the remaining cause of action against it, for breach of contract, which at this stage of the litigation is asserted only by Niagara and, by way of subrogation, Charter Oak. We therefore reverse the order insofar as appealed from. It is well settled that the elements of a breach of contract cause of action are "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages" (*JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803; *see Clearmont Prop., LLC v Eisner*, 58

AD3d 1052, 1055). Ferguson contracted to provide a "3-year Electrical Preventive Maintenance Program" (EPMP) for a fee of $2,108 per year, and the contract specified the services to be provided pursuant thereto. It is undisputed that there was a written contract between Ferguson and Niagara and that Niagara met its obligations under the contract, which in this context was payment for the services rendered. While plaintiffs allege that Ferguson breached that contract, they do not identify what service or services were either not performed at all or were inadequately performed. Plaintiffs thus effectively concede that Ferguson performed the services it promised to perform pursuant to the contract, and they instead attempt to prove based on matters outside the agreement that Ferguson failed to perform additional services or to meet certain industry standards for an EPMP.

"[I]nasmuch as [Niagara] seeks to create triable issues of fact solely through the use of parol evidence, resolution of the propriety of [the c]ourt's [denial] of summary judgment against [it] turns upon whether parol evidence is admissible in this instance" (*State Univ. Constr. Fund v Aetna Cas. & Sur. Co.*, 189 AD2d 929, 931-932). It is well established that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569). Moreover, "[p]arol evidence—evidence outside the four corners of the document—is admissible only if a court finds an ambiguity in the contract" (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436). Here, parole evidence is not admissible because there is no ambiguity in the contract between Niagara and Ferguson (*see Polyfusion Elecs., Inc. v Promark Elecs., Inc.*, 108 AD3d 1186, 1187). "What [plaintiffs] misapprehend[] is that evidence of current industry practice is only 'admissible to explain the meaning of terms used in any particular trade, when their meaning is material to construe the contract' " (*News Am. Mktg., Inc. v Lepage Bakeries, Inc.*, 16 AD3d 146, 148). Ferguson met its initial burden by establishing through proof in admissible form that it performed the services it had promised to perform in the contract and, in opposition, plaintiffs failed to present evidence that Ferguson breached the contract (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). As a result, Ferguson is entitled to summary judgment dismissing the cause of action for breach of contract against it. In light of our determination, we need not address Ferguson's separate contention relating solely to Charter Oak's right of subrogation.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1045

CA 13-00091

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

NIAGARA FOODS, INC., BENLEY REALTY CO. AND
THE CHARTER OAK FIRE INSURANCE COMPANY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

FERGUSON ELECTRIC SERVICE COMPANY, INC.,
DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF ROBERT A. STUTMAN, P.C., NEW YORK CITY AND BRANDT, ROBERSON & BRANDT, P.C., LOCKPORT (CAROL R. FINOCCHIO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered December 24, 2012. The order, upon reargument, denied the motion of defendant Ferguson Electric Service Company, Inc., for summary judgment dismissing the cause of action for breach of contract.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant Ferguson Electric Service Company, Inc. with respect to the breach of contract cause of action is granted and the first amended complaint is dismissed in its entirety against that defendant.

Same Memorandum as in *Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.* ([appeal No. 1] ___ AD3d ___ [Nov. 15, 2013]).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1059

CA 13-00551

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

KIMBERLY L. ACKMAN,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

MARK HABERER, DEFENDANT-RESPONDENT-APPELLANT.

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

HAGELIN KENT LLC, BUFFALO (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered July 24, 2012. The order denied both the motion of defendant to dismiss the complaint and the cross motion of plaintiff for summary judgment on the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiff's cross motion for summary judgment on the complaint in the amount of $75,000 and as modified the order is affirmed without costs.

Memorandum: This is the second of two personal injury actions commenced by plaintiff, both of which arise out of an accident involving the collision of two snowmobiles. Plaintiff was the passenger on defendant's snowmobile, and she previously sued only the driver of the other snowmobile. Notably, defendant was impleaded as a third-party defendant in the prior action. Plaintiff, however, did not seek to assert a direct claim against him until she made a postverdict motion for that relief, after the jury returned a verdict in the amount of $150,000, with an apportionment of liability of 50% each to the driver of the other snowmobile and to the defendant herein. Supreme Court denied that motion, and plaintiff thereafter commenced this action. Plaintiff appeals and defendant cross-appeals from an order that denied both defendant's motion to dismiss the complaint and plaintiff's cross motion for summary judgment on the complaint in the amount of $75,000.

Addressing first the cross appeal, we reject defendant's contention that the court erred in denying his motion to dismiss the complaint on the ground that plaintiff's action is barred by, inter alia, res judicata. " 'The doctrine of res judicata operates to preclude the reconsideration of claims actually litigated and resolved

in a prior proceeding, as well as claims for different relief against the same party which arise out of the same factual grouping or transaction, and which should have or could have been resolved in the prior proceeding' " (*Ippolito v TJC Dev., LLC*, 83 AD3d 57, 71). Here, while plaintiff could have asserted a direct claim against defendant in the prior action (*see e.g.* CPLR 1009), "res judicata, or claim preclusion, is . . . inapplicable, for the basic reason that the plaintiff never asserted any claim against this defendant" (*Seaman v Fichet-Bauche N. Am.*, 176 AD2d 793, 794). Moreover, "[t]he fact that the plaintiff sued one tort[]feasor does not automatically preclude [her] from suing another tort[]feasor later" (*id*. at 794-795; *see* CPLR 3002 [a]). We also reject defendant's contention that this action is barred by the doctrine of judicial estoppel inasmuch as plaintiff is not in this action adopting a position contrary to a position assumed in the prior action (*see Kilcer v Niagara Mohawk Power Corp.*, 86 AD3d 682, 683). We have considered the other grounds asserted by defendant in support of his motion and conclude that they are without merit.

With respect to plaintiff's appeal, we agree that plaintiff is entitled to summary judgment in the amount sought in the complaint based on the doctrine of collateral estoppel. We therefore modify the order accordingly. "The doctrine of collateral estoppel precludes a party from relitigating 'an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point' " (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455, quoting *Gilberg v Barbieri*, 53 NY2d 285, 291). "The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action" (*id.* at 456). Here, the issues are identical because in the prior action defendant was required to defend against the claim that he was negligent in the operation of his snowmobile and that his negligence was a proximate cause of this accident. Moreover, he had a full and fair opportunity to litigate those issues in the prior action and was in no way limited by virtue of the fact that he was a third-party defendant as opposed to a direct defendant. Specifically, CPLR 1008 grants to a third-party defendant all of the rights a direct defendant has to defend against a plaintiff's claims, including the full rights of discovery afforded by CPLR article 31 (*see generally Cogan v Madeira Assoc.*, 1 AD3d 1066, 1067). Given that defendant had a full and fair opportunity to litigate the negligence claim against him in the prior action as well as to contest the value of plaintiff's injuries, plaintiff is entitled to summary judgment (*see generally Fofana v 41 W. 34th Street, LLC*, 71 AD3d 445, 448, *lv denied* 14 NY3d 713).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1060

CA 13-00705

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

LAURA HARDEN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAMES W. FAULK, M.D., DEFENDANT-RESPONDENT.

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

DAMON MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered July 11, 2012. The judgment dismissed the complaint upon a jury verdict of no cause of action.

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

Memorandum: Plaintiff commenced this medical malpractice action against the physician who initially treated her ankle fracture. Following a trial, the jury determined that defendant was not negligent and did not reach the remaining issues. Plaintiff made a posttrial motion pursuant to CPLR 4404 (a) seeking to set aside the verdict, and Supreme Court denied the motion. Thereafter, the court entered a judgment, dismissing the complaint upon the jury verdict of no cause of action. Plaintiff appeals, and we affirm.

Even assuming, arguendo, that the court erred in allowing defendant to amend his bill of particulars or in permitting a defense expert to testify on an alternative theory of causation, we conclude that any such errors were harmless inasmuch as they related to only those issues that the jury did not reach (*see Martin v Triborough Bridge & Tunnel Auth.*, 73 AD3d 481, 483, *lv denied* 15 NY3d 713; *Gilbert v Luvin*, 286 AD2d 600, 600). Contrary to plaintiff's contention, we conclude that the "error in judgment" charge was appropriate here. "[E]ach party's expert[s] testified to acceptable methods of diagnosing and treating" plaintiff's initial and subsequent fractures (*Petko v Ghoorah*, 178 AD2d 1013, 1014).

Plaintiff also contends that the verdict is not supported by legally sufficient evidence and is against the weight of the evidence, and thus that the court erred in denying her posttrial motion to set aside the verdict. Plaintiff failed to preserve for our review her

contention that the evidence is legally insufficient inasmuch as she did not move on that ground (*see Tomaszewski v Seewaldt* [appeal No. 1], 11 AD3d 995, 995). Additionally, contrary to plaintiff's contention, the court did not err in denying the posttrial motion on the ground that the verdict is against the weight of the evidence. "[T]he preponderance of the evidence in favor of plaintiff is not so great that the verdict could not have been reached upon any fair interpretation of the evidence, nor is the verdict [finding that defendant was not negligent] palpably wrong or irrational" (*Kettles v City of Rochester*, 21 AD3d 1424, 1425; *see Kubala v Suddaby*, 32 AD3d 1227, 1227; *see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746; *Winiarski v Harris* [appeal No. 2], 78 AD3d 1556, 1557; *Harris v Parwez*, 13 AD3d 675, 675-676).

Plaintiff further contends that the verdict should be set aside in the interests of justice because plaintiff was denied a fair trial by judicial error, juror misconduct and misconduct of counsel. Specifically, plaintiff asserts that she was prejudiced by a comment made by a juror, who was later discharged, to other jury members suggesting that plaintiff was receiving Medicare benefits and thereby suggesting that plaintiff was attempting to receive a double recovery. That contention is "based solely on speculation" (*Hersh v Przydatek* [appeal No. 2], 286 AD2d 984, 985; *see also Copeland v Town of Amboy*, 152 AD2d 911, 912) and, in any event, "the jury is presumed to have followed the court's curative instruction" to disregard any comments made by the juror who was discharged (*Topczij v Clark*, 28 AD3d 1139, 1140). We also reject the contention of plaintiff that the question posed by defendant's attorney regarding her disability status prior to the alleged medical malpractice deprived plaintiff of a fair trial (*see generally Clemons v Vanderpool*, 289 AD2d 1078, 1079). That question was not so prejudicial as to deprive plaintiff of a fair trial (*see Guthrie v Overmyer*, 19 AD3d 1169, 1171).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1065

CA 12-02032

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

KIMBERLY L. ACKMAN, PLAINTIFF-APPELLANT,

V ORDER

DOUGLAS C. GROSS, DEFENDANT-RESPONDENT.

DOUGLAS C. GROSS, THIRD-PARTY PLAINTIFF,

V

MARK HABERER, THIRD-PARTY DEFENDANT-RESPONDENT.

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

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANT-RESPONDENT AND THIRD-PARTY PLAINTIFF.

HAGELIN KENT LLC, BUFFALO (VICTOR M. WRIGHT OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), entered January 17, 2012. The judgment awarded plaintiff money damages against defendant-third-party plaintiff upon a jury verdict.

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

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1066

CA 13-00617

PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ.

JERMAIN STOKELY, BY THE PARENT AND NATURAL GUARDIAN ROSINA BELL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DOUGLAS WRIGHT, ALONZO GADSDEN, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

ATHARI & ASSOCIATES, LLC, UTICA (MO ATHARI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (JOHN D. GOLDMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT DOUGLAS WRIGHT.

HURWITZ & FINE, P.C., BUFFALO (V. CHRISTOPHER POTENZA OF COUNSEL), FOR DEFENDANT-RESPONDENT ALONZO GADSDEN.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered September 18, 2012. The order, inter alia, granted the motion of defendant Alonzo Gadsden for summary judgment dismissing, among other things, the complaint against him, and denied that part of the cross motion of plaintiff for partial summary judgment on the issue of liability.

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 cause of action for negligent abatement against defendant Alonzo Gadsden as well as the cross claim against him, and by vacating that part of the order denying the cross motion with respect to the affirmative defenses asserted by him, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as a result of his exposure to lead paint as a child in two apartments in which he resided (premises). Plaintiff asserted causes of action for negligent ownership and negligent maintenance of the premises, as well as negligent abatement of the lead paint hazard. Following joinder of issue and discovery, defendant Alonzo Gadsden, a landlord, moved for summary judgment dismissing, inter alia, the complaint against him. Plaintiff cross-moved for, inter alia, partial summary judgment on the issue of defendants' liability and dismissal of certain affirmative defenses. Supreme Court granted Gadsden's motion and denied plaintiff's cross motion with the exception of the request for

dismissal of certain affirmative defenses asserted by defendant Douglas Wright and issuance of a subpoena. Plaintiff appeals.

" 'To establish that a landlord is liable for a lead-paint condition, a plaintiff must demonstrate that the landlord had actual or constructive notice of, and a reasonable opportunity to remedy, the hazardous condition' " and failed to do so (*Pagan v Rafter*, 107 AD3d 1505, 1506). We conclude that Gadsden met his burden of establishing that he had no actual or constructive notice of the hazardous lead paint condition prior to an inspection conducted by the Oneida County Department of Health (*see generally Chapman v Silber*, 97 NY2d 9, 15), and plaintiff failed to raise a triable issue of fact by contending that Real Property Law § 235-b or 42 USC § 4851 placed Gadsden on notice or imposed liability (*see Pagan*, 107 AD3d at 1507; *Watson v Priore*, 104 AD3d 1304, 1305). Despite plaintiff's repeated assertions to the contrary, "[t]he factors set forth in *Chapman . . .* (97 NY2d 9, 20-21 [2001]) remain the bases for determining whether a landlord knew or should have known of the existence of a hazardous lead paint condition and thus may be held liable in a lead paint case" (*Watson*, 104 AD3d at 1305; *see Sykes v Roth*, 101 AD3d 1673, 1674).

We agree with plaintiff, however, that the court erred in granting Gadsden's motion for summary judgment dismissing the complaint in its entirety against him inasmuch as he failed to address the cause of action for negligent abatement against him in his motion (*see Pagan*, 107 AD3d at 1506; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Consequently, we modify the order accordingly, and we remit the matter to Supreme Court for further proceedings on that part of plaintiff's cross motion seeking dismissal of certain of Gadsden's affirmative defenses.

Contrary to plaintiff's contention, he was not entitled to judgment as a matter of law "on the issue of liability[,] including notice, negligence and substantial factor," against Wright and Gadsden (*see Watson*, 104 AD3d at 1305; *see generally Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 648; *Derr v Fleming*, 106 AD3d 1240, 1242-1243; *Van Wert v Randall*, 100 AD3d 1079, 1080-1081). No proof submitted by plaintiff showed that he was observed ingesting paint fragments in defendants' premises or that peeling paint was observed in defendants' premises prior to plaintiff's diagnosis of elevated levels of lead in his blood, and thus plaintiff failed to establish his entitlement to partial summary judgment on the issue of liability (*see generally Alvarez*, 68 NY2d at 324). Finally, the court properly denied that part of plaintiff's cross motion to dismiss certain affirmative defenses of Wright inasmuch as plaintiff failed to show that those defenses lacked merit as a matter of law (*see Derr*, 106 AD3d at 1244; *Van Wert*, 100 AD3d at 1081).

Frances E. Cafarell

Entered: November 15, 2013

Clerk of the Court

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

1073

KA 11-02470

PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HENRY SANTIAGO, JR., DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered November 7, 2011. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of predatory sexual assault (Penal Law § 130.95 [1] [a]), defendant contends that County Court abused its discretion in denying his request for substitution of counsel or for an adjournment of the trial to permit him to retain new counsel. We reject that contention. Indeed, "defendant failed to proffer specific allegations of a 'seemingly serious request' that would require the court to engage in a minimal inquiry" before denying defendant's request (*People v Porto*, 16 NY3d 93, 100). Furthermore, we note that "good cause [for an adjournment to permit a defendant to retain new counsel] does not exist [where, as here,] defendant[is] guilty of delaying tactics or where, on the eve of trial, disagreements over trial strategy generate discord" (*People v Linares*, 2 NY3d 507, 511; *see People v Arroyave*, 49 NY2d 264, 271; *People v Sayavong*, 248 AD2d 1023, 1024, *lv denied* 92 NY2d 905).

As defendant correctly concedes, he failed to preserve for our review his contention that the court erred in failing to submit to the jury the issue of the voluntariness of his statements to the police (*see People v Thomas*, 96 AD3d 1670, 1673, *lv denied* 19 NY3d 1002). In any event, "[f]or [the issue of] voluntariness to be submitted to the jury, there must be [both] a proper objection and an offer of evidence sufficient to raise a factual dispute" (*People v Mateo*, 2 NY3d 383, 416 n 20, *cert denied* 542 US 946; *see People v Cefaro*, 23 NY2d 283, 286-287; *People v Haque*, 70 AD3d 967, 967, *lv denied* 15 NY3d 750, *cert*

denied ___ US ___, 131 S Ct 903), and here there was neither.

Defendant challenges the legal sufficiency of the evidence with respect to whether the victim sustained a serious physical injury within the meaning of Penal Law § 130.95 (1) (a) and whether he caused such injury. The People presented evidence establishing that the victim sustained a fractured jaw that was wired shut for four weeks, along with evidence that the victim experienced numbness that continued until the time of trial and lost three teeth. Consequently, we conclude that the evidence of serious physical injury is legally sufficient to support the conviction (*see People v Blackman*, 90 AD3d 1304, 1307, *lv denied* 19 NY3d 971; *People v Johnson*, 50 AD3d 1537, 1537-1538, *lv denied* 10 NY3d 935; *Matter of Tirell R.*, 33 AD3d 804, 805). Defendant's further contention that the evidence is legally insufficient to establish that he caused the victim's injury is without merit inasmuch as the victim testified that defendant punched her in the jaw and that she felt it break. Also, two physicians testified that the victim's jaw was broken in two places, and that such injuries are consistent with a punch as described by the victim.

Finally, the sentence is not unduly harsh or severe.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1079

KA 09-02633

PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN BROWN, DEFENDANT-APPELLANT.

JEANNIE D. MICHALSKI, PUBLIC DEFENDER, GENESEO, FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered September 10, 2009. The judgment convicted defendant, upon a jury verdict, of rape in the second degree, sexual abuse in the second degree and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of rape in the second degree (Penal Law § 130.30 [1]), sexual abuse in the second degree (§ 130.60 [2]), and endangering the welfare of a child (§ 260.10 [1]), defendant contends that County Court erred in refusing to suppress the statements that he made to the police. Defendant's specific contentions are that, contrary to the court's conclusion, he was in custody, that the statements were the result of coercion and intimidation by the police sergeant who questioned him, and that he did not understand the import of the *Miranda* warnings provided by the police sergeant. We reject those contentions.

"In determining whether a defendant was in custody for *Miranda* purposes, '[t]he test is not what the defendant thought, but rather what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position' " (*People v Kelley*, 91 AD3d 1318, 1318, *lv denied* 19 NY3d 963, quoting *People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851). Here, the record establishes that defendant voluntarily drove himself to the police station, was not handcuffed, was permitted to leave the police station to smoke a cigarette, and was not subjected to lengthy, coercive or accusatory questioning (*see People v Towsley*, 53 AD3d 1083, 1084, *lv denied* 11 NY3d 795; *People v Duda*, 45 AD3d 1464, 1466, *lv denied* 10 NY3d 764). Consequently, we conclude that defendant was not in custody. In any event, the police sergeant provided *Miranda* warnings at the start of

the interview, prior to any statements being made by defendant.

We also reject defendant's contention that his statements were the result of police coercion and intimidation. The record of the suppression hearing supports the court's determination that the statements were not coerced, i.e., defendant received no promises in exchange for making the statements and he was not threatened in any way, and "the court's determination is entitled to great deference" (*People v Peay*, 77 AD3d 1309, 1310, *lv denied* 15 NY3d 955; *see People v Heary*, 104 AD3d 1208, 1210, *lv denied* 21 NY3d 943, *reconsideration denied* 21 NY3d 1016; *see generally People v Prochilo*, 41 NY2d 759, 761). Contrary to defendant's further contention, the evidence introduced at the suppression hearing fails to establish that he did not understand the import of the *Miranda* warnings. To the contrary, having reviewed the record of the *Huntley* hearing, we conclude that "defendant understood the *Miranda* warnings and, with such understanding, freely chose to answer the questions asked by the police" (*People v Benton*, 158 AD2d 987, 987, *lv denied* 75 NY2d 963; *see People v Young*, 303 AD2d 952, 952).

We reject defendant's further contention that the statements were not sufficiently corroborated. "A person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed" (CPL 60.50). "[T]he policy behind the statute is satisfied by the production of some [evidence], of whatever weight, that a crime was committed by someone" (*People v Daniels*, 37 NY2d 624, 629; *see People v Booden*, 69 NY2d 185, 187-188). Viewing the evidence in the light most favorable to the People (*see People v Potter*, 262 AD2d 1074, 1074; *see generally People v Smith*, 55 NY2d 945, 947), we conclude that the 13-year-old victim's testimony that defendant had sexual intercourse with her was sufficient to meet the corroboration requirement.

Defendant contends that the verdict is against the weight of the evidence because, inter alia, the jury acquitted him of certain additional crimes involving the same victim. That contention is actually a challenge to the verdict as repugnant, but defendant failed to preserve that challenge for our review inasmuch as he did not object to the verdict on that ground before the jury was discharged (*see People v Alfaro*, 66 NY2d 985, 987). 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]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we otherwise reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant also failed to preserve for our review his contention that the court erred in permitting the People to recall the victim to testify following the testimony of another witness (*see People v Hare*, 27 AD3d 1171, 1172, *lv denied* 6 NY3d 894; *People v Cunningham*, 13 AD3d 1118, 1119-1120, *lv denied* 4 NY3d 829). In any event, we conclude

that the court did not abuse its discretion in permitting the People to recall the victim as a witness (*see People v Rostick*, 244 AD2d 768, 768-769, *lv denied* 91 NY2d 929).

Defendant failed to preserve for our review his further contention that the sentence imposed was a vindictive punishment for rejecting the plea offer and proceeding to trial (*see People v Hurley*, 75 NY2d 887, 888). In any event, that contention is without merit. Defendant primarily relies upon the fact that a longer sentence was imposed after trial, but "[i]t is well settled that [t]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial" (*People v Spencer*, 108 AD3d 1081, 1083 [internal quotation marks omitted]). Finally, the sentence is not unduly harsh or severe.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1092

KA 09-02632

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH T. HYSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered July 8, 2009. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [2] [b]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737). We reject defendant's further contention that his right to counsel was violated when County Court denied his request for a new attorney without making an inquiry into his reasons for the request. Defendant's request for a new attorney was wholly lacking in "specific factual allegations of 'serious complaints about counsel' " (*People v Porto*, 16 NY3d 93, 100). We note in any event that, at the next court date following defendant's request for a new attorney, which was to be a conditional examination of the elderly victim, defendant accepted a plea offer with sentencing consideration that was more favorable than the prior offer. Indeed, based on the court's statements at sentencing, it appears that the sentence was considerably more favorable than the sentence that the court would have imposed but for the sentencing parameters agreed to as part of the plea.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1094

KA 08-00845

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAHEEN M. GAYDEN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Elma A. Bellini, J.), rendered February 15, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same Memorandum as in *People v Gayden* ([appeal No. 2] ___ AD3d ___ [Nov. 15, 2013]).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1095

KA 11-01802

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAHEEN M. GAYDEN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER 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 (Vincent M. Dinolfo, J.), entered August 1, 2011. The order denied the motion of defendant to vacate the judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is granted, the judgment is vacated and a new trial is granted.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]). In appeal No. 2, defendant appeals from an order denying his motion seeking to vacate the judgment of conviction pursuant to CPL 440.10. Defendant contends with respect to each appeal that, in failing to disclose the status of an essential prosecution witness as a paid informant, the People violated their obligations under *Brady v Maryland* (373 US 83). We address that contention in the context of defendant's appeal from the order, as opposed to the appeal from the judgment, and we agree with defendant that it has merit. We therefore dismiss the appeal from the judgment in appeal No. 1 as academic, and we thus do not address the contentions raised in that appeal.

We note at the outset that the following quote from *People v Fuentes* (12 NY3d 259, 263, *rearg denied* 13 NY3d 766) is instructive: "[t]he Due Process Clauses of the Federal and State Constitutions both guarantee a criminal defendant the right to discover favorable evidence in the People's possession material to guilt or punishment . . . [, and i]mpeachment evidence falls within the ambit of a prosecutor's *Brady* obligation . . . To establish a *Brady* violation, a

defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material . . . In New York, where a defendant makes a specific request for a document, the materiality element is established provided there exists a 'reasonable possibility' that it would have changed the result of the proceedings" (*see People v Hayes*, 17 NY3d 46, 50, *cert denied* ___ US ___, 132 S Ct 844).

Here, there is no dispute that defendant satisfied the first element of the *Fuentes* test inasmuch as the People do not dispute that the prosecution witness at issue was a paid informant and do not contend that evidence of the status of that witness is not favorable to defendant. The People's contention that County Court erred in determining that defendant satisfied the second element of the *Fuentes* test is beyond the scope of our review under CPL 470.15 (1) (*see People v Concepcion*, 17 NY3d 192, 196). We note in any event that "[t]he mandate of *Brady* extends beyond any particular prosecutor's actual knowledge" (*People v Wright*, 86 NY2d 591, 598, citing *Giglio v United States*, 405 US 150), and " 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police' " (*id.*, quoting *Kyles v Whitley*, 514 US 419, 437; *see People v Santorelli*, 95 NY2d 412, 421).

We further conclude that the court should have granted defendant's CPL 440.10 motion insofar as it sought vacatur of the judgment of conviction on the basis of the *Brady* issue. Here, defendant made a specific request for *Brady* material including agreements between the People and their witnesses, disclosure of whether any information was provided by an informant, and the substance of that informant's information. We conclude that "there exists a 'reasonable possibility' that [such material] would have changed the result of the proceedings" (*Fuentes*, 12 NY3d at 263; *see People v Harris*, 35 AD3d 1197, 1197).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1108

CA 12-02397

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

DAVID PATANE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STEPHEN C. PERRY, LAURA PERRY, ALSO KNOWN AS LAURIE SCHOCKEN, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

BOND, SCHOENECK & KING, PLLC, OSWEGO (DOUGLAS M. MCRAE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

O'NEILL GROSSO, WILLIAMSVILLE (JAMES C. GROSSO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered October 9, 2012. The order granted the motion of defendants Stephen C. Perry and Laura Perry, also known as Laurie Schocken, for summary judgment dismissing the amended complaint against them.

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

Memorandum: Plaintiff commenced this action seeking damages for personal injuries he sustained when he fell down a flight of stairs in the common area of rental property owned by Stephen C. Perry and Laura Perry, also known as Laurie Schocken (defendants). We reject plaintiff's contention that he presented proof in admissible form sufficient to create an issue of fact in opposition to defendants' motion for summary judgment dismissing the amended complaint against them and that, as a result, Supreme Court erred in granting defendants' motion. Plaintiff was at the subject premises on the day of the accident because he was assisting two friends move the belongings of one of those friends out of a second-floor apartment. Prior to the accident, plaintiff had been up and down the stairs approximately a dozen times without incident, carrying boxes or furniture. At the time of the accident, plaintiff was in front of a large piece of furniture that his friends were moving down the stairs on a dolly, at which time he was stepping backward down the stairs and was not holding the handrail. At his deposition, plaintiff testified that he "slipped" and that he never examined the stairway following the accident to determine what caused him to slip, but he contends that the accident occurred because of dangerous and defective conditions in the stairway.

" 'Since it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation' " (*McGill v United Parcel Serv., Inc.*, 53 AD3d 1077, 1077; *see Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1769-1770, *affd* 16 NY3d 729; *Smart v Zambito*, 85 AD3d 1721, 1721-1722). Plaintiff's assertion that an issue of fact exists based on circumstantial evidence, which in turn is bolstered by his expert's affidavit, is without merit. "To warrant submission of a negligence case based upon circumstantial evidence to the jury, the evidence need not entirely exclude other causes but the proof must render those other causes sufficiently remote or technical to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Artessa v City of Utica*, 23 AD3d 1148, 1148 [internal quotation marks omitted]). Moreover, the expert affidavit of plaintiff's architect is insufficient to create an issue of fact because it is speculative and conclusory with respect to what supposedly caused plaintiff to fall (*see Costanzo v County of Chautauqua*, 108 AD3d 1133, 1133-1134).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1113

KA 13-00692

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW JOHNSON, DEFENDANT-APPELLANT.

SUSAN M. KARALUS, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered September 12, 2011. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [2] [b]). Defendant's valid waiver of the right to appeal encompasses his contention concerning the denial of his request for youthful offender status (*see People v Elshabazz*, 81 AD3d 1429, 1429, *lv denied* 16 NY3d 858). In any event, that contention is without merit. "[County] Court carefully considered the request to be considered a youthful offender and stated the reasons for its denial" (*People v Williams*, 37 AD3d 1193, 1194), and it cannot be said that the court abused its discretion in denying that request (*see id.*; *Elshabazz*, 81 AD3d at 1429; *People v Smith*, 286 AD2d 878, 878-879, *lv denied* 98 NY2d 641).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1117

OP 13-00735

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF TIMOTHY N. PETERS, PETITIONER,

V MEMORANDUM AND ORDER

HONORABLE DOUGLAS A. RANDALL, MONROE COUNTY COURT JUDGE, RESPONDENT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to review a determination of respondent. The determination revoked the pistol permit of petitioner.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, after a hearing, revoking his pistol permit. Contrary to the contention of petitioner, we conclude that the determination is neither arbitrary and capricious nor an abuse of discretion. It is well established that "[r]espondent is vested with broad discretion in determining whether to revoke a pistol permit and may do so for any good cause," including "a finding that the petitioner lack[s] the essential temperament or character which should be present in one entrusted with a dangerous instrument . . . , or that he or she does not possess the maturity, prudence, carefulness, good character, temperament, demeanor and judgment necessary to have a pistol permit" (*Matter of Schiavone v Punch*, 34 AD3d 1366, 1366 [internal quotation marks omitted]; *see* Penal Law § 400.00 [1], [11]; *Matter of Strom v Erie County Pistol Permit Dept.*, 6 AD3d 1110, 1111-1112). Here, petitioner's pistol permit was revoked after a domestic incident involving his wife at the time. Police reports from the incident date indicate that petitioner twice grabbed his wife by the arms and pushed her against the wall, warning her that "there was going to be trouble" if she called the police. The reports also indicate a prior history of domestic violence. Notably, petitioner did not dispute the above factual basis for the revocation of his pistol permit, but argued only that it was an "isolated

incident" (*see Matter of Demyan v Monroe*, 108 AD2d 1004, 1005). In light of the above facts, we conclude that there is a rational basis for the determination, and that respondent did not abuse his broad discretion or act in an arbitrary and capricious manner in revoking petitioner's pistol permit (*see Matter of Moreno v Cacace*, 61 AD3d 977, 978-979; *see also Matter of Cuda v Dwyer*, 107 AD3d 1409, 1410; *Matter of Dlugosz v Scarano*, 255 AD2d 747, 748, *appeal dismissed* 93 NY2d 847, *lv denied* 93 NY2d 809, *cert denied* 528 US 1079).

Finally, petitioner's further contention that the revocation of his pistol permit violates the Second Amendment of the United States Constitution is without merit (*see Cuda*, 107 AD3d at 1410; *Matter of Kelly v Klein*, 96 AD3d 846, 847-848).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1118

CAF 12-02128

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF RACHEL LAWSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RITCHEL LAWSON, RESPONDENT-APPELLANT.

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

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY DUGUAY OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Monroe County (Thomas W. Polito, R.), entered November 3, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner sole custody and primary physical residence of the parties' children.

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

Memorandum: In this custody proceeding pursuant to article 6 of the Family Court Act, respondent father appeals from an order modifying a prior custody order by, inter alia, awarding sole custody and primary physical residence of the parties' children to petitioner mother. We reject the father's contention that Family Court placed undue emphasis upon evidence of his private immoral conduct. The record establishes that the court did not consider the moral implications of the father's extramarital relationship. Instead, the court carefully considered that evidence only in evaluating the father's history of impulsiveness and his inability to put the needs of the children before his own (*see Matter of Adriano D. v Yolanda A.*, 94 AD3d 448, 449; *Matter of Galanos v Galanos*, 28 AD3d 554, 555, *lv denied* 7 NY3d 711; *Granata v Granata*, 289 AD2d 527, 528). Indeed, the court properly determined that evidence of the father's infidelity or sexual indiscretions was not relevant except in those contexts (*see Sitts v Sitts*, 74 AD3d 1722, 1723, *lv dismissed* 15 NY3d 833, *lv denied* 18 NY3d 801). Contrary to the father's further contention, there is a sound and substantial basis in the record to support the court's determination that it was in the children's best interests to award sole custody to the mother, and thus we will not disturb that determination (*see Matter of Tisdale v Anderson*, 100 AD3d 1517, 1517-

1518; *Capodiferro v Capodiferro*, 77 AD3d 1449, 1450). Finally, contrary to the father's contention, the court did not deny him visitation on the Thanksgiving and Christmas holidays. In addition to visitation during the children's February and April school vacations and the majority of their summer vacation, the court awarded the father "reasonable [visitation] time with the children whenever he travels to the children's residence during their periods of residence with the [mother]." Thus, the order provides the father with an opportunity for visitation on the holidays in question. In the event that the mother frustrates the father's exercise of such visitation, his remedy is to file a violation petition.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1123

CAF 12-02378

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF MONROE COUNTY DEPARTMENT
OF HUMAN SERVICES-CSEU, ON BEHALF OF WANDA G.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DERRELL M., RESPONDENT-RESPONDENT.

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (MARIE C. D'AMICO OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Monroe County (Gail A. Donofrio, J.), entered April 11, 2012 in a proceeding pursuant to Family Court Act article 5. The order denied the objections of petitioner to the order of the Support Magistrate.

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

Memorandum: In this proceeding pursuant to article 5 of the Family Court Act, petitioner appeals from an order denying its objections to the order of the Support Magistrate. We conclude that Family Court erred in determining that it lacked personal jurisdiction over respondent because the affidavit of service did not include the last name of the person of "suitable age and discretion" who was served with process (§ 525 [a]; *see Dunn v Pallett*, 42 AD3d 807, 808-809; *Matter of Commissioner of Social Servs. of City of N.Y. v Evans*, 170 AD2d 225, 227-228; *Plycon Transp. Group, LLC v Kirschenbaum*, 36 Misc 3d 1232[A], 2012 NY Slip Op 51576[U], *3-5; *see also* CPLR 308 [2]). We further conclude that in any event the court erred in sua sponte dismissing the petition for lack of personal jurisdiction (*see Buckeye Retirement Co., L.L.C., Ltd. v Lee*, 41 AD3d 183, 183-184). We therefore reverse the order and reinstate the petition, and we remit the matter to Family Court for further proceedings thereon.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1128

CA 13-00511

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ.

ANDREW PRESTIGIACOMO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JUNE N. AMES, ET AL., DEFENDANTS,
BARBARA SPRINGER, ET AL., DEFENDANTS-RESPONDENTS.

MOYER AND RUSSI, P.C., WEBSTER (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAVIDSON FINK LLP, ROCHESTER (CURTIS A. JOHNSON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered August 3, 2012. The order granted the motion of a group of defendants, who are identified as the "Canandaigua Lake Rights Defendants," to dismiss the complaint against them and denied the cross motion of plaintiff for summary judgment.

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

Memorandum: In this action to quiet title in connection with an easement, plaintiff appeals from an order that granted the motion of a group of defendants, who are identified as the "Canandaigua Lake Rights Defendants" (defendants), to dismiss the complaint against them and denied plaintiff's cross motion for summary judgment. Contrary to plaintiff's contention, we conclude that Supreme Court properly granted defendants' motion inasmuch as it was based on documentary evidence, i.e., a deed, conclusively establishing a defense to plaintiff's complaint as a matter of law (*see* CPLR 3211 [a] [1]; *Thirty One Dev., LLC v Cohen*, 104 AD3d 1195, 1196; *see generally Camperlino v Town of Manlius Mun. Corp.*, 78 AD3d 1674, 1676, *lv dismissed* 17 NY3d 734; *Blangiardo v Horstmann*, 32 AD3d 876, 879, *lv dismissed* 8 NY3d 939). In opposition, plaintiff failed to assert any ground to defeat defendants' motion. In particular, plaintiff failed to raise a question of fact that the language of the deed with respect to the easement contains conditions subsequent that resulted in reversion or forfeiture of the grant of the easement (*see Stratis v Doyle*, 176 AD2d 1096, 1098; *Koshian v Kirchner*, 139 AD2d 942, 943; *Fausett v Guisewhite*, 16 AD2d 82, 86-87). Plaintiff's cross motion for summary judgment seeking a ruling that the easement is, inter alia, "no longer legally valid" was premature (*see* CPLR 3212 [a]) and,

in any event, lacked merit.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1133

KA 11-01321

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILSON STEWART, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MARIA MALDONADO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered July 9, 2010. The judgment convicted defendant, after a nonjury trial, of assault in the first degree, assault in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of assault in the first degree (Penal Law § 120.10 [1]), assault in the second degree (§ 120.05 [2]), and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends, inter alia, that County Court erred in failing to rule on that part of his pretrial motion seeking inspection of the grand jury minutes to determine whether the grand jury proceedings were defective. We agree. "The record does not reflect that the court ever ruled on [that part of] defendant's motion, and a failure to rule on a motion cannot be deemed a denial thereof" (*People v Jones*, 103 AD3d 1215, 1217, *lv dismissed* 21 NY3d 944; *see generally People v Concepcion*, 17 NY3d 192, 197-198). We therefore hold the case, reserve decision and remit the matter to County Court to decide that part of defendant's motion.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1137

KA 12-02213

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH CANFIELD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 19, 2012. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [2]) and sexual abuse in the first degree (§ 130.65 [2]). We reject defendant's contention that Supreme Court erred in refusing to charge the jury with respect to the voluntariness of defendant's statements to the police. Such a charge is required only if defendant raises the issue of voluntariness at trial "by a proper objection, and evidence sufficient to raise a factual dispute [is] adduced either by direct [examination] or cross-examination" (*People v Cefaro*, 23 NY2d 283, 288-289; *see People v Medina*, 93 AD3d 459, 460, *lv denied* 19 NY3d 999). Inasmuch as defendant did not submit any evidence presenting a genuine issue of fact concerning the voluntariness of his statements, the court was not required to instruct the jury on that issue (*see People v Nathan*, 108 AD3d 1077, 1078; *People v White*, 27 AD3d 884, 886, *lv denied* 7 NY3d 764).

We reject defendant's further contention that, in response to a jury question, the court erred in providing an expanded definition of the term "unconscious" as used in Penal Law § 130.00 (7). When presented with a jury question, the court is obligated to provide a meaningful response pursuant to CPL 310.30 (*see People v Kadarko*, 14 NY3d 426, 429). The term "unconscious" is not defined in the statute, and we perceive no error in the court's use of a dictionary definition in responding to the jury's question (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 234). Defendant failed to preserve for our review

his contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). Furthermore, "[s]itting as the thirteenth juror . . . [and] weigh [ing] the evidence in light of the elements of the crime[s] as charged to the other jurors" (*People v Danielson*, 9 NY3d 342, 349), we conclude that, although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495). Also contrary to defendant's contention, he was not denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). In particular, with respect to defendant's allegation that defense counsel was ineffective based on his failure to move to suppress his statements to the police, we conclude that defendant failed to establish that such a motion, if made, would have been successful (*see People v Peterson*, 19 AD3d 1015, 1015, *lv denied* 6 NY3d 851). Finally, the sentence is not unduly harsh or severe.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1138

KA 13-00536

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES W. FRYSINGER, DEFENDANT-APPELLANT.

JAMES A. BAKER, ITHACA, FOR DEFENDANT-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JAMES P. MILLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered October 19, 2012. The judgment convicted defendant, upon his plea of guilty, of unlawfully dealing with a child in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea and the waiver of indictment are vacated, and the matter is remitted to Steuben County Court for further proceedings.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of unlawfully dealing with a child in the first degree (Penal Law § 260.20 [2]). We note at the outset that defendant's waiver of the right to appeal is invalid. Despite the existence of a written appeal waiver form signed by defendant and his attorney, no questions were asked of defendant about the appeal waiver and his understanding thereof. In addition, the appeal waiver was not mentioned until after defendant pleaded guilty. Thus, the record is "insufficient to establish that [County Court] 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767; *see People v Hamilton*, 49 AD3d 1163, 1164).

We agree with defendant that the court erred in denying his motion to vacate his guilty plea, which, inter alia, challenged the factual sufficiency of his plea allocution (*see People v Lopez*, 71 NY2d 662, 665). Defendant was expressly charged with the act of providing alcoholic beverages to persons under 21 years of age, but during the brief factual colloquy at the plea proceeding he never admitted that he provided alcohol. Here, defendant "preserve[d his] challenge to the factual sufficiency of [the] plea allocution . . . [by making] a motion to withdraw the plea under CPL 220.60 (3)" (*id.*),

and we conclude that the court erred in denying that motion.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1145

CA 12-01126

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

PAUL SIEMUCHA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT D. GARRISON AND CLARNELL HENDERSON,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (JOSHUA P. RUBIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from a judgment of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered April 17, 2012. The judgment awarded plaintiff money damages upon a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when his vehicle was rear-ended by a vehicle driven by defendant Robert D. Garrison and owned by defendant Clarnell Henderson. Following a jury trial, the jury found that plaintiff sustained a significant limitation of use of a body function or system and awarded plaintiff $50,000 for past pain and suffering and $20,000 for future pain and suffering for five years. Supreme Court denied defendants' motion to set aside the verdict, and defendants now appeal.

The court properly denied defendants' pretrial motion seeking summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Although we agree with defendants that they met their initial burden, we conclude that plaintiff's submissions were sufficient to raise a triable issue of fact on the permanent consequential limitation of use and significant limitation of use categories of serious injury (*see Vitez v Shelton*, 6 AD3d 1180, 1181-1182; *Hoffman v Stechenfinger*, 4 AD3d 778, 779), the two categories pursued by plaintiff at trial. Defendants failed to preserve for our review their contention that the affirmed report of the chiropractor was not in admissible form (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 351 n 3; *cf. Hartley v White*, 63 AD3d 1689, 1690; *Shinn v*

Catanzaro, 1 AD3d 195, 197-198). In any event, a plaintiff "may rely on unsworn reports and uncertified medical records if they were submitted by defendants . . . or were referenced in the reports of physicians who examined plaintiff on their behalf, and [defendants] submitted the reports of their experts" (*Feggins v Fagard*, 52 AD3d 1221, 1223; *see Brown v Achy*, 9 AD3d 30, 32). Here, defendants' expert reviewed and referenced numerous medical records of plaintiff in his report, including the chiropractic records.

Plaintiff raised a triable issue of fact to defeat defendants' motion by submitting objective proof of spasm in his cervical spine (*see Austin v Rent A Ctr., E., Inc.*, 90 AD3d 1542, 1544), and proof showing quantitative restrictions in the range of motion in his cervical and lumbar spine (*see Hedgecock v Pedro*, 93 AD3d 1250, 1252; *Howard v Robb*, 78 AD3d 1589, 1590; *see generally Toure*, 98 NY2d at 350-351). Finally, plaintiff submitted the opinions of two physicians who determined that plaintiff's cervical spine injury and the exacerbation of his lumbar spine injury were causally related to the accident.

We reject defendants' contention that the court erred in precluding them from raising plaintiff's prior drug addiction and substance abuse at trial. Although the drug addiction and substance abuse were relevant to plaintiff's credibility (*see Simon v Indursky*, 211 AD2d 404, 404; *see generally Badr v Hogan*, 75 NY2d 629, 634), it is well settled that the nature and extent of cross-examination rests firmly with the trial court (*see Badr*, 75 NY2d at 634; *Bodensteiner v Vannais*, 167 AD2d 954, 954; *see generally Salm v Moses*, 13 NY3d 816, 817). We perceive no abuse of discretion here inasmuch as, under the circumstances of this case, it would be more prejudicial than probative to allow such cross-examination. Defendants further contend that the evidence of plaintiff's drug use was relevant to the claim of loss of enjoyment of life and plaintiff's heart problems, but defendants' expert disclosure did not include those topics, and the court therefore properly precluded defendants from presenting such evidence at trial (*see generally Lidge v Niagara Falls Mem. Med. Ctr.* [appeal No. 2], 17 AD3d 1033, 1035). Likewise, the court did not abuse its discretion in precluding defendants' expert from testifying regarding his experience treating patients with pending litigation and a study concerning that subject matter inasmuch as those matters were not included in defendants' expert disclosure (*see generally id.*).

Defendants contend that the court erred in denying their request at the commencement of trial to admit all of plaintiff's medical records in evidence pursuant to CPLR 3122-a (c). According to defendants, the records were automatically admissible because plaintiff raised no objection within 10 days of trial (*see id.*). We reject that contention. Plaintiff's failure to object within 10 days before the trial waived any objection plaintiff had to the admissibility of the records as business records (*see* CPLR 3122-a [c]; 4518 [a]), but he did not waive any objection to their admissibility based on other rules of evidence (*see Afridi v Glen Oaks Vil. Owners, Inc.*, 49 AD3d 571, 572). Indeed, plaintiff properly objected at trial

on relevancy grounds with respect to the admissibility of some of the records (*see Montes v New York City Tr. Auth.*, 46 AD3d 121, 124; *Bostic v State of New York*, 232 AD2d 837, 839, *lv denied* 89 NY2d 807).

We further conclude that the court did not abuse its broad discretion in subsequently ruling on the admissibility of certain medical records when defendants again sought to admit such records in evidence during cross-examination of plaintiff's witnesses and during their direct case (*see Gerbino v Tinseltown USA*, 13 AD3d 1068, 1070). The court properly refused to admit the records concerning plaintiff's cardiac issues inasmuch as they were not mentioned in defendants' expert disclosure (*see Lidge*, 17 AD3d at 1035). The records concerning plaintiff's knee injuries were not relevant inasmuch as plaintiff testified that he was not claiming an injury to his knee as a result of the motor vehicle accident. The records from plaintiff's former employer were relevant to the issue of plaintiff's credibility, but the court did not abuse its discretion in refusing to admit such records on that collateral issue (*see Coopersmith v Gold*, 89 NY2d 957, 959-960, *rearg denied* 89 NY2d 1086, *rearg dismissed* 90 NY2d 889; *Restey v Higgins*, 252 AD2d 954, 956). Plaintiff did not object to the admission of the portions of the records from the Niagara Falls Memorial Medical Center that defendants sought to admit, and defendants failed to preserve for our review their contention on appeal that other portions of those records should have been admitted. Contrary to defendants' further contention, having successfully moved to admit certain of plaintiff's medical records in evidence, they waived their subsequent hearsay objections to plaintiff's use of those records (*see Lahren v Boehmer Transp. Corp.*, 49 AD3d 1186, 1187; *see also Matter of MacDonald*, 40 NY2d 995, 996, *rearg dismissed* 42 NY2d 1102; *Matter of Kellogg v Kellogg*, 300 AD2d 996, 996-997).

Defendants next contend that the court erred in refusing to allow them to use a police report from an earlier motor vehicle accident in cross-examining plaintiff. Defendants contend that the court should have allowed them to impeach plaintiff with his admission therein, i.e., his complaint of neck pain after that accident. Facts stated in a police report that are hearsay are not admissible unless they constitute an exception to the hearsay rule, such as an admission (*see Huff v Rodriguez*, 45 AD3d 1430, 1432; *Stevens v Kirby*, 86 AD2d 391, 395). Here, however, inasmuch as "the source of the information was never identified," the statement was not admissible as an admission (*Huff*, 45 AD3d at 1432). In any event, any error by the court with respect to the police report does not require reversal "because any such 'error did not adversely affect a substantial right of the [defendants]' " (*Cor Can. Rd. Co., LLC v Dunn & Sgromo Engrs., PLLC*, 34 AD3d 1364, 1365).

The court properly denied defendants' posttrial motion seeking to set aside the verdict as against the weight of the evidence. "A motion to set aside a jury verdict as against the weight of the evidence . . . should not be granted 'unless the preponderance of the evidence in favor of the moving party is so great that the verdict could not have been reached upon any fair interpretation of the

evidence' . . . That determination is addressed to the sound discretion of the trial court, but if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury" (*Ruddock v Happell*, 307 AD2d 719, 720; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746). Based on the testimony of plaintiff and the medical experts, the jury's verdict finding that plaintiff sustained a significant limitation of use of a body function or system "is one that reasonable persons could have rendered after receiving conflicting evidence" (*Ruddock*, 307 AD2d at 720). Finally, the award for pain and suffering does not deviate materially from what would be reasonable compensation (*see* CPLR 5501 [c]).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1146

CA 12-01544

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

PAUL SIEMUCHA, PLAINTIFF-RESPONDENT,

V ORDER

ROBERT D. GARRISON AND CLARNELL HENDERSON,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (JOSHUA P. RUBIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered June 6, 2012. The order denied the motion of defendants 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; *see also* CPLR 5501 [a] [1]).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1148

CA 13-00572

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF GERALD STROBEL, FAITH STROBEL, JAMES COLLINS, PATRICIA COLLINS, FREDERICK MINTER AND BARBARA MINTER, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, TOWN OF CLARENCE, ERIE COUNTY DEPARTMENT OF HEALTH, JAMES BUONO AND KELLI BUONO, RESPONDENTS-RESPONDENTS.

BLAIR & ROACH, LLP, TONAWANDA (DAVID L. ROACH OF COUNSEL), FOR PETITIONERS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, BUFFALO (TIMOTHY HOFFMAN OF COUNSEL), FOR RESPONDENT-RESPONDENT NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, HOLLAND (RONALD P. BENNETT OF COUNSEL), FOR RESPONDENT-RESPONDENT TOWN OF CLARENCE.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (KENNETH R. KIRBY OF COUNSEL), FOR RESPONDENT-RESPONDENT ERIE COUNTY DEPARTMENT OF HEALTH.

MYERS, QUINN & SCHWARTZ, LLP, WILLIAMSVILLE (JAMES I. MYERS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS JAMES BUONO AND KELLI BUONO.

Appeal from a judgment of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered June 1, 2012 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding alleging, inter alia, that respondents acted in an arbitrary and capricious manner in issuing a permit for and undertaking the construction of a spillway at a freshwater pond in the Town of Clarence (respondent). Inasmuch as respondent moved to dismiss the petition pursuant to CPLR 3211 (a) (1), and a special proceeding may be summarily determined "upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised" (CPLR 409 [b]; *see* CPLR 7804 [a]; *Matter of Barreca v DeSantis*, 226 AD2d 1085, 1086), we reject petitioners' contention that Supreme

Court's consideration was limited to the issue whether the petition contained a cognizable legal theory (*see* CPLR 7804 [f]; *Matter of Conners v Town of Colonie*, 108 AD3d 837, 839). We further conclude that the court properly determined that none of petitioners' causes of action has merit (*see generally Held v Kaufman*, 91 NY2d 425, 430-431).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1160

CAF 12-01822

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF ROSS BREWER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DAWN M. SOLES, RESPONDENT-APPELLANT.

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

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

CHRISTINE M. VALKENBURGH, ATTORNEY FOR THE CHILD, BATH.

Appeal from an order of the Family Court, Steuben County (Timothy K. Mattison, J.H.O.), entered September 17, 2012. The order, inter alia, transferred primary physical placement of the subject child from respondent to petitioner.

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

Memorandum: Respondent mother appeals from an order entered after an evidentiary hearing that, inter alia, transferred primary physical placement of the subject child from the mother to petitioner father. The mother contends that Family Court erred in finding that the father made the requisite showing of a change in circumstances to warrant an inquiry into the best interests of the child. According to the father, however, he was not required to make that showing inasmuch as the prior custody order, entered upon consent of the parties in 2009, provided that all of its provisions "are without prejudice to either party and that all parties may seek modification." Assuming, without deciding, that the father was required to establish a change in circumstances notwithstanding the above-referenced language of the prior custody order (*cf. generally Matter of Murphy v Wells*, 103 AD3d 1092, 1092-1093, *lv denied* 21 NY3d 854; *Matter of Apostolos v Fairservice*, 23 AD3d 720, 722; *Matter of Schattinger v Schattinger*, 256 AD2d 1209, 1210, *appeal dismissed* 93 NY2d 919), we conclude that the court properly determined that he met that burden, thus warranting an inquiry into whether the child's best interests would be served by modifying the existing custody arrangement (*see Matter of Cole v Nofri*, 107 AD3d 1510, 1511-1512; *Matter of O'Connell v O'Connell*, 105 AD3d 1367, 1367).

Since entry of the prior custody order, the child has had to repeat kindergarten and has struggled academically in the first and second grades. According to the child's second grade teacher, the child frequently falls asleep in the classroom and, despite being a year older than most second graders, is not on "grade level" and ranks "towards the bottom" of the class. The teacher further testified that the child appears sullen, sad and withdrawn. Also since entry of the prior custody order, the child has been referred for mental health treatment due to behavior exhibited both at school and at home. Although it is true, as the mother points out, that the child suffered from fatigue and struggled at school when the prior custody order was entered, we conclude that the court properly determined that the child's "downward slide" constituted a change of circumstances sufficient to warrant an inquiry into the child's best interests.

We further conclude that, contrary to the mother's contention, there is a sound and substantial basis in the record to support the court's determination that it was in the child's best interests to award primary physical placement to the father (*see Matter of Marino v Marino*, 90 AD3d 1694, 1695-1696; *see also Matter of Tarant v Ostrowski*, 96 AD3d 1580, 1582, *lv denied* 20 NY3d 855). The child has performed poorly at school for four years while living primarily with the mother. The child's teacher and school counselor testified that the child reported that he stayed up late watching television, which they attributed as a cause of the child's fatigue. Indeed, the teacher testified that the child sometimes fell asleep in class or was required to go to the school nurse's office to nap. Although the mother had removed the television from the child's room at the suggestion of the counselor, the child reported to the counselor that the television was again in his room. We note that the mother is unemployed and must rely on others for transportation. The father, in contrast, is gainfully employed and is able to provide a more stable home for the child. According to the child's teacher, the child was more alert and less sullen following weekend visitation with the father. We further note that the Attorney for the Child supported the father's modification petition and now contends that the order should be affirmed. Under the circumstances, and considering that "a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight" (*Marino*, 90 AD3d at 1695), we perceive no basis upon which to set aside the court's award of primary physical placement of the child to the father.

Finally, the mother is not aggrieved by the court's implicit denial of two violation petitions filed by the father and thus may not raise contentions on appeal with respect thereto (*see Johnson v Johnson*, 68 AD3d 1685, 1686; *see generally* CPLR 5511; *K.J.D.E. Corp. v Hartford Fire Ins. Co.*, 89 AD3d 1531, 1532).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1162

CAF 12-01705

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF MELISA PECORE,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

BRODY BLODGETT, RESPONDENT-PETITIONER-APPELLANT.

DAVIS LAW OFFICE PLLC, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR RESPONDENT-PETITIONER-APPELLANT.

LESLEY C. GERMANOW, FULTON, FOR PETITIONER-RESPONDENT-RESPONDENT.

TIMOTHY J. KIRWAN, ATTORNEY FOR THE CHILD, OSWEGO.

Appeal from an order of the Family Court, Oswego County (Donald E. Todd, A.J.), entered August 17, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner-respondent sole legal and physical custody of the parties' child.

It is hereby ORDERED that the order so appealed from is unanimously vacated on the law without costs, the cross petition of respondent-petitioner is granted in part by awarding him primary physical custody of the child, and the matter is remitted to Family Court, Oswego County, to fashion a visitation schedule for petitioner.

Memorandum: Petitioner-respondent mother commenced this proceeding seeking to modify a prior order entered upon stipulation of the parties, pursuant to which the parties had joint legal custody of their child, with primary physical custody with the mother. The mother sought an award of sole legal custody and respondent-petitioner father cross-petitioned for sole legal and primary physical custody of the child. The father appeals from an order that, inter alia, granted the mother's petition.

Although an "existing [custody] arrangement that is based upon a stipulation between the parties is entitled to less weight than a disposition after a plenary trial" (*Matter of Alexandra H. v Raymond B.H.*, 37 AD3d 1125, 1126 [internal quotation marks omitted]), "[Family Court] cannot modify [such an] order unless a sufficient change in circumstances—since the time of the stipulation—has been established, and then only where a modification would be in the best interests of the child[]" (*Matter of Hight v Hight*, 19 AD3d 1159, 1160; *see Matter of York v Zullich*, 89 AD3d 1447, 1448). As a general rule, the

custody determination of the trial court is entitled to great deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174), but "[s]uch deference is not warranted . . . where the custody determination lacks a sound and substantial basis in the record" (*Fox v Fox*, 177 AD2d 209, 211-212). Moreover, "[o]ur authority in determinations of custody is as broad as that of Family Court" (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1450; *see Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947).

We agree with the father that the incidents of domestic violence in the mother's household constitute a sufficient change in circumstances warranting modification of the prior custody order (*see Matter of Jeremy J.A. v Carley A.*, 48 AD3d 1035, 1036). Furthermore, we conclude that modification is warranted because the parties' prior "parenting time" arrangement, pursuant to which the father had scheduled visitation, will "no longer [be] practical upon the child's attainment of school age" (*York*, 89 AD3d at 1448; *see Matter of Claflin v Giamporcaro*, 75 AD3d 778, 779-780, *lv denied* 15 NY3d 710).

We also agree with the father, upon our review of the relevant factors (*see Fox*, 177 AD2d at 210), that it is in the child's best interests to award him primary physical custody of the child. Although the mother has been the primary residential parent since the child's birth, we conclude that the violent and abusive behavior of the child's uncle in the mother's home has created a dangerous environment for the child (*see Matter of Brothers v Chapman*, 83 AD3d 1598, 1599, *lv denied* 17 NY3d 707). We therefore vacate the order, grant that part of the father's cross petition seeking primary physical custody of the child, and we remit the matter to Family Court to fashion an appropriate visitation schedule for the mother.

The mother failed to take an appeal from the order settling the record, and her contentions with respect to that order therefore are not properly before us (*see Matter of Haley M.T.*, 96 AD3d 1549, 1550; *see generally Hecht v City of New York*, 60 NY2d 57, 60-61).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1166

CA 13-00473

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF THE FORECLOSURE OF TAX LIENS BY PROCEEDING IN REM PURSUANT TO ARTICLE 11, TITLE 3, OF THE REAL PROPERTY TAX LAW BY COUNTY OF CHAUTAUQUA, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MERLE J. ELDERKIN, RESPONDENT-APPELLANT.

THE WESTMAN LAW FIRM, JAMESTOWN (JAMES E. WESTMAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

STEPHEN M. ABDELLA, COUNTY ATTORNEY, MAYVILLE (KURT D. GUSTAFSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Chautauqua County Court (Stephen W. Cass, A.J.), entered May 30, 2012 in a proceeding pursuant to RPTL article 11. The order confirmed the report of the Referee, dated January 12, 2012.

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

Memorandum: In 2008, petitioner commenced an in rem proceeding to foreclose tax liens against, inter alia, 23 parcels purportedly owned by respondent (*see* RPTL 1120). Respondent filed an answer alleging deficiencies in the foreclosure proceeding, and County Court granted petitioner's request to sever those parcels from the proceeding in order to address the merits of respondent's allegations. Petitioner thereafter moved for summary judgment in the severed proceeding with respect to respondent's parcels and, before the motion was heard, respondent commenced a bankruptcy proceeding. The Bankruptcy Court granted petitioner's motion seeking to modify the automatic stay resulting from the bankruptcy proceeding and ordered that the foreclosure proceeding could "proceed to the extent of considering the merits of [petitioner's] pending motion for summary judgment in the [foreclosure proceeding], and determining the amount of the delinquent property tax liabilities as they pertain to the [p]roperties." Petitioner thereafter withdrew its motion for summary judgment and, upon the consent of the parties, the matter was referred to a referee, who conducted a hearing (*see* RPTL 1130 [2]). The Referee concluded that respondent is the owner of the parcels, that certain amounts paid by respondent were properly credited to respondent's tax liability, and that petitioner's witnesses had

established the amount of tax liability that had accrued on respondent's parcels through January 2011. Respondent moved pursuant to CPLR 4403 for an order rejecting the Referee's report. The court instead granted petitioner's request to confirm the report with respect to the total amount of respondent's tax liability, and respondent now appeals.

Although we affirm the order confirming the Referee's report, our reasoning differs from that of the court. The automatic stay was modified to permit petitioner to proceed with its motion for summary judgment, which sought title to respondent's parcels (*see* RPTL 1136 [2] [a]; [3]; *see generally Anderson v Pease*, 284 AD2d 871, 872-873). Because respondent contested, inter alia, whether taxes were paid, we conclude that the court properly ordered a hearing. We further conclude that the Referee properly rejected respondent's assertions that petitioner failed to prove that respondent was the owner of the parcels and that petitioner failed to establish that credits had been applied to reduce respondent's total tax liability. Moreover, inasmuch as petitioner may be obligated to accept partial payments of taxes for properties affected by the bankruptcy proceeding (*see* RPTL 1140 [3]), or may be required to cancel tax liens (*see* RPTL 1140 [4]), the Referee properly considered the total amount of respondent's tax liability, and not only that portion that had accrued prior to the commencement of the in rem proceeding.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1167

CA 13-00342

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND VALENTINO, JJ.

ERICA DANIELS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FRANCES A. RUMSEY, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

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

THE HIGGINS KANE LAW GROUP, P.C., BUFFALO (TERRENCE P. HIGGINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered May 15, 2012. The order, inter alia, denied that part of the motion of defendant Frances A. Rumsey to compel a physical examination of plaintiff by an orthopedic specialist.

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

Same Memorandum as in *Daniels v Rumsey* ([appeal No. 2] ___ AD3d ___ [Nov. 15, 2013]).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1168

CA 13-00343

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND VALENTINO, JJ.

ERICA DANIELS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FRANCES A. RUMSEY, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

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

THE HIGGINS KANE LAW GROUP, P.C., BUFFALO (TERRENCE P. HIGGINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered July 9, 2012. The order, inter alia, granted plaintiff leave to reargue the motion of defendants and, upon reargument, adhered to that part of a prior decision denying the motion of defendant Frances A. Rumsey insofar as it sought to compel a physical examination of plaintiff by an orthopedic specialist.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed in the exercise of discretion without costs and the motion of defendant Frances A. Rumsey is granted in accordance with the following Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the motor vehicle in which she was a passenger collided with a vehicle owned and operated by defendant Frances A. Rumsey. The vehicle in which plaintiff was a passenger was owned and operated at the time of the accident by defendant BuWayna Daniels (Daniels). The accident occurred when Rumsey attempted to turn left into the parking lot of a restaurant on Delaware Avenue in Buffalo in front of Daniels's oncoming vehicle.

In appeal No. 1, Rumsey appeals from an order that, inter alia, denied that part of her motion to compel a physical examination of plaintiff by an orthopedic specialist, but granted that part of her motion seeking to strike the note of issue. In appeal No. 2, Rumsey appeals from an order in which Supreme Court granted leave to reargue and, inter alia, adhered to its ruling with respect to the physical examination of plaintiff by an orthopedic specialist, but reinstated the note of issue. In appeal No. 3, Rumsey, as limited by her brief, appeals from an order granting Daniels's motion for summary judgment dismissing the complaint and cross claims against her.

We note at the outset that we dismiss the appeal from the order in appeal No. 1 inasmuch as that order was superseded by the order in appeal No. 2 (*see generally Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985). With respect to appeal No. 2, we have repeatedly recognized that "[a] trial court has broad discretion in supervising the discovery process, and its determinations will not be disturbed absent an abuse of that discretion" (*Finnegan v Peter, Sr. & Mary L. Liberatore Family Ltd. Partnership*, 90 AD3d 1676, 1677; *see Carpenter v Browning-Ferris Indus.*, 307 AD2d 713, 715). We have also repeatedly noted, however, "that, where discretionary determinations concerning discovery and CPLR article 31 are at issue, [we] '[are] vested with the same power and discretion as [Supreme Court, and thus we] may also substitute [our] own discretion *even in the absence of abuse*' " (*Radder v CSX Transp., Inc.*, 68 AD3d 1743, 1745, quoting *Brady v Ottaway Newspapers*, 63 NY2d 1031, 1032; *see Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745; *Phoenix Mut. Life Ins. Co. v Conway*, 11 NY2d 367, 370). Here, Rumsey contends that the court erred in denying her motion insofar as it sought an order compelling plaintiff to attend further physical examinations as warranted by her allegations. In particular, Rumsey sought to have plaintiff physically examined by an orthopedic specialist. Although plaintiff previously had submitted to a physical examination by a neurologist pursuant to CPLR 3121 (a), under the circumstances we conclude that the court erred in denying Rumsey's motion insofar as it sought a further physical examination of plaintiff by an orthopedic specialist. The record establishes that the neurologist examined plaintiff only two weeks before she underwent spinal surgery, that Rumsey learned of that surgery after the fact, and that plaintiff served a supplemental bill of particulars advising of the possibility of surgery approximately two weeks before the physical examination was performed, and approximately two months after the original date for which that examination was noticed. Moreover, we note that the physical examination was adjourned at plaintiff's behest. Given those circumstances, we conclude that Rumsey met her burden of demonstrating the necessity for one further physical examination of plaintiff, by an orthopedic specialist (*see Carrington v Truck-Rite Dist. Sys. Corp.*, 103 AD3d 606, 607; *Tucker v Bay Shore Stor. Warehouse, Inc.*, 69 AD3d 609, 610). We therefore substitute our discretion for that of the court and grant Rumsey's motion to that extent (*see Young v Kalow*, 214 AD2d 559, 559-560; *see also Dominguez v Manhattan & Bronx Surface Tr. Operating Auth.*, 168 AD2d 376, 376; *see generally Radder*, 68 AD3d at 1745; *Gitto v Scamoni*, 62 AD3d 1232, 1233).

With respect to appeal No. 3, we conclude that the court properly granted Daniels's motion for summary judgment dismissing the complaint and cross claims against her. Pursuant to Vehicle and Traffic Law § 1141, "[t]he driver of a vehicle intending to turn to the left . . . into . . . [a] private road[] or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." To meet her initial burden on her motion, Daniels was required "to establish both that [Rumsey's] vehicle suddenly entered the lane where [Daniels] was operating [her vehicle] in a lawful and prudent manner and that there was nothing [Daniels] could have done to avoid the

collision" (*Ithier v Harnden*, 13 AD3d 1204, 1205 [internal quotation marks omitted]; *see Miller v Richardson*, 48 AD3d 1298, 1300, *lv denied* 11 NY3d 710; *Pomietlasz v Smith*, 31 AD3d 1173, 1174). Daniels met that burden by submitting evidence that the accident occurred after Rumsey turned her vehicle left into Daniels's path of travel in the southbound curb lane of Delaware Avenue, that Daniels had the right-of-way, and that Daniels was proceeding at a speed of between 30 and 35 miles per hour at the time of the accident, i.e., no more than five miles per hour above the posted speed limit. Daniels also established that she did not see Rumsey's vehicle until its grill was in her lane of travel, and that she had only "[f]ractions of a second" to take evasive measures, which proved unsuccessful. Contrary to Rumsey's contention, the fact that Daniels may have been driving at a speed in excess of five miles per hour over the posted speed limit of 30 miles per hour is inconsequential inasmuch as there is no indication that she could have avoided the accident even if she had been traveling at a speed at or below the posted speed limit (*see Galvin v Zacholl*, 302 AD2d 965, 966, *lv denied* 100 NY2d 512; *see also Stinehour v Kortright*, 157 AD2d 899, 900). In opposition to Daniels's motion, Rumsey failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1169

CA 13-00344

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND VALENTINO, JJ.

ERICA DANIELS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FRANCES A. RUMSEY, DEFENDANT-APPELLANT,
AND BUWAYNA DANIELS, DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

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

THE HIGGINS KANE LAW GROUP, P.C., BUFFALO (TERRENCE P. HIGGINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

COHEN & LOMBARDO, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered August 22, 2012. The order, inter alia, granted the motion of defendant BuWayna Daniels for summary judgment dismissing the complaint and cross claims against her.

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

Same Memorandum as in *Daniels v Rumsey* ([appeal No. 2] ___ AD3d ___ [Nov. 15, 2013]).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1173

TP 13-00534

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

IN THE MATTER OF EDDIE ORTIZ, PETITIONER,

V MEMORANDUM AND ORDER

CHARLES KELLY, JR., SUPERINTENDENT, MARCY CORRECTIONAL FACILITY AND BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS.

EDDIE ORTIZ, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order and judgment of the Supreme Court, Oneida County [Bernadette T. Clark, J.], entered February 7, 2013) to review a determination finding after a tier II hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that said appeal insofar as it concerns the declaratory judgment action is unanimously dismissed, the determination is confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this hybrid CPLR article 78 proceeding and declaratory judgment action, seeking to challenge the determination, following a tier II disciplinary hearing, that he violated inmate rule 106.10 (*see* 7 NYCRR 270.2 [B] [7] [i] [refusal to obey orders]). Supreme Court sua sponte dismissed the declaratory judgment causes of action in the complaint and transferred the CPLR article 78 proceeding to this Court pursuant to CPLR 7804 (g), to review a question of substantial evidence.

We note at the outset that the appeal must be dismissed insofar as it concerns the court's sua sponte dismissal of the declaratory judgment causes of action (*see Mohler v Nardone*, 53 AD3d 600, 600). No appeal lies as of right "from an ex parte order, including an order entered sua sponte" (*Sholes v Meagher*, 100 NY2d 333, 335; *see Obot v Medaille Coll.*, 82 AD3d 1629, 1630, *appeal dismissed* 17 NY3d 756), and permission to appeal has not been granted (*see* CPLR 5701 [c]).

Contrary to petitioner's contention with respect to the CPLR article 78 proceeding, the determination is supported by substantial evidence. We reject petitioner's contention that the Hearing Officer erred in refusing to permit him to present evidence concerning his allegedly valid excuse for failing to obey the correction officer's order. The reason for the order is "irrelevant to the issue of his guilt or innocence" (*Matter of Washington v Napoli*, 73 AD3d 1300, 1300). Indeed, " '[t]he risks inescapably attendant on the refusal of an inmate to carry out even an illegal order of a correction officer are such as to require compliance at the time' " the order is given (*Matter of Roman v Coughlin*, 202 AD2d 1000, 1001, quoting *Matter of Rivera v Smith*, 63 NY2d 501, 515; *see Matter of Hogan v Fischer*, 90 AD3d 1544, 1545, *lv denied* 19 NY3d 801).

We have considered petitioner's remaining contentions with respect to the CPLR article 78 proceeding, and we conclude that they are without merit.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1174

KA 12-01253

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LARRY M. PETERSON, DEFENDANT-APPELLANT.

CARR SAGLIMBEN LLP, OLEAN (JAY D. CARR OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (JOHN C. LUZIER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (M. William Boller, A.J.), rendered May 14, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]). We agree with defendant that the waiver of the right to appeal does not encompass his challenge to the severity of the sentence because "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal" with respect to his conviction that he was also waiving his right to appeal any issue concerning the severity of the sentence (*People v Pimentel*, 108 AD3d 861, 862; *see People v Maracle*, 19 NY3d 925, 928). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1175

KA 12-01266

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAJENEE J., DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 8, 2012. The adjudication revoked defendant's probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the adjudication so appealed from is unanimously modified on the law by directing that all of the sentences shall run concurrently with respect to each other and as modified the adjudication is affirmed.

Memorandum: Defendant was adjudicated a youthful offender on January 6, 2012 and was sentenced to, inter alia, concurrent terms of five years of probation with respect to the three crimes of which he was convicted. Defendant subsequently admitted that he had violated the conditions of his probation, and he now appeals from an adjudication that revoked his probation and sentenced him to three terms of incarceration of 1⅓ to 4 years, two of which were ordered to run consecutively to each other. Defendant's sentence thus aggregates to a term of incarceration of 2⅔ to 8 years, and we agree with defendant that the sentence is illegal. "[H]aving adjudicated defendant a youthful offender, [Supreme C]ourt was without authority to impose consecutive sentences in excess of four years" (*People v Jorge N.T.*, 70 AD3d 1456, 1458, *lv denied* 14 NY3d 889 [internal quotation marks omitted]; *see People v Cory T.*, 59 AD3d 1063, 1064). We therefore modify the adjudication by directing that all of the sentences shall run concurrently with respect to each other (*see People v Christopher T.*, 48 AD3d 1131, 1131-1132). The sentence as modified is not unduly harsh or severe.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1176

KA 11-01120

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY GRIFFIN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered September 15, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts), robbery in the first degree, robbery in the second degree (three counts), assault in the second degree, criminal possession of a weapon in the third degree, intimidating a victim or witness in the second degree (two counts), endangering the welfare of a child, conspiracy in the fourth degree, criminal solicitation in the fourth degree, criminal possession of a controlled substance in the second degree, criminal possession of a controlled substance in the third degree, menacing in the third degree, criminal contempt in the second degree (two counts) and making a punishable false written statement.

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 reversing those parts convicting defendant of criminal possession of a weapon in the third degree and intimidating a victim or witness in the second degree and dismissing counts 8 through 10 of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts each of burglary in the first degree (Penal Law § 140.30 [2], [3]), intimidating a victim or witness in the second degree (§ 215.16 [1], [2]) and criminal contempt in the second degree (§ 215.50 [3]), three counts of robbery in the second degree (§ 160.10 [1], [2] [a]; [3]), and one count each of robbery in the first degree (§ 160.15 [3]), assault in the second degree (§ 120.05 [6]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We reject defendant’s contention that County Court erred in denying his motion to sever the counts of the indictment relating to the order of protection and drug possession

from the robbery and burglary counts. Where counts of an indictment are properly joined because "either proof of the first offense would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first" (CPL 200.20 [2] [b]), the trial court has no discretion to sever counts pursuant to CPL 200.20 (3) (*see People v Bongarzone*, 69 NY2d 892, 895; *People v Lane*, 56 NY2d 1, 7). Here, the counts were properly joined pursuant to CPL 200.20 (2) (b), and thus the court "lacked statutory authority to grant defendant's [severance] motion" (*People v Murphy*, 28 AD3d 1096, 1097, *lv denied* 7 NY3d 760). Defendant "did not seek to reopen the [*Huntley*] hearing based on the trial testimony or move for a mistrial" (*People v Kendrick*, 256 AD2d 420, 420, *lv denied* 93 NY2d 900), and he thus failed to preserve for our review his further contention that the court erred in refusing to suppress his statement to the police based on that trial testimony. We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's contention, the testimony of the victim concerning the uncharged crimes of rape and sexual assault was admissible "as background material that completed the narrative of the episode," and the court properly instructed the jury that the testimony was admitted for that limited purpose (*People v Strong*, 234 AD2d 990, 990, *lv denied* 89 NY2d 1016; *see also People v Robinson*, 283 AD2d 989, 991, *lv denied* 96 NY2d 906).

We agree with defendant, however, that the conviction of criminal possession of a weapon in the third degree and intimidating a victim or witness in the second degree is not supported by legally sufficient evidence. Although defendant failed to preserve his contention with respect to those crimes for our review (*see People v Devane*, 78 AD3d 1586, 1586-1587, *lv denied* 16 NY3d 858), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we modify the judgment accordingly. With respect to criminal possession of a weapon, the evidence is legally insufficient to establish either that defendant knew that his coconspirator possessed a knife or that he intended to use it unlawfully against another (*see* Penal Law §§ 265.01 [2]; 265.02 [1]; *People v Smith*, 87 AD3d 1169, 1170). With respect to intimidating a victim or witness, the evidence likewise is legally insufficient to establish that defendant shared his coconspirator's intent to cause physical injury to the victim during the burglary and robbery (*see* § 215.16 [1], [2]; *cf. People v Boler*, 4 AD3d 768, 769, *lv denied* 2 NY3d 761). Although defendant preserved for our review his legal insufficiency contention with respect to the remaining crimes, we conclude that it lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the remaining crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant's challenge to the severity of the sentence lacks merit. Although defendant is correct that the aggregate maximum term exceeds the 50-year statutory limitation (*see* Penal Law former § 70.30 [1] [e] [vi]), the Department of Corrections and Community Supervision will "calculate the aggregate maximum length of imprisonment consistent with the applicable [statutory] limitation" and reduce the maximum term accordingly (*People v Moore*, 61 NY2d 575, 578; *see People v Jurgensen*, 288 AD2d 937, 938, *lv denied* 97 NY2d 684). We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1177

KA 12-00727

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL A. COLLEN, ALSO KNOWN AS ALLEN COLLEN,
DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (JOHN E. TYO OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (HEATHER PARKER HINES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered October 26, 2011. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the second degree (Penal Law § 120.05 [12]). Although we agree with defendant that it was improper for the prosecutor to elicit testimony regarding whether defendant agreed to give the police a written statement concerning the incident (*see People v De George*, 73 NY2d 614, 619), we conclude that County Court gave prompt curative instructions sufficient to cure any prejudice to defendant (*see generally People v Foster*, 101 AD3d 1668, 1670, *lv denied* 15 NY3d 750).

Contrary to the further contention of defendant, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The victim and other witnesses testified that defendant punched the victim without provocation, and defendant is the only person to have testified to the contrary. In resolving issues of witness credibility, we give great deference to the jury's opportunity to view the witnesses, hear the testimony and observe demeanor, and it cannot be said that the jury here failed to give the evidence the weight it should be accorded (*see People v Mohamed*, 94 AD3d 1462, 1464, *lv denied* 19 NY3d 999, *reconsideration denied* 20 NY3d 934).

Finally, we reject defendant's challenge to the severity of the sentence.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1178

KA 12-00894

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYLER L., DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CHARLES J. GREENBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from an adjudication of the Ontario County Court (Frederick G. Reed, A.J.), rendered April 25, 2012. Defendant was adjudicated a youthful offender upon his plea of guilty to robbery in the second degree (four counts).

It is hereby ORDERED that the adjudication so appealed from is unanimously modified on the law by vacating those parts that replaced the conviction on counts two and seven of the indictment and dismissing those counts of the indictment, and as modified the adjudication is affirmed.

Memorandum: Defendant appeals from a youthful offender adjudication based upon his plea of guilty of four counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [a]). Defendant contends, and the People correctly concede, that County Court was not authorized to accept the plea of guilty with respect to counts two and seven of the indictment, charging him with robbery in the second degree under section 160.10 (1). As a juvenile offender who was 15 years old at the time of the crimes, defendant cannot be held criminally responsible for robbery in the second degree pursuant to that subdivision (*see* CPL 1.20 [42]; Penal Law §§ 10.00 [18]; 30.00 [2]). We conclude that the portion of the plea with respect to those counts of the indictment is not "an integral part of a nonseverable plea bargain" (*People v Boye*, 175 AD2d 924, 924), and that the plea with respect to those counts of the indictment must be vacated and "deemed a nullity" (*id.*; *see People v McKoy*, 60 AD3d 1374, 1375, *lv denied* 12 NY3d 856; *People v Stowe*, 15 AD3d 597, 598, *lv denied* 5 NY3d 770). We therefore modify the adjudication accordingly.

Defendant further contends that the court erred in denying that part of his omnibus motion seeking removal of this matter to Family Court pursuant to CPL 210.43 (1). We reject that contention. The court properly considered the statutory factors (*see* CPL 210.43 [2]),

and it is well settled that removal to Family Court over the District Attorney's objections may be ordered only "in the exceptional case" (*Matter of Vega v Bell*, 47 NY2d 543, 553). Inasmuch as the prosecutor objected and defendant failed to establish that this is an exceptional case, we conclude that the court did not abuse its discretion in denying defendant's request (*see People v Sanchez*, 128 AD2d 816, 816-817, *lv denied* 70 NY2d 655; *see generally People v Charles M.*, 286 AD2d 942, 942-943).

Finally, the sentence is not unduly harsh or severe.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1179

KA 12-00387

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAKOTA MIX, DEFENDANT-APPELLANT.

CARR SAGLIMBEN LLP, OLEAN (JAY D. CARR OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (M. William Boller, A.J.), rendered January 23, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fifth degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal sale of a controlled substance in the fifth degree (Penal Law § 220.31), defendant contends that County Court abused its discretion in denying his request to adjudicate him a youthful offender. We reject that contention. " 'The determination . . . whether to grant . . . youthful offender status rests within the sound discretion of the court and depends upon all the attending facts and circumstances of the case' " (*People v Dawson*, 71 AD3d 1490, 1490, *lv denied* 15 NY3d 749). Here, the record reflects that the court considered the relevant facts and circumstances in denying defendant's request. Although the crime was not particularly grave and did not involve violence, the remaining factors to be considered upon the application for youthful offender treatment weighed against such a determination (*cf*. *People v Shrubsall*, 167 AD2d 929, 930). Defendant has been involved with probation since he was 12 years old based on orders adjudicating him to be a person in need of supervision and juvenile delinquency adjudications and has been offered many services, but he continued to violate probation and was ultimately placed with the Office of Children and Family Services for 18 months. Defendant did not take responsibility for the instant offense and was uncooperative during his presentence interview. Defendant dropped out of school after the 10th grade and, although he was 19 years old at the time of sentencing, he had no verifiable employment and no plans for future employment in the area. The probation officer recommended against probation and believed that defendant's prospects for

rehabilitation and hope for a future constructive life were poor. We therefore conclude that the court did not abuse its discretion in denying defendant's request.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1180

KA 12-00390

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL PLUMLEY, DEFENDANT-APPELLANT.

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

MICHAEL PLUMLEY, DEFENDANT-APPELLANT PRO SE.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (LAURIE M. BECKERINK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered December 19, 2011. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [1]). We reject defendant's contention that County Court erred in refusing to suppress physical evidence seized by the police from the bedroom and an adjoining room in an apartment in which defendant had stayed. "It is well established that the police need not procure a warrant in order to conduct a lawful search when they have obtained the voluntary consent of a party possessing the requisite authority or control over the premises or property to be inspected" (*People v Adams*, 53 NY2d 1, 8, *rearg denied* 54 NY2d 832, *cert denied* 454 US 854; *see People v Cosme*, 48 NY2d 286, 290). Thus, " 'where two or more individuals share a common right of access to or control of the property to be searched, any one of them has the authority to consent to a warrantless search in the absence of the others' " (*People v Rivera*, 83 AD3d 1370, 1372, *lv denied* 17 NY3d 904, quoting *Cosme*, 48 NY2d at 290).

Here, the People met their burden of establishing that the police reasonably believed that the lessee of the subject apartment had the authority to consent to the search of the apartment, including the areas of the apartment from which the physical evidence was seized (*see People v Smith*, 101 AD3d 1794, 1794, *lv denied* 20 NY3d 1104; *see also Adams*, 53 NY2d at 9-10; *see generally People v Berrios*, 28 NY2d

361, 367). Indeed, the police searched the apartment pursuant to a waiver that was voluntarily signed by the lessee of that premises, and the bedroom and an adjoining room from which the physical evidence was seized were areas that were accessible to everyone in the apartment. Specifically, the evidence establishes that there was no door to the bedroom, and that the adjacent room at issue was connected to the bedroom by "an open doorway."

Defendant appears to contend that we should also consider whether the police had consent to search the bags found within the rooms at issue. Although defendant relies on case law containing the well-settled principle that general consent granted by someone other than a defendant to search a premises does not validate the search of something used exclusively by the defendant for personal effects, i.e., a drawer, bag or similar item (*see People v Holmes*, 89 AD3d 1491, 1492; *see also People v Gonzalez*, 88 NY2d 289, 294-295), that reliance is misplaced inasmuch as there is no evidence that the police seized anything from the apartment that was stored inside of a bag. Although the police officer who testified on behalf of the People at the suppression hearing acknowledged that there were bags in the area that was searched, he provided no indication that such bags were opened or that evidence was taken from those bags. We thus conclude that the People met "the burden of going forward to show the legality of the police conduct in the first instance" (*Berrios*, 28 NY2d at 367 [internal quotation marks and emphasis omitted]), and that defendant otherwise failed to meet his "ultimate burden of proving that the [seized] evidence should not be used against him" (*id.*).

We also reject defendant's contention that the court erred in refusing to suppress evidence of the victim's identification of him. Contrary to defendant's contention, "the subjects depicted in the photo array are sufficiently similar in appearance so that the viewer's attention is not drawn to any one photograph in such a way as to indicate that the police were urging a particular selection" (*People v Quinones*, 5 AD3d 1093, 1093, *lv denied* 3 NY3d 646; *see People v Page*, 105 AD3d 1380, 1382). The fact that defendant is the only person in the photo array wearing a red shirt is of no moment inasmuch as defendant was not the only person shown wearing a dark-colored shirt, defendant was not shown in a shirt similar to the white thermal shirt that he was wearing for a prior showup identification, and shirt color was not a part of the description of the assailant that the victim provided to the police (*see People v Bell*, 19 AD3d 1074, 1075, *lv denied* 5 NY3d 803, 850; *People v Porter*, 2 AD3d 1429, 1430, *lv denied* 2 NY3d 744). Contrary to defendant's further contention, the fact that the severely injured victim identified defendant in a photo array approximately five days after the victim failed to identify defendant in a showup procedure that was conducted at the hospital where the victim was undergoing treatment is of no consequence here. " '[M]ultiple pretrial identification procedures are not inherently suggestive' " (*People v Morgan*, 96 AD3d 1418, 1419, *lv denied* 20 NY3d 987; *see People v Peterkin*, 81 AD3d 1358, 1359, *lv denied* 17 NY3d 799) and, in this case, the police officer who testified on behalf of the People indicated that the victim did not remember anything about the showup procedure at the time the victim

identified defendant in the photo array (*cf. People v Thompson*, 17 AD3d 138, 139, *lv denied* 5 NY3d 795; *see generally People v Young*, 261 AD2d 109, 110, *lv denied* 93 NY2d 1007). Even assuming, arguendo, that the victim remembered the showup identification procedure, we note that the shirt defendant wore during that procedure was a different color than the shirt defendant wore in the picture used in the photo array (*cf. generally People v Munoz*, 223 AD2d 370, 370, *lv denied* 88 NY2d 990), and there is nothing in the record establishing that the photo array was tainted by the showup procedure (*cf. People v Anderson*, 94 AD3d 1010, 1011, *lv denied* 19 NY3d 956, *reconsideration denied* 19 NY3d 1101). We have reviewed defendant's remaining contention and conclude that it is without merit.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1182

KA 12-01678

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANA GARNER, 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 October 19, 2009. 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, we conclude that his waiver of the right to appeal was knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256). To the extent that defendant challenges the factual sufficiency of the plea allocution, that challenge is encompassed by the valid waiver of the right to appeal (*see People v Topolski*, 106 AD3d 1532, 1533, *lv denied* 21 NY3d 1020). Although defendant's contention that the plea was not knowingly, voluntarily and intelligently entered survives the valid waiver of the right to appeal (*see People v Theall*, 109 AD3d 1107, 1107-1108), we conclude based upon the record before us that his contention lacks merit (*see generally People v Seeber*, 4 NY3d 780, 781-782).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1183

KA 11-01149

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. JUDD, JR., DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered March 7, 2011. 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 modified as a matter of discretion in the interest of justice by vacating the fine and as modified the judgment is 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]). Initially, we agree with defendant that his waiver of the right to appeal is invalid inasmuch as " 'the minimal inquiry made by County Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Jones*, 107 AD3d 1589, 1589, *lv denied* 21 NY3d 1075; *see People v Amir W.*, 107 AD3d 1639, 1640).

By pleading guilty, defendant waived his contention that he was improperly arraigned on the special information based on the court's error in stating that he would be pleading guilty to attempted burglary in the third degree. A " 'guilty plea . . . results in a forfeiture of the right to appellate review of any nonjurisdictional defects in the proceedings' " (*People v Leary*, 70 AD3d 1394, 1395, *lv denied* 14 NY3d 889, quoting *People v Fernandez*, 67 NY2d 686, 688; *see People v Releford*, 73 AD3d 1437, 1438, *lv denied* 15 NY3d 808), which include any defect in the arraignment procedure (*see People v Williams*, 25 Misc 3d 15, 18; *see generally People v Roberts*, 6 AD3d 942, 943, *lv denied* 3 NY3d 662).

Although the waiver of the right to appeal was invalid and thus does not bar defendant's challenge to the guilty plea, defendant

failed to preserve for our review his challenge to the factual sufficiency of the plea colloquy (*see People v Lopez*, 71 NY2d 662, 665; *People v Spears*, 106 AD3d 1534, 1535). Contrary to defendant's further contention, this case does not fall within the rare exception to the preservation requirement set forth in *Lopez* because nothing in the plea allocution calls into question the voluntariness of the plea or casts "significant doubt" upon his guilt (*id.* at 666; *see People v Lewandowski*, 82 AD3d 1602, 1602).

With respect to defendant's further contention that he was denied effective assistance of counsel, such a claim survives a plea of guilty only if "the plea bargaining process was infected by [the] allegedly ineffective assistance or [if] defendant entered the plea because of his attorney[']s allegedly poor performance" (*People v Robinson*, 39 AD3d 1266, 1267, *lv denied* 9 NY3d 869 [internal quotation marks omitted]; *see People v Lugg*, 108 AD3d 1074, 1075; *People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912). Here, defendant failed to establish that the plea was infected by or was the result of the allegedly ineffective acts of his attorney. In any event, the record establishes that defendant received "an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404).

Defendant further contends that the court erred at sentencing in denying his request to redact the presentence report by changing the initial charge listed in that report, and he asks this Court to remit the matter to County Court for further proceedings to amend the report and ensure its accuracy. "[A]bsent any indication that the court relied upon allegedly erroneous information in the presentence report in imposing the sentence" (*People v Jaramillo*, 97 AD3d 1146, 1148, *lv denied* 19 NY3d 1026), we perceive no reason to grant defendant's request for that relief. In addition, defendant failed to preserve for our review his contention that he was not properly adjudicated a second violent felony offender based on the failure of the People and the court to comply with CPL 400.15 (*see People v Hall*, 82 AD3d 1619, 1620, *lv denied* 16 NY3d 895; *see also People v Butler*, 96 AD3d 1367, 1368, *lv denied* 20 NY3d 931; *see generally People v Pellegrino*, 60 NY2d 636, 637). In any event, "[t]he statutory purposes for filing a predicate statement (CPL 400.21) have been satisfied, to wit: apprising the court of the prior conviction and providing defendant with reasonable notice and an opportunity to be heard. The People's failure to file a predicate statement was harmless, and remanding for filing and resentencing would be futile and pointless" (*People v Bouyea*, 64 NY2d 1140, 1142).

We agree, however, with defendant's additional contention that the sentence is excessive insofar as it imposes a fine in addition to a term of incarceration and postrelease supervision. Consequently, we modify the judgment by vacating the fine. As modified, the sentence is not unduly harsh or severe.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1184

KA 12-01096

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAMONE WALKER, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered January 4, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth 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 fifth degree (Penal Law § 220.06 [5]). The waiver by defendant of the right to appeal encompasses his challenge to the factual sufficiency of the plea allocution (*see People v Thousand*, 96 AD3d 1439, 1439-1440, *lv denied* 19 NY3d 1002) and, moreover, that challenge is unpreserved for our review inasmuch as defendant did not move to withdraw the plea or vacate the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665; *People v Nelson*, 105 AD3d 1389, 1390, *lv denied* 21 NY3d 1044). The waiver of the right to appeal also encompasses defendant's contention that the sentence is unduly harsh and severe (*see generally People v Maracle*, 19 NY3d 925, 928; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1185

CAF 12-01091

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

IN THE MATTER OF LINDA SMITH-GILSEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD D. GRISANTI, RESPONDENT-RESPONDENT.

IN THE MATTER OF RICHARD D. GRISANTI,
PETITIONER-RESPONDENT,

V

LINDA SMITH-GILSEY, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

RICHARD D. GRISANTI, RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT PRO SE.

JANE E. MONAGHAN, ATTORNEY FOR THE CHILD, WARSAW.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered February 2, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, denied the petition of petitioner-respondent for a modification of custody.

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

Memorandum: Petitioner-respondent mother appeals from two orders that, inter alia, denied her petition for a modification of custody (appeal No. 1) and changed her visitation schedule (appeal No. 2). We affirm the order in each appeal. A parent seeking to modify an existing custody order must demonstrate "a change in circumstances that reflects a genuine need for the modification so as to ensure the best interests of the child" (*Matter of Taylor v Fry*, 63 AD3d 1217, 1218; *see Matter of Sumner v Lyman*, 70 AD3d 1223, 1224, *lv denied* 14 NY3d 709). Although we agree with the mother that she met her burden of proving a change in circumstances because the parties' relationship had deteriorated and the child had missed numerous visitations with her, we conclude on the record before us " 'that a change in custody would not be in the best interests of the [child]' " (*Matter of*

Dingeldey v Dingeldey, 93 AD3d 1325, 1326). Furthermore, the court properly exercised its discretion in crafting a visitation schedule that was in the child's best interests (*see Matter of Fox v Fox*, 93 AD3d 1224, 1225).

Contrary to the mother's contention, by requiring respondent-petitioner father to post an undertaking in a specified amount, the court properly imposed a meaningful sanction based on the father's failure to comply with orders concerning her visitation rights, to ensure that visitation occurred (*see generally Matter of Mason-Crimi v Crimi*, 94 AD3d 1572, 1573-1574; *Schoonheim v Schoonheim*, 92 AD2d 474, 474-475). Finally, we reject the mother's contention that the court lacked jurisdiction over the instant matters, inasmuch as the father resides in Wyoming County (*see* Family Ct Act § 171).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1186

CAF 12-01092

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

IN THE MATTER OF RICHARD D. GRISANTI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LINDA SMITH-GILSEY, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

MICHAEL STEINBERG, ROCHESTER, FOR RESPONDENT-APPELLANT.

RICHARD D. GRISANTI, PETITIONER-RESPONDENT PRO SE.

JANE E. MONAGHAN, ATTORNEY FOR THE CHILD, WARSAW.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered March 28, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, changed respondent's parenting time.

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

Same Memorandum as in *Matter of Smith-Gilsey v Grisanti* ([appeal No. 1] ___ AD3d ___ [Nov. 15, 2013]).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1189

CA 13-00575

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

CAMERON E. PARO, PLAINTIFF,

V MEMORANDUM AND ORDER

PIEDMONT LAND AND CATTLE, LLC, DEFENDANT.

PIEDMONT LAND AND CATTLE, LLC, THIRD-PARTY PLAINTIFF-APPELLANT,

V

W.D. BACH EXCAVATING & CONSULTING, LLC, THIRD-PARTY DEFENDANT-RESPONDENT.

KNYCH & WHRITENOUR, LLC, SYRACUSE (PETER W. KNYCH OF COUNSEL), FOR DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (BRANDON R. KING OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered January 15, 2013. The order granted the motion of third-party defendant for summary judgment dismissing the third-party complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking summary judgment dismissing the claim for contribution and reinstating the third-party complaint to that extent, and as modified the order is affirmed without costs.

Memorandum: Defendant-third-party plaintiff, Piedmont Land and Cattle, LLC (Piedmont), the owner of a parking lot, entered a contract with third-party defendant, W.D. Bach Excavating & Consulting, LLC (Bach), pursuant to which Bach was to raze the structures that had been on the property and to fill in all holes or voids that might exist there. Pursuant to that contract, Bach leveled the buildings and filled in certain holes not relevant herein. Plaintiff commenced this action against Piedmont, seeking damages for injuries that he sustained when his foot fell through a hole in the parking lot and entered a hidden vault below it. Piedmont later commenced a third-party action seeking contribution and common-law indemnification from Bach. Piedmont appeals from an order granting Bach's motion for summary judgment dismissing the third-party complaint. We note at the

outset that Piedmont does not challenge that part of the order dismissing the claim for common-law indemnification, and thus it has abandoned any contentions with respect to that claim (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We agree with Piedmont that the court erred in granting that part of the motion with respect to the claim for contribution, and we therefore modify the order accordingly.

We conclude that Bach met its initial burden on its motion with respect to the claim for contribution by establishing its entitlement to judgment as a matter of law dismissing that claim (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Specifically, Bach established as a matter of law "that the injured plaintiff was not a party to [the] contract . . . and that it thus owed no duty of care to the injured plaintiff" (*Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d 810, 811; *see Petito v City of New York*, 95 AD3d 1095, 1096). In opposition, however, Piedmont raised triable issues of fact to defeat that part of the motion. Although plaintiff was a noncontracting third party with respect to the construction contract between Bach and Piedmont, Bach may still be liable if, "in failing to exercise reasonable care in the performance of its duties, [it] 'launche[d] a force or instrument of harm' " (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140; *see Church v Callanan Indus.*, 99 NY2d 104, 111), or otherwise made the area "less safe than before the construction project began" (*Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 67, *lv dismissed* 4 NY3d 739, *rearg denied* 4 NY3d 795). Here, there are issues of fact whether Bach negligently filled in the vault only partially, and concealed its existence, thereby creating a force or instrument of harm or otherwise making the area less safe than before the demolition project began (*see e.g. Schosek v Amherst Paving, Inc.*, 11 NY3d 882, 883; *Cornell v 360 W. 51st St. Realty, LLC*, 51 AD3d 469, 470; *cf. Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257-258).

We have considered Piedmont's remaining contentions, and we conclude that they are without merit or are moot in light of our decision.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1191

CA 13-00362

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

KATHLEEN NASCA AND ANTHONY NASCA,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MARK LOUIS DELMONTE, DOING BUSINESS AS NIAGARA CHIROPRACTIC OFFICE (FORMERLY INCORRECTLY SUED HEREIN AS "NIAGARA CHIROPRACTIC"),
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

TRONOLONE & SURGALLA, P.C., BUFFALO, LAW OFFICE OF GERARD A. STRAUSS, HAMBURG (GERARD A. STRAUSS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

FELDMAN KIEFFER, LLP, BUFFALO (MATTHEW J. KIBLER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered May 8, 2012. The order denied the motions of plaintiff to amend the amended complaint and to add a party defendant.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the June 16, 2011 motion upon condition that plaintiffs shall serve the proposed pleading within 30 days of service of a copy of the order of this Court with notice of entry and as modified the order is affirmed without costs in accordance with the following Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries sustained by Kathleen Nasca (plaintiff) as a result of a cervical manipulation performed by defendant Curtis R. Venne, D.C. The amended complaint named Venne and Mark Louis DelMonte, doing business as Niagara Chiropractic Office, as defendants. Over a year after the statute of limitations expired, plaintiffs filed two motions seeking leave to amend the amended complaint.

In their first motion (hereafter, March motion), plaintiffs sought to amend the amended complaint to add Mark Louis DelMonte, in his individual capacity, and Mark Louis DelMonte, D.C., P.C. (DelMonte P.C.) as defendants. According to plaintiffs, evidence had been adduced in discovery supporting the claims that DelMonte P.C. is a sham corporation and that misrepresentations were made to the public and to plaintiff with respect to the employment status of Venne. Plaintiffs submitted a proposed “second amended complaint” in connection with the March motion. We note at the outset with respect

to DelMonte in his individual capacity that plaintiffs previously named DelMonte, doing business as Niagara Chiropractic Office, as a defendant in the amended complaint. Plaintiffs thus were not required to seek leave to amend the amended complaint to name him as a defendant in his individual capacity (*see* Business Corporation Law § 1505 [a]).

While the March motion was pending, plaintiffs made a second motion (hereafter, June motion), characterized by plaintiffs as an application to amend the amended complaint to add DelMonte P.C. as a "party defendant" and to deem service made nunc pro tunc on that defendant. In the June motion, plaintiffs sought "leave to . . . file and serve the third amended complaint" based on grounds that included the relation back doctrine. In connection with the June motion, plaintiffs submitted a proposed "third amended complaint" that is substantively identical to the proposed "second amended complaint." Supreme Court denied the June motion and deemed the March motion to be moot on the ground that plaintiffs' claims are barred by the statute of limitations. The court characterized the March motion as one seeking leave to amend the amended complaint and deemed the June motion as one to add a party defendant. We conclude that the motions seek essentially the same relief and thus that the March motion was superseded by the June motion. We further conclude that the court erred in denying the June motion, and we therefore modify the order accordingly.

We conclude that the court erred in denying plaintiffs' motion with respect to DelMonte P.C. based upon the relation back doctrine. In order for the relation back doctrine to apply, a plaintiff must establish that "(1) both claims arose out of the same conduct, transaction, or occurrence, (2) the additional party is united in interest with the original party, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits, and (3) the additional party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the additional party as well" (*Kirk v University OB-GYN Assoc., Inc.*, 104 AD3d 1192, 1193-1194; *see Buran v Coupal*, 87 NY2d 173, 178*; Haidt v Kurnath*, 86 AD3d 935, 936).

Here, we conclude that the first prong of the relation back doctrine test is satisfied because the claims against DelMonte P.C. arise out of the same occurrence as that alleged against DelMonte, doing business as Niagara Chiropractic Office, i.e., Venne's treatment of plaintiff (*see Kirk*, 104 AD3d at 1193-1194; *Cole v Tat-Sum Lee*, 309 AD2d 1165, 1167). We further conclude that plaintiffs satisfied the second prong of that test inasmuch as DelMonte P.C. employed Venne and therefore may be held vicariously liable for his conduct (*see Verizon N.Y., Inc. v LaBarge Bros. Co., Inc.*, 81 AD3d 1294, 1296; *see also De Sanna v Rockefeller Ctr., Inc.*, 9 AD3d 596, 598; *Schiavone v Victory Mem. Hosp.*, 300 AD2d 294, 295). We conclude that plaintiffs also satisfied the third prong of that test inasmuch as they established that their failure to include DelMonte P.C. as a defendant in the

original or first amended complaint " 'was a mistake and not . . . the result of a strategy to obtain a tactical advantage' " (*Haidt*, 86 AD3d at 936; *see Kirk*, 104 AD3d at 1193-1194; *see also Buran*, 87 NY2d at 176).

Finally, we note that plaintiffs' inclusion of allegations in the proposed third amended complaint relating to their attempt to pierce the corporate veil is of no moment. Piercing the corporate veil is not "a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141; *see Robinson v Day*, 103 AD3d 584, 588; *H & R Project Assoc. v City of Syracuse*, 289 AD2d 967, 968). By their additional allegations, plaintiffs did not assert a new cause of action.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1192

CA 13-00029

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

JOSHUA MORRIS AND JESSICA MORRIS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF LOCKE AND TOWN OF LANSING,
DEFENDANTS-RESPONDENTS.

JOSHUA MORRIS, PLAINTIFF-APPELLANT PRO SE.

JESSICA MORRIS, PLAINTIFF-APPELLANT PRO SE.

ANDREW S. FUSCO, AUBURN, FOR DEFENDANT-RESPONDENT TOWN OF LOCKE.

THALER & THALER, ITHACA (GUY K. KROGH OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF LANSING.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered March 30, 2012 in a declaratory judgment action. The judgment, among other things, granted the cross motions of defendants for summary judgment dismissing the amended complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the amended complaint and as modified the judgment is affirmed without costs in accordance with the following Memorandum: Plaintiffs commenced this action seeking, inter alia, a declaration that Robinson Road is a public highway and thereafter moved for summary judgment with respect to that requested relief. Defendants cross-moved for summary judgment dismissing the amended complaint contending, inter alia, that Robinson Road had been abandoned by nonuse. Supreme Court granted the cross motions, declaring in its bench decision that, even if Robinson Road had been a public highway, it had been abandoned. The court's declaration was proper because even assuming, arguendo, that the road was once a public highway, we agree with defendants that the court properly determined that they met their burden of establishing that Robinson Road had been abandoned by nonuse (*see* Highway Law § 205 [1]; *Pless v Town of Royalton*, 185 AD2d 659, 659, *affd* 81 NY2d 1047). In opposition, plaintiffs failed to demonstrate that any use of the road since 1935 was other than occasional limited use that does not amount to use as a highway, which requires "[t]ravel . . . in forms reasonably normal" (*Town of Leray v New York Cent. R.R. Co.*, 226 NY 109, 113; *see Matter of County of Suffolk [Arved, Inc.]*, 63 AD2d 673,

674). Plaintiffs failed to preserve for our review their contention that the abandonment of Robinson Road constituted an unconstitutional taking without just compensation (*see Melahn v Hearn*, 60 NY2d 944, 945). Nevertheless, the court erred in dismissing the amended complaint in this declaratory judgment action, and we therefore modify the judgment accordingly (*see generally Tumminello v Tumminello*, 204 AD2d 1067, 1067).

In light of our determination, we do not reach defendant Town of Lansing's alternate grounds for affirmance.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1194.1

CA 12-02185

PRESENT: SMITH, J.P., CENTRA, FAHEY, AND WHALEN, JJ.

DENNIS GREEN AND THERESA GREEN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ASSOCIATED MEDICAL PROFESSIONALS OF NY, PLLC,
ET AL., DEFENDANTS,
AND TIMOTHY E. KENDRICK, RPAC, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (DANIEL P. LARABY OF COUNSEL), FOR DEFENDANT-APPELLANT.

DEFRANCISCO & FALGIATANO LAW FIRM, SYRACUSE (JEAN MARIE WESTLAKE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered March 13, 2012. The order denied the motion of defendant Timothy E. Kendrick, RPAC, to dismiss the complaint against him.

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

Memorandum: Plaintiffs commenced these medical malpractice actions seeking damages arising from the alleged failure of defendants to diagnose and treat the prostate cancer of Dennis Green (plaintiff) in a timely manner. In appeal No. 1, defendant Timothy E. Kendrick, RPAC (Timothy) contends that Supreme Court erred in denying his motion to dismiss the complaint against him as time-barred pursuant to CPLR 3211 (a) (5). In appeal No. 2, defendants contend that the court erred in denying what the order on appeal characterizes as "[d]efendant's motion" to dismiss the complaints against them pursuant to CPLR 3211 (a) (3) based on plaintiffs' lack of capacity to sue. We affirm the order in appeal No. 1, and we reverse the order in appeal No. 2.

With respect to appeal No. 1, we note that "[a]n action for medical . . . malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure" (CPLR 214-a). Here, Timothy met his initial burden on the motion by demonstrating that he last treated plaintiff on September 27, 2007,

and that plaintiffs commenced their action against him over two years and six months later, on May 18, 2011 (*see Massie v Crawford*, 78 NY2d 516, 519, *rearg denied* 79 NY2d 978; *Nailor v Oberoi*, 237 AD2d 898, 898; *see generally Larkin v Rochester Hous. Auth.*, 81 AD3d 1354, 1355; *Perrino v Maguire*, 60 AD3d 1475, 1476). "The burden therefore shifted to plaintiff[s] to establish the applicability of the continuous treatment doctrine, which tolls the Statute of Limitations until the end of the course of treatment" (*Nailor*, 237 AD2d at 898, citing *Massie*, 78 NY2d at 519).

We conclude that plaintiffs met that burden. "[U]nder the 'continuous treatment doctrine,' a Statute of Limitations or a notice of claim period does not begin to run until 'the course of treatment which includes the wrongful acts or omissions has run *continuously* and is *related* to the same original condition or complaint' " (*Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296, quoting *Borgia v City of New York*, 12 NY2d 151, 155; *see Hilts v FF Thompson Health Sys., Inc.* [appeal No. 2], 78 AD3d 1689, 1691). "The toll of the continuous treatment doctrine was created to enforce the view that a patient should not be required to interrupt corrective medical treatment by a physician and undermine the continuing trust in the physician-patient relationship in order to ensure the timeliness of a medical malpractice action" (*Young*, 91 NY2d at 296; *see Rizk v Cohen*, 73 NY2d 98, 104). It thus follows that " '[t]he continuous treatment doctrine may be applied to a physician who has left a medical group, by imputing to him or her the continued treatment provided by subsequently-treating physicians in that group' " (*Mule v Peloro*, 60 AD3d 649, 650; *see Watkins v Fromm*, 108 AD2d 233, 233-235; *see generally Cole v Syracuse Community Health Ctr.*, 209 AD2d 1005, 1005). Here, plaintiffs raised an issue of fact concerning the applicability of the continuous treatment doctrine by submitting evidence that plaintiff was a group patient of defendant Syracuse Urology Associates, P.C. (SUA) and defendant AMP Urology (AMP), that plaintiff underwent a continuous course of treatment that began in 2004, and that such treatment remained ongoing within two years and six months of the commencement of the action (*see Ozimek v Staten Is. Physicians Practice, P.C.*, 101 AD3d 833, 834-835; *Cole*, 209 AD2d at 1005; *Watkins*, 108 AD2d at 239-242).

With respect to appeal No. 2, we address at the outset two procedural issues concerning the motions to dismiss the complaints for lack of capacity to sue.

First, we note that, although SUA was a moving defendant in appeal No. 2, was named in the affidavit of service of the notice of appeal as a defendant represented by counsel, and seeks relief in defendants' joint appellate brief in appeal No. 2, it was not named as an appellant in the notice of appeal. Pursuant to CPLR 2001, we disregard the error in the text of the notice of appeal and treat the appeal as also taken by SUA (*see Matter of Tagliaferri v Weiler*, 1 NY3d 605, 606).

Second, we note that AMP was not named as a movant in defendants'

respective motion papers in appeal No. 2, but the court characterized AMP as a movant in the order in appeal No. 2. Plaintiffs do not contend on appeal that the court erred in doing so, and we likewise deem AMP to have been a movant (*see* CPLR 2001).

We agree with defendants in appeal No. 2 that the complaints should have been dismissed because plaintiffs lack capacity to sue. Here, plaintiffs filed for chapter 7 bankruptcy protection on April 22, 2009 without listing a potential medical malpractice claim as an asset, and they obtained a bankruptcy discharge on August 3, 2009. "The failure of . . . plaintiff[s] to disclose a cause of action as an asset in a prior bankruptcy proceeding, the existence of which the plaintiff[s] knew or should have known existed at the time, deprive[s] the plaintiff[s] of the legal capacity to sue subsequently on that cause of action" (*Whelan v Longo*, 23 AD3d 459, 460, *affd* 7 NY3d 821; *see R. Della Realty Corp. v Block 6222 Constr. Corp.*, 65 AD3d 1323, 1323; *Technology Outsource Solutions, LLC v ENI Tech., Inc.*, 21 AD3d 1280, 1281-1282; *see generally Dynamics Corp. of Am. v Marine Midland Bank-N.Y.*, 69 NY2d 191, 196-197; *Dischiavi v Calli* [appeal No. 2], 68 AD3d 1691, 1692-1693). Inasmuch as plaintiffs acknowledge that they did not list the instant malpractice claims on their 2009 bankruptcy petition, we must determine when plaintiffs' claims accrued, whether plaintiffs knew or should have known of those claims at the time of that bankruptcy filing, and what effect, if any, the bankruptcy proceeding has on plaintiffs' capacity to sue. We note that the bankruptcy proceeding was reopened by the United States Bankruptcy Court for the Northern District of New York during the pendency of this appeal.

With respect to the issue of accrual, we note that "[a]n action in medical malpractice 'accrues' at the date of the original negligent act or omission, [and] subsequent continuous treatment does not change or extend the accrual date but serves only to toll the running of the applicable Statute of Limitations" (*Matter of Daniel J. v New York City Health & Hosps. Corp.*, 77 NY2d 630, 634; *see Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 295). Here, in this medical malpractice case based on the alleged failure of defendants to render a proper diagnosis for plaintiff, the accrual date could be no later than approximately April 2008, when plaintiff's cancer returned. Inasmuch as plaintiffs filed for bankruptcy protection in April 2009, we conclude that plaintiffs' claims accrued prior to the bankruptcy filing.

With respect to the issue whether plaintiffs should have known of their instant claims at the time of the bankruptcy filing, we note that "plaintiff[s'] knowledge of the *facts* giving rise to the claim[s], rather than [their] knowledge of [their] *legal right*[s], is decisive" (*Cafferty v Thompson*, 223 AD2d 99, 101, *lv denied* 88 NY2d 815 [emphasis added]; *see Hansen v Madani*, 263 AD2d 881, 883). "Neither ignorance of the law nor inadvertent mistake excuses a plaintiff's failure to list such a claim as a potential asset in the bankruptcy petition" (*Hutchinson v Chana Weller, DDS, PLLC*, 93 AD3d 509, 510). Here, although they might not have known that defendants' alleged failure to render a proper diagnosis was actionable, on the

record before us we conclude that plaintiffs knew of the circumstances of plaintiff's treatment with defendants and plaintiff's cancer, i.e., the *facts* giving rise to the malpractice claims, prior to the bankruptcy filing.

Finally, with respect to the issue of the reopening of the bankruptcy proceeding, we note that, "[i]n light of the defect based on a lack of capacity to sue, . . . the trustee must commence a new action in a representative capacity on behalf of [plaintiffs'] bankruptcy estate and, in doing so, [the trustee] will receive the benefit of the [six]-month extension embodied in CPLR 205" (*Pinto v Ancona*, 262 AD2d 472, 473; *see Reynolds v Blue Cross of Northeastern N.Y.*, 210 AD2d 619, 620). We further note that, although we are granting defendants' motions, the complaints are dismissed without prejudice to commence a new action asserting these claims pursuant to CPLR 205 (a) (*cf. Chiacchia & Fleming v Guerra*, 309 AD2d 1213, 1213-1214, *lv denied* 2 NY3d 704).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1194.2

CA 12-02186

PRESENT: SMITH, J.P., CENTRA, FAHEY, AND WHALEN, JJ.

DENNIS GREEN AND THERESA GREEN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ASSOCIATED MEDICAL PROFESSIONALS OF NY, PLLC,
AMP UROLOGY, TIMOTHY E. KENDRICK, RPAC, AND
WILLIAM H. ROBERTS, M.D., DEFENDANTS-APPELLANTS.
(ACTION NO. 1.)

DENNIS GREEN AND THERESA GREEN,
PLAINTIFFS-RESPONDENTS,

V

SYRACUSE UROLOGY ASSOCIATES, P.C.,
DEFENDANT-APPELLANT.
(ACTION NO. 2.)

DENNIS GREEN AND THERESA GREEN,
PLAINTIFFS-RESPONDENTS,

V

MICHAEL JOSEPH KENDRICK, M.D.,
DEFENDANT-APPELLANT.
(ACTION NO. 3.)
(APPEAL NO. 2.)

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (DANIEL P. LARABY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DEFRANCISCO & FALGIATANO LAW FIRM, SYRACUSE (JEAN MARIE WESTLAKE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered October 2, 2012. The order, inter alia, denied the motion of defendants to dismiss the complaints.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motions are granted and the complaints are dismissed without prejudice.

Same Memorandum as in *Green v Associated Med. Professionals of*

NY, PLLC ([appeal No. 1] ___ AD3d ___ [Nov. 15, 2013).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1195

KA 11-01827

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALFREDO ARIOSA, ALSO KNOWN AS CUBA,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES 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 (Francis A. Affronti, J.), rendered June 5, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1196

KA 13-00320

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

TERRANCE WILLIAMS, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated August 10, 2012. The order reduced a count of the indictment.

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

Memorandum: The People appeal from an order that granted in part defendant's motion to dismiss the indictment based on the legal insufficiency of the evidence before the grand jury by reducing the first count of the indictment. We affirm. Contrary to the contention of the People, we conclude that the evidence presented to the grand jury is not legally sufficient to establish a prima facie case of reckless endangerment in the first degree (Penal Law § 120.25), and Supreme Court therefore properly reduced that count to reckless endangerment in the second degree (§ 120.20). Legally sufficient evidence is "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof" (CPL 70.10 [1]; *see People v Jensen*, 86 NY2d 248, 252). "In the context of a [g]rand [j]ury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*People v Bello*, 92 NY2d 523, 526).

Pursuant to Penal Law § 120.25, "[a] person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he [or she] recklessly engages in conduct which creates a grave risk of death to another person" (*see People v Boutin*, 81 AD3d 1399, 1399-1400, *lv denied* 17 NY3d 792). Depraved indifference to human life is a culpable mental state that has "the same meaning in both the depraved indifference murder statute and the reckless endangerment statute" (*People v Feingold*, 7 NY3d 288, 290; *see People v Lewie*, 17 NY3d 348, 358). "[D]epraved indifference

is best understood as an utter disregard for the value of human life—a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not" (*Feingold*, 7 NY3d at 296 [internal quotation marks omitted]). To evince depraved indifference, the actor's reckless conduct must be so imminently dangerous that it presents a grave risk of death (*see People v Graham*, 14 AD3d 887, 889, *lv denied* 4 NY3d 853). "[T]his calculus requires an objective assessment of the degree of risk presented by defendant's reckless conduct" (*id.* [internal quotation marks omitted]*; see People v Lynch*, 95 NY2d 243, 247). Generally, the conduct of a person who acts with depraved indifference to human life endangers a number of people, such as when a person fires a weapon into a crowd (*see People v Suarez*, 6 NY3d 202, 214). Courts, however, have upheld depraved indifference convictions involving conduct that endangered only one person where the defendant's actions "reflect wanton cruelty, brutality or callousness directed against a particularly vulnerable victim, combined with utter indifference to the life or safety of the helpless target of the perpetrator's inexcusable acts" (*id.* at 613; *see Boutin*, 81 AD3d at 1400; *People v Coon*, 34 AD3d 869, 870).

Here, we conclude that the evidence before the grand jury, viewed in the light most favorable to the People (*see People v Jennings*, 69 NY2d 103, 114), was legally insufficient to support a finding that defendant acted with depraved indifference to human life (*see* Penal Law § 120.25; *Lewie*, 17 NY3d at 359). Specifically, the evidence established that defendant engaged in unprotected sex with the victim on two to four occasions without disclosing his HIV positive status. Shortly after their sexual relationship ended, defendant told the victim that a former sexual partner had tested positive for HIV and urged the victim to be tested. The victim was diagnosed as HIV positive several months later. We conclude that, although defendant may have acted with indifference to the victim's health, his conduct lacked the " 'wanton cruelty, brutality, or callousness' " required for a finding of depraved indifference toward a single victim (*Coon*, 34 AD3d at 870). Defendant told the police that he did not disclose his HIV positive status to the victim because he was "afraid [the victim] would not want to be with" him, and that he "loved [the victim] so very much." Defendant wrote a letter apologizing to the victim because he was "so upset" and "felt terrible." The fact that defendant encouraged the victim to be tested for HIV indicates that defendant "was trying, however weakly and ineffectively," to prevent any grave risk that might result from his conduct (*Lewie*, 17 NY3d at 359). We thus conclude that, "while the evidence certainly shows that defendant cared much too little about [the victim]'s safety, it cannot support a finding that [he] did not care at all" (*id.*).

We further conclude that the grand jury evidence, viewed in the light most favorable to the People (*see Jennings*, 69 NY2d at 114), also did not establish that defendant's conduct presented a grave risk of death to the victim (*see* Penal Law § 120.25; *Lynch*, 95 NY2d at 247). The victim's physician, an infectious disease expert, testified that the ability to treat HIV has increased dramatically over the past 15 years, with over 20 different antiviral medications available for treatment. The expert testified that although an HIV positive

diagnosis may have been tantamount to a death sentence in the past, with treatment, the prognosis today is "outstanding," particularly when a patient promptly learns that he or she is infected and seeks treatment. Indeed, the expert testified that patients with HIV who take their medication, eat well, do not smoke, and reduce their alcohol intake can live a "very healthy, normal lifestyle," and he expected a similar prognosis for the victim. We thus conclude that, under the circumstances of this case, the People failed to establish that defendant's reckless conduct posed a grave or "very substantial" risk of death to the victim (*People v Roe*, 74 NY2d 20, 24).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1197

KA 11-01983

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN GILBERT, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered March 16, 2011. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree, aggravated criminal contempt and endangering the welfare of a child (three 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, inter alia, assault in the first degree (Penal Law § 120.10 [1]) and aggravated criminal contempt (§ 215.52 [1]), defendant contends that he involuntarily entered his plea and that his negotiated sentence is unduly harsh and severe. Because defendant did not move to withdraw his plea or to vacate the judgment of conviction, his challenge to the voluntariness of his plea is unpreserved for our review (*see People v Weakfall*, 108 AD3d 1115, 1116; *People v Spears*, 106 AD3d 1534, 1535), and the narrow exception to the preservation rule does not apply here (*see People v Lopez*, 71 NY2d 662, 666; *People v Wissert*, 85 AD3d 1633, 1634, *lv denied* 17 NY3d 956). In any event, defendant's contention lacks merit. Although defendant stated during the plea colloquy that he was "under a lot of pressure," that statement alone did not render his plea involuntary.

Finally, given that defendant did not dispute that he slashed his wife's throat in front of their children and came dangerously close to killing her, we conclude that defendant's negotiated sentence is neither unduly harsh nor severe.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1200

KA 10-01828

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL FLAGG, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered February 24, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the second 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: 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 County Court erred in failing to rule on his applications to be adjudicated a youthful offender. Defendant, an apparently eligible youth (*see* CPL 720.10 [2]), pleaded guilty pursuant to a plea bargain that included a promised sentence and a waiver of the right to appeal, but there was no mention during the plea proceedings whether he would be afforded youthful offender treatment. At sentencing, defense counsel made several applications for youthful offender treatment but, without expressly ruling on them, the court imposed a sentence that was incompatible with youthful offender treatment.

"Upon conviction of an eligible youth, the court must order a [presentence] investigation of the defendant. After receipt of a written report of the investigation and at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender" (CPL 720.20 [1]). A sentencing court must determine whether to grant youthful offender treatment with respect to every defendant who is eligible for it because, inter alia, "[t]he judgment of a court as to which young people have a real likelihood of turning their lives around is just too valuable, both to the offender and to the community, to be sacrificed in plea bargaining" (*People v Rudolph*, 21 NY3d 497, 501). "[W]e cannot deem the court's failure to rule on the . . . [applications] as . . . denial[s] thereof" (*People v*

Spratley, 96 AD3d 1420, 1421, *following remittal* 103 AD3d 1211, *lv denied* 21 NY3d 1020; *see People v Ingram*, 18 NY3d 948, 949; *People v Chattley*, 89 AD3d 1557, 1558). Furthermore, even if the court had denied the applications, there is no information in this record from which we could ascertain whether the court properly did so in the exercise of its discretion, or whether it improperly acceded to the prosecutor's plea conditions. We therefore hold the case and remit the matter to County Court to make and state for the record "a determination of whether defendant is a youthful offender" (*Rudolph*, 21 NY3d at 503).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1203

CAF 11-02392

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF LEBRAUN H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BRENDA H., RESPONDENT-APPELLANT.

IN THE MATTER OF LINDA C.,
PETITIONER-RESPONDENT,

V

BRENDA H., RESPONDENT-APPELLANT.

IN THE MATTER OF BRENDA H.,
PETITIONER-APPELLANT,

V

LINDA C., RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

TIMOTHY J. HENNESSY, WILLIAMSVILLE, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered October 21, 2011. The order, among other things, determined that the subject child had been neglected by respondent-petitioner Brenda H. and granted the petition of petitioner-respondent Linda C.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by dismissing the petition of Erie County Department of Social Services and vacating the supervised visitation provision, and as modified the order is affirmed without costs and the matter is remitted to Family Court, Erie County, to fashion an appropriate schedule of unsupervised visitation for

respondent-petitioner Brenda H.

Memorandum: Petitioner Erie County Department of Social Services (DSS) commenced a proceeding pursuant to Family Court Act article 10 alleging that the subject child had been neglected by respondent-petitioner Brenda H., her paternal grandmother (respondent). At or about the same time, petitioner-respondent Linda C., the maternal grandmother (petitioner), commenced a proceeding pursuant to Family Court Act article 6 seeking modification of a prior order granting joint custody of the child to her and respondent. The parties and Family Court agreed to consolidate the proceedings, inasmuch as they anticipated that the evidence at a hearing would overlap to some extent. In appeal No. 1, respondent appeals from an order determining, following a fact-finding hearing, that she neglected the child. The order also granted the petition of petitioner by terminating joint custody and placing the child in the sole custody of petitioner with supervised visitation to respondent. In appeal No. 2, respondent appeals from an order, entered following a dispositional hearing, directing that respondent complete sex offender and parenting treatment programs, and continuing respondent's supervised visitation with the child.

We agree with respondent in appeal No. 1 that DSS failed to meet its burden of establishing by a preponderance of the evidence that the "child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired" as a consequence of respondent's failure to exercise a minimum degree of care (*Nicholson v Scoppetta*, 3 NY3d 357, 368). The court's finding of neglect hinges on the testimony of DSS's expert psychologist that respondent's dismissive response to the child's allegations that she had been sexually abused by her eight-year-old cousin put the child at risk of harm because such response would cause the child to be reluctant to report future allegations of abusive contact. The evidence did not establish that the child was in fact sexually abused, and we therefore conclude that the court erred in finding that respondent is chargeable with neglect for failing to protect the child from actual harm (*see Matter of Robert D.*, 18 AD3d 871, 871-872). Moreover, the finding of neglect cannot be based upon the child's possible reaction to future harm. "[A] finding of neglect will not be based on a failure to prevent theoretical future harm which never occurred" (*Matter of P. Children*, 272 AD2d 211, 212, *lv denied* 95 NY2d 770). We therefore modify the order in appeal No. 1 by dismissing the neglect petition. As a consequence of the dismissal of that petition, there is no jurisdictional basis for the directives in the dispositional order in appeal No. 2, and we therefore vacate that order (*see Matter of Brandon C.*, 237 AD2d 821, 822; *Matter of Rasha B.*, 139 AD2d 962, 963).

With respect to the court's directives concerning custody and visitation in the order in appeal No. 1, petitioner and respondent agree that modification of the existing custody arrangement was warranted inasmuch as their acrimonious relationship has rendered joint custody unworkable and not in the child's best interests (*see Matter of Rhubart v Rhubart*, 15 AD3d 936, 936). Upon our review of the evidence in light of the relevant factors (*see generally*

Friederwitzer v Friederwitzer, 55 NY2d 89, 94), we conclude that the award of sole custody to petitioner has a sound and substantial basis in the record (*see Matter of Chilbert v Soler*, 77 AD3d 1405, 1406, *lv denied* 16 NY3d 701). We note that the child has never lived primarily with respondent, and that respondent acknowledges that her relationship with the child is strained. We reach a contrary conclusion, however, with respect to the court's determination that respondent's visitation with the child should be supervised (*see Matter of Ross v Ross*, 86 AD3d 615, 617; *Matter of Oliver v Oliver*, 284 AD2d 934, 935). We therefore further modify the order in appeal No. 1 accordingly, and we remit the matter to Family Court to fashion an appropriate schedule of unsupervised visitation for respondent.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1204

CAF 12-00492

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF LEBRAUN H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BRENDA H., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered February 29, 2012 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent is to complete sex offender and parenting programs.

It is hereby ORDERED that the order so appealed from is unanimously vacated on the law without costs.

Same Memorandum as in *Matter of Lebraun H.* ([appeal No. 1] ___ AD3d ___ [Nov. 15, 2013]).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1205

CA 13-00704

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

SUNRISE NURSING HOME, INC., PLAINTIFF,

V MEMORANDUM AND ORDER

MARION FERRIS, ALSO KNOWN AS MARION WALLIS,
ET AL., DEFENDANTS,
AND STANLEY FERRIS, INDIVIDUALLY AND AS POWER
OF ATTORNEY FOR MARION FERRIS, ALSO KNOWN AS
MARION WALLIS, DEFENDANT-APPELLANT.

GLORIA FLORES BALDWIN, AS GUARDIAN AD LITEM FOR
MARION FERRIS, ALSO KNOWN AS MARION WALLIS,
RESPONDENT.
(APPEAL NO. 1.)

FINOCCHIO & ENGLISH, SYRACUSE (VINCENT J. FINOCCHIO, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

GLORIA FLORES BALDWIN, BALDWINSVILLE, RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered July 12, 2012. The order, among other things, adjudged that defendant Stanley Ferris, individually and as power of attorney for Marion Ferris, also known as Marion Wallis, must pay respondent Gloria Flores Baldwin, guardian ad litem for Marion Ferris, also known as Marion Wallis, the sum of $13,142.33 for services rendered in this action.

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

Memorandum: In appeal No. 1, Stanley Ferris (defendant), individually and as power of attorney for his wife, defendant Marion Ferris, also known as Marion Wallis, appeals from an order granting the application of respondent, the guardian ad litem for Marion, for an interim award of fees. In appeal No. 2, defendant, individually, appeals from an order denying that part of his motion to dismiss the sixth cause of action based on plaintiff's failure to state a cause of action (*see* CPLR 3211 [a] [7]), and from those parts of his purported motion to dismiss the first and second causes of action, which we note were asserted only against Marion, as well as the seventh cause of action against him, based on plaintiff's lack of legal capacity to sue (see CPLR 3211 [a] [3]).

Contrary to defendant's contention in appeal No. 1, Supreme Court had the authority to make an interim award of fees to the guardian ad litem (*see generally* CPLR 1204; *Haynes v Haynes*, 200 AD2d 457, 457, *affd* 83 NY2d 954; *Matter of Infant X. v Children's Hosp. of Buffalo*, 197 AD2d 884, 884). Moreover, we conclude that the court did not abuse its discretion with respect to the amount of the award in view of the guardian ad litem's efforts in the case (*see Matter of Reitano*, 89 AD3d 535, 535-536, *appeal dismissed sub nom. Cangro v Marangos*, 18 NY3d 985, *reconsideration denied* 19 NY3d 992; *see also Haynes*, 83 NY2d at 957), or with respect to its apportionment of the award among the parties (*see Matter of HSBC Bank USA, N.A. [Knox]*, 98 AD3d 300, 322-323, *lv denied* 20 NY3d 860). We therefore affirm the order in appeal No. 1. Finally, we decline to impose sanctions against appellate counsel for defendant, as power of attorney, as urged by the guardian ad litem in appeal No. 1 (*see generally Matter of Gademsky v Masset*, 213 AD2d 1082, 1082).

We note at the outset with respect to appeal No. 2 that the first and second causes of action, corresponding to the first and second ordering paragraphs of the order on appeal, have been discontinued pursuant to a stipulation, and thus any contentions with respect to those causes of action or ordering paragraphs are moot (*see Virella v Allstate Home Care of Buffalo, Inc.*, 59 AD3d 1100, 1101). As now relevant in appeal No. 2, defendant contends that the court erred in failing to grant his motion with respect to the sixth and seventh causes of action. We conclude, however, that defendant did not move to dismiss the seventh cause of action, nor indeed did he seek dismissal of the third and eighth causes of action. Thus, the court's consideration of those causes of action was improper (*see generally Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1038-1039), and any contention by defendant on appeal with respect to them is not properly before us. We therefore modify the order in appeal No. 2 by vacating the third, seventh, and eighth ordering paragraphs (*see County of Oneida v Estate of Kennedy*, 300 AD2d 1091, 1092). We note in particular that, because defendant did not move against those causes of action, he should not be precluded from subsequently doing so (*see* CPLR 3211 [e]).

Contrary to the contention of defendant, individually, in appeal No. 2, plaintiff's sixth cause of action properly asserts a cause of action for necessaries against him in his individual capacity (*see generally Medical Bus. Assoc. v Steiner*, 183 AD2d 86, 90-91), and we thus conclude that the court properly denied that part of the motion seeking to dismiss that cause of action.

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1206

CA 13-00709

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

SUNRISE NURSING HOME, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARION FERRIS, ALSO KNOWN AS MARION WALLIS,
DEFENDANT-RESPONDENT,
DOROTHY ROSE, INDIVIDUALLY AND AS POWER OF
ATTORNEY FOR MARION FERRIS, ALSO KNOWN AS
MARION WALLIS, DEFENDANT,
AND STANLEY FERRIS, INDIVIDUALLY AND AS POWER OF
ATTORNEY FOR MARION FERRIS, ALSO KNOWN AS
MARION WALLIS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FINOCCHIO & ENGLISH, SYRACUSE (VINCENT J. FINOCCHIO, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

M. ANGELO GENOVA, III, NEW YORK CITY, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered July 18, 2012. The order denied in part the motion of defendant Stanley Ferris, individually and as power of attorney for Marion Ferris, also known as Marion Wallis, to dismiss certain causes of action against him.

It is hereby ORDERED that said appeal from the order with respect to the first and second causes of action is unanimously dismissed and the order is modified on the law by vacating the third, seventh, and eighth ordering paragraphs and as modified the order is affirmed without costs.

Same Memorandum as in *Sunrise Nursing Home, Inc. v Ferris* ([appeal No. 1] ___ AD3d ___ [Nov. 15, 2013]).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1207

CA 13-00577

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

CIPRIANA MARTINEZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM T. MURDOCK AND EMILY A. MURDOCK,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

LAW OFFICES OF MARC JONAS, UTICA (JASON D. FLEMMA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SANTACROSE & FRARY, ALBANY (ELISE CASSAR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered January 7, 2013. The order granted that part of defendants' motion to vacate plaintiff's note of issue and certificate of readiness.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the vehicle in which she was a passenger was struck by a vehicle owned by defendant Emily A. Murdock and operated by defendant William T. Murdock. Following the discovery of documents and the depositions of the parties, plaintiff served defendants on or about March 26, 2012 with a notice of availability for medical examination pursuant to 22 NYCRR 202.17 (notice), which set forth May 4, 2012 as the date of plaintiff's availability for the medical examination. Defendants scheduled the medical examination for June 11, 2012, but plaintiff advised defendants that she would not appear for it because the date was beyond the time frame of "not less than 30 nor more than 60 days after service of th[e] notice," as set forth in 22 NYCRR 202.17 (a) and recited in the notice. Plaintiff did not appear for the scheduled medical examination and, on July 6, 2012, filed her note of issue and certificate of readiness. In appeal No. 1, plaintiff appeals from an order granting that part of defendants' motion to vacate her note of issue and certificate of readiness and, in appeal No. 2, plaintiff appeals from that part of an order granting those parts of the same motion for an order compelling plaintiff to appear for a medical examination and affording defendants an extension of time in which to file any "dispositive motions."

We reject plaintiff's contention in appeal No. 1 that Supreme Court abused its discretion in striking the note of issue and certificate of readiness. Pursuant to 22 NYCRR 202.1 (b), the court "[f]or good cause shown, and in the interests of justice . . . may waive compliance with any of the rules in this Part, other than sections 202.2 and 202.3, unless prohibited from doing so by statute or by a rule of the Chief Judge." We conclude that the court properly waived the time requirements of 22 NYCRR 202.17 (a) in the interests of justice because defendants established good cause by showing that the medical examination was scheduled to occur only 16 days after plaintiff's notice expired, and plaintiff did not establish that she was prejudiced by the extension of time (*see generally Hall & Co. v Steiner & Mondore*, 147 AD2d 225, 227).

In light of our determination in appeal No. 1 that the note of issue and certificate of readiness was properly vacated, there is no bar to the continuance of discovery (*see generally Furrukh v Forest Hills Hosp.*, 107 AD3d 668, 669), or to the filing of "dispositive motions" by defendants (*see generally* CPLR 3212 [a]). We therefore dismiss as moot plaintiff's appeal from the order in appeal No. 2 (*see generally Meabon v Town of Poland*, 108 AD3d 1183, 1185).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1208

CA 13-00581

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

CIPRIANA MARTINEZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM T. MURDOCK AND EMILY A. MURDOCK,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LAW OFFICES OF MARC JONAS, UTICA (JASON D. FLEMMA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SANTACROSE & FRARY, ALBANY (ELISE CASSAR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered January 7, 2013. The order, inter alia, granted those parts of the motion of defendants for an order compelling plaintiff to appear for a medical examination and affording defendants an extension of time in which to file any "dispositive motions".

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

Same Memorandum as in *Martinez v Murdock* ([appeal No. 1] ___ AD3d ___ [Nov. 15, 2013]).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1209

CA 12-01352

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

MANUEL MARTINEZ, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 119899.)
(APPEAL NO. 1.)

MANUEL MARTINEZ, CLAIMANT-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK K. WALSH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered May 16, 2012. The order denied the motion of claimant to compel defendant to send him to an orthopaedic specialist.

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

Memorandum: Claimant, an inmate at a correctional facility, commenced this action to recover damages arising from a slip and fall accident in which he allegedly injured his knee, and from his subsequent medical treatment. In appeal No. 1, he appeals from an order denying his motion to compel defendant to send him to an orthopaedic specialist for, inter alia, a magnetic resonance image (MRI) of his knee. In appeal No. 2, he appeals from an order granting defendant's cross motion for a protective order relieving it from the responsibility of responding to claimant's interrogatories.

Contrary to claimant's contention in appeal No. 1, we conclude that the Court of Claims did not abuse its discretion in denying his motion for a court-ordered MRI. Specifically, claimant contends that the court was required to order an MRI because defendant has a duty to provide medical treatment to him based on his status as a prison inmate. That contention, however, must be raised in Supreme Court in a CPLR article 78 proceeding (*see e.g. Matter of Wooley v New York State Dept. of Correctional Servs.*, 61 AD3d 1189, 1189-1190, *affd* 15 NY3d 275, *rearg denied* 15 NY3d 841; *Matter of Scott v Goord*, 32 AD3d 638, 638-639), not in the Court of Claims as part of an action for money damages. Furthermore, although the Court of Claims may order certain equitable relief incidental to a money judgment (*see Zutt v State of New York*, 50 AD3d 1131, 1132), there has been no judgment or other resolution in claimant's favor that would permit the relief he

seeks at this juncture of the litigation. Insofar as claimant seeks an order directing defendant to pay for an MRI as part of the discovery process in this litigation, we note that the Court of Claims may not direct defendant to pay the litigation costs of any party (*see* Court of Claims Act § 27; *Shell v State of New York*, 307 AD2d 761, 762, *lv denied* 1 NY3d 505; *Gittens v State of New York*, 175 AD2d 530, 530-531).

Contrary to claimant's contention in appeal No. 2, we conclude that the court properly granted defendant's cross motion seeking a protective order with respect to claimant's interrogatories. Although a deposition pursuant to CPLR 3106 (b) and discovery and inspection pursuant to CPLR 3120 (1) "may be sought against [a] nonparty witness as well as against a party, the interrogatory under CPLR 3130 (a) is available only against a party" (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3130:1). Here, claimant directed the interrogatories to nonparty employees of defendant, and the court therefore properly issued the protective order (*see Carp v Marcus*, 116 AD2d 854, 856).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1210

CA 12-01353

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

MANUEL MARTINEZ, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 119899.)
(APPEAL NO. 2.)

MANUEL MARTINEZ, CLAIMANT-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK K. WALSH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered May 16, 2012. The order granted the cross motion of defendant for a protective order relieving it from the responsibility of responding to claimant's interrogatories.

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

Same Memorandum as in *Martinez v State of New York* ([appeal No. 1] ___ AD3d ___ [Nov. 15, 2013]).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1211

CA 12-02369

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF MICHAEL D. GREEN, M.D.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MONROE COUNTY CHILD SUPPORT ENFORCEMENT UNIT,
RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

FORSYTH, HOWE, O'DWYER, KALB & MURPHY, P.C., ROCHESTER (SANFORD R. SHAPIRO OF COUNSEL), FOR PETITIONER-APPELLANT.

MERIDETH A. SMITH, COUNTY ATTORNEY, ROCHESTER (MARIE C. D'AMICO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered March 7, 2012 in a CPLR article 78 proceeding. The order remitted the proceeding to Family Court for a hearing before the Support Magistrate on the merits of petitioner's objection to his ex-wife's request for a cost of living adjustment to the amount of his child support obligation.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to vacate respondent's determination denying his claim that respondent erred in calculating the amount of his child support arrears. Petitioner asserted, inter alia, that his ex-wife withdrew her request for a cost of living adjustment (COLA) to the amount of his child support obligation, and thus that respondent was precluded from making any such adjustment. In appeal No. 1, petitioner appeals from an order remitting the matter to Family Court for a hearing before the Support Magistrate on the merits of petitioner's objections to the COLA. In appeal No. 2, petitioner appeals from an "amended order" providing that prior orders of Family Court relative to the ex-wife's request for a COLA and petitioner's objections thereto "will not prevent an adjustment to petitioner's child support." The "amended order" is in fact a supplemental order and therefore does not supersede the order in appeal No. 1 (*see VanDusen v Fairport Sav. and Loan Assn.*, 147 AD2d 973, 973; *cf. Allen v Gen. Elec. Co.*, 32 AD3d 1163, 1165).

We conclude that both appeals must be dismissed. "An appeal from

a nonfinal intermediate order in a CPLR article 78 proceeding does not lie as of right" (*People ex rel. Afrika v Russi*, 204 AD2d 1062, 1062, *appeal dismissed* 84 NY2d 821; *see* CPLR 5701 [b] [1]), but "is authorized only upon permission of the Judge who made the order or from a Justice of the Appellate Division" (*Afrika*, 204 AD2d at 1063; *see* CPLR 5701 [c]). Although we have the discretion to treat the notices of appeal as applications for permission to appeal (*see Matter of Laidlaw Energy & Envtl., Inc. v Town of Ellicottville*, 60 AD3d 1284, 1284), we decline to do so under the circumstances of this case (*see e.g. Matter of Scarcella v Village of Scarsdale Bd. of Trustees*, 72 AD3d 831, 831, *lv denied* 15 NY3d 715; *Matter of Young Israel of Merrick v Board of Appeals of Town of Hempstead*, 304 AD2d 834, 834-835; *Afrika*, 204 AD2d at 1063). In addition, we note that the appeal from the order in appeal No. 1 must be dismissed on the further ground that petitioner is not aggrieved by that order inasmuch as Supreme Court merely remitted the matter to Family Court for a hearing before the Support Magistrate on the merits of petitioner's objections to the COLA (*see Matter of Byrne v Byrne*, 46 AD3d 811, 811). Finally, the issue raised in appeal No. 1 whether the court properly remitted the matter to Family Court is not encompassed by the notice of appeal therein (*see generally Camperlino v Town of Manlius Mun. Corp.*, 78 AD3d 1674, 1675, *lv dismissed* 17 NY3d 734).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1212

CA 12-02370

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF MICHAEL D. GREEN, M.D.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MONROE COUNTY CHILD SUPPORT ENFORCEMENT UNIT,
RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

FORSYTH, HOWE, O'DWYER, KALB & MURPHY, P.C., ROCHESTER (SANFORD R. SHAPIRO OF COUNSEL), FOR PETITIONER-APPELLANT.

MERIDETH A. SMITH, COUNTY ATTORNEY, ROCHESTER (MARIE C. D'AMICO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Monroe County (John J. Ark, J.), entered April 5, 2012. The amended order provided that the prior orders of the Family Court relative to the request of petitioner's ex-wife for a cost of living adjustment to the amount of petitioner's child support obligation and petitioner's objections thereto will not prevent an adjustment of petitioner's child support.

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

Same Memorandum as in *Matter of Green v Monroe County Child Support Enforcement Unit* ([appeal No. 1] ___ AD3d ___ [Nov. 15, 2013]).

Entered: November 15, 2013

Frances E. Cafarell
Clerk of the Court