SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 21, 2014

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

1272/12

CA 12-00845

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

RONALD A. RITZEL, SR., PLAINTIFF,

V ORDER

DENNIS CARRION, LONG BEACH MORTGAGE,
GOTHAM ABSTRACT LLC, DEFENDANTS-RESPONDENTS,
JEANNE M. BARLEY, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (JOHN A. SICKINGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

GARY H. COLLISON, LIVERPOOL, FOR DEFENDANT-RESPONDENT DENNIS CARRION.

GETNICK LIVINGSTON ATKINSON & PRIORE, LLP, UTICA (DAVID A. EGHIGIAN OF COUNSEL), FOR DEFENDANT-RESPONDENT LONG BEACH MORTGAGE.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), dated July 19, 2011. The order, among other things, denied the motion of defendant Jeanne M. Barley for an extension of time to file a motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance of appeal signed by the attorneys for the parties on March 7 and 8, 2013 and February 28, 2014,

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

844

CA 13-00288

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

STEPHANIE L. WORDEN, PLAINTIFF-RESPONDENT,

V ORDER

TONI SIMPSON AND FREDERICK L. SIMPSON,
DEFENDANTS-APPELLANTS.

ADAMS, HANSON, REGO, CARLIN, KAPLAN & FISHBEIN, ALBANY (PAUL G. HANSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MICHAEL A. CASTLE, HERKIMER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Norman I. Siegel, J.), entered November 5, 2012. The order denied the motion of defendants for summary judgment.

Now, upon the stipulation discontinuing action signed by the attorneys for the parties on August 6, 2013, and filed in the Herkimer County Clerk’s Office on August 27, 2013,

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1198

KA 11-01585

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOYCE E. POWELL, DEFENDANT-APPELLANT.

MARCEL J. LAJOY, ALBANY, FOR DEFENDANT-APPELLANT.

JOYCE E. POWELL, DEFENDANT-APPELLANT PRO SE.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION, FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered August 1, 2011. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her, following a jury trial, of murder in the second degree (Penal Law § 125.25 [1]) arising from the 1992 shooting death of the victim. The trial evidence established that, several weeks before the murder, defendant confronted the victim, who was an acquaintance of defendant, with a small handgun and threatened to kill him because he owed defendant money. On the night of the murder, the victim was at a bar with defendant and two other men, and a bartender observed the group leave and drive away in a black car with a red top. The bartender's description of the car matched defendant's car. After leaving the bar, according to one of the men—a passenger riding in the back seat, defendant stopped the car along a road where defendant, the victim, and the other man exited the car. The backseat passenger heard an argument followed by six or seven gunshots. Defendant and the other man returned to the car without the victim and drove away. Thereafter, the victim's body was discovered along a rural road, and an earring in the victim's earlobe was missing its back. A subsequent autopsy revealed that the victim had been shot several times. The day after the victim's body was discovered, defendant admitted to the victim's sister that she was with the victim on the night in question, but claimed that she had left the victim at a party.

Ten days after the victim's body was discovered, the police made an unrelated traffic stop of defendant's black car with a red top, and they observed two live rounds of ammunition inside the car. During a

search of the car, police recovered the back to an earring from the floor of the back seat and a cassette tape from the floor of the front passenger seat. Police also recovered a gun in the hatchback area of the car. Ballistics testing of the gun linked it to bullets recovered from the victim's body during the autopsy, and sales receipts connected defendant to the out-of-state purchase of ammunition for the gun in the weeks before the murder.

Prior to trial, police discovered that the cassette tape recovered from defendant's car contained a rap song with lyrics paralleling the circumstances of the murder. Witnesses familiar with defendant's voice identified her voice as the female voice singing the rap song, and other witnesses testified with respect to the cassette tape, a digitally enhanced compact disc recording of the rap song, and a transcript of the rap song's lyrics. Those three items thereafter were admitted in evidence.

Defendant contends in her main brief that County Court erred in allowing testimony of uncharged bad acts from two witnesses. We reject that contention. We note that only one of the two witnesses testified to an uncharged bad act, i.e., that, in the weeks prior to the victim's death, the witness had observed defendant confront the victim with a small handgun and threaten to kill him because he owed her money. We conclude that the court properly admitted that testimony because it was relevant to establish defendant's motive and intent, and the court properly determined that the prejudicial effect of the evidence does not outweigh its probative value (*see People v Mosley*, 55 AD3d 1371, 1372, *lv denied* 11 NY3d 856; *People v Dilbert*, 1 AD3d 967, 967, *lv denied* 1 NY3d 626; *see generally People v Ventimiglia*, 52 NY2d 350, 359). Contrary to defendant's contention, the other witness did not give any testimony concerning uncharged bad acts; rather, her testimony concerned her familiarity with defendant's voice and the identification of defendant's voice on the recording of the rap song.

Defendant further contends in her main brief that the court erred in admitting the cassette tape in evidence inasmuch as the person rapping on the cassette tape had not been clearly identified. That contention is not preserved for our review inasmuch as defendant failed to object to the admission of the cassette tape in evidence on that ground (*see* CPL 470.05 [2]).

Defendant contends in her pro se supplemental brief that the rap song was admitted in evidence without a proper evidentiary foundation. We reject that contention. In addition to the four witnesses who identified defendant's voice, the backseat passenger testified that he recorded the background music for the rap song up to a year before the victim's death. Police witnesses gave testimony with respect to the chain of custody of the cassette tape, and a sound engineer/acoustics expert opined that, within a reasonable degree of scientific certainty, the cassette tape was recorded only once and had not been altered. To the extent that defendant contends that there was a gap in the chain of custody of the cassette tape, such gaps go to the weight of the evidence and not to its admissibility (*see People v*

Hawkins, 11 NY3d 484, 494; *People v McGee*, 49 NY2d 48, 60, *cert denied* 446 US 942; *cf. People v Ely*, 68 NY2d 520, 527-528). Consequently, the court did not err in determining that the evidentiary foundation of the cassette tape was adequate. Although there was no evidence conclusively establishing when defendant recorded the rap song, we conclude that the cassette tape was nevertheless admissible inasmuch as "[t]he lyrics of the song describe a murder occurring under similar circumstances as those present in the instant case" (*People v Wallace*, 59 AD3d 1069, 1070, *lv denied* 12 NY3d 861). We reject defendant's related contention in her main brief that the alleged error in admitting the cassette tape in evidence was compounded by the admission in evidence of the transcript of the lyrics. We conclude that the court properly exercised its discretion in permitting the use of the transcript of the rap song as an aid to the jury (*see People v Knight*, 280 AD2d 937, 939, *lv denied* 96 NY2d 864). Even assuming, arguendo, that the court erred in admitting the rap song and a transcript of its lyrics in evidence, we conclude that the error is harmless inasmuch as the evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant otherwise would have been acquitted (*see generally People v Crimmins*, 36 NY2d 230, 241-242; *People v Wachtel*, 124 AD2d 613, 615, *lv denied* 69 NY2d 835).

Defendant contends in her main brief that the evidence is legally insufficient to support the conviction. That contention is preserved for our review only to the extent that she contends that the testimony of the backseat passenger was incredible as a matter of law, that the evidence failed to connect her to the victim's death, and that there was insufficient forensic evidence at the murder scene and in defendant's car (*see People v Gray*, 86 NY2d 10, 19; *People v Gaston*, 104 AD3d 1206, 1207). We reject defendant's contention that the backseat passenger's testimony was incredible as a matter of law. It cannot be said that his testimony was " 'manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*Gaston*, 104 AD3d at 1207), and we decline to disturb the jury's credibility determinations with respect to that testimony (*see People v Aikey*, 94 AD3d 1485, 1486, *lv denied* 19 NY3d 956). We also reject defendant's claims that the evidence failed to connect her to the victim's death and that there was insufficient forensic evidence at the murder scene and in her car. Rather, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial and . . . as a matter of law satisfy the proof and burden requirements for every element of [murder in the second degree]" as a principal or an accomplice (*People v Bleakley*, 69 NY2d 490, 495).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention in her main brief that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends in her main brief that the prosecutor's opening statement was insufficient because the prosecutor failed to address the issue of liability and accountability pursuant to Penal Law § 20.00. We reject that contention. "There is no distinction between liability as a principal and criminal culpability as an accessory and the status for which the defendant is convicted has no bearing upon the theory of the prosecution" (*People v Duncan*, 46 NY2d 74, 79-80, *rearg denied* 46 NY2d 940, *cert denied* 442 US 910). Whether defendant was the actual perpetrator of the crime or liable as an accessory is therefore irrelevant, and we conclude that the prosecutor's opening statement "was sufficient to apprise the jury of the nature of the case" (*People v Nuffer*, 70 AD3d 1299, 1300).

Contrary to defendant's contention in her main and pro se supplemental briefs that she was denied her right to a fair trial when the prosecutor told prospective jurors that a codefendant had been acquitted, we conclude that the court's "inquiry and instructions were sufficient to cure any potential prejudice and to ensure defendant's right to a fair trial" (*People v Chavys*, 263 AD2d 964, 964, *lv denied* 94 NY2d 821). The court therefore did not abuse its discretion in denying defendant's motion for a mistrial premised on the prosecutor's comment (*see People v Wilson*, 78 AD3d 1213, 1214, *lv denied* 16 NY3d 747).

Defendant's contention in her pro se supplemental brief that defense counsel was ineffective "is based in large part upon facts that are outside the record and thus [is] not subject to review on direct appeal" (*People v Bennett*, 277 AD2d 1008, 1008, *lv denied* 96 NY2d 780).

We have reviewed defendant's remaining contentions in her main and pro se supplemental briefs and conclude that none warrants reversal or modification of the judgment of conviction.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1247

KA 07-01841

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HOWARD S. WRIGHT, DEFENDANT-APPELLANT.

DAVID M. KAPLAN, PENFIELD, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered July 10, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that the conviction is not supported by legally sufficient evidence. We reject that contention. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People" (*People v Hines*, 97 NY2d 56, 62, *rearg denied* 97 NY2d 678 [internal quotation marks omitted]). Here, several witnesses testified at trial that defendant was with the victim in her vehicle before she was killed. The People also presented evidence that the victim was raped in her vehicle, and defendant's DNA could not be excluded from various pieces of evidence recovered therefrom. In addition, the People presented testimony establishing that defendant was seen with the victim's vehicle on the night she was killed, and a witness testified that, the next morning, defendant took him to the place where the victim's vehicle was parked after the victim's death. We thus conclude that there is a valid line of reasoning and permissible inferences that could lead a rational person to the conclusion reached by the jury (*see People v Hernandez*, 79 AD3d 1683, 1683, *lv denied* 16 NY3d 895).

Viewing the evidence in light of the elements of murder in the

second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although an acquittal 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 id.*).

Defendant failed to preserve for our review his contention that he was denied a fair trial based on prosecutorial misconduct on summation (*see* CPL 470.05 [2]; *People v Stanley*, 108 AD3d 1129, 1131), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, contrary to defendant's contention, we conclude that the evidence, the law and the circumstances of this case, viewed in totality and as of the time of the representation, establish that he received meaningful representation (*see People v Bergman*, 70 AD3d 1494, 1495, *lv denied* 14 NY3d 885; *see generally People v Baldi*, 54 NY2d 137, 147).

All concur except FAHEY and CARNI, JJ., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully disagree with the conclusion of our colleagues that we should not exercise our power, as a matter of discretion in the interest of justice, to review defendant's contention that he was deprived of a fair trial based on prosecutorial misconduct. Upon our review of that contention (*see* CPL 470.15 [6] [a]), we conclude that the prosecutor's mischaracterization on summation of DNA evidence linking defendant to the victim's murder is reversible error. We also conclude that defendant was denied effective assistance of counsel as a matter of law based on defense counsel's failure to object to that prosecutorial misconduct. We therefore dissent and would reverse the judgment of conviction and grant a new trial on the first count of the indictment.

Before we address the incidents of prosecutorial misconduct, it is first necessary to address the evidence on which those incidents are based. As the majority notes, the People "presented evidence that . . . defendant's DNA could not be excluded from various pieces of evidence recovered [from the victim's vehicle]." At trial, the People's forensic expert, who analyzed defendant's DNA sample, described the two types of DNA testing used in this case—mitochondrial DNA analysis and YSTR DNA analysis. "[M]itochondrial DNA is not unique to any one individual[,] [and] everyone in a maternal line will share the same mitochondrial DNA" (Wes R. Porter, Expert Witnesses: Criminal Cases, § 8:22). By contrast, YSTR DNA analysis involves only the Y chromosome, and the genetic testing based on YSTR DNA analysis produces results only with respect to male individuals. Those more limited results are a natural consequence of the human genetic constitution inasmuch as a female inherits an X chromosome from each parent, whereas a male inherits an X chromosome from his mother and a Y chromosome from his father (*see* Forensic DNA Evidence: Science and the Law, ch 7:1). Absent "mutations, 95% of the genetic information on the Y chromosome is left unchanged from one generation to the next" (*id.*) and, "[b]ecause of [that] conservation, all male relatives from the same paternal line will have the same genetic information in the

non-recombinant region of their Y chromosomes" (*id.*). YSTR DNA "testing [thus] produces results that are specific to male individuals only" (*id.*).

The People's forensic expert acknowledged the two above-mentioned types of DNA analysis at trial, but she did not speak at length about a third type of DNA analysis—autosomal, which involves analysis of non-sex chromosomes and which permits "a statistical expression of the [DNA] profile's rarity in certain human populations" (*id.* at ch 5). Courts have observed that " '[t]he major difference between autosomal . . . DNA analysis and [YSTR] DNA analysis is in the interpretation and application of the test results' " (*People v Stevey*, 209 Cal App 4th 1400, 1413, quoting *People v Calleia*, 414 NJ Super 125, 145, 997 A2d 1051, 1062-1063, *revd on other grounds* 206 NJ 274, 20 A3d 402), and that "[YSTR DNA] testing . . . appears to have limited usefulness in *identifying* someone by a DNA match, but it may be useful for *excluding* a person" (*Moore v Commonwealth*, 357 SW3d 470, 491-492 [emphasis added]; *see Calleia*, 414 NJ Super at 145-147, 997 A2d at 1063-1064). Given its "high probability of identifying an individual as the DNA source," autosomal DNA testing "is the preferred method of analysis" (*Calleia*, 414 NJ Super at 146, 997 A2d at 1063).

By way of illustrating the above limitations of YSTR DNA analysis in the context of this case, we note that the People's forensic expert testified on direct examination that YSTR DNA analysis could not exclude defendant and the victim's husband as contributors to a sample collected from the ligature that bound the victim's hands; that YSTR DNA analysis of a sperm fraction from the vaginal swab collected from the victim could not exclude defendant's accomplice; and that YSTR DNA analysis could not exclude the victim's husband, defendant's accomplice and defendant as contributors to a sample collected from the victim's underwear. Further, on cross-examination, the People's forensic expert acknowledged that no typical statistical calculations are done in YSTR DNA testing, and that the "whole profile" is "compare[d] . . . to a database . . . to approximate how common or rare that particular profile might be found in the male population." None of the DNA evidence that tied defendant to the victim's murder was backed by any statistical calculations.

Notwithstanding the circumstantial and inconclusive nature of the above DNA evidence, the People presented it as their strongest proof linking defendant to the victim's murder. The People's remaining evidence of defendant's guilt was equally circumstantial, establishing only that the victim's body was found in a driveway; that the victim had been strangled to death with a shoelace; that the victim's hands had been bound behind her back with a ligature; and that, the day before her body was discovered, the victim, who tested positive for cocaine after her death, had been seen with defendant and codefendant, two cocaine dealers who were also observed in the victim's car without the victim a few hours before the victim's body was discovered.

Consequently, during her summation, the prosecutor relied heavily on the DNA evidence. She began her discussion of that proof by

arguing to the jury that defendant and his accomplice "thought that they had gotten away with murder, but they left their DNA all over the crime." After conceding that there was no statistical calculation available for the DNA results from the vaginal swab, the prosecutor noted that there had been only two contributors to the sperm fraction from the swab, which "matched the YSTR/DNA profile of the defendant and of [defendant's accomplice]." The prosecutor added that the semen collected from the victim's underwear contained a mixture of DNA, which included contributions from both defendant and his accomplice.

With respect to the hand ligature, the prosecutor noted that the People's analysts were unable to obtain a complete DNA profile from that evidence, but "at four locations, there was able to be detected the presence of a Y chromosome . . . [E]very single number that they were able to determine, and they were able to determine partial profile matches, is that of [defendant] and [the victim's husband]." After noting again that there was no statistical calculation available, the prosecutor further argued to the jury that, according to the People's forensic expert, defendant "could not be excluded as a contributor to the mixture on the ligature."

From there, the prosecutor went further, referring to a chart listing the YSTR DNA profiles of several different potential matches and alleging that "the only one who matches the DNA profile on the ligature is [defendant]." Arguing that such fact was probative and not coincidental, the prosecutor further claimed that there was "no reasonable explanation for [defendant's] DNA on that ligature that bound [the victim's] hands." In closing her discussion of the DNA evidence, the prosecutor also argued to the jury that defendant's "sperm" had been in the victim's vagina and on the victim's underwear, and that his DNA profile was "included on the ligature that bound [the victim's] hands together." Finally, the prosecutor added: "The defendant's DNA is inside [the victim], on her underwear, on the ligature that binds her hands . . . When you put it all together, members of the jury, it is common sense and there is only one conclusion that you can reach, and that is guilty."

"Reversal based on prosecutorial misconduct is 'mandated only when the conduct [complained of] has caused such substantial prejudice to the defendant that he has been denied due process of law' " (*People v Jacobson*, 60 AD3d 1326, 1328, *lv denied* 12 NY3d 916). "In measuring whether substantial prejudice has occurred, one must look at the severity and frequency of the conduct, whether the court took appropriate action to dilute the effect of that conduct, and whether review of the evidence indicates that without the conduct the same result would undoubtedly have been reached" (*People v Mott*, 94 AD2d 415, 419).

In light of the circumstantial nature of all of the evidence against defendant, we cannot conclude that the jury would have reached the same result had not the prosecutor both mischaracterized and emphasized the DNA evidence on summation, which evidence the People made the linchpin of their case. Here, the testimony of the People's forensic expert put defendant in only a statistically-undefined *group*

of people whose DNA could have been found on the victim's underwear, on the ligature, and in the sperm fraction from the vaginal swab. In other words, that evidence placed defendant in a *class* of people that could have contributed to the DNA, but the prosecutor argued to the jury that the analysis of the DNA *established* defendant as the DNA's contributor. We conclude that the prosecutor's willful and repeated mischaracterization of evidence of class as evidence of exactitude was misconduct that could have " 'tip[ped] the scales against defendant' " (*People v Elliott*, 294 AD2d 870, 870, *lv denied* 98 NY2d 696). We cannot conclude that the same result herein "would undoubtedly have been reached" absent that misconduct (*Mott*, 94 AD2d at 419).

We further conclude that, under the circumstances of this case, defense counsel's failure to object to the prosecutor's remarks on summation deprived defendant of meaningful representation. "A single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152; *see People v Atkins*, 107 AD3d 1465, 1465, *lv denied* 21 NY3d 1040). "In order to sustain a claim of ineffective assistance of counsel, a court must consider whether defense counsel's actions at trial constituted egregious and prejudicial error such that defendant did not receive a fair trial" (*People v Oathout*, 21 NY3d 127, 131 [internal quotation marks omitted]). Here, we conclude that defense counsel's failure to object to the prosecutor's baseless transformation of evidence that defendant was in a group or class of people that could have contributed to the subject DNA samples to evidence that defendant was the sole possible contributor to those samples was so egregious and prejudicial that defendant did not receive a fair trial. In our view, there is no strategic or other legitimate explanation for that shortcoming (*see People v Benevento*, 91 NY2d 708, 712), and we conclude that defendant was denied the right to effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Consequently, for the foregoing reasons, we would reverse the judgment on the law based on ineffective assistance of counsel. We would also reverse the judgment as a matter of discretion in the interest of justice and on the law based on prosecutorial misconduct. Further, we would grant defendant a new trial on the first count of the indictment.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1300

CA 13-00908

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

STEVEN C. RIDGE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALICE GOLD, ET AL., DEFENDANTS,
AND JAY BRAYMILLER, DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, BUFFALO (CARLTON K. BROWNELL, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (AARON GLAZER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered November 16, 2012. The order, insofar as appealed from, denied the motion of defendant Jay Braymiller for summary judgment dismissing plaintiff's complaint.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, the motion of defendant Jay Braymiller for summary judgment is granted, and the complaint against him is dismissed.

Memorandum: Plaintiff was allegedly injured when he fell from a ladder while working on an addition to a home owned by defendants Alice Gold and Susan Griesman. In a proceeding before the Workers' Compensation Board (Board), the Board concluded that plaintiff lacked credibility and that no accident had occurred as alleged by plaintiff. Plaintiff thereafter commenced this Labor Law and common-law negligence action against the homeowners and Jay Braymiller (defendant), the general contractor on the project. Defendant moved for summary judgment dismissing the complaint against him on the ground "that the action is barred by collateral estoppel." We agree with defendant that Supreme Court erred in denying his motion, and we therefore reverse the order insofar as appealed from, grant defendant's motion, and dismiss the complaint against him.

The doctrine of collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500). Thus, "[t]he quasi-judicial determinations of administrative agencies are entitled to collateral estoppel effect where the issue a party seeks

to preclude in a subsequent civil action is identical to a material issue that was necessarily decided by the administrative tribunal and where there was a full and fair opportunity to litigate before that tribunal" (*Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 255). "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" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456; *see Ackman v Haberer*, 111 AD3d 1378, 1379).

Here, defendant met his burden on his motion by establishing the "identicality and decisiveness of the issue" decided in the workers' compensation proceeding (*Ryan*, 62 NY2d at 501; *see Matter of Kibler v New York State Dept. of Corr. Servs.*, 91 AD3d 1218, 1221, *lv denied* 19 NY3d 803; *Rigopolous v American Museum of Natural History*, 297 AD2d 728, 729; *see also Scipio v Wal-Mart Stores E., L.P.*, 100 AD3d 1452, 1453). In support of his motion, defendant submitted the form entitled "C-7 Notice That Right To Compensation Is Controverted" (hereafter, C-7 Notice) submitted to the Board by the workers' compensation insurance carrier, which specifically lists "[c]ausally [r]elated [a]ccident" as one of the grounds for controverting plaintiff's claim. The narrative portion of the C-7 Notice states that the insurance carrier "raise[s] the issue of causal relationship because we believe that . . . [plaintiff] has a prior work related injury involving the neck and back." Defendant also submitted copies of the decisions of the Workers' Compensation Law Judge and the Board, which confirm that the issue whether a work-related accident had in fact occurred was in controversy at the hearing on plaintiff's workers' compensation claim.

In opposition to defendant's motion, plaintiff asserted that there was no identity of issue because the sole purpose of the hearing was to determine whether an employer-employee relationship existed. Plaintiff, however, failed to attach excerpts of the hearing transcript to support his contention that the scope of the hearing was narrower than indicated on the C-7 Notice, even though it is clear from the record that he had a copy of the transcript. There is likewise no merit to plaintiff's assertion that his credibility was not "clearly raised" or otherwise placed in issue in the workers' compensation proceeding. "In any judicial or quasi-judicial inquiry[,] the credibility of any witness is always a most important factor" (*Matter of Fisher v One Oak Dairy*, 274 App Div 274, 274; *see 1515 Summer St. Corp. v Parikh*, 13 AD3d 305, 307), and it is well established that the Board "has broad authority to resolve factual issues based on credibility of witnesses and [to] draw any reasonable inference from the evidence in the record" (*Matter of Marshall v Elf Atochem N. Am.*, 285 AD2d 933, 934 [internal quotation marks omitted]; *see Matter of Papadakis v Volmar Constr., Inc.*, 17 AD3d 874, 875).

Although plaintiff claimed at oral argument of this appeal that the phrase "[c]ausally [r]elated [a]ccident" on the C-7 Notice referred to medical causation only and not to the issue whether an

accident in fact occurred, he failed to raise that argument in his appellate brief or before the trial court, and thus that argument is not properly before us (*see Pellescki v City of Rochester*, 198 AD2d 762, 763, *lv denied* 83 NY2d 752). In any event, case law supports the conclusion that the phrase "causally related accident" encompasses both the happening of the accident and the causal relationship between the accident and the claimed injuries (*see Matter of Curley v Allstate Ins. Co.*, 2 AD3d 995, 996; *Matter of Wachtler v AT&T*, 285 AD2d 767, 768; *Marshall*, 285 AD2d at 934-935). Indeed, whether an accident actually occurred—when such occurrence is controverted—is a threshold factual question in a workers' compensation proceeding.

Finally, plaintiff failed to establish that he did not have a full and fair opportunity to litigate the issue whether an accident in fact occurred in the prior proceeding (*see Ryan*, 62 NY2d at 501, 503-504; *Rigopolous*, 297 AD2d at 729). Plaintiff, who was represented by counsel, had notice of the issue prior to the hearing, testified at the hearing, and had the opportunity to cross-examine the witnesses against him (*see Ryan*, 62 NY2d at 503-504; *Matter of Mordukhayev [Commissioner of Labor]*, 104 AD3d 1005, 1006; *Kibler*, 91 AD3d at 1221).

Inasmuch as the absence of an accident is dispositive of plaintiff's Labor Law and common-law negligence causes of action, we conclude that defendant "eliminat[ed] all triable issues of fact from the case," and he is therefore entitled to summary judgment dismissing the complaint against him (*Rigopolous*, 297 AD2d at 729; *see Yoonessi v State of New York*, 289 AD2d 998, 1000, *lv denied* 98 NY2d 609, *cert denied* 537 US 1047).

All concur except SCONIERS and WHALEN, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent. In our view, Supreme Court properly denied the motion of Jay Braymiller (defendant) for summary judgment dismissing the complaint against him inasmuch as defendant failed to meet his initial burden of establishing that the doctrine of collateral estoppel bars plaintiff's action against him.

There is no question that the doctrine of collateral estoppel "gives preclusive effect" to the determination of a quasi-judicial agency like the Workers' Compensation Board (Board) as long as "two basic conditions are met: (1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest th[at] issue in the administrative tribunal" (*Jeffreys v Griffin*, 1 NY3d 34, 39; *see Staatsburg Water Co. v Staatsburgh Fire Dist.*, 72 NY2d 147, 153). Courts have discretion in deciding whether to apply the doctrine of collateral estoppel (*see Calhoun v Ilion Cent. Sch. Dist.* [appeal No. 2], 90 AD3d 1686, 1689; *Matter of Russo v Irwin*, 49 AD3d 1039, 1041), and the decision whether it is proper to do so "depends upon 'general notions of fairness involving a practical inquiry into the realities of the litigation' " (*Jeffreys*, 1 NY3d at 41, quoting *Matter of Halyalkar v Board of*

Regents of State of N.Y., 72 NY2d 261, 268). "The proponent of collateral estoppel as the basis for the granting of summary judgment has the burden of demonstrating" that both basic conditions are met (*S.D.I. Corp. v Fireman's Fund Ins. Cos.*, 208 AD2d 706, 708). We conclude that, here, defendant failed to meet his burden with respect to the first condition, i.e., that he failed to demonstrate that the issue whether an accident in fact occurred was clearly raised and decided in a prior workers' compensation proceeding (*see Rigopolous v American Museum of Natural History*, 297 AD2d 728, 729; *see generally Jeffreys*, 1 NY3d at 39). The record before us, which does not contain any excerpts from the transcript of the hearing on plaintiff's workers' compensation claim or the documentation relied upon by the Workers' Compensation Law Judge and the Board that decided that claim, simply does not establish as a matter of law whether that issue was "addressed and decided" in the proceeding (*Madden v Pine Hill-Kingston Bus. Corp.*, 288 AD2d 600, 601; *Capitaland United Soccer Club v Capital Dist. Sports & Entertainment*, 238 AD2d 777, 780). Moreover, we note that the Board found in its decision "that no accident occurred *as [plaintiff] has alleged*, based on [his] lack of credibility" (emphasis added), which is not equivalent to a finding that no accident occurred at all. In sum, we conclude that "the inadequacy of the record . . . precludes us from determining on the merits whether the doctrine of collateral estoppel should be applied" (*FTL Co. v Chase Manhattan Bank, N. A.*, 78 AD2d 628, 628).

We also conclude that there is an issue of fact with respect to the second condition, i.e., whether plaintiff had a fair and full opportunity to litigate the disputed issue before the Board (*see generally Jeffreys*, 1 NY3d at 39). Indeed, the record establishes that plaintiff did not receive sufficient notice that his employer was challenging in the workers' compensation proceeding whether a work-related accident actually occurred (*see Jenkins v Meredith Ave. Assoc.*, 238 AD2d 477, 479). The form entitled "C-7 Notice That Right To Compensation Is Controverted" (hereafter, C-7 Notice), which was submitted by defendant in support of his motion, did not put plaintiff on notice that his employer was challenging the issue whether an accident in fact occurred. The C-7 Notice contains boxes that an employer may check to indicate the issues being raised in the proceeding. Here, plaintiff's employer checked boxes titled "Employer-Employee Relationship," "Causally Related Accident or Occupational Disease," "Proper Carrier," and "General or Special Employment." The remaining boxes—"Accident within meaning of Workers' Compensation Law," "Accident Arising Out Of and in the Course of Employment," and "Subject Matter Jurisdiction"—were left unchecked. Although plaintiff's employer raised an issue whether plaintiff's injuries were causally related to the alleged accident because of a prior work-related injury that plaintiff had sustained, we note that the issue of injury causation is different from the issue whether an accident occurred at all. We also note that defendant failed to include in his motion submissions a copy of the transcript of the hearing, thereby preventing us from determining whether plaintiff was put on notice that his employer was controverting the issue whether the accident actually occurred. We therefore conclude that there is a

question of fact whether plaintiff had a full and fair opportunity to litigate that issue before the Board (*see id.*).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1324

CA 13-00795

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

IN THE MATTER OF ALLEGANY WIND LLC,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PLANNING BOARD OF TOWN OF ALLEGANY,
RESPONDENT-RESPONDENT.

YOUNG/SOMMER LLC, ALBANY (J. MICHAEL NAUGHTON OF COUNSEL), FOR PETITIONER-APPELLANT.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered February 28, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding to challenge respondent's denial of its request for a second one-year extension of a special use permit and site plan approval previously issued to petitioner for its proposed 29-turbine wind farm (hereafter, project) in the Town of Allegany (Town). Supreme Court properly dismissed the petition. We reject petitioner's contention that the denial by respondent of its request for an extension of the special use permit was arbitrary and capricious. As a general rule, where a party applies for an extension of a special use permit previously issued, the applicant "must be afforded an opportunity to show that circumstances have not changed, and a denial of extension will only be sustained if proof of such circumstances is lacking" (Patricia E. Salkin, 2 New York Zoning Law & Practice § 29:34; *see generally Matter of Dil-Hill Realty Corp.*, 53 AD2d 263, 267). Moreover, "[a] board has substantial discretion in dealing with requests for an extension of a durational limitation" (Terry Rice, *2005-2006 Survey of New York Law, Zoning Law*, 57 Syracuse L Rev 1455, 1470; *see generally 420 Tenants Corp. v EBM Long Beach, LLC*, 41 AD3d 641, 643). A board may not, however, "base its determination on 'generalized community objections' " (*Matter of Metro Enviro Transfer, LLC v Village of Croton-on-Hudson*, 5 NY3d 236, 240; *see Matter of Constantino v Moline*, 4 AD3d 820, 821).

Here, respondent issued a special use permit to petitioner on July 11, 2011, allowing it to construct the wind farm. Respondent notified petitioner that its permit would "expire if construction has not commenced within a year of [respondent's] approval." On June 11, 2012, respondent extended the deadline "until the earlier of" one year or 90 days after the "conclusion of the" lawsuit commenced against the Town by a citizens' group, Concerned Citizens of Cattaraugus County (CCCC), which opposed the project. By letter dated August 3, 2012, petitioner advised the Town that it was "considering use of alternate turbine models" for the project. Petitioner thereafter requested a second extension of the special use permit, but the Planning Board denied that request during its October 15, 2012 meeting.

We conclude that, contrary to petitioner's contention, there was a material change in circumstances since the special use permit had been issued, and that the Planning Board's refusal to extend the special use permit for a second time was not arbitrary or capricious. When the special use permit was granted, petitioner contemplated the use of Nordex N1000 turbines. It is undisputed that, by the time petitioner requested its second extension of the permit, petitioner proposed using alternate turbine models. The record establishes that, during a meeting conducted by respondent several months before petitioner requested its second extension, petitioner's counsel answered in the affirmative when asked whether a change in turbine models would constitute a change in circumstances sufficient to warrant reconsideration of the project by respondent. Specifically, counsel stated, "Yes, looking at how specific the approvals were with regard to a turbine model, the potential impact may be different based on the characteristics." We note that respondent's consultant concluded that use of the proposed alternate turbines would result in noncompliance with the Town's noise setback requirements.

We reject petitioner's further contention that the expiration date of its special use permit was tolled during the pendency of the lawsuit filed by CCCC. According to petitioner, the time period should be tolled because, until the litigation was resolved, it could not obtain necessary financing and could not commence construction of the wind farm. We reject that contention. Although several states have recognized an equitable doctrine that would allow for the tolling of the time period (*see* 3 Rathkopf, Zoning and Planning § 58:24 [4th ed]), New York has not done so and, in any event, this case does not warrant the application of that equitable doctrine.

The record makes clear that the CCCC lawsuit was not the primary reason for petitioner's failure to proceed with the project in a timely manner. As representatives of petitioner acknowledged in several media interviews, petitioner did not go forward with construction in large part because it was waiting to find out whether Congress was going to extend the Production Tax Credit (PTC) for wind energy. The PTC was scheduled to expire at the end of 2012. Furthermore, petitioner's response to the CCCC lawsuit does not support a basis in equity to toll the time period for petitioner's special use permit during the pendency of the CCCC lawsuit. Supreme Court dismissed CCCC's petition on November 10, 2011, approximately

six weeks after the proceeding had been commenced. Although CCCC filed a notice of appeal on December 5, 2011, it failed to perfect the appeal within 60 days of service of the notice of appeal, thus rendering the appeal subject to dismissal (*see* 22 NYCRR 1000.2). Nevertheless, petitioner did not move to dismiss the appeal.

Moreover, when CCCC's attorney advised the Town and petitioner that CCCC did not intend to pursue the appeal, petitioner's attorney refused to sign a stipulation discontinuing the action. The Town therefore moved to dismiss CCCC's appeal, but petitioner threatened the Town with legal action if it did not withdraw the motion. After the Town withdrew its motion, CCCC then moved to dismiss its own appeal, but petitioner opposed the motion, notwithstanding that petitioner was a *respondent* on the appeal and had not cross-appealed. Thus, it is clear from the record that petitioner engaged in sustained efforts to delay dismissal of CCCC's appeal.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1373

CA 13-00925

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

GARRETT HARGRAVE AND KARI JEAN HARGRAVE,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

LECHASE CONSTRUCTION SERVICES, LLC,
DEFENDANT-RESPONDENT-APPELLANT.

KENNY & KENNY, PLLC, SYRACUSE (MICHAEL P. KENNY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (L. DAMIEN COSTANZA OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered February 11, 2013. The order, among other things, denied in part the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by granting defendant's motion in its entirety and dismissing the amended complaint and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Garrett Hargrave (plaintiff) when he tripped on a piece of old insulation and fell on a stack of boards on a flat roof. The Penn Yan Central School District (District) hired defendant as the construction manager on a capital facilities project at its senior high school, and hired plaintiff's employer as the roofing contractor. At the time of his injury, plaintiff was walking backward on the roof dragging a new piece of insulation from one section of the roof to another section where his coworkers were working. Plaintiff testified at his deposition that a piece of old insulation had blown over from an upper roof into his path, causing him to trip. Supreme Court granted defendant's motion seeking summary judgment dismissing the amended complaint in part, dismissing only the Labor Law § 240 (1) and § 241 (6) causes of action, and plaintiffs now appeal and defendant cross-appeals. Plaintiffs raise no issues on appeal with respect to section 240 (1) and thus are deemed to have abandoned any issues with respect thereto (*see Hale v Odd Fellow & Rebekah Health Care Facility*, 302 AD2d 948, 949; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

We reject plaintiffs' contention on their appeal that defendant was liable pursuant to Labor Law § 241 (6) as an agent of the District. A construction manager may be liable as an agent of the owner if "the manager had the ability to control the activity which brought about the injury" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864). " 'Defendant established as a matter of law that it was not an agent of the owner because the owner had not delegated to it the authority to supervise and control plaintiff's work' " (*Rowland v Wilmorite, Inc.*, 68 AD3d 1770, 1770). Pursuant to the express terms of the contract between defendant and the District, defendant "had no control over or responsibility for the safety of the workers at the construction site" (*Titus v Kirst Constr., Inc.*, 43 AD3d 1324, 1325; *see Uzar v Louis P. Ciminelli Constr. Co., Inc.*, 53 AD3d 1078, 1079; *Bateman v Walbridge Aldinger Co.*, 299 AD2d 834, 835, *lv denied* 100 NY2d 502). The deposition testimony and affidavits submitted by defendant established that defendant acted in accordance with its authority under the contract, i.e., coordinating the schedules of the contractors and ensuring that their work complied with the requirements of the construction documents, and did nothing more. Plaintiffs failed to raise a triable issue of fact whether defendant was liable as an agent of the District (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We agree with defendant on its cross appeal that the court erred in denying those parts of its motion seeking dismissal of the Labor Law § 200 and common-law negligence causes of action, and we therefore modify the order by dismissing the amended complaint in its entirety. "Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877; *see McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1581). On the other hand, where the " 'plaintiff's injuries stem not from the manner in which the work was being performed[ ] but, rather, from a dangerous condition on the premises, [an owner or] general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition' " (*Miller v Savarino Constr. Corp.*, 103 AD3d 1137, 1138). Regardless of which theory applies here, defendant was not an agent of the owner and "was not responsible either for the performance of [plaintiff's] work or the premises on which that work was undertaken" (*id.* at 1139). Defendant therefore met its initial burden with respect to the section 200 and common-law negligence causes of action, and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

All concur except WHALEN, J., who dissents and votes to modify in accordance with the following Memorandum: I respectfully dissent because I cannot agree with the majority's conclusion that plaintiffs failed to raise a triable issue of fact whether defendant had supervisory control and authority over the work being done by the employer of Garrett Hargrave (plaintiff) (*see Walls v Turner Constr.*

Co., 4 NY3d 861, 864). I therefore conclude that Supreme Court erred in granting defendant's motion with respect to Labor Law § 241 (6) and properly denied it with respect to Labor Law § 200 and common-law negligence, and I would modify the order accordingly.

Plaintiffs submitted an affidavit from plaintiff's former coworker, who averred that although no safety devices were provided to the workers, it was his understanding that defendant had the authority to decide whether they were required. Plaintiff's coworker further averred that representatives from defendant would come to the work site two or three times per week, and that one of the representatives, "Tom," would tell him and the other workers to pick up pieces of debris off the roof and to keep the work area clean. Moreover, defendant's project manager testified at his deposition that defendant's onsite supervisor, Tom McCormack, would inspect the roof daily and had the authority to stop unsafe work on the site should students, faculty, or staff be in danger from the work being performed. I conclude that a factfinder could reasonably infer that McCormack was the man identified by plaintiff's coworker.

Furthermore, plaintiff's coworker averred that there was a separate contractor working on the upper roof, i.e., the area that the insulation upon which plaintiff tripped came from. In the absence of any evidence concerning the nature of the relationship between defendant and that unidentified contractor, a question of fact also remains whether defendant had "supervisory control and authority over the work being done" by that contractor (*id.* at 864). Although defendant submitted proof that there were no contractors other than plaintiff's employer performing roofing work, we must view the evidence in the light most favorable to plaintiffs, the nonmoving parties (*see Nichols v Xerox Corp.*, 72 AD3d 1501, 1502).

Because a question of fact remains whether defendant had supervisory control over the work on the roof, the court erred in granting that part of defendant's motion for summary judgment dismissing the Labor Law § 241 (6) cause of action (*see Walls*, 4 NY3d at 864; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877). For the same reason, I conclude that the court properly denied defendant's motion with respect to the section 200 and common-law negligence causes of action (*see Comes*, 82 NY2d at 877).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

20.1
CA 13-00791
PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ.

SOUTH BUFFALO DEVELOPMENT, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PVS CHEMICAL SOLUTIONS, INC.,
DEFENDANT-RESPONDENT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS, LLP, BUFFALO (MATTHEW J. BECK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BLAIR & ROACH, LLP, TONAWANDA (DAVID L. ROACH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 12, 2013. The order, among other things, granted the cross motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff and defendant own contiguous parcels in the vicinity of the Buffalo River in South Buffalo that were once part of one common property owned by defendant's predecessor in interest. Defendant's property sits between a large section of plaintiff's property and the Buffalo River, and currently houses a "sewer effluent line" that provides discharge from plaintiff's property into the Buffalo River. Pursuant to an easement agreement executed in 1977, when the common property was severed, defendant's predecessor in interest granted an easement to plaintiff's predecessor in interest "for the maintenance and operation of a sewer effluent line from Grantee's property to the Buffalo River, over, under, across and upon a [15-foot] strip of land of Grantor's property." The easement agreement further provided that the "fail[ure] to use said right of way and easement for the purpose designated for a period of 12 consecutive months" would result in termination of the easement. After commencing this action for, inter alia, injunctive relief, plaintiff moved for summary judgment determining that an easement exists in favor of plaintiff and preventing defendant from interfering with the easement, and defendant cross-moved for summary judgment dismissing the complaint.

Supreme Court properly granted defendant's cross motion upon

determining that plaintiff is not entitled to the easement set forth in the easement agreement. The "conditional easement [was] extinguished by its own terms" in 2005 (*Norse Realty Group, Inc. v Mormando Family Ltd. Partnership*, 38 AD3d 735, 736), inasmuch as plaintiff's predecessor in interest, which had ceased its operations, "fail[ed] to use [the] right of way and easement for the purpose designated," i.e., "the maintenance and operation of a sewer effluent line," for the preceding 12 months. Contrary to plaintiff's contention, the fact that storm water incidentally passed through the sewer effluent line before and after plaintiff's predecessor in interest ceased its operations does not save the easement from termination. Notably, the easement was for a sewer effluent line, not a general sewer line or a storm drainage system, and the court properly determined that the easement agreement was unambiguous in that respect. "In determining whether a[n agreement] is ambiguous, the court first must determine whether the [agreement] 'on its face is reasonably susceptible of more than one interpretation' " (*Gilpin v Oswego Bldrs., Inc.*, 87 AD3d 1396, 1397, quoting *Chimart Assoc. v Paul*, 66 NY2d 570, 573). Here, the court properly concluded that the language of the easement agreement and the plain and ordinary meaning of "effluent" demonstrated that the purpose of the easement was solely to remove wastewater (*see generally Kass v Kass*, 91 NY2d 554, 566; *Mazzola v County of Suffolk*, 143 AD2d 734, 735).

Contrary to plaintiff's further contention, it is not entitled to an implied easement to use the sewer effluent line to convey storm water. Even assuming, arguendo, that we may decide this appeal on a legal theory not expressly raised in the complaint (*see Boyle v Marsh & McLennan Cos., Inc.*, 50 AD3d 1587, 1588, *lv denied* 11 NY3d 705; *see generally* CPLR 3026), we conclude that plaintiff is not entitled to an implied easement inasmuch as the express easement for wastewater was in effect at the time the common property was severed, i.e., when the implied easement was allegedly created, and an express easement and an implied easement cannot exist simultaneously (*see Corrarino v Byrnes*, 43 AD3d 421, 425; *Oliphant v McCarthy*, 208 AD2d 1079, 1080; *see also Alt v Laga*, 207 AD2d 971, 971).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

27

KA 12-01343

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBIN DROUIN, DEFENDANT-APPELLANT.

JOSEPH P. MILLER, CUBA, FOR DEFENDANT-APPELLANT.

KEITH A. SLEP, DISTRICT ATTORNEY, BELMONT (MICHAEL B. FINN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered May 17, 2012. The judgment convicted defendant, upon a jury verdict, of vehicular manslaughter in the second degree and criminally negligent homicide.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a jury verdict, of vehicular manslaughter in the second degree (Penal Law § 125.12 [1]) and criminally negligent homicide (§ 125.10). Contrary to the contention of defendant, we conclude that the evidence is legally sufficient to support the conviction. With respect to the vehicular manslaughter conviction, defendant contends that the People failed to establish that she ingested a drug set forth in Public Health Law § 3306 or that her ability to operate the motor vehicle was impaired by such drug (*see* Penal Law § 125.12 [1]; Vehicle and Traffic Law §§ 114-a, 1192 [4], [4-a]). We reject that contention. Defendant admitted to the arresting officer that, prior to the accident, she ingested oxycodone and alprazolam, both of which are listed in Public Health Law § 3306 (Schedule II [b] [1] [14]; Schedule IV [c] [1]). Several witnesses, including law enforcement officers and a registered nurse who examined defendant at the hospital, testified that defendant exhibited classic signs of drug impairment, including glassy, bloodshot eyes; dilated pupils; slurred speech; and poor motor coordination and balance (*see People v Gonzalez*, 90 AD3d 1668, 1668-1669; *People v Curkendall*, 12 AD3d 710, 713, *lv denied* 4 NY3d 743; *People v Kraft*, 278 AD2d 591, 591, *lv denied* 96 NY2d 864). Defendant also failed four out of the six standard field sobriety tests administered at the hospital. Further, a certified drug recognition expert concluded based upon his evaluation of defendant that she was under the influence of a central nervous system depressant and a narcotic analgesic, and that she “was impaired and unable to operate a

motor vehicle safely down the road" (*see People v Clark*, 309 AD2d 1076, 1077; *People v Crandall*, 255 AD2d 617, 618-619). With respect to causation, once "it is established that the defendant was unlawfully . . . impaired while operating the vehicle, 'there [is] a rebuttable presumption that, *as a result of such [impairment]* . . . , [the defendant] operated the motor vehicle . . . in a manner that caused such death' " (*People v Stickler*, 97 AD3d 854, 855, *lv denied* 20 NY3d 989, quoting Penal Law § 125.12 [emphasis added]; *see People v Mojica*, 62 AD3d 100, 108-109, *lv denied* 12 NY3d 856). Here, although defendant claimed that the accident occurred because she was distracted by the presence of an "unusually large number of waterfowl," and not because she was impaired, we conclude that the above evidence, coupled with the circumstances of the accident, provided the jury with a rational basis to reject that explanation (*see Curkendall*, 12 AD3d at 713). We thus conclude that the evidence is legally sufficient to establish defendant's guilt of vehicular manslaughter in the second degree beyond a reasonable doubt (*see People v Bain*, 85 AD3d 1193, 1194, *lv denied* 17 NY3d 902; *see generally People v Bleakley*, 69 NY2d 490, 495).

With respect to the conviction of criminally negligent homicide, Penal Law § 125.10 provides that "[a] person is guilty of criminally negligent homicide when, with criminal negligence, he [or she] causes the death of another person." Criminal negligence "requires a defendant to have 'engaged in some blameworthy conduct creating or contributing to a substantial and unjustifiable risk of' a proscribed result," such as death (*People v Conway*, 6 NY3d 869, 872, quoting *People v Boutin*, 75 NY2d 692, 696; *see* § 15.05 [4]). Here, we conclude that the evidence that defendant took an oxycodone tablet that was not prescribed to her, in combination with other prescription medications that had been prescribed to her, and then operated a motor vehicle "demonstrated that [she] engaged in conduct exhibiting 'the kind of seriously blameworthy carelessness whose seriousness would be apparent to anyone who shares the community's general sense of right and wrong' " (*People v Asaro*, 21 NY3d 677, 685, quoting *People v Cabrera*, 10 NY3d 370, 377; *see Conway*, 6 NY3d at 871-872; *Kraft*, 278 AD2d at 592).

Defendant's contention that the verdict is against the weight of the evidence "is raised for the first time in [her] reply brief and therefore is not properly before us" (*People v Sponburgh*, 61 AD3d 1415, 1416, *lv denied* 12 NY3d 929). Contrary to the further contention of defendant, we conclude that County Court did not err in refusing to suppress her statements to the police. Defendant was not in police custody when the police initially questioned her at the hospital and, in any event, we conclude that the questions were investigatory rather than accusatory in nature (*see People v Prue*, 8 AD3d 894, 897, *lv denied* 3 NY3d 680; *People v O'Hanlon*, 5 AD3d 1012, 1012, *lv denied* 3 NY3d 645; *People v Bongiorno*, 243 AD2d 719, 720, *lv denied* 91 NY2d 889; *People v Bowen*, 229 AD2d 954, 955, *lv denied* 88 NY2d 1019). We further conclude that "the record of the suppression hearing establishes that [defendant] was not [impaired by drugs] to such a degree that [s]he was incapable of voluntarily, knowingly, and

intelligently waiving [her] *Miranda* rights" (*People v Cimino*, 49 AD3d 1155, 1157, *lv denied* 10 NY3d 861 [internal quotation marks omitted]; *see People v Downey*, 254 AD2d 795, *lv denied* 92 NY2d 1031). Contrary to defendant's contention, the People met their burden of proof at the suppression hearing through the testimony of the two investigating officers who elicited the challenged statements, and the People were not required to produce a third officer who had minimal contact with defendant upon her initial arrival at the hospital (*see People v Witherspoon*, 66 NY2d 973, 974; *People v Caballero*, 23 AD3d 1031, 1032, *lv denied* 6 NY3d 846; *People v Holloway*, 16 AD3d 1062, 1063, *lv denied* 5 NY3d 763).

Although we agree with defendant that the court improperly admitted in evidence a photograph of the victim taken when she was alive because such evidence was not relevant to any material fact to be proven at trial (*see People v Stevens*, 76 NY2d 833, 835-836; *People v Colon*, 102 AD3d 705, 705, *lv denied* 21 NY3d 942; *People v Dove*, 233 AD2d 751, 754, *lv denied* 89 NY2d 1011), we conclude that the error is harmless inasmuch as there was "overwhelming evidence of the defendant's guilt, and no significant probability that the error contributed to [her] conviction[]" (*Colon*, 102 AD3d at 705; *see People v Jackson*, 41 AD3d 1268, 1269; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Contrary to the contention of defendant, we conclude that the sentence is not unduly harsh and severe. Finally, we have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

37

CA 13-01118

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

PHILIP BUFF, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF MANLIUS AND MARK-PAUL SERAFIN,
MAYOR, VILLAGE OF MANLIUS,
DEFENDANTS-RESPONDENTS.

THOMAS J. JORDAN, ALBANY, FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (COLIN M. LEONARD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered February 11, 2013. The order granted defendants' motion to dismiss the complaint.

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

Memorandum: Plaintiff, a retired employee of defendant Village of Manlius (Village), commenced this breach of contract action seeking to compel defendants to pay 80% of plaintiff's health insurance plan premiums. Plaintiff alleged that defendants paid that percentage when he was employed, pursuant to the terms of a collective bargaining agreement (CBA) between the Village and the union representing Village firefighters (union). Defendants moved to dismiss the complaint on the ground that the grievance procedure provided for in the CBA was the exclusive procedure by which plaintiff could seek redress, and that plaintiff was required to bring his claim through the grievance procedure despite his status as a retiree. Plaintiff opposed defendants' motion, arguing, inter alia, that the CBA restricted the class of individuals who could file a grievance to active employees. Supreme Court determined that the language of the CBA contained no such restriction and granted defendants' motion. We conclude that the court erred in interpreting the CBA, and we therefore reverse the order, deny defendants' motion, and reinstate the complaint.

It is well settled that, "when an employer and a union enter into a collective bargaining agreement that creates a grievance procedure, an employee subject to the agreement may not sue the employer directly for breach of that agreement but must proceed, through the union, in accordance with the contract" (*Matter of Board of Educ., Commack Union*

Free Sch. Dist. v Ambach, 70 NY2d 501, 508, *cert denied sub nom. Margolin v Board of Educ., Commack Union Free Sch. Dist.*, 485 US 1034; *see also Clark v County of Cayuga*, 212 AD2d 963, 963). There are, however, two exceptions to that rule. The first exception applies when "the contract provides otherwise" (*Ambach*, 70 NY2d at 508), i.e., the contract "either expressly allows such suits or implicitly does so by excluding the dispute at issue from, or not covering it within, the ambit of the contractual dispute resolution procedures" (*Ledain v Town of Ontario*, 192 Misc 2d 247, 251, *affd* 305 AD2d 1094). The second exception applies "when the union fails in its duty of fair representation" (*Ambach*, 70 NY2d at 508), but the employee must allege and prove that the union breached its duty to provide fair representation to the employee (*see Ledain*, 192 Misc 2d at 251; *see also Matter of Reese v Board of Trustees of Mohawk Val. Community Coll.*, 28 AD3d 1240, 1241, *lv denied* 7 NY3d 709; *Matter of Prendergast v Kingston City Sch. Dist.*, 242 AD2d 773, 774; *Clark*, 212 AD2d at 963). We agree with defendants that plaintiff did not allege that the union breached its duty of fair representation, and therefore only the first exception is at issue here.

In relevant part, the CBA defines the term "grievance" broadly as "a controversy, dispute or difference arising out of the interpretation or application of this contract." The first step of the grievance procedure requires either the union or a "member" to present the grievance in writing. "It is well established that[,] when reviewing a contract, '[p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties manifested thereby' " (*Kolbe v Tibbetts*, 22 NY3d 344, 353, quoting *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404; *see Matter of El-Roh Realty Corp.*, 74 AD3d 1796, 1799). Furthermore, we "must give the words and phrases employed their plain meaning" (*Laba v Carey*, 29 NY2d 302, 308, *rearg denied* 30 NY2d 694; *see Fingerlakes Chiropractic v Maggio*, 269 AD2d 790, 792). Elsewhere in the CBA, the word "member" is used interchangeably with the word "employee," and several CBA provisions that apply to "members," such as provisions for holiday pay and annual physicals, clearly affect only active employees. In addition, the CBA provides that the Village recognizes the union "as the exclusive representative for collective negotiations with respect to salaries, wages, and other terms and conditions of employment *of all full-time and part-time employees*" (emphasis added).

Giving the word "member" its plain meaning, and interpreting the contract as a whole, we agree with plaintiff that the word "member" means a member of the union. It is undisputed that plaintiff ceased to be a member of the union after his retirement. Thus, according to the clear and unambiguous terms of the CBA, plaintiff, who was no longer a "member" of the union when he became aggrieved, could not file a grievance. We therefore further agree with plaintiff that our decision in *Matter of DeRosa v Dyster* (90 AD3d 1470) is controlling here. In that case, the first step of the grievance procedure as provided for in the collective bargaining agreement required "an aggrieved 'employee' to request 'a review and determination of his [or

her] grievance by the head of the appropriate department' " (*id.* at 1472). The majority concluded that, because the petitioner was no longer an "employee" when she became aggrieved, she "could not have pursued a grievance" (*id.*). In this case, as in *DeRosa*, "the grievance procedure set forth in the CBA is predicated upon the status of the affected beneficiar[y . . . ,] as [an] active employee or retiree" (*id*. [internal quotation marks omitted]).

We conclude that the court erred in determining that this case is distinguishable from *DeRosa* on the ground that the section of the CBA that provides for health insurance benefits after retirement also uses the word "member." In *DeRosa*, the collective bargaining agreement expressly permitted "grievances concerning retirement benefits" and expressly provided for health insurance benefits after retirement (*see id.* at 1471-1472). The majority nevertheless held that, because only an individual "employee" could file a grievance, the petitioner could not have filed a grievance before commencing a CPLR article 78 proceeding (*id.* at 1472). Thus, the fact that the CBA expressly provides for health insurance benefits after retirement does not necessarily mean that an individual retiree will be permitted to use the grievance procedure to enforce those provisions. Rather, here, as in *DeRosa*, the clear and unambiguous terms of the CBA prevented plaintiff from filing a grievance (*see id.*; *cf. Ledain*, 192 Misc 2d at 255).

Defendants' reliance on *Matter of City of Ithaca* (*Ithaca Paid Fire Fighters Assn., IAFF, Local 737*) (29 AD3d 1129) is misplaced. In that case, the court did not hold that the aggrieved retirees were required to bring their claims through the grievance procedure. Rather, in the context of the former employer's motion to stay arbitration on the ground that the dispute was not subject to arbitration because the aggrieved retirees were not represented by the union, the court held that "issues such as respondent's relationship to retired employees . . . [and] whether retirees are covered by the grievance procedure . . . are matters which concern the precise scope of the substantive contractual provisions and, as such, are for the arbitrator" to decide (*id.* at 1132; *see Matter of Mariano v Town of Orchard Park*, 92 AD3d 1232, 1233-1234; *Matter of Jefferson-Lewis-Hamilton-Herkimer-Oneida BOCES [Jefferson-Lewis-Hamilton-Herkimer-Oneida BOCES Professional Assn., Local 2784]*, 247 AD2d 829, 829).

We reject plaintiff's contention, however, that the court erred when it declined to consider the extrinsic evidence he submitted to support his position that retirees could not file a grievance. "[E]xtrinsic evidence may not be considered unless the document itself is ambiguous," and " 'extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face' " (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278; *see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163). We conclude that the CBA's use of the word "member" to describe which individuals may file a grievance unambiguously excludes plaintiff, and thus extrinsic evidence may not

be considered in support of either party’s position.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 12-00175

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

THE ESTATE OF EVELYN SONNELITTER, DECEASED, GARY SONNELITTER, EXECUTOR, AND SONNELITTER FAMILY TRUST, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V ORDER

THE ESTATE OF JOSEPH WHITE, DECEASED, CAROL ALABISO, EXECUTOR, DEFENDANT-RESPONDENT-APPELLANT, CAROL ALABISO, GERALD MCCLAIN WHITLEY AND MCCLAIN PROPERTIES, LLC, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

HOGAN WILLIG, PLLC, AMHERST (COREY HOGAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

KEENAN LAW CENTER, P.C., HAMBURG (JOHN J. KEENAN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT THE ESTATE OF JOSEPH WHITE, DECEASED, CAROL ALABISO, EXECUTOR.

LAWRENCE C. BROWN, CHEEKTOWAGA, FOR DEFENDANTS-RESPONDENTS.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered May 26, 2011. The order found Joseph White to have breached his fiduciary duty.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 12-00176

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

THE ESTATE OF EVELYN SONNELITTER, DECEASED, GARY SONNELITTER, EXECUTOR, AND SONNELITTER FAMILY TRUST, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

THE ESTATE OF JOSEPH WHITE, DECEASED, CAROL ALABISO, EXECUTOR, DEFENDANT-RESPONDENT-APPELLANT, CAROL ALABISO, GERALD MCCLAIN WHITLEY AND MCCLAIN PROPERTIES, LLC, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

HOGAN WILLIG, PLLC, AMHERST (COREY HOGAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

KEENAN LAW CENTER, P.C., HAMBURG (JOHN J. KEENAN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT THE ESTATE OF JOSEPH WHITE, DECEASED, CAROL ALABISO, EXECUTOR.

LAWRENCE C. BROWN, CHEEKTOWAGA, FOR DEFENDANTS-RESPONDENTS.

Appeal and cross appeal from a judgment of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered July 26, 2011. The judgment decreed that Joseph White breached his fiduciary duty to the Sonnelitter Family Trust, awarded plaintiffs money damages against White and otherwise dismissed plaintiffs' causes of action.

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

Memorandum: Gary Sonnelitter (plaintiff) is the executor of his deceased mother's estate. Prior to her death, plaintiff's mother (decedent) was advised by her accountant, Joseph White, who is also deceased but whose estate has been sued herein, to establish a trust for the purpose of more readily qualifying her for Medicaid, should the need arise for her to enter a nursing home. The only asset placed into the trust was a condominium owned by decedent in Florida. Decedent, a widow, lived in Lockport, and the condominium had not been used for several years at the time the trust was created in November 2000. Although White recommended that plaintiff serve as trustee, plaintiff declined the appointment, and White therefore became trustee. On February 25, 2003, while decedent was still alive, White sold the condominium for $127,000 to defendant McClain Properties,

LLC, which was controlled by White's friend and business associate, defendant Gary McClain Whitley.

Decedent died after the property was transferred, and plaintiff thereafter commenced this action on behalf of her estate and the trust. According to plaintiff, White sold the property to Whitley for below market value and did so with the intent of surreptitiously obtaining the property for himself and his girlfriend, defendant Carol Alabiso. The complaint asserted a cause of action for breach of fiduciary duty against White only, and causes of action for fraud and unjust enrichment against all defendants.

Following a nonjury trial, Supreme Court awarded judgment to plaintiff on the cause of action for breach of fiduciary duty, and directed White to pay damages of $43,000, plus interest from the date of sale, representing the difference between the sale price, $127,000, and what the court determined to be the property's market value, $185,000, minus eight percent for closing costs. Plaintiff contends on appeal that the court erred in dismissing his causes of action for fraud and unjust enrichment, and erred in denying his request for appreciation damages. On his cross appeal, White contends, inter alia, that the court erred in finding him liable under the cause of action for breach of fiduciary duty. We affirm.

To prevail on a cause of action for fraud, a plaintiff must "prove a misrepresentation or a material omission of fact which was false and known to be false by [the defendant], made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Vineyard Oil & Gas Co. v Stand Energy Corp.*, 45 AD3d 1291, 1293 [internal quotation marks omitted]; *see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421). "[L]iability for fraud may be premised on knowing participation in a scheme to defraud, even if that participation does not by itself suffice to constitute the fraud" (*Kuo Feng Corp. v Ma*, 248 AD2d 168, 168-169, *appeal dismissed* 92 NY2d 845, *lv denied* 92 NY2d 809; *see CPC Intl. v McKesson Corp.*, 70 NY2d 268, 286). Evidence of fraud may be circumstantial (*see Kuo Feng Corp.*, 248 AD2d at 169), but the fraud must be proved by clear and convincing evidence (*see Vineyard Oil & Gas Co.*, 45 AD3d at 1293).

"In a nonjury trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*Mohan v State of New York*, 110 AD3d 573, 573 [internal quotation marks omitted]; *see Treat v Wegmans Food Mkts., Inc.*, 46 AD3d 1403, 1404). Here, the cause of action for fraud was premised on plaintiff's theory that White and defendants acted together in a scheme to defraud decedent by making it appear as if the condominium had been sold for market value in an arm's length transaction to a third party, when in fact White was the real purchaser for a price well below market value. Although plaintiff introduced circumstantial evidence of such a scheme at trial, there was contrary evidence as

well, including the testimony of White, Whitley and Alabiso, all of whom denied that White was the true purchaser of the property. Giving deference to the credibility determinations of the court, which had the benefit of seeing the witnesses and assessing their demeanor, we conclude that, although a different verdict on the cause of action for fraud would not have been unreasonable, the court's determination is based on a fair interpretation of the evidence.

We further conclude that plaintiff's cause of action for unjust enrichment is foreclosed by the existence of a valid and enforceable contract (*see Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790-791, *rearg denied* 19 NY3d 937; *LaBarte v Seneca Resources Corp.*, 285 AD2d 974, 976). Although the contract price was below market value, plaintiff prevailed on his cause of action for breach of fiduciary duty against White, thus rendering the cause of action for unjust enrichment duplicative. As the Court of Appeals has explained, "[a]n unjust enrichment [cause of action] is not available where it simply duplicates, or replaces, a conventional contract or tort [cause of action]" (*Corsello*, 18 NY3d at 790).

We reject plaintiff's contention that the court erred in denying his request for appreciation damages. Appreciation damages are appropriate where a trustee sells property he or she was duty-bound to retain, "the theory being that the beneficiaries are entitled to be placed in the same position they would have been in had the breach not consisted of a sale of property that should have been retained" (*Scalp & Blade v Advest, Inc.*, 309 AD2d 219, 227 [internal quotation marks omitted]; *see Matter of Rothko*, 43 NY2d 305, 320-321). Here, White had no duty to retain decedent's condominium; in fact, the record establishes that there were many good reasons for White to sell the property, which was not being used and cost decedent between $6,000 and $8,000 annually to maintain. Moreover, as noted, White was not found to have engaged in fraudulent conduct. Under the circumstances, we conclude that the court properly denied plaintiff's request for appreciation damages.

Finally, we have reviewed White's contentions on his cross appeal and conclude that they lack merit.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00837

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

M&T BANK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHOICE GRANITE PRODUCTS LTD., ET AL., DEFENDANTS,
AND CARINA FARBER, ALSO KNOWN AS CARMEN FARBER,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

GETMAN & BIRYLA, LLP, BUFFALO (MATTHEW D. VALAURI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 12, 2013. The order granted plaintiff's motion for summary judgment as against Carina Farber, also known as Carmen Farber.

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

Same Memorandum as in *M&T Bank v Choice Granite Products Ltd.* ([appeal No. 2] ___ AD3d ___ [Mar. 21, 2014]).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00838

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

M&T BANK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHOICE GRANITE PRODUCTS LTD., ET AL., DEFENDANTS,
AND CARINA FARBER, ALSO KNOWN AS CARMEN FARBER,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

GETMAN & BIRYLA, LLP, BUFFALO (MATTHEW D. VALAURI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 18, 2013. The judgment, among other things, awarded plaintiff the sum of $108,373.66 as against defendant Carina Farber, also known as Carmen Farber.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the amount of attorneys' fees awarded and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: In appeal No. 1, Carina Farber, also known as Carmen Farber (defendant), appeals from an order granting plaintiff's motion for summary judgment against her as guarantor of a loan to defendant Choice Granite Products Ltd. (Choice Granite), and in appeal No. 2 she appeals from the judgment awarding plaintiff the sum of $108,373.66 plus interest, and $8,741.25 in attorneys' fees. We note at the outset that appeal No. 1 must be dismissed inasmuch as the order granting plaintiff's motion for summary judgment is subsumed in the final judgment in appeal No. 2 (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988).

In March 2007, Choice Granite applied for a $100,000 loan from plaintiff and, as part of the application, defendant, the sales manager and part owner of defendant, signed a guaranty in her individual capacity. An agreement containing the terms of the loan was attached to the application, and both the agreement and guaranty defined the "loan agreement" as including the application, agreement, and the terms of any subsequent approval letter. The application requested information on prior loans, and eligibility for loans, from the United States Small Business Administration (SBA). The guaranty

indicated that Choice Granite might be approved for a loan from a "credit facility" other than plaintiff. By signing the guaranty, defendant waived "notice of the terms of the Loan Agreement, [and] any amendments thereto." On April 18, 2007, plaintiff sent Choice Granite a conditional approval letter for a $100,000 loan under the "SBAExpress Program," which was conditioned upon SBA approval. The President of Choice Granite signed and returned the letter to plaintiff in April 2007, and Choice Granite thereby accepted the terms of the agreement attached to the initial application, as modified. SBA approved the loan, and Choice Granite thereafter defaulted in its payments.

Defendant contends that the conditional approval letter, and SBA's involvement, improperly altered her obligation without her consent and she is therefore relieved of her obligation as guarantor (*see White Rose Food v Saleh*, 99 NY2d 589, 591). We reject that contention because the application, agreement, and approval letter, by their express terms, constitute "one transaction," and defendant waived notice of the terms of the approval letter (*id.* at 591). "The test is whether there is a new contract," and here there was only one (*Bier Pension Plan Trust v Estate of Schneierson*, 74 NY2d 312, 315). Supreme Court therefore properly granted plaintiff's motion for summary judgment (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We agree with defendant, however, that the court erred in awarding attorneys' fees without conducting a hearing, which is needed to determine the manner in which plaintiff's attorneys are to be compensated (*see generally CIT Group/Equip. Fin., Inc. v Riddle*, 31 AD3d 477, 478). We therefore modify the judgment accordingly, and we remit the matter to Supreme Court for a hearing to determine the amount of attorneys' fees to which plaintiff is entitled.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00405

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

PLAZA DRIVE GROUP OF CNY, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF SENNETT, DEFENDANT-RESPONDENT.

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

GALBATO LAW FIRM, AUBURN (RICCARDO T. GALBATO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered November 21, 2012 in a declaratory judgment action. The judgment, insofar as appealed from, granted that part of the cross motion of defendant seeking to dismiss the second cause of action.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, that part of the judgment dismissing the second cause of action is vacated and judgment is granted thereon in favor of defendant as follows:

> It is ADJUDGED and DECLARED that the unsigned February 6, 2012 letter is not a binding contract on defendant and is unenforceable against it.

Memorandum: As limited by its brief, plaintiff, a local commercial developer, contends on appeal that Supreme Court erred in granting that part of defendant's cross motion seeking dismissal of the second cause of action. In that cause of action, plaintiff sought a declaration of the parties' rights and legal relations pursuant to an unsigned letter dated February 6, 2012 from plaintiff to defendant, which contained terms relating to the installation of a duplicate water meter and water meter pit at a shopping plaza developed by plaintiff. Plaintiff attached a check to its letter upon which it noted "water meter pit final," and plaintiff set forth in the letter that the check was payment for the final balance due to defendant for the cost associated with the duplicate water meter. According to plaintiff, defendant's acceptance of the check and deposit of it constituted an accord and satisfaction of costs associated with the duplicate water meter and pit and defendant thereby accepted the terms of the letter, rendering it a binding

contract upon defendant.

We note at the outset that "[a] motion to dismiss [a cause of action seeking a declaration] 'presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration' " (*DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC*, 102 AD3d 725, 728). "[W]here a cause of action is sufficient to invoke the court's power to 'render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy' . . . , a motion to dismiss that cause of action should be denied" (*Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150; *see St. Lawrence Univ. v Trustees of Theol. Sch. of St. Lawrence Univ.*, 20 NY2d 317, 325). Where, however, no questions of fact are presented, a court may reach the merits of a properly pleaded cause of action for a declaratory judgment upon a motion to dismiss for failure to state a cause of action (*see Hoffman v City of Syracuse*, 2 NY2d 484, 487) and, "[u]nder such circumstances, the 'motion [to dismiss for failure to state a cause of action] should be taken as a motion for a declaration in the defendant's favor and treated accordingly' " (*Tilcon*, 87 AD3d at 1150).

Deeming the material allegations of the complaint to be true, we conclude that the allegations in the second cause of action presented a justiciable controversy sufficient to invoke the court's power to render a declaratory judgment (*see North Shore Towers Apts. Inc. v Three Towers Assoc.*, 104 AD3d 825, 827; *DiGiorgio*, 102 AD3d at 728-729). Furthermore, we are able to determine, as a matter of law, that defendant is entitled to a declaration in its favor (*see Hoffman*, 2 NY2d at 487; *DiGiorgio*, 102 AD3d at 728). Plaintiff has not alleged that defendant's town board considered or approved plaintiff's unsigned letter agreement as required by Town Law § 64 (6) so as to establish a valid contract. The unsigned letter therefore does not constitute a valid binding agreement and is unenforceable against defendant. Contrary to plaintiff's contention, defendant did not ratify the unsigned letter agreement by accepting plaintiff's check (*see generally JRP Old Riverhead Ltd. v Town of Southampton*, 44 AD3d 905, 909).

Plaintiff's alternative contention, i.e., that the parties could not be bound by their prior agreement if defendant was not bound by the letter, is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 11-01291

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JABRE DAVIS, DEFENDANT-APPELLANT.

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

JABRE DAVIS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered March 30, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends in his main and pro se supplemental briefs that the verdict is against the weight of the evidence. We reject that contention. As defendant concedes, he was present when the victim was shot in the head at close range, and he was identified as the shooter in separate showup procedures by two eyewitnesses to the shooting, both of whom later identified defendant in a lineup. Moreover, one of the eyewitnesses also identified defendant in a surveillance video taken at a store that defendant had entered shortly before the shooting occurred. The video showed defendant and the three other men who were with him when the victim was shot, one of whom defendant claims to have been the shooter. Upon observing the four men in the video, the eyewitness informed the police that, although he initially doubted whether he had correctly identified defendant in the showup procedure, he was now certain that defendant was the person he had seen shoot the victim. At trial, both eyewitnesses unequivocally identified defendant as the shooter. The eyewitnesses did not know defendant prior to the shooting, and neither had any apparent motive to accuse him falsely.

In addition to the eyewitness testimony, the People introduced evidence that, after the shooting, defendant ran from the scene and hid in a nearby house, which was surrounded by the police. Defendant refused to come out of the house for approximately 30 minutes and, when he eventually emerged, he was wearing a different shirt than the one he had been wearing when the victim had been shot. Defendant then lied to the police, stating that he had not heard any shots being fired and that he had not observed the victim involved in an altercation immediately before the fatal shot was fired. Defendant's actions following the shooting evinced a consciousness of guilt.

As defendant correctly notes, both eyewitnesses testified that the shooter had been wearing a white T-shirt with air brushing on the front and back, and the surveillance video showed that defendant was wearing a white T-shirt with air brushing on the front only, while another man present at the time of the shooting had been wearing a white T-shirt with air brushing on the front and back. The other man in a white T-shirt was not apprehended and was not identified. Defendant also points to the fact that the police searched the house into which defendant fled, as well as the surrounding neighborhood, and did not find any firearms. We note, however, that the prosecutor argued that defendant had sufficient time in which to hide the murder weapon before he entered the house and that, given the chaotic scene following the shooting, the eyewitnesses were simply mistaken regarding the presence of air brushing on the back of the shooter's T-shirt.

This case turned largely upon the reliability, as opposed to the credibility, of the two eyewitnesses who repeatedly and consistently identified defendant as the shooter, and neither of whose identification was influenced by the other. We are mindful that "mistaken eyewitness identifications play a significant role in many wrongful convictions" (*People v Santiago*, 17 NY3d 661, 669), and we are cognizant of our duty to conduct an independent assessment of all of the proof (*see People v Delamota*, 18 NY3d 107, 116-117). In our view, however, this is not an appropriate case to substitute our reliability determinations for those of the jury, inasmuch as the identifications of defendant by the eyewitnesses were not "incredible and unbelievable, that is, impossible of belief because [they were] manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Rumph*, 93 AD3d 1346, 1347, *lv denied* 19 NY3d 967 [internal quotation marks omitted]; *see People v Wallace*, 306 AD2d 802, 802-803). "Sitting 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; *People v Kalen*, 68 AD3d 1666, 1666-1667, *lv denied* 14 NY3d 842).

Defendant further contends that the identifications of him by the two eyewitnesses were the product of inherently suggestive showup procedures, and that County Court therefore erred in denying his

motion to suppress their identification testimony. We reject that contention as well. Although showup identification procedures are generally disfavored (*see People v Ortiz*, 90 NY2d 533, 537), such procedures are permitted "where [they are] reasonable under the circumstances—that is, when conducted in close geographic and temporal proximity to the crime—and the procedure used was not unduly suggestive" (*People v Brisco*, 99 NY2d 596, 597; *see Ortiz*, 90 NY2d at 537; *People v Jackson*, 78 AD3d 1685, 1685-1686, *lv denied* 16 NY3d 743). Here, the showups were conducted within 70 minutes of the shooting, during the "course of a continuous, ongoing investigation" (*People v Woodward*, 83 AD3d 1440, 1441, *lv denied* 17 NY3d 803; *see Brisco*, 99 NY2d at 597), and less than one half of a mile from the crime scene. Thus, the court properly denied defendant's motion to suppress the subject identification testimony.

Contrary to defendant's further contention, the identification of him by one of the prosecution witnesses in the store surveillance video was not unduly suggestive. "[T]here is nothing inherently suggestive" in showing a witness a surveillance video depicting the defendant and other individuals, provided that the "defendant was not singled-out, portrayed unfavorably, or in any other manner prejudiced by police conduct or comment or by the setting in which [the defendant] was taped" (*People v Edmonson*, 75 NY2d 672, 676-677, *rearg denied* 76 NY2d 846, *cert denied* 498 US 1001). Here, defendant was shown in the video with three other people, one of whom defendant claims to have been the shooter, and defendant was not singled out or portrayed unfavorably, or in any other manner prejudiced. In a related contention, defendant asserts that the identification of him in the surveillance video is tantamount to an identification from a photo array, and that the court therefore erred in allowing the witness in question to testify at trial that he identified defendant in the video. Defendant failed to preserve that contention for our review, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

There is no merit to defendant's contention that the lineup procedures employed by the police were unduly suggestive. Although defendant and one filler have somewhat lighter skin than the other participants, it is well settled that the police need not surround a defendant in a lineup with individuals nearly identical in appearance (*see People v Chipp*, 75 NY2d 327, 336, *cert denied* 498 US 833; *People v Diggs*, 19 AD3d 1098, 1099, *lv denied* 5 NY3d 787, *amended on rearg* 21 AD3d 1438). Having reviewed photographs of defendant with the other lineup participants, we conclude that the "the alleged variations in appearance between the fillers and the defendant were not so substantial as to render the lineup impermissibly suggestive" (*People v Brown*, 89 AD3d 1032, 1033, *lv denied* 18 NY3d 922).

We have reviewed defendant's remaining contentions in his main and pro se supplemental briefs and conclude that they lack merit.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01241

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

IN THE MATTER OF JOSEPH D. CANDINO, JR.,
CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STARPOINT CENTRAL SCHOOL DISTRICT, STARPOINT CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, STARPOINT HIGH SCHOOL, IROQUOIS CENTRAL SCHOOL DISTRICT, IROQUOIS CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, IROQUOIS CENTRAL HIGH SCHOOL, WEST SENECA SCHOOL DISTRICT, WEST SENECA SCHOOL DISTRICT BOARD OF EDUCATION AND WEST SENECA EAST SENIOR HIGH SCHOOL, RESPONDENTS-APPELLANTS.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA (LOUIS B. DINGELDEY, JR., OF COUNSEL), FOR RESPONDENTS-APPELLANTS STARPOINT CENTRAL SCHOOL DISTRICT, STARPOINT CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION AND STARPOINT HIGH SCHOOL.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR RESPONDENTS-APPELLANTS IROQUOIS CENTRAL SCHOOL DISTRICT, IROQUOIS CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION AND IROQUOIS CENTRAL HIGH SCHOOL.

WEBSTER SZANYI LLP, BUFFALO (JEREMY A. COLBY OF COUNSEL), FOR RESPONDENTS-APPELLANTS WEST SENECA SCHOOL DISTRICT, WEST SENECA SCHOOL DISTRICT BOARD OF EDUCATION AND WEST SENECA EAST SENIOR HIGH SCHOOL.

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

Appeals from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered February 1, 2013. The order granted the application of claimant for leave to serve a late notice of claim.

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

Memorandum: We agree with respondents that Supreme Court abused its discretion in granting claimant's application seeking leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5). On February 4 and 5, 2011, claimant, then a 16-year-old student at respondent West Seneca East Senior High School, participated in the Section VI high school wrestling championship (tournament) held at

respondent Starpoint High School in Lockport. It is undisputed that one of the wrestlers at the tournament, from respondent Iroquois Central High School, had a highly contagious virus. In September 2012, approximately five months after he reached the age of majority and 19 months after the tournament, claimant sought leave to serve a late notice of claim against respondents, alleging that he had contracted herpes from the infected wrestler and that respondents were negligent in, among other things, allowing the infected wrestler to participate in the tournament and in failing to take reasonable steps to avoid claimant's injury.

In seeking leave of the court to file a late notice of claim, claimant offered no excuse, reasonable or otherwise, for failing to serve a timely notice of claim. In support of his application, however, claimant asserted that respondents had actual knowledge of the facts underlying his claim because another student who allegedly contracted herpes from the same wrestler at the tournament had served a timely notice of claim against respondents Starpoint High School and Iroquois Central High School. Claimant further asserted that respondents had actual knowledge based on Health Advisory #279a, issued by the Erie County Department of Health (DOH) on February 11, 2011 to all school districts in Erie and Niagara Counties. The advisory stated that DOH was investigating "several cases of skin infection in high school wrestlers" who had participated in the tournament, and it also identified all schools that had participated in the tournament. Finally, claimant contended that respondents had suffered no prejudice from his failure to serve a timely notice of claim. The court granted the application, and we now reverse.

Where a claimant does not offer a reasonable excuse for failing to serve a timely notice of claim, a court may grant leave to serve a late notice of claim only if the respondent has actual knowledge of the essential facts underlying the claim, there is no compelling showing of prejudice to the respondent (*see Matter of Hall v Madison-Oneida County Bd. of Coop. Educ. Servs.*, 66 AD3d 1434, 1435), and the claim does not "patently lack merit" (*Matter of Hess v West Seneca Cent. Sch. Dist.*, 15 NY3d 813, 814; *see Matter of Catherine G. v County of Essex*, 3 NY3d 175, 179). Here, respondents asserted that, until claimant made the instant application, they had no knowledge that he had contracted herpes or otherwise had been injured at the tournament. Although claimant offered no evidence to the contrary, he essentially contended that respondents *should have known* of his injury because another wrestler had filed a timely notice of claim regarding an identical injury and because respondents had received Health Advisory #279a.

As we have repeatedly stated, actual knowledge of the essential facts of a claim requires "[k]nowledge of the injuries or damages claimed by a [claimant], rather than mere notice of the underlying occurrence" (*Santana v Western Regional Off-Track Betting Corp.*, 2 AD3d 1304, 1305, *lv denied* 2 NY3d 704 [internal quotation marks omitted]; *see Dalton v Akron Cent. Schools*, 107 AD3d 1517, 1518). Here, claimant's proof in support of his application establishes, at most, that respondents had constructive knowledge of his claim. In

other words, there is nothing in the notice of claim filed by the other wrestler who was infected at the tournament or in Health Advisory #279a that gave respondents actual knowledge that claimant was similarly injured.

Thus, even assuming, arguendo, that respondents suffered no prejudice from the delay and that the proposed claim against them does not patently lack merit, we conclude that the court abused its discretion in granting claimant's application for leave to serve a late notice of claim (*see Palumbo v City of Buffalo*, 1 AD3d 1032, 1033).

All concur except FAHEY and WHALEN, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent. In our view, Supreme Court did not abuse its discretion in granting claimant's application for leave to serve a late notice of claim upon respondents, and we therefore would affirm the order.

"A notice of claim must be served within 90 days after the claim accrues, although a court may grant leave extending that time, provided that the application therefor is made before the expiration of the statute of limitations period of one year and 90 days (*see* General Municipal Law § 50-e [1] [a]; [5]). The decision whether to grant such leave 'compels consideration of all relevant facts and circumstances,' including the 'nonexhaustive list of factors' in section 50-e (5) (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539). The three main factors are 'whether the claimant has shown a reasonable excuse for the delay, whether the municipality had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the municipality' (*Matter of Friend v Town of W. Seneca*, 71 AD3d 1406, 1407; *see generally* § 50-e [5]). '[T]he presence or absence of any one of the numerous relevant factors the court must consider is not determinative' (*Salvaggio v Western Regional Off-Track Betting Corp.*, 203 AD2d 938, 938-939), and '[t]he court is vested with broad discretion to grant or deny the application' (*Wetzel Servs. Corp. v Town of Amherst*, 207 AD2d 965, 965). Absent a 'clear abuse' of the court's broad discretion, 'the determination of an application for leave to serve a late notice of claim will not be disturbed' (*Matter of Hubbard v County of Madison*, 71 AD3d 1313, 1315 [internal quotation marks omitted])" (*Dalton v Akron Cent. Schs.*, 107 AD3d 1517, 1518; *see* Education Law § 3813 [2-a]).

Here, we conclude that the court properly weighed the relevant factors and did not abuse its discretion in granting the application. The record establishes that, in 2011, claimant, then a 16-year-old student at respondent West Seneca East Senior High School, participated in a wrestling tournament (tournament) held at respondent Starpoint High School. The tournament involved wrestlers from many high schools, including respondent Iroquois Central High School, and one of the wrestlers from that high school had a highly contagious virus that claimant allegedly contracted during a wrestling match with that wrestler.

We agree with claimant that respondents had actual knowledge of the facts surrounding the claim within 90 days of its accrual. In particular, we note that, approximately one week after the tournament, the Erie County Department of Health issued a health advisory to all school districts in Erie and Niagara Counties regarding the investigation of several cases of skin infection in high school wrestlers who had participated in the tournament and that, according to both the court and claimant's attorney, the incident received media coverage. More importantly, another wrestler allegedly infected at the tournament served a timely notice of claim against respondents Starpoint Central School District, Starpoint Central School District Board of Education and Starpoint High School (collectively, Starpoint respondents), and respondents Iroquois Central School District, Iroquois Central School District Board of Education and Iroquois Central High School (collectively, Iroquois respondents), and he commenced a lawsuit following the filing of his notice of claim.

We further agree with claimant that respondents would not be substantially prejudiced if he were permitted to file a late notice of claim. In our view, the opportunity to investigate provided by the health advisory, and the investigation that such advisory should have triggered, ameliorate the potential prejudice to the Starpoint and Iroquois respondents. We also agree with claimant that, under the circumstances of this case, respondents West Seneca School District, West Seneca School District Board of Education and West Seneca East Senior High School (collectively, West Seneca respondents) failed to substantiate their assertions that they would be prejudiced if claimant were permitted to file a late notice of claim (*see Matter of Gilbert v Eden Cent. Sch. Dist.*, 306 AD2d 925, 926-927).

We reject the contention of the Starpoint respondents that the court should have exercised its discretion to deny the application because the claim is patently meritless. At a minimum, there is a question of fact whether the Starpoint respondents exercised sufficient control over the tournament and whether that control created a duty to claimant upon which their legal responsibility could be based (*see Butler v Germantown Cent. Sch. Dist. Parent Teacher Student Assn.*, 101 AD3d 1415, 1417; *Garman v East Rochester Sch. Dist.*, 46 AD3d 1354, 1355; *Hochreiter v Diocese of Buffalo*, 309 AD2d 1216, 1217; *see also Basso v Miller*, 40 NY2d 233, 241-242; *cf. Farrell v Hochhauser*, 65 AD3d 663, 663-664). Finally, contrary to the contentions of the Iroquois respondents and the West Seneca respondents, we conclude that claimant has a plausible theory of liability against them based on their alleged failure to supervise the wrestlers during the tournament (*see Hochreiter*, 309 AD2d at 1217).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 12-01049

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTIAN M. PATTERSON, DEFENDANT-APPELLANT.

CHRISTOPHER JUDE PELLI, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered April 11, 2012. The judgment convicted defendant, upon a jury verdict, of aggravated murder, attempted aggravated murder (two counts), criminal possession of a weapon in the fourth degree and harassment in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, one count of aggravated murder (Penal Law § 125.26 [1] [a] [i]) and two counts of attempted aggravated murder (§§ 110.00, 125.26 [1] [a] [i]), defendant contends that he was denied effective assistance of counsel based upon several alleged failures of trial counsel. We reject defendant's contention.

This conviction arose from an incident spread over two dates, in which defendant shot and killed a deputy sheriff (hereafter, deputy). The evidence at trial, including defendant's trial testimony, establishes that the deputy responded after defendant's neighbors called 911 and reported a domestic dispute regarding defendant and his girlfriend. The neighbors also told the 911 operator that defendant might be armed. The evidence, again including defendant's testimony, establishes that the deputy parked his vehicle in defendant's driveway and began to walk toward defendant's house. Before the deputy said or did anything, defendant picked up a pump action shotgun and placed his finger on the trigger. A six-hour stalemate ensued, involving the deputy, defendant, and numerous other members of several law enforcement agencies. Despite numerous requests from the deputy and other law enforcement personnel at the scene to put down the shotgun, defendant never removed his finger from the trigger. The incident came to a climax when defendant moved to a less-visible part of his garage and began to put on a jacket. He released the trigger when he

began to put his arm in the sleeve of the jacket. Two law enforcement agents quickly fired non-lethal projectiles at defendant, which knocked him down and caused him to drop the shotgun. The deputy rushed into the garage with a taser, in a further attempt to subdue defendant with non-lethal force. Before the deputy reached him, however, defendant picked up the shotgun and fired a slug that struck the deputy in the hand and neck, causing his death. The remaining law enforcement officers shot defendant several times, which resulted in non-lethal injuries. As they were shooting at him, he worked the pump action of the shotgun two more times, firing the weapon at a law enforcement agent each time.

The matter proceeded to trial, where the jury rejected the defense that defendant was under the influence of an extreme emotional disturbance.

Defendant contends that his attorney was ineffective in failing to move to suppress evidence unlawfully seized from him by the law enforcement personnel at the scene in the absence of a warrant or probable cause to arrest him. We reject that contention. It is well settled that "a showing that [defense] counsel failed to make a particular pretrial motion generally does not, by itself, establish ineffective assistance of counsel" (*People v Rivera*, 71 NY2d 705, 709; *see People v Biro*, 85 AD3d 1570, 1571; *see also People v Webster*, 56 AD3d 1242, 1242-1243, *lv denied* 11 NY3d 931), and it is equally well settled that, in order "[t]o prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's failure to request a particular hearing. Absent such a showing, it will be presumed that counsel acted in a competent manner and exercised professional judgment in not pursuing a hearing" (*Rivera*, 71 NY2d at 709). Furthermore, "[t]here can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *see People v Watson*, 90 AD3d 1666, 1667, *lv denied* 19 NY3d 868; *People v McGee*, 87 AD3d 1400, 1403, *affd* 20 NY3d 513). Here, defendant failed to demonstrate the absence of legitimate explanations for defense counsel's failure to make a suppression motion, or that the " 'motion, if made, would have been successful and that defense counsel's failure to make that motion deprived him of meaningful representation' " (*People v Bassett*, 55 AD3d 1434, 1437-1438, *lv denied* 11 NY3d 922; *see People v Bedell*, 114 AD3d 1153, ___; *cf. People v Carnevale*, 101 AD3d 1375, 1378-1381).

Defendant's further contention that his attorney failed to provide effective assistance of counsel by failing to pursue a justification defense and to request a justification charge is also without merit. Contrary to defendant's contention, there is no reasonable view of the evidence that would permit defense counsel to pursue such a defense, and thus such a charge would not be appropriate (*see generally Caban*, 5 NY3d at 152). With respect to defendant's contention that he was entitled to use deadly force to prevent his

arrest, it is well settled that "defendant was not entitled to use *any* physical force to resist an arrest by a police officer who reasonably appeared to be [such an officer]" (*People v Degondea*, 269 AD2d 243, 245, *lv denied* 95 NY2d 834; *see People v Douglas*, 160 AD2d 1015, 1016, *lv denied* 76 NY2d 855), much less deadly physical force. There is no reasonable view of the evidence supporting defendant's further contention that the deputy and the other law enforcement agents were committing a burglary that would justify defendant's use of deadly force pursuant to Penal Law § 35.20 (3). Similarly, his contention that he was justified in using deadly physical force pursuant to section 35.15 is without merit because "the justification defense would not be available [where, as here,] defendant was 'the initial aggressor' " (*People v Watson*, 20 NY3d 1018, 1020, quoting § 35.15 [1] [b]).

We have reviewed defendant's further contentions regarding defense counsel's other alleged shortcomings and, viewing the evidence, the law and the circumstances of this case in totality and as of the time of representation, we conclude that defendant received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

We reject defendant's further contention that the court erred in failing to instruct the jury, sua sponte, on the defense of justification. Even assuming, arguendo, that such an instruction was supported by the evidence, we conclude that the "court did not err in refraining from delivering such a charge sua sponte, as this would have improperly interfered with defense counsel's strategy" (*People v Poston*, 95 AD3d 729, 730, *lv denied* 19 NY3d 1104).

Finally, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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TP 13-01112

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

IN THE MATTER OF JARVIS ELDER, PETITIONER,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered June 18, 2013) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs, the amended petition is granted and respondent is directed to expunge from petitioner's institutional record all references to the violation of inmate rules 116.10 (7 NYCRR 270.2 [B] [17] [i]) and 116.12 (7 NYCRR 270.2 [B] [17] [iii]).

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated inmate rules 116.10 (7 NYCRR 270.2 [B] [17] [i] [stealing]) and 116.12 (7 NYCRR 270.2 [B] [17] [iii] [forgery]), relating to his alleged forgery of another inmate's name on certain disbursement forms. We agree with petitioner that the determination is not supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139), and we therefore grant the amended petition, annul the determination and direct that all references to the matter be expunged from petitioner's record. Although a misbehavior report may by itself constitute substantial evidence of guilt (*see id.* at 140-141), here the misbehavior report was based upon the belief of the sergeant who authored it that petitioner forged another inmate's signature on certain disbursement forms, and there is no indication in the misbehavior report that the sergeant showed the other inmate the disbursement forms or that the other inmate claimed that it was not his signature on the forms. There likewise was no

evidence to that effect presented at the hearing. Although five of the seven disbursement forms bear the stamp "inmate identification verified hall capt.," those correction officers were not identified in the misbehavior report and their signatures are obscured by the stamp on the top copy of the triplicate disbursement form. Indeed, we note that the record establishes that petitioner requested that those correction officers be identified by using copies in the triplicate disbursement form and that they be called as witnesses at the hearing. The hearing, however, concluded without compliance with petitioner's request. Indeed, we note that the Hearing Officer indicated that the signatures of the hall captains were illegible and thus unidentifiable, even by those officers in the block to whom the Hearing Officer had spoken, but nevertheless agreed to "try" to comply with petitioner's request to call those witnesses. The record does not reflect any efforts made by the Hearing Officer to do so.

We further agree with petitioner that he was denied meaningful employee assistance and was prejudiced by the inadequate assistance he received. Thus, at a minimum, petitioner would have been entitled to a new hearing in any event (*see Matter of Bellamy v Fischer*, 87 AD3d 1217, 1218). Petitioner objected to the assistance provided to him, complaining that the assistant did not bring him copies of the documents being used against him and that the assistant did not want to help him. "When the inmate is unable to provide names of potential witnesses, but provides sufficient information to allow the employee [assistant] to locate the witnesses 'without great difficulty[,']' failure to make any effort to do so constitutes a violation of the meaningful assistance requirement" (*Matter of Velasco v Selsky*, 211 AD2d 953, 954). The record fails to set forth what efforts, if any, the employee assistant made to ascertain the names of the correction officers who signed the disbursement forms and what measures, if any, the assistant took to secure their presence at the hearing. Under the circumstances, it cannot be said that "reasonable efforts were made to locate petitioner's witnesses" (*Matter of Davila v Selsky*, 48 AD3d 846, 847).

Furthermore, petitioner was denied the right to call a witness, i.e., the other inmate, as provided in the regulations (*see Matter of Barnes v LeFevre*, 69 NY2d 649, 650; *Matter of Robinson v Fischer*, 68 AD3d 1687, 1688). "The hearsay report of a correction officer that a witness refuses to testify unaccompanied by any reason from the witness proffered to the [H]earing [O]fficer for such refusal is not a sufficient basis upon which an inmate's conditional right to call witnesses can be summarily denied" (*Barnes*, 69 NY2d at 650).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 12-00870

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL ANTHONY HOLMES, DEFENDANT-RESPONDENT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR APPELLANT.

PETER J. GLENNON, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Alex R. Renzi, J.), dated March 26, 2012. The order granted the motion of defendant to suppress evidence.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion to suppress the firearm is denied and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the indictment.

Memorandum: The People appeal from an order granting defendant's motion to suppress a handgun seized by the police during a search of his motor vehicle. We agree with the People that Supreme Court erred in granting the motion. The evidence adduced at the suppression hearing established that an identified citizen called 911 and reported that she witnessed a man being forced at gunpoint into a brown Ford Explorer near the intersection of Brooks Avenue and Genesee Street in the City of Rochester. A dispatch with that information was then broadcast over the police radio. Within minutes of hearing the dispatch, a police officer observed a brown Ford Explorer on Genesee Street approximately one quarter of a mile from Brooks Avenue. The officer further observed that the Ford Explorer was being followed by a vehicle whose driver, later identified as the person who called 911, was waving her hand outside the window and yelling, "That's them, that's them," while pointing at the Ford Explorer.

The officer proceeded to stop the Ford Explorer and ordered its three occupants out of the vehicle. Defendant was the driver, and it was determined by another officer at the scene that his driver's license had been suspended. Defendant was therefore charged with aggravated unlicensed operation of a motor vehicle in the second degree, a misdemeanor, along with unlicensed operation of a motor vehicle, a traffic infraction. At the scene, the woman who called 911 informed the police that the person who had been abducted was her

boyfriend, and that she had seen one of the other two occupants of the Ford Explorer put what appeared to be a gun to her boyfriend's head and force him into the vehicle. The police decided to tow the vehicle, and before doing so an officer searched the vehicle and found a loaded firearm secreted near the center console in the front seat. Defendant and his codefendant were charged with criminal possession of a weapon in the second degree, and the codefendant also was charged with kidnapping in the second degree.

Following indictment, defendant moved to suppress the firearm seized by the police, contending that the search of the vehicle was unlawful. In their responding papers, the People argued that the search was lawful because the police had probable cause to believe that defendant had committed a crime. Following the hearing, defense counsel did not dispute that the police lawfully stopped the vehicle defendant was driving or that defendant was lawfully arrested. Defense counsel argued, however, that the police conducted an unlawful inventory search of the vehicle. The People responded that the search was a lawful inventory search and that, in any event, it was supported by probable cause to believe that defendant had committed a crime. The court granted defendant's motion and suppressed the firearm. We now reverse.

It is well settled that, " 'where police have validly arrested an occupant of an automobile, and they have reason to believe that [it] may contain evidence related to the crime for which the occupant was arrested *or that a weapon may be discovered* or a means of escape thwarted, they may contemporaneously search the passenger compartment, including any containers found therein' " (*People v Blasich*, 73 NY2d 673, 678-679, quoting *People v Belton*, 55 NY2d 49, 55, *rearg denied* 56 NY2d 646 [emphasis added]; *see People v Galak*, 81 NY2d 463, 467).

Here, as noted, there is no dispute that defendant was lawfully stopped and arrested. Rather, the issue before us is whether the police lawfully searched the vehicle defendant was driving. Even assuming, without deciding, that the police did not conduct a lawful inventory search, we conclude that a search was authorized because the police had probable cause to believe that a gun was inside the vehicle. Probable cause arose from the information provided to the police by the identified citizen informant, who stated that she observed one of the occupants of defendant's vehicle in possession of what appeared to be a handgun used in the abduction of her boyfriend. "An identified citizen informant is presumed to be personally reliable" (*People v Parris*, 83 NY2d 342, 350; *see People v Van Every*, 1 AD3d 977, 978, *lv denied* 1 NY3d 602) and, here, the informant had a sufficient basis of knowledge inasmuch as she personally observed the weapon in question (*see generally People v Rodriguez*, 52 NY2d 483, 491).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

99

KA 11-00098

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RHASHAY R. WHITFIELD, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered December 20, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, conspiracy in the fourth degree and criminal impersonation in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that County Court erred in allowing him to proceed pro se. We reject that contention. "Implicit in the exercise of [the constitutional right to counsel] is the concomitant right to forego the advantages of counsel and represent oneself" (*People v Arroyo*, 98 NY2d 101, 103; *see People v Henriquez*, 3 NY3d 210, 215). Here, we conclude that the court conducted the requisite " 'searching inquiry' to insure that defendant's request to proceed pro se was accompanied by a 'knowing, voluntary and intelligent waiver of the right to counsel' " (*People v Providence*, 2 NY3d 579, 580, quoting *Arroyo*, 98 NY2d at 103; *see People v Deponceau*, 96 AD3d 1345, 1347, *lv denied* 19 NY3d 1025; *People v Herman*, 78 AD3d 1686, 1686-1687, *lv denied* 16 NY3d 831) and, contrary to the contention of defendant, the court repeatedly warned him of the risks associated with proceeding pro se (*see People v Chandler*, 109 AD3d 1202, 1203; *People v Clark*, 42 AD3d 957, 958, *lv denied* 9 NY3d 960).

Although defendant contends that his responses during the inquiry and his subsequent conduct and statements revealed his lack of knowledge of the law and criminal procedure, it is well established that, " '[r]egardless of his lack of expertise and the rashness of his choice,' . . . defendant may 'choose to waive counsel if he [does] so

knowingly and voluntarily' " (*People v Gillian*, 8 NY3d 85, 88, quoting *People v Vivenzio*, 62 NY2d 775, 776). We conclude that defendant made a knowing and voluntary choice in this case. We reject defendant's further contention that the court had a continuing obligation to ask defendant, at various points during the proceedings, whether he wished to continue to represent himself, particularly where, as here, defendant gave no indication to the contrary (*see generally Vivenzio*, 62 NY2d at 776).

Defendant further contends that he was deprived of a fair trial by prosecutorial misconduct. Defendant's contention with respect to most of the instances of alleged prosecutorial misconduct have not been preserved for our review (*see People v Mull*, 89 AD3d 1445, 1446, *lv denied* 19 NY3d 965), and we decline to exercise our power to review his contention with respect to those instances of alleged misconduct as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We conclude that the remaining instances of misconduct were "not so egregious as to deprive defendant of a fair trial" (*People v Wittman*, 103 AD3d 1206, 1207, *lv denied* 21 NY3d 915; *see People v Eldridge*, 288 AD2d 845, 845-846, *lv denied* 97 NY2d 681). We reject defendant's further contention that the court erred in its *Molineux* ruling. Testimony concerning defendant's prior drug sales was admissible with respect to the issue of defendant's intent to sell drugs (*see People v Ray*, 63 AD3d 1705, 1706, *lv denied* 13 NY3d 838; *People v Lowman*, 49 AD3d 1262, 1263, *lv denied* 10 NY3d 936; *People v Williams*, 21 AD3d 1401, 1402-1403, *lv denied* 5 NY3d 885), as well as " 'to complete the narrative of events leading up to the crime for which defendant [was] on trial' " (*Ray*, 63 AD3d at 1706). Further, we conclude that the probative value of such evidence outweighed its prejudicial impact (*see People v Alvino*, 71 NY2d 233, 242).

We agree with defendant that it was improper for the People to condition the plea of a codefendant upon his promise not to testify at defendant's trial and to threaten to increase the codefendant's sentence should he violate that condition (*see e.g. People v Turner*, 45 AD2d 749, 749-750; *Maples v Stegall*, 427 F3d 1020, 1033-1034; *United States v Henricksen*, 564 F2d 197, 198; *cf. People v Dixon*, 93 AD3d 894, 895-896). As the United States Supreme Court wrote in *Washington v Texas* (388 US 14, 19), "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he [or she] has the right to present his [or her] own witnesses to establish a defense. This right is a fundamental element of due process of law." Thus, "substantial interference by the State with a defense witness' free and unhampered choice to testify violates due process as surely as does a willful withholding of evidence" (*People v Shapiro*, 50 NY2d 747, 761; *see People v Sharpe*, 70 AD3d 1184, 1186, *lv denied* 14 NY3d 892). Here, however, defendant was not prejudiced by the improper plea condition inasmuch as the court granted his motion to permit the codefendant to

testify on defendant's behalf without exposure to a more severe sentence, and the court advised the codefendant of its ruling (*see United States v Foster*, 128 F3d 949, 953).

Contrary to the further contention of defendant, he was not denied a fair trial by the prosecutor's refusal to grant immunity to the codefendant. This is not a case in which "witnesses favorable to the prosecution are accorded immunity while those whose testimony would be exculpatory of the defendant are not, or . . . where the failure to grant immunity deprives the defendant of vital exculpatory testimony" (*Shapiro*, 50 NY2d at 760; *see People v Owens*, 63 NY2d 824, 825-826). In any event, the codefendant did testify at trial and he provided exculpatory testimony to the effect that he alone possessed the drugs at issue without defendant's knowledge or participation and that defendant did not help him purchase those drugs.

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "Although a different result would not have been unreasonable, the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Orta*, 12 AD3d 1147, 1147, *lv denied* 4 NY3d 801).

Defendant failed to preserve for our review his contention that, in sentencing him, the court penalized him for exercising the right to a jury trial (*see People v Trinidad*, 107 AD3d 1432, 1432, *lv denied* 21 NY3d 1046; *People v Irrizarry*, 37 AD3d 1082, 1083, *lv denied* 8 NY3d 946). In any event, it 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 Galens*, 111 AD3d 1322, 1323), and "[a] review of the record reveals no evidence of retaliation or vindictiveness on the part of County Court" (*Irrizarry*, 37 AD3d at 1083; *see Trinidad*, 107 AD3d at 1432-1433).

Finally, the sentence is not unduly harsh or severe.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

101

CA 13-00293

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

OFELIA RODRIGUEZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARIA I. COLON, DEFENDANT-RESPONDENT.

LOUIS ROSADO, BUFFALO, FOR PLAINTIFF-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Drury, J.), entered October 15, 2012. The judgment denied the motion of plaintiff to set aside a jury verdict or for a new trial and awarded money damages to plaintiff.

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

Memorandum: In this personal injury action, plaintiff appeals from a judgment denying her motion seeking to set aside the jury verdict in the amount of $10,000 and for a new trial. Plaintiff was a passenger in two separate motor vehicle accidents occurring on April 26 and August 1, 2007. Defendant was the driver of the vehicle involved in the April accident and conceded liability, and it was disclosed during the trial on damages that plaintiff settled her claim against the driver involved in the August accident. The jury determined that the injuries sustained by plaintiff in the April accident were distinguishable from the injuries she sustained in the August accident, and awarded plaintiff $10,000 for past pain and suffering only.

We are unable to review plaintiff's contention that she was denied the opportunity to question prospective jurors during voir dire and was therefore denied her right to a fair trial and an impartial jury. Voir dire was not transcribed, and plaintiff did not prepare a statement in lieu of stenographic transcript (*see* CPLR 5525 [d]). We conclude that plaintiff, as the appellant, must "suffer the consequences" of an incomplete appellate record where, as here, there are conflicting accounts of what occurred during voir dire (*Matter of Santoshia L.*, 202 AD2d 1027, 1028; *see generally Polyfusion Elecs., Inc. v AirSep Corp.*, 30 AD3d 984, 985).

Contrary to plaintiff's further contention, "the verdict is based

on a fair interpretation of the evidence" (*Latour v Hayner Hoyt Corp.* [appeal No. 2], 13 AD3d 1147, 1148; *see* CPLR 4404 [a]; *Kuncio v Millard Fillmore Hosp.*, 117 AD2d 975, 976, *lv denied* 68 NY2d 608). MRI scans of plaintiff's cervical and lumbar spine taken after each accident supported the jury's determination that the injuries sustained in the April accident were distinguishable from those sustained in the August accident (*cf. Reilly v Fulmer*, 9 AD3d 818, 819-820). Furthermore, testimony and medical records presented at the trial on damages established that plaintiff had low back pain prior to the April accident, that she had a preexisting degenerative spinal condition that was exacerbated by her cigarette smoking and obesity, and that the pain in her neck and back was improving before the August accident. "Given the conflicting experts' opinions and the plaintiff's subsequent accident[] and other conditions, it cannot be said that the damages award deviated materially from what would be reasonable compensation" (*Ballas v Occupational & Sports Medicine of Brookhaven, P.C.*, 46 AD3d 498, 498, *lv dismissed* 10 NY3d 803, *lv denied* 12 NY3d 702; *see* CPLR 5501 [c]; *Latour*, 13 AD3d at 1148-1149).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

103

CA 13-01249

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

LUZ M. HOUSTON, AS ADMINISTRATRIX OF THE
ESTATE OF ROBERT M. HOUSTON, SR., DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MCNEILUS TRUCK AND MANUFACTURING, INC.,
DEFENDANT-APPELLANT,
MACK TRUCKS, INC., ET AL., DEFENDANTS.

COLUCCI & GALLAHER, P.C., BUFFALO (ANTHONY COLUCCI, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered April 18, 2013. The order, among other things, denied in part the motion of defendant McNeilus Truck and Manufacturing, Inc. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion with respect to the manufacturing defect claims and dismissing those claims and all cross claims based on that theory against defendant-appellant and as modified the order is affirmed without costs.

Memorandum: In this negligence action in which plaintiff seeks damages arising from the decedent's death during a garbage truck accident, McNeilus Truck and Manufacturing, Inc. (defendant), as limited by its notice of appeal, contends that Supreme Court erred in denying those parts of its motion for summary judgment dismissing the claims and all cross claims against it for a manufacturing defect, "conscious pain and suffering/preimpact terror," and failure to warn. We agree with defendant that the court erred in denying its motion with respect to the claims for a manufacturing defect and we therefore modify the order by dismissing those claims and all cross claims based on that theory against defendant. Defendant met its initial burden by establishing as a matter of law that the truck at issue was not defective and that a manufacturing defect therefore did not cause plaintiff's injuries (*see generally Ramos v Howard Indus., Inc.*, 10 NY3d 218, 222-224), and plaintiff failed to raise a triable issue of fact in opposition (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Indeed, we note that, in its brief on appeal, plaintiff

failed to address defendant's contention that the court erred in denying that part of its motion.

Contrary to defendant's contention, however, we conclude that the court properly denied those parts of its motion for summary judgment dismissing the claims for conscious pain and suffering and preimpact terror. Although "a plaintiff bears the ultimate burden of proof at trial on the issue of conscious pain and suffering, on a motion for summary judgment the defendant bears the initial burden of showing that the decedent did not endure conscious pain and suffering" (*Gaida-Newman v Holtermann*, 34 AD3d 634, 635; *see Dmytryszyn v Herschman*, 98 AD3d 715, 715-716; *Haque v Daddazio*, 84 AD3d 940, 941). With respect to such a claim, it is well settled "that summary judgment should not be granted where a party—such as defendant[] herein—[establishes] that a decedent was unconscious when found at the scene and continued to be unconscious thereafter, if the [evidence does] not establish the decedent's unconscious condition during the interval immediately after the accident but before emergency help arrived" (*Barron v Terry*, 268 AD2d 760, 761). Here, although defendant established that decedent's coworker found him unresponsive a short time after the accident, defendant failed to establish decedent's condition in the short time before that. Similarly, defendant failed to establish as a matter of law that decedent did not experience preimpact terror (*see generally Lang v Bouju*, 245 AD2d 1000, 1001).

Contrary to defendant's further contention, the court also properly denied that part of its motion with respect to the claim for failure to warn. "A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known . . . A manufacturer also has a duty to warn of the danger of unintended uses of a product provided these uses are reasonably foreseeable" (*Liriano v Hobart Corp.*, 92 NY2d 232, 237). " 'The nature of the warning and to whom it should be given depend upon a number of factors including the harm that may result from use of the product without the warnings, the reliability and adverse interest of the person to whom notice is given, the kind of product involved and the burden in disseminating the warning' " (*Chien Hoang v ICM Corp.*, 285 AD2d 971, 972; *see generally Cover v Cohen*, 61 NY2d 261, 276). Consequently, " '[i]n all but the most unusual circumstances, the adequacy of a warning is a question of fact' to be determined at trial" (*Johnson v UniFirst Corp.*, 90 AD3d 1539, 1540; *see Repka v Arctic Cat, Inc.*, 20 AD3d 916, 918). Here, defendant failed to meet its burden of establishing as a matter of law that the warnings were adequate or that the failure to give warnings was not a proximate cause of the accident (*cf. Pizzaro v City of New York*, 188 AD2d 591, 593, *lv denied* 82 NY2d 656). In any event, even assuming, arguendo, that defendant met its initial burden on the motion by submitting the affidavit of its expert, we note that the expert's affidavit submitted by plaintiff in opposition to the motion "presented a credibility battle between the parties' experts, and issues of credibility" may not be decided on a motion for summary judgment (*Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624; *see Baity*

v General Elec. Co., 86 AD3d 948, 952).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01266

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

EMERALD EQUIPMENT SYSTEMS, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GEARHART BROTHERS SERVICES, LLC,
DEFENDANT-RESPONDENT.

FRANK A. SARAT, HOMER, FOR PLAINTIFF-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (MARK SCHLEGEL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered June 12, 2013. The order denied plaintiff's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following Memorandum: Plaintiff commenced this breach of contract action seeking to recover certain payments allegedly due under two equipment leases. The first cause of action seeks to recover monthly rental payments, the second cause of action seeks to recover late charges based upon nonpayment of the rent, the third cause of action seeks damages allegedly incurred as a result of defendant's improper operation or maintenance of the leased equipment, and the fourth cause of action seeks expenses, including attorney's fees, that plaintiff incurred to enforce its rights under the contract upon defendant's alleged default. Defendant asserted counterclaims for breach of express warranty and breach of the implied warranties of merchantability and fitness for a particular purpose. Plaintiff thereafter moved for summary judgment on the first and second causes of action, partial summary judgment on liability on the fourth cause of action, and dismissal of the counterclaims. In opposition to the motion, defendant did not dispute plaintiff's entitlement to the payments due under the terms of the lease agreements, but asserted that it was entitled to a reduction in rent based upon delays in defendant's work occasioned by mechanical problems with the equipment. Defendant further asserted that plaintiff "waived any disclaimers of warranty" in the lease agreements "and/or [that] the leases were modified" such that defendant was not obligated to pay the entire amount due under the lease agreements based upon plaintiff's oral representations, prior course of

performance, and industry practice.

We agree with plaintiff that Supreme Court erred in denying its motion inasmuch as plaintiff met its initial burden with respect to the causes of action and counterclaims at issue, and defendant failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). "[I]nasmuch as [defendant] seeks to create triable issues of fact solely through the use of parol evidence, resolution of the propriety of Supreme Court's [denial] of summary judgment [in plaintiff's favor] 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). "Parol 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; *see Polyfusion Elecs., Inc. v Promark Elecs., Inc.*, 108 AD3d 1186, 1187). Here, parol evidence is not admissible because the lease agreements unambiguously provide that defendant is responsible for paying the cost of repairs to the equipment (*see Polyfusion Elecs., Inc.*, 108 AD3d at 1187).

We further conclude that plaintiff's conduct in providing a one-time credit to defendant does not constitute a course of dealing sufficient to modify the terms of the lease agreements (*see General Motors Acceptance Corp. v Clifton-Fine Cent. Sch. Dist.*, 85 NY2d 232, 237; *V.J. Gautieri, Inc. v State of New York*, 195 AD2d 669, 671). The deposition testimony of defendant's director of operations and project manager that it was industry practice to "work out the hours" when a project was completed, rather than to estimate the number of hours in the contract, is insufficient to raise an issue of fact inasmuch as "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" (*Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1377 [internal quotation marks omitted]). We further agree with plaintiff that its repair of the equipment and issuance of an invoice to defendant for the cost of the repairs was consistent with the terms of the lease agreements and, therefore, did not modify the terms of the agreements or constitute a waiver thereof (*see* UCC 2-A-207 [3]).

Finally, we agree with plaintiff that it is entitled to dismissal of the counterclaims inasmuch as "the broad, express, and conspicuous disclaimer of all warranties set forth in the [lease agreements] is fatal to [defendant's counter]claims for breach of the implied warranties of merchantability and fitness for a particular purpose," as well as its counterclaim for breach of express warranty (*West 63 Empire Assoc., LLC v Walker & Zanger, Inc.*, 107 AD3d 586, 586; *see Mangano v Town of Babylon*, 111 AD3d 801, 802).

We therefore reverse the order and grant plaintiff's motion, thus granting judgment on the first and second causes of action and partial

summary judgment on liability on the fourth cause of action, and we remit the matter to Supreme Court to determine, with respect to the fourth cause of action, the expenses, including attorney's fees, to which plaintiff is entitled pursuant to the terms and conditions of the lease agreements (*see PHH Mortgage Corp. v Ferro, Kuba, Mangano, Skylar, Gacovino & Lake, P.C.*, 113 AD3d 813, ___).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

114

KA 08-02354

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD L. VROOMAN, DEFENDANT-APPELLANT.

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

RONALD L. VROOMAN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered October 31, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). Defendant's contention that the prosecutor erred in eliciting testimony with respect to defendant's invocation of the right to counsel is not preserved for our review (*see* CPL 470.05 [2]; *see also People v Kithcart*, 85 AD3d 1558, 1559-1560, *lv denied* 17 NY3d 818). In any event, we conclude that any error with respect thereto is "harmless beyond a reasonable doubt inasmuch as there is no reasonable possibility that the error[] might have contributed to defendant's conviction" (*People v Capers*, 94 AD3d 1475, 1476, *lv denied* 19 NY3d 971 [internal quotation marks omitted]; *see Kithcart*, 85 AD3d at 1559-1560; *see generally People v Crimmins*, 36 NY2d 230, 237). Defendant was not denied effective assistance of counsel by defense counsel's failure to object to that testimony (*see People v Caban*, 5 NY3d 143, 152; *People v Williams*, 107 AD3d 1516, 1517, *lv denied* 21 NY3d 1047) and, viewing the evidence, the law and the circumstances of the case, in totality and at the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

In his pro se supplemental brief, defendant contends that the conviction is not based on legally sufficient evidence. We reject that contention. Here, the evidence adduced at trial establishes that

the victim was brutally beaten and had a petechial injury in her eye commonly associated with asphyxiation; that the victim was left to die after the beating; that defendant's DNA was found on the victim; that defendant's fingerprint was found on a cup located approximately 30 inches from the victim's body; and that defendant admitted to the People's final witness his role in the "killing" of a person who matched some of the victim's characteristics and who was killed at approximately the same time as the victim. Defendant challenges the legal sufficiency of the evidence on the specific grounds that the People failed to establish his identity as the victim's killer and his intent to kill the victim. Defendant's challenge to the legal sufficiency of the evidence with respect to intent is unpreserved for our review (*see generally People v Gray*, 86 NY2d 10, 19; *People v Scott*, 61 AD3d 1348, 1349, *lv denied* 12 NY3d 920, *reconsideration denied* 12 NY3d 799). In any event, in light of the above evidence, we conclude that both of defendant's challenges to the legal sufficiency of the evidence lack merit (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant contends that the verdict is against the weight of the evidence because the testimony of the People's final witness was incredible. We reject that contention. " '[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury' " (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942), and we see no reason to disturb the jury's resolution of those issues in this case. Defendant also contends that the verdict is against the weight of the evidence with respect to the issues of intent and identification, arguing specifically that the evidence establishes only that he had sexual contact with the victim on the night she was killed, and not that he killed her. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). We note in particular that "intent [to kill] 'may be inferred from defendant's conduct as well as the circumstances surrounding the crime' " (*People v Massey*, 61 AD3d 1433, 1433, *lv denied* 13 NY3d 746; *see generally People v Geddes*, 49 AD3d 1255, 1256, *lv denied* 10 NY3d 863).

Finally, defendant contends in his pro se supplemental brief that County Court erred in failing to submit the lesser included offense of "manslaughter" to the jury. "Defendant did not ask the court to so charge and therefore failed to preserve his contention[] for our review" (*People v Gibbs*, 286 AD2d 865, 867, *lv denied* 97 NY2d 704; *see People v Taylor*, 83 AD3d 1505, 1506, *lv denied* 17 NY3d 822), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

121

CA 13-00510

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

PAULA J. JOHNSON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RUSSELL E. JOHNSON, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MOHAMMAD AYYUB, M.D., WELLSVILLE RADIOLOGY, P.L.L.C., DEFENDANTS-APPELLANTS, JONES MEMORIAL HOSPITAL, ET AL., DEFENDANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DWYER, BLACK & LYLE, LLP, OLEAN (JEFFREY A. BLACK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered October 4, 2012. The order, among other things, denied the cross motion of defendants Mohammad Ayyub, M.D. and Wellsville Radiology, P.L.L.C. for dismissal or summary judgment, on the grounds of spoliation of evidence.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking damages arising from the death of her husband (decedent), who died of lung cancer in May 2009. In January 2006, decedent had a CT scan taken of his chest at defendant Jones Memorial Hospital (hospital). Mohammad Ayyub, M.D. (defendant), a radiologist, reviewed films of decedent's lungs taken from the CT scan and observed no abnormalities or signs of cancer. Approximately two years later, decedent was diagnosed with Stage IV lung cancer with metastasis to the brain. According to the amended complaint, defendant was negligent in, among other things, "failing to appropriately and accurately interpret the radiology films" taken of decedent's chest, and in failing to diagnose his lung cancer.

During the pendency of this action, it was discovered that the "lung window" films reviewed by defendant are missing. According to the hospital, the films were included in a packet of decedent's medical records picked up by plaintiff from the hospital in May 2008. Plaintiff acknowledges that she picked up decedent's medical records from the hospital but maintains that the films were not included

therein. Defendant cross-moved for, inter alia, dismissal of the amended complaint based on spoliation of evidence, contending that he cannot defend the action without the films. Following a fact-finding hearing, Supreme Court determined that the films were lost by either plaintiff or the hospital but denied defendant's request to dismiss the amended complaint. The court stated that, instead, it would give an adverse inference charge at trial against either plaintiff or the hospital "if it finds that one or the other was the responsible party, or none at all." Defendant contends that the court abused its discretion in failing to dismiss the amended complaint as a sanction for spoliation of evidence. We reject that contention.

It is well settled that trial courts have "broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence" (*Iannucci v Rose*, 8 AD3d 437, 438; *see McFadden v Oneida, Ltd.*, 93 AD3d 1309, 1311), and the striking of a pleading is warranted only where the spoliation results from the intentional destruction of evidence or where a party's ability to defend the action is " 'fatally compromised' " (*Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717, 718; *see Call v Banner Metals, Inc.*, 45 AD3d 1470, 1471-1472; *Enstrom v Garden Place Hotel*, 27 AD3d 1084, 1086). Here, there is no evidence that plaintiff intentionally destroyed the "lung window" films that were reviewed by defendant. In fact, as the court noted in its decision, it is not even clear that plaintiff was responsible for the loss of the films. Moreover, we conclude that the loss of the films does not fatally compromise defendant's ability to defend the action, inasmuch as the films may be recreated from the "standard views" of the CT scan, which are stored on an available compact disc. Under the circumstances, it cannot be said that the court abused its discretion in refusing to impose the drastic sanction of dismissal.

We have reviewed defendant's remaining contentions and conclude that, to the extent that they are properly before us, they lack merit.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00176

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

IN THE MATTER OF ROBERT CARDEW,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered September 13, 2012 in a CPLR article 78 proceeding. The judgment denied the petition.

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

Memorandum: In this CPLR article 78 proceeding, petitioner, an inmate at Attica Correctional Facility, appeals from a judgment denying his petition, which alleged that respondent acted arbitrarily and capriciously in denying a grievance he filed against the Department of Corrections and Community Supervision (DOCCS). In his grievance, petitioner, who is serving a sentence of 28 years to life for murder in the second degree, among other offenses, contended that DOCCS failed to provide him with sufficient information and resources to prepare a viable postrelease plan for housing and employment, without which he cannot obtain release to parole supervision. We conclude that Supreme Court properly denied the petition.

We reject petitioner's contention that he was required to have a postrelease plan for housing and employment in place in order to be released on parole. We note that a "release plan[] [involving] . . . employment" is one of eight statutory factors considered by the Parole Board in "making [a] parole release decision" (Executive Law § 259-i [2] [c] [A]), and that the Parole Board has the power to require an inmate to secure approved housing before being released on parole (*see People ex rel. Beam v Hodges*, 286 AD2d 936, 937). Here, however, there is no indication in the record that the Parole Board required petitioner to have a postrelease employment or housing plan before he

could be released on parole, or that the Parole Board denied petitioner parole because petitioner failed to fulfill that purported requirement. In fact, it appears from the record that petitioner was denied release by the Parole Board following his first parole hearing in 2008 because of the severity of his offense and his poor disciplinary record while incarcerated.

In any event, even assuming, arguendo, that DOCCS has a duty to assist petitioner in finding appropriate housing and employment (*see* Correction Law § 201 [5]; *cf. Matter of Breeden v Donnelli*, 26 AD3d 660, 661; *Matter of Lynch v West*, 24 AD3d 1050, 1051), we conclude that DOCCS fulfilled that duty. The record establishes that DOCCS provided petitioner with all the materials and resources it had available for Broome County, where petitioner expects to reside if released, as well as hundreds of pages of information regarding housing and employment in counties throughout the state. Petitioner was also referred to the Broome County Reentry Taskforce and the CEPHAS group for assistance in making postrelease plans, and he was provided with access to his facility's Transitional Services Center (TSC), the TSC's counselors, and a facility parole officer.

We reject petitioner's further contention that DOCCS acted arbitrarily and capriciously in denying his request for access to a telephone, email and the internet for purposes of securing housing and employment. Even assuming, arguendo, that DOCCS's policy of denying such access to inmates impinged upon petitioner's constitutional rights, we conclude that the policy is valid because it is " 'reasonably related to legitimate penological interests' " (*Matter of Walton v New York State Dept. of Correctional Servs.*, 13 NY3d 475, 491, quoting *Turner v Safley*, 482 US 78, 89). Petitioner has failed to establish that the restriction is unduly burdensome and is not related to the legitimate interest of prison safety (*see Matter of Malik v Coughlin*, 157 AD2d 961, 962-963; *Matter of Montgomery v Jones*, 88 AD2d 1003, 1003-1004).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 13-00330

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

LOUIS GRIMES, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Onondaga County Court (Donald E. Todd, A.J.), dated November 29, 2012. The order, insofar as appealed from, granted that part of the motion of defendant seeking to dismiss that count of the indictment charging him with assault in the first degree.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to dismiss the count of assault in the first degree is denied, that count of the indictment is reinstated, and the matter is remitted to Onondaga County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to dismiss the count of the indictment charging defendant with assault in the first degree (Penal Law § 120.10 [1]). The indictment also contains a second count, charging defendant with assault in the second degree (§ 120.05 [2]). In dismissing the count charging defendant with assault in the first degree, County Court held that the People improperly reopened the grand jury proceedings after a true bill had been voted on the charge of assault in the second degree, which had not been filed as an indictment, in order to supplement the evidence and bring the higher charge of assault in the first degree. The court concluded that, pursuant to CPL 190.25 (1) and *People v Cade* (74 NY2d 410), the People were required to obtain the vote of at least 12 members of the grand jury to vacate the grand jury's earlier vote and reopen the proceedings. We agree with the People that the court erred in dismissing the count charging defendant with assault in the first degree.

Dismissal of an indictment under CPL 210.35 (5) based on a defective grand jury proceeding " 'is limited to instances of

prosecutorial misconduct, fraudulent conduct or errors which potentially prejudice the ultimate decision reached by the [g]rand [j]ury' " (*People v Sheltray*, 244 AD2d 854, 855, *lv denied* 91 NY2d 897; *see People v Huston*, 88 NY2d 400, 409; *People v Shol*, 100 AD3d 1461, 1462, *lv denied* 20 NY3d 1103). Pursuant to CPL 190.25 (1), "[p]roceedings of a grand jury are not valid unless [16] of its members are present. The finding of an indictment . . . and every other affirmative official action or decision requires the concurrence of at least [12] members thereof."

Here, as noted, the court held that the grand jury proceedings were defective because the People, without seeking a formal vote of at least 12 members of the grand jury, submitted additional evidence after the grand jury had voted the first true bill, but before an indictment had been filed. Contrary to the court's conclusion, *Cade* does not hold that a grand jury must vote to vacate a prior true bill that has not been filed as an indictment in order to reopen the proceedings and introduce additional evidence in support of proposed charges that were not previously considered by the grand jury (*see generally People v Frasier*, 105 AD3d 1079, 1080; *People v Lyons*, 40 AD3d 1121, 1122, *lv denied* 9 NY3d 878; *People v Dorsey*, 166 AD2d 180, 181, *lv denied* 76 NY2d 1020, *reconsideration denied* 77 NY2d 877). Indeed, in *Cade*, the Court of Appeals noted that there are reasons, other than a prosecutor's belief that the evidence before the grand jury was inadequate or that dismissal was likely, "why a prosecutor *or* a [g]rand [j]ury would choose to reopen the evidence. The prosecutor might, for example, supplement the evidence to bring additional or higher charges" (74 NY2d at 417 [emphasis added]). Moreover, unlike the procedure that was in any event approved in *Cade*, here the prosecutor never requested that the grand jury reconsider the lower charge of assault in the second degree in light of the additional evidence (*cf. id.* at 413-414). Thus, inasmuch as there was no second presentment of that charge, the grand jury was not required to vacate its prior vote. We therefore conclude that the integrity of the grand jury was not impaired (*see Shol*, 100 AD3d at 1462). In view of our conclusion, we do not address the issue whether defendant was prejudiced by the procedure employed here.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00839

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

MICHAEL A. LAWLER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KST HOLDINGS CORPORATION, ET AL., DEFENDANTS,
AND KEVIN S. TAILLIE, DEFENDANT-RESPONDENT.

HISCOCK & BARCLAY, LLP, ROCHESTER (GEORGE G. MACKEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ADAIR LAW FIRM, ROCHESTER (DONALD R. ADAIR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Wayne County (Kenneth R. Fisher, J.), entered March 1, 2013. The judgment dismissed plaintiff's complaint.

It is hereby ORDERED that the judgment entered March 1, 2013, insofar as it dismissed the foreclosure cause of action, is unanimously vacated and the order dated August 3, 2010 is modified on the law by granting that part of plaintiff's motion for summary judgment with respect to the foreclosure cause of action, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Wayne County, for further proceedings in accordance with the following Memorandum: Plaintiff appeals from a judgment (denominated order) dismissing his complaint following a bench trial in this mortgage foreclosure action, contending that Supreme Court erred in denying that part of his pretrial motion for summary judgment on his first cause of action, for foreclosure. We note at the outset that plaintiff's appeal properly brings up for review the propriety of the order denying his pretrial motion (*see* CPLR 5501 [a] [1]), and we further note that plaintiff has abandoned any contention with respect to the denial of his motion concerning his other cause of action, as well as the court's dismissal of that cause of action following the bench trial (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

The underlying facts are as follows. Defendant Kevin S. Taillie was the high bidder at the auction of the real and personal property of the Ontario Golf Club (OGC) on January 9, 2007. After making down payments totaling $278,300, however, Taillie was underfunded and could not close the purchase. Plaintiff thereafter agreed to provide Taillie with a $500,000 letter of credit that would have allowed Taillie to obtain a "bridge" mortgage sufficient to close the

purchase. The record establishes that, in conjunction with plaintiff's agreement to provide the subject letter of credit, Taillie agreed, inter alia, that plaintiff would have a 51% ownership interest in defendant KST Holdings Corporation (KST), which at that point had not been formed, and that Taillie would own the remaining 49% of that company. KST was subsequently incorporated and, by separate certificates signed by Taillie and dated February 23, 2007, plaintiff was issued 51 shares in KST, and Taillie was issued 49 shares in that corporation. On the same day, Jason Roth, Esq., the attorney assisting in the purchase of OGC, transmitted to plaintiff a "Written Consent of the Officers, Directors and Shareholders of KST," which authorized KST to purchase the OGC real and personal property and to execute the documents necessary to finalize the "bridge" financing.

The closing on the OGC purchase was scheduled for March 7, 2007, but on March 6, 2007, Roth realized that KST was $30,000 to $35,000 short of the funds required for the closing. It is unclear on the record before us whether Roth represented both plaintiff and KST; according to plaintiff, there was such dual representation, but Roth has indicated that he represented only KST.

Upon then making an inquiry into the details of the bridge loan that Taillie had arranged, plaintiff determined that the OGC purchase was "doomed" and that the deal was "dead." In an effort to save the transaction, plaintiff wired to HSBC Bank (HSBC), the holder of the foreclosed mortgage on the OGC real property, the sum of over $1.5 million, which was the amount needed to close the purchase of both the real property and the personal property of OGC. According to plaintiff, at the time that money was wired plaintiff instructed Roth to put the OGC property solely in plaintiff's name.

Roth, however, failed to do so, and instead put the property in the name of KST. Upon learning that the subject property had been placed in the name of KST, plaintiff determined that "[t]he easiest and most efficient solution to correct [the] error and to secure [plaintiff's] loan was to have KST grant [plaintiff] a mortgage." At the first annual meeting of KST, Taillie was removed as an officer and director of that corporation, and two new directors were elected. KST thereafter resolved, inter alia, to borrow from plaintiff the precise sum wired by plaintiff to HSBC to close the OGC purchase, and to issue plaintiff a note and first mortgage payable in that amount. The note and the mortgage were later approved by KST's directors who were appointed at KST's first annual meeting, and the note and mortgage were subsequently recorded. KST also issued a note and mortgage to Taillie equal to the amount of Taillie's down payment on the OGC real and personal property and entered into a security agreement with plaintiff by which KST granted a security interest in all of KST's personal property as collateral to secure the payment of all obligations and liabilities of KST to plaintiff. After KST defaulted on both of the subject mortgages, plaintiff commenced this action.

We agree with plaintiff that the court erred in denying that part of his motion seeking summary judgment on the foreclosure cause of

action. We therefore vacate the judgment and modify the underlying order accordingly, and we remit the matter to Supreme Court for the appointment of a referee to compute the amount due on the mortgage issued by KST to plaintiff.

With respect to that part of plaintiff's motion on the foreclosure cause of action, we conclude that plaintiff met his initial burden of establishing his " 'prima facie entitlement to judgment as a matter of law by submitting the mortgage [issued by KST to plaintiff], the underlying note, and evidence of a default' " (*Ekelmann Group, LLC v Stuart* [appeal No. 2], 108 AD3d 1098, 1099; *see Cassara v Wynn* [appeal No. 2], 55 AD3d 1356, 1356, *lv dismissed* 11 NY3d 919). "The burden [thus] shift[ed] to the defendant[s] to demonstrate 'the existence of a triable issue of fact as to a bona fide defense to the action' " (*Rose v Levine*, 52 AD3d 800, 801; *see Ekelmann Group, LLC*, 108 AD3d at 1099; *Cassara*, 55 AD3d at 1356). Only Taillie opposed the motion, and he failed to meet that burden.

Taillie opposed the motion on three grounds, none of which has merit. First, Taillie contended that plaintiff sought a controlling interest in KST only *after* executing the letter of credit, and Taillie thus implicitly contended that the monies wired by plaintiff to close the KST transaction were intended to be a capital contribution to KST. That contention lacks merit. We conclude that the record establishes that plaintiff asked for a controlling interest *in conjunction* with his provision of the subject letter of credit, and that Taillie's contentions to the contrary were merely an attempt to raise a feigned issue of fact (*see generally Taillie v Rochester Gas & Elec. Corp.*, 68 AD3d 1808, 1809).

Second, Taillie explicitly contended that plaintiff financed the purchase of OGC real and personal property in exchange for control of KST. That contention is belied by the record inasmuch as the stock certificates establishing that plaintiff had controlling interest in that corporation were signed and dated well before plaintiff wired approximately $1.5 million to finance the purchase of OGC. We also note that plaintiff wired the monies directly to HSBC, not to KST, and that KST never received those monies.

Third, Taillie contended that the "Written Consent" form authorized acquisition of the bridge loan but not the financing provided by plaintiff, and was thus invalid. Even assuming, arguendo, that such consent did not apply to the financing provided by plaintiff, we conclude for the reasons set forth above that the monies provided by plaintiff to complete the purchase of the OGC property were not a capital contribution to KST but, rather, those monies were a loan.

As previously noted, we are deciding this case on the ground that the court erred in denying that part of plaintiff's motion for summary judgment with respect to the foreclosure cause of action. On this record, we conclude that it was the clear intent of the parties that KST would finance the purchase of the OGC real and personal property,

and that there is a valid obligation underlying the mortgage, i.e., the funds plaintiff wired to complete the OGC transaction for which the mortgage was intended as security (*see Tornatore v Bruno*, 12 AD3d 1115, 1117). Contrary to Taillie's further contention, he failed to raise an issue of fact whether the mortgage is invalid because plaintiff was an interested director of KST at the time KST issued that mortgage (*cf.* Business Corporation Law § 713 [a], [b]).

Finally, in view of our conclusion, we do not address plaintiff's further contentions with respect to the judgment.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01350

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

MERLE A. HARVEY AND DIANE F. HARVEY,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

RANDY AGLE AND AMY AGLE, DEFENDANTS-RESPONDENTS.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (ADAM P. HANEY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (MICHAEL F. GERACI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered January 3, 2013. The order denied plaintiffs' motion for summary judgment in lieu of complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiffs' motion insofar as it sought summary judgment on the promissory note in the amount of $75,000 and as modified the order is affirmed without costs.

Memorandum: Plaintiffs, as limited by their brief, contend on appeal that Supreme Court erred in denying in its entirety their motion for summary judgment in lieu of complaint pursuant to CPLR 3213 with respect to two promissory notes, and instead should have granted the motion insofar as it sought summary judgment on one of the promissory notes, in the amount of $75,000. We agree, and we therefore modify the order accordingly. Plaintiffs met their initial burden by submitting the subject note, which contained a clause that accelerated the balance in the event that defendants defaulted, and by submitting evidence that defendants failed to make a required, biannual interest payment by the June 21, 2012 deadline (*see Sandu v Sandu*, 94 AD3d 1545, 1546; *Kehoe v Abate*, 62 AD3d 1178, 1180). In opposition thereto, defendants failed to "come forward with evidentiary proof showing the existence of a triable issue of fact with respect to a bona fide defense of the note" (*Judarl v Cycletech, Inc.*, 246 AD2d 736, 737; *see Ring v Jones*, 13 AD3d 1078, 1078). Although "knowledgeable acceptance of late payments over an extended period of time . . . establishes the necessary elements to constitute a waiver of the right to insist upon timely payments" (*Snide v Larrow*, 93 AD2d 959, 959, *affd* 62 NY2d 633; *see Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 30 AD3d 1, 6, *affd* 8 NY3d 59, *rearg denied* 8 NY3d 867), defendants established, at most, that they had made only

two prior untimely payments on the subject note. Evidence that plaintiffs had routinely accepted untimely monthly payments on a second promissory note representing a separate obligation between the parties does not compel a different result.

Frances E. Cafarell

Entered: March 21, 2014

Clerk of the Court

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

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CA 13-01239

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

CARL HENSLER, PLAINTIFF-RESPONDENT,

V ORDER

DOMINIC A. GALASSO, DEFENDANT-APPELLANT.

SCHNITTER CICCARELLI MILLS PLLC, EAST AMHERST (PATRICIA S. CICCARELLI OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, LANCASTER (SAMUEL J. CAPIZZI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered April 29, 2013. The order denied the motion of defendant for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on December 30, 2013, and filed in the Erie County Clerk’s Office on January 23, 2014,

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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CAF 13-00661

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

IN THE MATTER OF ANTHONY J. VENETTOZZI,
PETITIONER-APPELLANT,

V ORDER

HEIDI L. MANTELLI, RESPONDENT-RESPONDENT.

ANTHONY VENETTOZZI, PETITIONER-APPELLANT PRO SE.

PETER J. DIGIORGIO, JR., ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Family Court, Oneida County (Louis P. Gigliotti, A.J.), entered July 2, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petitions.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

159

CA 13-01309

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

CHRISTOPHER M. BOWER,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF LOCKPORT, DENNIS ZABROWSKI AND GREGORY CHAMBERS, DEFENDANTS-APPELLANTS-RESPONDENTS.

WEBSTER SZANYI LLP, BUFFALO (CHARLES E. GRANEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

HOGAN WILLIG, PLLC, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Catherine Nugent Panepinto, J.), entered October 15, 2012. The order denied defendants' motion for summary judgment and plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendants' motion and dismissing the third amended complaint, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained when he fell down a set of stairs in his uncle's home, where he had been staying, while police officers, the individual defendants herein, investigated a possible burglary there. Defendants moved for summary judgment dismissing the third amended complaint, and plaintiff cross-moved for partial summary judgment against all defendants "on the issue of negligence." Supreme Court denied both the motion and the cross motion. We agree with defendants that the court erred in denying their motion, and we therefore modify the order accordingly.

With respect to the negligence cause of action, it is well settled that, in an action against a municipality, it is "the fundamental obligation of a plaintiff pursuing a negligence cause of action to prove that the putative defendant owed a duty of care. Under the public duty rule, although a municipality owes a general duty to the public at large to [perform certain governmental functions], this does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created. This is an offshoot of

the general proposition that[,] '[t]o sustain liability against a municipality, the duty breached must be more than that owed the public generally' . . . The second principle relevant here relates not to an element of plaintiff['s] negligence claim but to a defense that [is] potentially available to [defendant]—the governmental function immunity defense . . . [T]he common-law doctrine of governmental immunity continues to shield public entities from liability for discretionary actions taken during the performance of governmental functions . . . [pursuant to which] '[a] public employee's discretionary acts—meaning conduct involving the exercise of reasoned judgment—may not result in the municipality's liability even when the conduct is negligent' " (*Valdez v City of New York*, 18 NY3d 69, 75-76; *see Middleton v Town of Salina*, 108 AD3d 1052, 1053).

With respect to the issue whether a special duty exists, it is well settled "that an agency of government is not liable for the negligent performance of a governmental function unless there existed a special duty to the injured person, in contrast to a general duty owed to the public . . . Such a duty, . . . [i.e.,] a duty to exercise reasonable care toward the plaintiff[,] is born of a special relationship between the plaintiff and the governmental entity" (*McLean v City of New York*, 12 NY3d 194, 199 [internal quotation marks omitted]). "A special relationship can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation" (*Pelaez v Seide*, 2 NY3d 186, 199-200; *see Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426; *McLean*, 12 NY3d at 199). According to plaintiff, a special relationship was formed in this case by the second method, i.e., the voluntary assumption of a duty of care by the municipal agency. That method requires plaintiff to establish "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (*Valdez*, 18 NY3d at 80 [internal quotation marks omitted]; *see Cuffy v City of New York*, 69 NY2d 255, 260). We conclude that defendants met their burden on the motion by establishing as a matter of law that there was no voluntary assumption of a duty of care, and plaintiff failed to raise a triable issue of fact whether the police officers who came to the house assumed, through promise or action, any duty to act on his behalf. Even assuming, arguendo, that plaintiff raised a triable issue of fact with respect to that requirement, we conclude that he also failed to raise a triable issue of fact with respect to the fourth requirement, i.e., whether he justifiably relied on any such assumption of duty by the police officers (*see Brown v City of New York*, 73 AD3d 1113, 1114-1115; *see also Middleton*, 108 AD3d at 1054). Consequently, we conclude that the court erred in denying the motion with respect to the negligence cause of action.

We further conclude, in any event, that the defense of governmental function immunity constitutes a separate and independent ground for dismissal of the negligence cause of action. That defense "shield[s] public entities from liability for discretionary actions taken during the performance of governmental functions" (*Valdez*, 18 NY3d at 76). Here, defendants established that they were providing police protection and engaging in the investigation of possible criminal behavior. It is well settled that "[p]olice and fire protection are examples of long-recognized, quintessential governmental functions" (*Applewhite*, 21 NY3d at 425). Furthermore, "defendants established that the conduct of the police officers throughout the course of their interaction with [plaintiff] was undertaken in the exercise of reasoned professional judgment of the officers, and was not inconsistent with accepted police practice. Accordingly, such conduct cannot serve as a basis for municipal liability" (*Bawa v City of New York*, 94 AD3d 926, 928, *lv denied* 19 NY3d 809; *see Lauer v City of New York*, 95 NY2d 95, 99).

We conclude with respect to the cause of action for gross negligence that defendants met their burden of establishing that the police officers' conduct did not " 'evince[] a reckless disregard for the rights of others or smack[] of intentional wrongdoing' " (*Tiede v Frontier Skydivers, Inc.*, 105 AD3d 1357, 1359, quoting *Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824), and plaintiff failed to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Finally, we conclude that the court erred in denying the motion with respect to the causes of action for battery and the violation of 43 USC § 1983. "The elements of battery are bodily contact, made with intent, and offensive in nature" (*Cerilli v Kezis*, 16 AD3d 363, 364; *see Hassan v Marriott Corp.*, 243 AD2d 406, 407; *Zgraggen v Wilsey*, 200 AD2d 818, 819). Similarly, the cause of action for the violation of 43 USC § 1983 alleges that defendants used excessive force in detaining plaintiff. Both of those causes of action are predicated on plaintiff's allegation that one of the police officers pushed him down the stairs. All of the police officers on the scene testified at depositions, however, that plaintiff stumbled and fell down the stairs because of his highly intoxicated condition, and thus defendants met their burden on the motion of establishing that plaintiff was not pushed down the stairs (*see generally Alvarez*, 68 NY2d at 324). Plaintiff testified at his deposition that he did not recall most of the events of the evening, including what caused him to fall, and he submitted no evidence establishing that he was pushed. Consequently, the first and fourth causes of action must be dismissed because any determination by a finder of fact that plaintiff was pushed down the stairs "would be based upon sheer speculation" (*Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1769, *affd* 16 NY3d 729 [internal quotation marks omitted]; *see McGill v United Parcel Serv., Inc.*, 53 AD3d 1077, 1077).

We have considered the parties' remaining contentions on the appeal and the cross appeal, and we conclude that they do not require

further modification of the order.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 12-01098

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IKIKO K. BROWN, DEFENDANT-APPELLANT.

LESLIE R. LEWIS, NEW HARTFORD (PETER DIGIORGIO, JR., 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 (Michael L. Dwyer, J.), rendered November 24, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (two counts).

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of two counts of robbery in the first degree (Penal Law § 160.15 [1], [2]), defendant contends that his plea to count one of the indictment was involuntarily entered because County Court, during the plea colloquy, misstated the law regarding accomplice liability. We note, however, that the alleged misstatement was made after defendant pleaded guilty and thus could not have rendered defendant's plea involuntary. In any event, because defendant did not move to withdraw his plea or to vacate the judgment of conviction on that ground, defendant's challenge to the voluntariness of his plea is unpreserved for our review (*see People v Bloom*, 96 AD3d 1406, 1406, *lv denied* 19 NY3d 1024).

Defendant further challenges the voluntariness of the plea on the ground that he made a statement during the plea colloquy that negated an element of the crime, thus rendering applicable the exception to the preservation rule in *People v Lopez* (71 NY2d 662, 666). We reject that contention. Defendant stated that he was in police custody when his codefendant, in an attempt to flee following the robbery, shot a deputy sheriff in the foot and thereby caused him serious physical injury. According to defendant, his statement about being in custody negated an element of robbery in the first degree under Penal Law § 160.15 (1), as charged in count one, which provides that a person is guilty of that crime when "he forcibly steals property and when, in

the course of the commission of the crime *or of immediate flight therefrom*, he *or another participant* in the crime . . . [c]auses serious physical injury to any person who is not a participant in the crime" (emphasis added).

The exception to the preservation rule set forth in *Lopez* permits review when the "factual recitation negates an essential element of the crime pleaded to" and the court fails to make a "further inquiry to ensure that defendant understands the nature of the charge" (*id.* at 666). Here, although defendant's statement about being in custody may have raised an issue of fact whether the codefendant caused serious injury to the deputy during the immediate flight from the robbery (*see People v Irby*, 47 NY2d 894, 895), it did not negate an element of the crime. In any event, after defendant made that statement, the court inquired further of defendant, who admitted that the shooting took place during the immediate flight from the robbery. We thus conclude that defendant's factual recitation, when viewed in its entirety, did not negate an essential element of the crime charged under count one of the indictment.

Finally, defendant contends that his sentence—an aggregate term of 30 years' imprisonment plus five years of postrelease supervision—is unduly harsh and severe considering that he has a minimal prior record (one misdemeanor, for which he was sentenced to community service), his participation in the crimes was limited to being the getaway driver, and, unlike his codefendant, he immediately surrendered to the police and accepted responsibility for his wrongdoing. Because defendant waived his right to appeal, however, he is precluded from asking us to modify his sentence as a matter of discretion in the interest of justice (*see People v Lopez*, 6 NY3d 248, 256; *People v Suttles*, 107 AD3d 1467, 1468, *lv denied* 21 NY3d 1046). We reject defendant's contention that his waiver of the right to appeal does not encompass his challenge to the severity of his sentence because the court failed to inform him of the maximum sentence he could receive. " '[T]he requirement that a defendant be apprised of [the] maximum sentence in order for a waiver [of the right to appeal] to be valid does not apply in a situation such as this where there is a specific sentence promise at the time of the waiver' " (*People v Semple*, 23 AD3d 1058, 1059, *lv denied* 6 NY3d 852; *cf. People v Hidalgo*, 91 NY2d 733, 737). We note that the certificate of conviction incorrectly recites that defendant was convicted of two counts of robbery in the first degree under Penal Law § 165.15 (1), and it must therefore be amended to reflect that he was convicted of one count under that subdivision and one count under Penal Law § 165.15 (2) (*see generally People v Saxton*, 32 AD3d 1286, 1286-1287).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

179

CA 13-00749

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

EAST2WEST CONSTRUCTION COMPANY, LLC, AND DAVID P. DURKIN, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

THE FIRST REPUBLIC CORPORATION OF AMERICA, HARRY BERGMAN, JOHN E. SILVERMAN, JAMES M. GALLAGHER, THE HOLDER GROUP, INC., DREW HOLDER, ALSO KNOWN AS ANDREW A. HOLDER, BETH LATOUR, ALSO KNOWN AS ELIZABETH LATOUR COLLINS, GLEICH, SIEGEL & FARKAS LLP, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 1.)

D'ARRIGO & COTE, LIVERPOOL (MARIO D'ARRIGO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (JULIAN B. MODESTI OF COUNSEL), AND GLEICH, SIEGEL & FARKAS LLP, GREAT NECK, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered October 24, 2012. The order, among other things, granted in part the motion of defendants-respondents to dismiss certain causes of action alleged in plaintiffs' 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 to dismiss the seventh cause of action against defendant Gleich, Siegel & Farkas LLP and to amend the caption to remove that defendant therefrom and as modified the order is affirmed without costs.

Memorandum: Plaintiff East2West Construction Company, LLC (E2W) entered into a contract with defendant The First Republic Corporation of America (FRCA) for the construction of a hotel in Liverpool, New York. FRCA allegedly failed to make certain payments pursuant to the contract. E2W and its sole member and principal, plaintiff David P. Durkin, thereafter commenced this action asserting causes of action for, inter alia, breach of contract, diversion of trust funds, fraud and deceit, conspiracy to defraud, and injury to property.

In appeal No. 1, plaintiffs appeal from an order that, inter alia, granted in part the motion of defendant Gleich, Siegel & Farkas LLP (GSF) and the remaining defendants-respondents (collectively, FRCA defendants) to dismiss certain causes of action. Contrary to plaintiffs' contention, Supreme Court properly dismissed the cause of action for fraud, asserted only against FRCA. "At most, plaintiffs allege that [FRCA] induced them to enter into a contract [modification] that [FRCA] did not intend to honor[, and] such allegations do not state a cause of action in fraud" (*Makuch v New York Cent. Mut. Fire Ins. Co.*, 12 AD3d 1110, 1111; *see Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 86 AD3d 919, 919). As a result, the court also properly dismissed the cause of action for conspiracy to defraud against the FRCA defendants because "there is no independent tort to provide a basis for liability under [any] concert of action, conspiracy, and aiding and abetting theories" (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57; *see Brenner v American Cyanamid Co.*, 288 AD2d 869, 869-870; *Pappas v Passias*, 271 AD2d 420, 421). As with the cause of action for fraud, plaintiffs' cause of action for injury to property was also properly dismissed against the FRCA defendants as duplicative of plaintiffs' breach of contract causes of action (*cf. Albemarle Theatre v Bayberry Realty Corp.*, 27 AD2d 172, 177).

We agree with plaintiffs, however, that the court erred in granting that part of the motion of GSF and the FRCA defendants seeking to dismiss the seventh cause of action, for diversion of trust funds, against GSF, and to remove GSF from the caption of the case. We therefore modify the order in appeal No. 1 accordingly. "An improper diversion of the contractor's trust assets occurs when any such trust asset is paid, transferred or applied for a nontrust purpose . . . before all of the trust claims have been paid or discharged . . . A trust beneficiary may enforce its rights against any nonbeneficiary who receives trust assets with knowledge of their trust status" (*Canron Corp. v City of New York*, 89 NY2d 147, 154; *see* Lien Law §§ 72 [1]; 77 [3] [a] [i], [vi]; *LeChase Data/Telecom Servs., LLC v Goebert*, 6 NY3d 281, 289; *Fleck v Perla*, 40 AD2d 1069, 1070). We agree with plaintiffs that a prior order of the court stating that GSF had returned a payment from FRCA does not defeat the allegation in the complaint that GSF received trust funds diverted by FRCA, inasmuch as the allegation did not specify a precise amount (*cf. generally* CPLR 3211 [a] [1]).

In appeal No. 2, plaintiffs appeal from an order that granted the motion of defendants Quinlivan, Pierik & Krause A/E, doing business as QPK Designs, Vincent Nicotra, and Linda K. Storrings (collectively, QPK defendants) to dismiss the complaint against them. The order also denied without prejudice E2W's cross motion to certify a class. The only causes of action asserted against the QPK defendants were those for conspiracy to defraud and injury to property, and we likewise conclude for the reasons set forth above that those causes of action were properly dismissed against the QPK defendants (*see Small*, 94 NY2d at 57; *cf. Albemarle Theatre*, 27 AD2d at 177). Finally, contrary to plaintiffs' contention, "the court properly exercised its discretion .

. . in denying class action certification . . . in light of the failure to set forth evidentiary facts to support such request" (*Matros Automated Elec. Constr. Corp. v Libman*, 37 AD3d 313, 313; *see* CPLR 901, 902; *Yonkers Contr. Co. v Romano Enters. of N.Y.*, 304 AD2d 657, 658-659).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00755

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

EAST2WEST CONSTRUCTION COMPANY, LLC, AND DAVID P. DURKIN, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

QUINLIVAN, PIERIK & KRAUSE A/E, DOING BUSINESS AS QPK DESIGNS, VINCENT NICOTRA, LINDA K. STORRINGS, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 2.)

D'ARRIGO & COTE, LIVERPOOL (MARIO D'ARRIGO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (SAMUEL M. VULCANO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered January 24, 2013. The order, among other things, granted the motion of defendants Quinlivan, Pierik & Krause A/E, doing business as QPK Designs, Vincent Nicotra and Linda K. Storrings to dismiss the complaint against them.

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

Same Memorandum as in *East2West Constr. Co., LLC v The First Republic Corp. of Am.* ([appeal No. 1] ___ AD3d ___ [Mar. 21, 2014]).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00640

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

HONORABLE JOSEPH J. CASSATA,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, THOMAS P. DINAPOLI,
AS COMPTROLLER OF STATE OF NEW YORK,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WEBSTER SZANYI, LLP, BUFFALO (KEVIN A. SZANYI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered November 21, 2012. The judgment, inter alia, granted the motion of plaintiff for summary judgment and declared that the pay disparity between City Court judges in the City of Buffalo and the City of Tonawanda, as set forth in Judiciary Law § 221-i, violates plaintiff's equal protection rights, and denied the cross motion of defendants State of New York and Thomas P. DiNapoli, as Comptroller of State of New York, for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, plaintiff's motion is denied, the cross motion of defendants-appellants is granted insofar as they seek a declaration in their favor, and it is

> ADJUDGED AND DECLARED that the salary disparity between City Court judges in Buffalo and Tonawanda, as set forth in Judiciary Law § 221-i, is constitutional.

Memorandum: Defendants-appellants (hereafter, defendants), appeal from a judgment granting plaintiff's motion for summary judgment and declaring that the pay disparity between City Court judges in the City of Buffalo and the City of Tonawanda, as set forth in Judiciary Law § 221-i, violates plaintiff's rights to equal protection under the federal and state constitutions, and awarding plaintiff back pay and other relief. We agree with defendants that Judiciary Law § 221-i is constitutional insofar as challenged. We therefore reverse the judgment, deny plaintiff's motion, grant

defendants' cross motion for summary judgment insofar as they seek a declaration in their favor rather than dismissal of the complaint (*see generally Alexander v New York Cent. Mut.*, 96 AD3d 1457, 1457), and declare that the salary disparity between City Court judges in Buffalo and Tonawanda, as set forth in Judiciary Law § 221-i, is constitutional.

It is undisputed that the disparate judicial salary schedule set forth in Judiciary Law § 221-i does not implicate a suspect class or a fundamental right, and thus it is subject to the rational basis standard of review (*see Affronti v Crosson*, 95 NY2d 713, 718-719, *cert denied* 534 US 826; *D'Amico v Crosson*, 93 NY2d 29, 31-32). Such rational basis review "is a paradigm of judicial restraint" (*Affronti*, 95 NY2d at 719 [internal quotation marks omitted]). "A statute subject to rational basis scrutiny is presumed to be constitutional, and the party challenging the statute bears the heavy burden of proving that there is no reasonably conceivable state of facts which rationally supports the distinction" (*D'Amico*, 93 NY2d at 32; *see Heller v Doe*, 509 US 312, 320; *Port Jefferson Health Care Facility v Wing*, 94 NY2d 284, 290). Thus, "the State has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is *not subject to courtroom factfinding* and may be based on *rational speculation* unsupported by evidence or empirical data" (*Affronti*, 95 NY2d at 719 [internal quotation marks omitted]).

Here, we conclude that there is a rational basis for the salary disparity between Tonawanda City Court and Buffalo City Court judges and, thus, that the disparity does not violate equal protection (*see id.* at 717; *see generally Matter of Tolub v Evans*, 58 NY2d 1, 8, *appeal dismissed* 460 US 1076). The cities of Buffalo and Tonawanda, although both located within Erie County and separated by only 12 miles, are very different municipalities. Buffalo is the largest city in Erie County and the second largest city in New York State. Tonawanda, by contrast, is "[o]ne of the smallest cities in Erie County." Nearly one third of the residents of Erie County (28%) live in Buffalo, while only 1.5% of the county's population resides in Tonawanda. In 2009, Buffalo's population was 18 times the size of Tonawanda's, i.e., 270,240 residents as compared to 14,766 residents. Tonawanda City Court has one full-time judge and one "half-time" judge, while Buffalo City Court has 13 full-time judges. Buffalo therefore has 20,787 residents per judge, which is more than twice the 9,844 residents per judge in Tonawanda.

We agree with defendants that it is rational for the State to pay a higher salary to judges who serve a larger population both as a proxy for caseload and as an indicator of potential future filings. Indeed, in our view, the substantial population differences between the two cities alone are sufficient to provide a rational basis for the 4.5% salary disparity (*see Mackston v State of New York*, 200 AD2d 717, 718, *appeal dismissed* 83 NY2d 905, *lv denied* 84 NY2d 803; *cf. Affronti*, 265 AD2d 817, 818, *modified on other grounds* 95 NY2d 713, *cert denied* 534 US 826; *Vogt v Crosson*, 199 AD2d 722, 723; *Davis v*

Rosenblatt, 159 AD2d 163, 170-171, *appeal dismissed* 77 NY2d 834, 79 NY2d 822, *lv denied* 79 NY2d 757; *Weissmann v Bellacosa*, 129 AD2d 189, 195; *see generally Cass v State of New York*, 58 NY2d 460, 464, *rearg denied* 60 NY2d 586). We further agree with defendants that caseload differences between Buffalo City Court and Tonawanda City Court provide a rational basis for the salary disparities between the two courts (*see Barr v Crosson*, 95 NY2d 164, 170; *see generally Cass*, 58 NY2d at 464). Although the number of filings per judge in both courts is roughly equivalent, Office of Court Administration (OCA) statistics reflect that Buffalo City Court judges handle a more complex and potentially time-consuming caseload than their counterparts in Tonawanda, with a significantly greater volume of criminal, civil, and landlord-tenant cases than Tonawanda City Court. Between 2008 and 2010, Buffalo City Court handled, on a per judge basis, more than twice as many criminal cases, three to four times as many civil cases, and more than 10 times as many landlord-tenant cases than were handled, per judge, in Tonawanda City Court. In 2008, for example, 38% (22,915) of Buffalo City Court's 60,363 filings were criminal matters, 37% (22,182) were civil matters, and 13% (7,878) were landlord-tenant matters. Of the 5,847 filings in Tonawanda City Court that year, only 19% (1,127) were criminal matters, 11% (629) were civil matters, and 1% (79) were landlord-tenant matters. By contrast, OCA statistics reflect that Tonawanda City Court predominately handles more routine matters, such as non-criminal motor vehicle infractions and parking violations. Indeed, motor vehicle and parking cases comprised 63% of Tonawanda's docket in 2008 and 62% of its docket in 2009. In 2010, parking and motor vehicle matters constituted 71% of the cases filed in Tonawanda City Court. Buffalo City Court does not hear parking violation cases and hears only criminal motor vehicle cases, which constituted less than 10% of its docket in 2010.

The caseload differences between Buffalo City Court and Tonawanda City Court are not surprising given the stark demographic differences between the two cities. According to census data in the record, from 2005 to 2009, the median household income in Tonawanda was $49,678, 75% of all housing units in Tonawanda were owner-occupied, and the median value of owner-occupied homes was $85,300. Further, only about 7% of the housing units in Tonawanda were vacant, and less than 10% of Tonawanda residents lived below the poverty line. The median household income in Buffalo during the same period was $30,376, only 44.4% of the housing units in Buffalo were owner-occupied, and the median value of owner-occupied homes was $65,200. Nearly one third of Buffalo's residents (28.6%) fell below the poverty line and roughly one fifth (19.1%) of Buffalo's housing units were vacant. Thus, both the OCA statistics and the census data indicate that Buffalo City Court judges face the often more complicated cases typically associated with urban areas—e.g., evictions, landlord-tenant disputes, criminal matters, and cases arising from vacant and deteriorated housing—while judges serving the City of Tonawanda, a much smaller and relatively more affluent community, deal with comparatively less serious or complex cases, thereby justifying the minimal salary differential (*see generally Henry v Milonas*, 91 NY2d 264, 268-269).

Plaintiff, however, contends that the OCA statistics do not

properly account for his unique circumstances, including the fact that he presides over several "specialty courts," that Tonawanda City Court serves as a "Hub Court" for drug cases in Erie County, and that, as the only full-time judge in Tonawanda City Court, he serves as the de facto administrative judge of that court. We note that Buffalo City Court is also a Hub Court for drug cases, and that Buffalo City Court judges likewise preside over specialty courts, albeit not as many as those overseen by plaintiff. In any event, even assuming, arguendo, that plaintiff's workload is in fact comparable to that of a Buffalo City Court judge based upon individual circumstances not reflected in court statistics, we conclude that plaintiff's individual workload would not invalidate the salary differences set forth in Judiciary Law § 221-i. As the Court of Appeals stated in *Cass* (58 NY2d at 464), "when a rational basis exists for the classification enacted by the Legislature, equal protection does not require that all classifications be made with mathematical precision . . . Thus[,] . . . the fact that the general statutory scheme, when applied on a Statewide basis, may produce some inequities for certain Judges within a particular class does not render the statute unconstitutional" (internal quotation marks omitted).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

186

TP 13-01389

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

IN THE MATTER OF BRYON K. RUSS, SR., PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

BRYON K. RUSS, SR., PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered August 9, 2013) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

187

TP 13-01635

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

IN THE MATTER OF DENNIS FLOYD, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered September 9, 2013) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

188

TP 13-01475

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

IN THE MATTER OF RICHARD TYES, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered August 15, 2013) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

189

KAH 12-02327

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
NICHOLAS ROBLES, PETITIONER-APPELLANT,

V ORDER

WARDEN ORLEANS STATE PRISON, ET AL.,
RESPONDENTS-RESPONDENTS.

STEVEN D. SESSLER, GENESEO, FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered October 25, 2012 in a proceeding pursuant to CPLR article 70. The judgment converted the petition under CPLR article 70 to one under CPLR article 78 and denied the petition.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

190

KA 12-01346

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERTO TEXIDOR, III, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), 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 (Sheila A. DiTullio, J.), rendered July 10, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, the record establishes that 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: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

192

KA 12-01929

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BERNARD PITTS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered September 20, 2012. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on January 9, 2014 and by the attorneys for the parties on January 6 and 17, 2014,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

193

KA 09-02219

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY BERNARD, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BETH A. RATCHFORD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered September 25, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (§ 265.03 [3]). Defendant contends in both appeals that the People failed to disclose *Brady* material in a timely manner. We agree. We conclude, however, that the *Brady* violation does not require reversal because the information was turned over as *Rosario* material prior to jury selection, thus affording defendant a "meaningful opportunity" to use the information during cross-examination (*People v Middlebrooks*, 300 AD2d 1142, 1143, *lv denied* 99 NY2d 630; *see People v Cortijo*, 70 NY2d 868, 870; *People v Abuhamra*, 107 AD3d 1630, 1631, *lv denied* 22 NY3d 1038). Contrary to defendant's contention, there is no "reasonable probability that, had the evidence been disclosed to [him]" prior to the *Wade* hearing, " 'the result of the [hear]ing would have been different' " (*People v Chin*, 67 NY2d 22, 33). Defendant failed to preserve for our review his alternative contention that County Court erred in failing to reopen the *Wade* hearing based upon the delayed disclosure (*see People v Clark*, 28 AD3d 1231, 1232; *People v Highsmith*, 259 AD2d 1006, 1007, *lv denied* 93 NY2d 925), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject the further contention of defendant that he was denied

effective assistance of counsel by his attorney's failure to request a limiting instruction with respect to certain *Molineux* evidence. Indeed, defense counsel "declined such an instruction on the record after a colloquy with County Court in which it was clear that doing so was part of a legitimate trial strategy" (*People v Smith*, 41 AD3d 964, 965, *lv denied* 9 NY3d 881), and we will not "second-guess" that strategic decision on appeal (*People v Cherry*, 46 AD3d 1234, 1238, *lv denied* 10 NY3d 839; *see People v Williams*, 107 AD3d 1516, 1516-1517, *lv denied* 21 NY3d 1047; *People v Copeland*, 43 AD3d 1436, 1436-1437, *lv denied* 9 NY3d 1032). Moreover, our review of the record as a whole establishes that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, the sentence is not unduly harsh or severe.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

194

KA 12-01386

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY BERNARD, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BETH A. RATCHFORD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered May 29, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Same Memorandum as in *People v Bernard* ([appeal No. 1] ___ AD3d ___ [Mar. 21, 2014]).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

197

CA 13-00984

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

IN THE MATTER OF SUZANNE LOZINAK,
PETITIONER-RESPONDENT,

V ORDER

BOARD OF EDUCATION OF WILLIAMSVILLE CENTRAL
SCHOOL, RESPONDENT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (EDWARD A. TREVVETT OF COUNSEL), FOR RESPONDENT-APPELLANT.

RICHARD E. CASAGRANDE, BUFFALO (TIMOTHY CONNICK OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (James H. Dillon, J.), entered March 22, 2013 in a CPLR article 78 proceeding. The judgment, among other things, granted the petition, vacated and annulled the resolution terminating petitioner's employment and directed respondent to reinstate petitioner.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

198

CA 13-01644

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

WILLIAM M. HOLST, LARRY J. PIERCE, LILLIAN BRAUNBACH, DAVID P. MARTIN, LINDA ZGODA-MARTIN, MARY E. PANKOW, STEVEN SMITH, ROBIN MARIE SMITH, ROBERT J. MARTIN, CARRIE A. MARTIN, DAVID S. WINNERT, MICHELE MUELLER, KENNETH J. ULICKI AND MARILYN M. ULICKI, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

VICTOR LIBERATORE AND SALLY LIBERATORE, DEFENDANTS-APPELLANTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (RALPH C. LORIGO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GOODELL & RANKIN, JAMESTOWN (ANDREW W. GOODELL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered December 4, 2012. The order and judgment, insofar as appealed from, granted the motion of plaintiffs for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking injunctive and other relief regarding their right to use an easement over defendants' property. Supreme Court properly granted plaintiffs' motion seeking summary judgment and permanently enjoined defendants from interfering with, blocking, or hindering in any manner the reasonable and incidental use of the right-of-way over defendants' property. The deeds, surveys, maps, and " 'pertinent surrounding circumstances' " established that certain plaintiffs have a right-of-way to access Chautauqua Lake over the western portion of defendants' property, as described in a deed granted to defendants' predecessor in 1971 (*Mertowski v Werthman*, 45 AD3d 1312, 1313). The court also properly concluded that the use of the easement included plaintiffs' placement of docks in the water, because that was a " 'reasonable use incidental to the purpose of the easement' " (*Hush v Taylor*, 84 AD3d 1532, 1535; *see Monahan v Hampton Point Assn.*, 264 AD2d 764, 764).

In opposition to the motion, defendants argued that the action should be dismissed because plaintiffs filed an order to show cause

and complaint, rather than a summons and complaint (*see generally* CPLR 304 [a]). Plaintiffs' failure to file a summons was a defect in personal jurisdiction, which defendants waived by failing to raise it in their answer or amended answer (*cf. Goldenberg v Westchester County Health Care Corp.*, 16 NY3d 323, 327). Defendants further argued in opposition to the motion that plaintiffs failed to join as necessary parties other property owners who had the same right-of-way language in their deeds as certain plaintiffs in this case. That contention, however, was rejected by us on a prior appeal (*Holst v Liberatore*, 105 AD3d 1374, 1375), and our holding constitutes the law of the case (*see Kaufmann's Carousel, Inc. v Carousel Ctr. Co. LP*, 87 AD3d 1343, 1344-1345, *lv dismissed* 18 NY3d 975, *rearg denied* 19 NY3d 938). We reject defendants' contention in opposition to the motion that plaintiffs also failed to join as a necessary party a property owner who had the same right-of-way language in its deed as defendants. Plaintiffs were not seeking to use an easement over that nonparty's property but, rather, they seek to use the easement only on defendants' property. Therefore, that nonparty's interests would not be inequitably affected by the resolution of this action (*see* CPLR 1001 [a]; *Ellison Hgts. Homeowners Assn., Inc. v Ellison Hgts. LLC*, 112 AD3d 1302, 1305).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

203

TP 13-01575

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

IN THE MATTER OF ANTHONY J. HENSEL, PETITIONER,

V MEMORANDUM AND ORDER

CITY OF UTICA, CITY OF UTICA POLICE DEPARTMENT AND ANDREW V. LALONDE, AS DESIGNATED HEARING OFFICER UNDER § 2-19-98 OF CITY OF UTICA CODE, RESPONDENTS.

THE TUTTLE LAW FIRM, LATHAM (JAMES B. TUTTLE OF COUNSEL), FOR PETITIONER.

MARK C. CURLEY, CORPORATION COUNSEL, UTICA (ARMOND J. FESTINE 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 a corrected order of the Supreme Court, Oneida County [David A. Murad, J.], entered August 19, 2013) to review a determination of respondents. The determination denied petitioner's application for General Municipal Law § 207-c benefits.

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 that he is not entitled to General Municipal Law § 207-c benefits. Petitioner was injured on March 9, 2008 while on duty as a police officer when he slipped on ice on the roadway and fell. Petitioner received General Municipal Law § 207-c benefits until June 2009, when he returned to work in a light-duty capacity. Petitioner returned to full duty later that year but, in January 2012, he stopped working and sought to resume the section 207-c benefits. After a hearing, the Hearing Officer determined that petitioner could perform the duties of a police officer and denied his application. We agree with respondents that the Hearing Officer's determination that petitioner was able to perform his regular duties is supported by substantial evidence (*see generally Matter of Clouse v Allegany County*, 46 AD3d 1381, 1381-1382; *Matter of Bernhard v Hartsdale Fire Dist.*, 226 AD2d 715, 716-717). We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

204

CA 13-01500

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

ROBIN E. RUNDLE-KRZYZANIAK AND THOMAS M. KRZYZANIAK, PLAINTIFFS-APPELLANTS,

V ORDER

JUSTIN A. BAIN, DEFENDANT-RESPONDENT.

STASIA ZOLADZ VOGEL, DERBY, FOR PLAINTIFFS-APPELLANTS.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (LAUREN M. YANNUZZI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered October 29, 2012. The order granted defendant's motion to dismiss plaintiffs' complaint.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

206

CA 13-01373

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

IN RE: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION.

JOANN H. SUTTNER, EXECUTRIX OF THE ESTATE OF GERALD W. SUTTNER, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

A.W. CHESTERTON COMPANY, ET AL., DEFENDANTS,
AND CRANE CO., DEFENDANT-APPELLANT.

K&L GATES LLP, PITTSBURGH, PENNSYLVANIA (MICHAEL J. ROSS, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ & PONTERIO, LLC, BUFFALO (JOHN N. LIPSITZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John P. Lane, J.H.O.), entered April 15, 2013. The judgment awarded plaintiff money damages against defendant Crane Co. upon a jury verdict.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

208

TP 13-01474

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

IN THE MATTER OF ARRELLO BARNES, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered August 15, 2013) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

209

KA 13-00153

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT M. FELVUS, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER 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 (Sara S. Farkas, J.), rendered October 11, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted rape in the first degree (Penal Law §§ 110.00, 110.05 [4]; 130.35 [3]), defendant contends that the waiver of the right to appeal is not valid, and he challenges the severity of the sentence. Although the record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), we agree with defendant that the valid waiver of the right to appeal does not encompass his challenge to the severity of the sentence because the record of the plea allocution concerning the waiver of defendant's right to appeal refers only to the conviction and does not establish that defendant was also waiving his right to appeal the severity of the sentence (*see People v Maracle*, 19 NY3d 925, 928). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

210

KA 12-01242

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCO A.C., 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 an adjudication of the Orleans County Court (James P. Punch, J.), rendered April 16, 2012. Defendant was adjudicated a youthful offender upon his plea of guilty of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a youthful offender adjudication convicting him, upon his plea of guilty, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Defendant's contention regarding the voluntariness of his plea is not preserved for our review because he did not move to withdraw his plea or to vacate the adjudication on that ground (*see People v Rosado*, 70 AD3d 1315, 1315-1316, *lv denied* 14 NY3d 892). Contrary to defendant's contention, this case does not fall within the rare exception to the preservation requirement because nothing in the plea allocution calls into question the voluntariness of the plea or casts "significant doubt" upon his guilt (*People v Lopez*, 71 NY2d 662, 666; *see People v Cubi*, 104 AD3d 1225, 1226, *lv denied* 21 NY3d 1003).

Defendant failed to preserve for our review his contention that County Court erred in ordering restitution without conducting a hearing (*see People v Robinson*, 112 AD3d 1349, 1350; *People v Baker*, 57 AD3d 1500, 1500), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). To the extent that defendant's contention that he was denied effective assistance of counsel survives his plea of guilty (*see People v Robinson*, 39 AD3d 1266, 1267, *lv denied* 9 NY3d 869), we reject that contention. 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).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

212

KA 12-00794

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON M. PULVINO, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered November 30, 2011. The judgment convicted defendant, upon a nonjury verdict, of criminal sexual act in the first degree and attempted aggravated sexual abuse in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, after a nonjury trial, of criminal sexual act in the first degree (Penal Law § 130.50 [3]) and two counts of attempted aggravated sexual abuse in the third degree (§§ 110.00, 130.66 [1] [c]). Defendant contends that the prosecutor engaged in misconduct during the grand jury proceedings by permitting the three victims to testify before the grand jury notwithstanding their lack of testimonial capacity (*see generally* CPL 60.20). Defendant failed to preserve that contention for our review (*see People v Walker*, 50 AD3d 1452, 1453, *lv denied* 11 NY3d 795, *reconsideration denied* 11 NY3d 931), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Insofar as defendant contends that County Court erred in denying, or in declining to rule on, his motion to dismiss the indictment on the ground that the victims lacked the capacity to testify under oath at the grand jury, we note that "[d]efendant was convicted 'upon legally sufficient trial evidence,' and thus his contention with respect to the competency of the evidence before the grand jury 'is not reviewable upon an appeal from the ensuing judgment of conviction' " (*People v Haberer*, 24 AD3d 1283, 1284, *lv denied* 7 NY3d 756, *reconsideration denied* 7 NY3d 848, quoting CPL 210.30 [6]; *see People v Paul*, 48 AD3d 833, 834, *lv denied* 10 NY3d 868; *People v Carpenter*, 35 AD3d 1092, 1093).

Contrary to defendant's contention, the court did not abuse its discretion in permitting the two younger victims to provide sworn testimony at trial. Those victims, who were seven and eight years old, demonstrated that they understood the nature of an oath, i.e., that they "appreciate[d] the difference between truth and falsehood, the necessity for telling the truth, and the fact that a witness who testifies falsely may be punished" (CPL 60.20 [2]; *see People v Alexander*, 109 AD3d 1083, 1084; *People v Feldt*, 198 AD2d 788, 789; *see generally People v Hetrick*, 80 NY2d 344, 349; *People v Nisoff*, 36 NY2d 560, 565-566). We reject defendant's contention that the court failed to rule on his request to preclude the two younger victims from testifying. To the contrary, the record establishes that the court individually questioned both of those victims and expressly ruled that they would be permitted to testify under oath.

Defendant further contends that the court erred in denying his request to preclude all three victims from giving sworn testimony because they lacked a basic religious education and because they were improperly coached by the prosecution. We reject that contention. Contrary to defendant's contention, the witnesses' lack of religious education is not a proper basis upon which to refuse to permit them to testify under oath (*see People v Cordero*, 257 AD2d 372, 375, *lv denied* 93 NY2d 968). We reject defendant's further contention that the prosecutor committed misconduct in the form of witness coaching (*see generally Perry v Leeke*, 488 US 272, 282). "There was no nonspeculative evidence of any improper influence exerted on th[ose] witness[es]" (*People v Thompson*, 59 AD3d 1115, 1116, *lv denied* 12 NY3d 860 [internal quotation marks omitted]; *see People v Kemp*, 251 AD2d 1072, 1072, *lv denied* 92 NY2d 900; *see also People v Montalvo*, 34 AD3d 600, 601, *lv denied* 8 NY3d 883; *People v Nickel*, 14 AD3d 869, 870-871, *lv denied* 4 NY3d 834).

Defendant further contends that he was denied effective assistance of counsel because of a litany of alleged errors, including defense counsel's failure to move to dismiss the indictment on constitutional speedy trial grounds. It is well settled that "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287). It is also well settled that, in determining whether there has been an unconstitutional delay in commencing a prosecution, the factors to be considered are "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (*People v Taranovich*, 37 NY2d 442, 445; *see People v Decker*, 13 NY3d 12, 14-15). Although no one factor is determinative, "the extent of the delay . . . is of critical importance because 'all other factors being equal, the greater the delay the more probable it is that the accused will be harmed thereby' " (*People v Romeo*, 12 NY3d 51, 56, quoting *Taranovich*, 37 NY2d at 445). Here, the 21-month delay in presenting the matter to a grand jury was not unconstitutionally excessive (*see generally Decker*, 13 NY3d at 15-16; *People v Gaston*,

104 AD3d 1206, 1206-1207; *People v Rogers*, 103 AD3d 1150, 1151, *lv denied* 21 NY3d 946; *People v Green*, 52 AD3d 1263, 1264, *lv denied* 11 NY3d 788), and defendant failed to identify any prejudice arising from that delay. Thus, a motion to dismiss the indictment on such grounds had little or no chance of success. We also reject defendant's remaining allegations of ineffective assistance of counsel and conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147).

We reject defendant's contention that the court abused its discretion in denying his motion in which he sought to be adjudicated a youthful offender. Pursuant to CPL 720.10 (3) (i), a youth who is convicted of, inter alia, aggravated sexual abuse or first-degree criminal sexual act is ineligible for a youthful offender adjudication unless the court concludes, insofar as relevant here, that there are "mitigating circumstances that bear directly upon the manner in which the crime was committed" (*see* CPL 720.10 [2] [a] [iii]; *People v Fields*, 287 AD2d 577, 578, *lv denied* 97 NY2d 681; *People v Victor J.*, 283 AD2d 205, 206-208, *lv denied* 96 NY2d 94). Here, defendant failed to introduce any evidence that such mitigating circumstances exist (*see People v Parker*, 67 AD3d 1405, *lv denied* 15 NY3d 755; *People v Terry*, 19 AD3d 1039, 1040, *lv denied* 5 NY3d 833), and "[t]hus, defendant was not eligible to be adjudicated a youthful offender" (*People v Lugo*, 87 AD3d 1403, 1405, *lv denied* 18 NY3d 860).

Defendant failed to preserve for our review his further contention that the duration of the orders of protection issued in connection with the judgment exceed the statutory maximum (*see People v Nieves*, 2 NY3d 310, 315-317), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see People v Childres*, 60 AD3d 1278, 1279, *lv denied* 12 NY3d 913). The sentence is not unduly harsh or severe.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

215

KAH 12-00747

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ALAN DALE, PETITIONER-APPELLANT,

V ORDER

DAVID STALLONE, CAYUGA CORRECTIONAL FACILITY,
ET AL., RESPONDENTS-RESPONDENTS.

ALAN DALE, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered November 2, 2011 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

216

CA 13-01407

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

ROBERT GIVAN AND DEBORAH LEAVITT, DOING BUSINESS AS SWIMWEAR ON THE GO, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ROBERT A. MAKIN AND BETH A. MAKIN, DEFENDANTS-APPELLANTS.

CARL R. VAHL, OLEAN, FOR DEFENDANTS-APPELLANTS.

AMIGONE, SANCHEZ & MATTREY, LLP, BUFFALO (ARTHUR G. BAUMEISTER, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered April 1, 2013. The order denied the motion of defendants to vacate a default judgment.

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

Memorandum: Defendants appeal from an order denying their motion to vacate a default judgment entered against them. We note that defendants' contention that the default was prematurely entered during a 30-day stay within which defendants were to obtain new counsel was raised for the first time in their reply papers in Supreme Court, and thus that contention was not properly before the court (*see Mikulski v Battaglia*, 112 AD3d 1355, 1356; *Zolfaghari v Hughes Network Sys., LLC*, 99 AD3d 1234, 1235, *lv denied* 20 NY3d 861; *Dannasch v Bifulco*, 184 AD2d 415, 417). We reject defendants' further contention that the court abused its discretion in denying their motion on the grounds that they failed to offer a reasonable excuse for missing a court conference and failed to establish a meritorious defense in their initial motion papers. "[E]ven assuming that [defendants'] nonappearance at the conference was excusable . . . , [we conclude that] their belated attempt in reply papers to establish a meritorious defense was inadequate" (*Contractors Cas. & Sur. Co. v 535 Broadhollow Realty*, 276 AD2d 737, 738).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

220

CA 13-01412

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

IN THE MATTER OF THE FORECLOSURE OF 2009 TAX LIENS BY PROCEEDINGS IN REM PURSUANT TO ARTICLE 11 OF THE REAL PROPERTY TAX LAW BY LEWIS COUNTY, PETITIONER-RESPONDENT.

---------- ORDER

NIAGARA MOHAWK POWER CORPORATION, DOING BUSINESS AS NATIONAL GRID, RESPONDENT-APPELLANT.

HISCOCK & BARCLAY, LLP, ALBANY (BELLA S. SATRA OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an amended order of the Supreme Court, Lewis County (Charles C. Merrell, A.J.), entered October 18, 2012 in a proceeding pursuant to RPTL article 11. The amended order, among other things, denied respondent's motion to vacate in part a default judgment.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

224

CA 12-01642

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

IN THE MATTER OF FRANK RUSSELL,
PETITIONER-APPELLANT,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

FRANK RUSSELL, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered June 20, 2012 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

226

CA 13-01040

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

CLEVELAND L. THOMAS AND SHERRY D. THOMAS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JACOB K. HUH, USA TRUCK, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

BURDEN, GULISANO & HICKEY, LLC, BUFFALO (SARAH E. HANSEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (JEANNA M. CELLINO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered March 8, 2013. The order denied in part the motion of defendants Jacob K. Huh and USA Truck, Inc., for summary judgment dismissing plaintiffs' complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Cleveland L. Thomas (plaintiff) when the vehicle he was driving was struck from behind by a tractor trailer owned by USA Truck, Inc., and operated by Jacob K. Huh (defendants). Defendants contend on appeal that Supreme Court erred in denying their motion for summary judgment dismissing the complaint with respect to two categories of serious injury within the meaning of Insurance Law § 5102 (d), i.e., permanent consequential limitation of use and significant limitation of use, and thus should have granted their motion in its entirety. We affirm. Defendants' own submissions in support of the motion raise triable issues of fact with respect to those two categories (*see Summers v Spada*, 109 AD3d 1192, 1192). Defendants submitted the reports of imaging studies of plaintiff's spine, thereby providing the requisite objective evidence of injury (*see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350), and they submitted several reports of tests that produced "designation[s] of . . . numeric percentage[s] of . . . plaintiff's loss of range of motion[, which] can be used to substantiate a claim of serious injury" (*id.*; *see Matte v Hall*, 20 AD3d 898, 899).

Contrary to defendants' contention, the report of one of the

physicians who conducted an independent medical examination of plaintiff is insufficient to eliminate all triable issues of fact and thus establish their entitlement to judgment as a matter of law. The opinion of that physician, i.e., that plaintiff's condition was the result of degenerative changes predating the accident, fails to account for evidence that plaintiff had no complaints of pain prior to the accident (*see Endres v Shelba D. Johnson Trucking, Inc.*, 60 AD3d 1481, 1482-1483; *Ashquabe v McConnell*, 46 AD3d 1419, 1419). In any event, his opinion is contrary to that of several other medical professionals who concluded that plaintiff's condition was causally related to the accident (*see Limardi v McLeod*, 100 AD3d 1375, 1377). That same physician, moreover, was alone in his opinion that plaintiff's limitations in his ranges of motion were magnified or self-imposed, and he provided no factual basis for that opinion (*see Busljeta v Plandome Leasing, Inc.*, 57 AD3d 469, 469). In light of defendants' failure to meet their initial burden on the motion, there is no need to consider the sufficiency of plaintiffs' opposition thereto (*see Summers*, 109 AD3d at 1193).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

227

TP 13-01359

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

IN THE MATTER OF JERMAIN BOYKIN, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

JERMAIN BOYKIN, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Livingston County [Robert B. Wiggins, A.J.], entered August 5, 2013) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

228

TP 13-01661

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

IN THE MATTER OF ANTHONY BOTTOM, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered September 16, 2013) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

231

KA 12-02107

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY BATES, ALSO KNOWN AS GINO,
DEFENDANT-APPELLANT.

TIMOTHY J. BRENNAN, AUBURN, FOR DEFENDANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (NIKKI KOWALSKI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered August 21, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the second degree (Penal Law § 220.41 [1]). The record establishes that defendant 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: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

232

KA 12-02273

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALI-MOHAMAD MOHAMUD, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered November 15, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) in connection with the beating death of his 10-year-old stepson. We note at the outset that, although the People contended at trial that defendant failed to comply with CPL 250.10 (2) by providing notice of his intent to request a charge on the affirmative defense of extreme emotional disturbance (*see* § 125.25 [1] [a]), it is now established that defendant was not required to do so because he based his defense solely on the People's evidence (*see People v Gonzalez*, ___ NY3d ___, ___ [Feb. 13, 2014]). We nevertheless reject defendant's contention that Supreme Court erred in refusing to instruct the jury on the affirmative defense of extreme emotional disturbance. Viewing the evidence in the light most favorable to defendant, we conclude that the evidence is not "reasonably supportive of the defense" (*People v McKenzie*, 19 NY3d 463, 466), which requires that, "at the time of the homicide, [defendant] was affected by an extreme emotional disturbance, and . . . that disturbance was supported by a reasonable explanation or excuse rooted in the situation as he perceived it" (*id.*). The evidence established that defendant bound and gagged the child before striking him in excess of 60 times with a rolling pin. Although the Court of Appeals has written that "the sheer number and redundancy of the . . . wounds inflicted on [the victim] was indicative of defendant's loss of control" (*id.* at 467), the Court has "never held that a jury may infer the presence of an extreme emotional disturbance based solely on proof

that the crime was especially violent or brutal. This is so because violence and brutality are not necessarily indicative of a loss of self-control or similar mental infirmity, nor is brutality generally more deserving of mercy. Where [the Court has] referenced the nature or severity of the wounds, the probative value of such evidence has been linked to other compelling evidence of extreme emotional disturbance" (*People v Roche*, 98 NY2d 70, 77-78; *see e.g. McKenzie*, 19 NY3d at 465-466; *People v Moye*, 66 NY2d 887, 890).

Here, the evidence established that the victim had refused to do his homework and had run from the house, in an apparent attempt to go to his sister's house. A neighbor assisted defendant in bringing the child home, and she described defendant as "upset" and "tired," but "not angry." We note that the neighbor also testified that defendant assured her that he would not do anything to the child and the child said "he always says that." Medical and physical evidence supports the conclusion that defendant put the child's head in the toilet. The evidence also establishes that, following the murder, defendant disposed of his bloody clothes, washed the rolling pin he used to beat the child and returned it to the kitchen drawer, cared for the two younger children in the home, waited several hours for his wife to return from work and lied to her about the child's whereabouts, and contacted his supervisor with instructions on how to dispose of his personal property. Defendant told his supervisor that he "killed [his] kid" but did not say why, did not express remorse, and was described by his supervisor as calm and "melancholy." In his statement to the police, defendant said that the child lied to him every day and that he "always [told] his [step]son to go live with his father in Africa." He related the events of the murder, but did not indicate that he "snapped" or lost control (*cf. Gonzalez*, ___ NY3d at ___; *McKenzie*, 19 NY3d at 466; *Moye*, 66 NY2d at 890). We conclude that "proof of the objective element [of the defense] is lacking" (*Roche*, 98 NY2d at 78), inasmuch as " 'defendant's behavior immediately before and after the killing was inconsistent with the loss of control associated with the affirmative defense' " (*People v McGrady*, 45 AD3d 1395, 1395, *lv denied* 10 NY3d 813; *cf. Gonzalez*, ___ NY3d at ___).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

234

KA 11-02057

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NJERA A. WILSON, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered June 28, 2011. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of two counts of assault in the second degree (Penal Law § 120.05 [2]). Defendant contends that his attorney raised potential defenses to both counts prior to the plea colloquy and that his subsequent guilty plea therefore was not voluntarily, knowingly, and intelligently entered. Although defendant's contention survives his waiver of the right to appeal, defendant failed to preserve his contention for our review by failing to move to withdraw his guilty plea or to vacate the judgment of conviction on that ground (*see People v McKeon*, 78 AD3d 1617, 1618, *lv denied* 16 NY3d 799). "This is not one of those rare cases 'where the defendant's recitation of the facts underlying the crime[s] pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea[]' to obviate the preservation requirement" (*People v Rodriguez*, 17 AD3d 1127, 1129, *lv denied* 5 NY3d 768, quoting *People v Lopez*, 71 NY2d 662, 666; *see People v Davis*, 45 AD3d 1357, 1358, *lv denied* 9 NY3d 1005).

Defendant's further contention that County Court deviated from its sentencing promise by issuing an order of protection is also unpreserved for our review (*see People v Smith*, 294 AD2d 916, 916). In any event, we conclude that it is without merit. " 'An order of protection may properly be issued independent of a plea agreement' . . . and, although such an order is issued at sentencing, it is not a

part of defendant's sentence" (*People v Lilley*, 81 AD3d 1448, 1448, *lv denied* 17 NY3d 860; *see People v Nieves*, 2 NY3d 310, 316; *People v Dixon*, 16 AD3d 517, 517).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

242

CA 13-01666

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

PAMELA J. QUILTY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DANIELLE J. CORMIER, DEFENDANT-RESPONDENT.

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

BARTH SULLIVAN BEHR, BUFFALO (JAMES A. DAVIS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered December 7, 2012. The order granted defendant's motion to compel plaintiff to provide unrestricted medical record authorizations.

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

Memorandum: Plaintiff commenced this personal injury action seeking damages for injuries she allegedly sustained in a motor vehicle accident. Contrary to plaintiff's contention, Supreme Court properly granted defendant's motion to compel plaintiff to provide unrestricted medical record authorizations inasmuch as she failed to comply with a stipulated order directing her to do so by a certain date. Notably, plaintiff does not contest the validity of that stipulated order. "[U]nless public policy is affronted, parties to a civil dispute are free to chart their own litigation course . . . They 'may fashion the basis upon which a particular controversy will be resolved . . . and in doing so '[t]hey may stipulate away . . . rights' " (*Mitchell v New York Hosp.*, 61 NY2d 208, 214; *see generally Hann v Black*, 96 AD3d 1503, 1504). We nevertheless note that, at oral argument, defendant's counsel agreed that the records may first be submitted to the court for an in camera review to determine their relevancy.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

244

CA 13-00691

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

ESAD SEFERAGIC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HANNAFORD BROS. CO., A SUBSIDIARY OF MARTIN FOODS OF SOUTH BURLINGTON, INC., DOING BUSINESS AS HANNAFORD SUPERMARKETS, DEFENDANT-APPELLANT.

HISCOCK & BARCLAY, LLP, ALBANY (DAVID M. COST OF COUNSEL), FOR DEFENDANT-APPELLANT.

PETER S. PALEWSKI, NEW YORK MILLS, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered November 30, 2012 in a personal injury action. The order denied defendant's motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he slipped and fell on premises owned by defendant. We agree with defendant that Supreme Court erred in denying its motion for summary judgment dismissing the complaint. " 'In seeking summary judgment dismissing the complaint, defendant had the initial burden of establishing that it did not create the alleged dangerous condition and did not have actual or constructive notice of it' " (*King v Sam's E., Inc.*, 81 AD3d 1414, 1414). We note at the outset that plaintiff did not assert that defendant created the allegedly dangerous condition, and thus the only issue before the court was whether defendant had actual or constructive notice thereof (*see Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469). Defendant established that it did not have actual notice of the allegedly dangerous condition by demonstrating that it did not receive any complaints about the allegedly wet floor prior to plaintiff's fall (*see Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857, 857). The fact that it was raining during the morning of plaintiff's fall and defendant's employees placed wet floor warning cones near the entrance "does not require a finding that defendant[] had actual notice of the allegedly dangerous condition. Defendant[] demonstrated that the warning signs were put out as a safety precaution and not in response to complaints regarding the condition

of the floor where plaintiff fell" (*Snauffer v 1177 Ave. of the Ams. LP*, 78 AD3d 583, 583). With respect to constructive notice, defendant submitted the deposition testimony of its manager in which he stated that the floor was dry following plaintiff's fall and that no remedial action was required. In addition, defendant submitted plaintiff's deposition testimony in which he stated that he did not observe any puddles on the floor after he fell. "It is well established that, '[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it' " (*King*, 81 AD3d at 1415), and here defendant established as a matter of law by the deposition testimony of defendant's manager and, indeed, plaintiff's own deposition testimony that the defect was not visible and apparent (*cf. King*, 81 AD3d at 1415). Plaintiff failed to raise an issue of fact in response (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

246

CA 13-01157

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

CARL TROST AND JENNIFER TROST,
PLAINTIFFS-RESPONDENTS,

V ORDER

ROCKINGHAM ESTATES, LLC AND FORBES HOMES, INC.,
DEFENDANTS-APPELLANTS.

BROWN & KELLY, LLP, BUFFALO (KATHLEEN T. FEROLETO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DEMPSEY & DEMPSEY, BUFFALO (EMILY G. CATALANO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 17, 2013 in a personal injury action. The order granted the motion of plaintiffs for partial summary judgment pursuant to Labor Law § 240 (1) and denied the cross motion of defendants for summary judgment.

Now, upon reading and filing the stipulation to withdraw appeal signed by the attorneys for the parties on February 20, 2014,

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

248

TP 13-01472

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

IN THE MATTER OF VINCENT HOWARD, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered August 15, 2013) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

250

KA 11-01070

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTWAN MYLES, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered April 27, 2010. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree and attempted murder in the second degree.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

256

CA 13-01523

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

IN THE MATTER OF GREGORY W. NORTON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF HORNELL AND HORNELL BOARD OF PUBLIC
SAFETY, RESPONDENTS-RESPONDENTS.

AKIN GUMP STRAUSS HAUER & FELD, PHILADELPHIA, PENNSYLVANIA (JEFFREY A. DAILEY OF COUNSEL), FOR PETITIONER-APPELLANT.

LIPPMAN O'CONNOR, BUFFALO (GERARD E. O'CONNOR OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered May 3, 2013 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: Petitioner commenced this CPLR article 78 proceeding seeking to compel respondents to reinstate him to the Police Department of respondent City of Hornell (City), with back pay, because his resignation on August 31, 2011 was obtained by duress, i.e., threats of criminal prosecution made by City officials against him, and was therefore invalid (*see Matter of Hassett v Barnes*, 11 AD2d 1089, 1090). We conclude that Supreme Court properly dismissed the petition on the ground that the proceeding was not timely commenced (*see Matter of Barbolini v Connelie*, 68 AD2d 949, 949-951, *lv denied* 47 NY2d 709, *appeal dismissed* 47 NY2d 1011).

"Where, as here, a public employee is discharged without a hearing, the four-month limitations period set forth in CPLR 217 begins to run when the employee's demand for reinstatement is refused" (*Matter of Dorsey v Coleman*, 40 AD3d 1187, 1188). "[T]he demand must be made within a reasonable time after the right to make the demand occurs or . . . within a reasonable time after [petitioner] becomes aware of the facts which give rise to his [or her] right of relief" (*Matter of Devens v Gokey*, 12 AD2d 135, 136-137, *affd* 10 NY2d 898), and we note that the four-month limitations period of CPLR article 78 proceedings has been "treat[ed] . . . as a measure of permissible delay in the making of the demand" (*id.* at 137; *see Matter of Densmore v Altmar-Parish-Williamstown Cent. Sch. Dist.*, 265 AD2d 838, 839, *lv*

denied 94 NY2d 758; *see also Dorsey*, 40 AD3d at 1188). Here, we conclude that petitioner's right to demand reinstatement to his position arose, at the latest, on or about December 6, 2011, when he received a letter from the District Attorney stating that he bore no civil or criminal responsibility for the acts of misconduct alleged against him, and that the matter would not be presented to the grand jury (*see Densmore*, 265 AD2d at 839; *cf. Barbolini*, 68 AD2d at 951). Nevertheless, petitioner did not demand reinstatement to his position until approximately nine months later, on August 31, 2012, well over the four-month guideline applied in *Devens* (12 AD3d at 137). Thus, "it was [well] within the court's discretion to determine that petitioner unreasonably delayed in making the demand" (*Densmore*, 265 AD2d at 839). Finally, contrary to petitioner's contention, respondents were not required to make a showing of prejudice in order to establish that petitioner "failed for an unreasonable period of time to demand" reinstatement to his position (*Matter of Curtis v Board of Educ. of Lafayette Cent. Sch. Dist.*, 107 AD2d 445, 448; *see Devens*, 12 AD2d at 137).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

261

CA 13-01532

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

NORMAN J. CARNEY, PLAINTIFF-APPELLANT,

V ORDER

PAVILION DRAINAGE SUPPLY CO., INC.,
DEFENDANT-RESPONDENT.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (MARY JO S. KORONA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DADD, NELSON & WILKINSON, ATTICA (DAVID H. NELSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered April 26, 2013. The order, insofar as appealed from, granted in part the motion of defendant for summary judgment and denied the cross motion of plaintiff to compel discovery.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

265

CA 13-00261

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

IN THE MATTER OF AHJEMIN ROSS-SIMMONS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered November 20, 2012 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated certain inmate rules. Petitioner failed to exhaust his administrative remedies with respect to his claims that he was denied his right to be present during the testimony of his witnesses and the author of the misbehavior report, and this Court has no discretionary authority to reach those claims (*see Matter of Stewart v Fischer*, 109 AD3d 1122, 1123, *lv denied* 22 NY3d 858; *Matter of Fuentes v Fischer*, 89 AD3d 1468, 1469). Contrary to petitioner's contention, Supreme Court properly concluded that "the penalty is not so disproportionate to the offense as to be shocking to one's sense of fairness" (*Matter of Ciotoli v Goord*, 256 AD2d 1192, 1193).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

267

KA 13-00124

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ROBERT SYLAR, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered November 19, 2012. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see People v Vaillancourt*, 112 AD3d 1375, 1375-1376; *People v Guzman*, 96 AD3d 1441, 1441-1442, *lv denied* 19 NY3d 812).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

268

KA 11-00479

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

HELEN TRAVET, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK 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 (William D. Walsh, J.), rendered March 1, 2011. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree (two counts) and petit larceny.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

270

KA 10-00732

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK A. WARE, 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 (Michael L. Dwyer, J.), rendered March 2, 2009. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]) and assault in the second degree (§ 120.05 [2]), defendant contends that his waiver of the right to appeal is invalid; his plea was not knowingly and voluntarily entered; and his sentence is unduly harsh and severe. Although we conclude that defendant's waiver of the right to appeal was valid (*see People v Lopez*, 6 NY3d 248, 256; *People v Flagg*, 107 AD3d 1613, 1614), his contention concerning the knowing and voluntary nature of the plea survives the valid waiver (*see People v Robinson*, 112 AD3d 1349, 1349). Nevertheless, the record does not establish that defendant timely moved to withdraw his plea or to vacate the judgment of conviction, and thus his contention is not preserved for our review (*see id.*). In any event, his contention is without merit (*see People v Cox*, 111 AD3d 1310, 1310). Defendant's valid waiver of the right to appeal "forecloses any challenge by defendant to the severity of the sentence" (*People v Pulley*, 107 AD3d 1560, 1561, *lv denied* 21 NY3d 1076).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

271

KA 12-02154

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARC A. GROSSKOPF, DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered September 19, 2012. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]) and sentencing him to an indeterminate term of incarceration. Contrary to defendant's contentions, we conclude that the violation of probation petition was not based on pretext and that the People established by the requisite preponderance of the evidence that defendant violated the terms and conditions of his probation (*see* CPL 410.70 [3]; *People v Ortiz*, 94 AD3d 1436, 1436, *lv denied* 19 NY3d 999).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

273

KA 12-00926

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JIMMY DEAN RUSSELL, DEFENDANT-APPELLANT.

MATTHEW T. AUSTIN, EAST ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Orleans County Court (James P. Punch, J.), entered May 8, 2012. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). Although "[a] sex offender facing risk level classification under SORA has a right to . . . effective assistance of counsel" (*People v Willingham*, 101 AD3d 979, 979), we conclude that, viewing the evidence, the law and the circumstances of this case in totality and as of the time of representation, defendant received effective assistance of counsel (*see People v Young*, 108 AD3d 1232, 1232, *lv denied* 22 NY3d 853, *rearg denied* 22 NY3d 1036; *see generally People v Baldi*, 54 NY2d 137, 147). Even assuming, arguendo, that defense counsel erred in failing to object to the admission in evidence of the document at issue, we conclude that the case summary alone is sufficient to support County Court's determination with respect to the risk factor at issue (*see Young*, 108 AD3d at 1232; *People v Guzman*, 96 AD3d 1441, 1441-1442, *lv denied* 19 NY3d 812).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

275

KAH 13-00535

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
RICHARD DEGROAT, PETITIONER-APPELLANT,

V ORDER

CHARLES KELLY, JR., SUPERINTENDENT, MARCY
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

RICHARD DEGROAT, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (David A. Murad, J.), entered January 17, 2013 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

277

CAF 13-00215

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

IN THE MATTER OF WILFREDO LOPEZ AND SANDRO LOPEZ, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

JENNIFER LUGO, RESPONDENT-APPELLANT.

IN THE MATTER OF WILFREDO LOPEZ, PETITIONER-RESPONDENT,

V

JENNIFER LUGO, RESPONDENT-APPELLANT.

IN THE MATTER OF JENNIFER LUGO, PETITIONER-APPELLANT,

V

WILFREDO LOPEZ AND SANDRO LOPEZ, RESPONDENTS-RESPONDENTS.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

STEVEN R. FORTNAM, ATTORNEY FOR THE CHILD, WESTMORELAND.

A.J. BOSMAN, ATTORNEY FOR THE CHILD, ROME.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered January 14, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded sole custody of the subject children to Sandro Lopez.

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

Memorandum: Respondent-petitioner (mother) appeals, as limited by her notice of appeal, from an order that, inter alia, granted sole custody of the subject children to petitioner-respondent Sandro Lopez (father). Initially, we note that the mother's contentions with respect to Family Court's denial of a motion by the Attorney for the Child (AFC) to withdraw from representing one of the subject children are not before us on this appeal. The appeal is limited by the

mother's notice of appeal to the issues of custody, parenting time, contact with the mother's husband and a grandparent's visitation, and thus the mother's contentions regarding the court's resolution of the AFC's motion to withdraw are not properly before this Court (*see Gray v Williams*, 108 AD3d 1085, 1087). In addition, the record on appeal does not contain the AFC's motion to withdraw from representing the subject child. "It is the obligation of the appellant to assemble a proper record on appeal" (*Gaffney v Gaffney*, 29 AD3d 857, 857), which must include all of the relevant papers that were before the motion court (*see Aurora Indus., Inc. v Halwani*, 102 AD3d 900, 901). The mother, "as the appellant, submitted this appeal on an incomplete record and must suffer the consequences" (*Matter of Santoshia L.*, 202 AD2d 1027, 1028; *see Matter of Rodriguez v Ward*, 43 AD3d 640, 641; *Le Roi & Assoc. v Bryant*, 309 AD2d 1144, 1145).

The mother failed to preserve for our review her contention that the AFC representing the other subject child "failed to advocate for the [child's] position regarding custody and visitation and thus failed to provide [him] with effective representation" (*Matter of Brown v Wolfgram*, 109 AD3d 1144, 1145; *see Matter of Mason v Mason*, 103 AD3d 1207, 1207-1208). In any event, the mother's contention that both AFCs failed to provide the subject children with effective representation is without merit. Although an AFC "must zealously advocate the child's position" (22 NYCRR 7.2 [d]), an exception exists where, as here, the AFC "is convinced . . . that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child" (22 NYCRR 7.2 [d] [3]; *see Mason*, 103 AD3d at 1208; *Matter of Swinson v Dobson*, 101 AD3d 1686, 1687, *lv denied* 20 NY3d 862). Both AFCs noted for the court that they were advocating contrary to their respective clients' wishes, and both amply demonstrated the "substantial risk of imminent, serious harm" (22 NYCRR 7.2 [d] [3]), including the mother's arrest for possession of drugs in the children's presence, the numerous weapons that had been seized from the mother's house, and the credible evidence establishing that the mother's husband assaulted one of the subject children who attempted to intervene when the husband attacked the mother with an electrical cord.

Finally, we reject the mother's further contention that there is insufficient evidence supporting the court's determination awarding custody of the subject children to the father, with limited visitation to the mother, and directing that all contact between the mother's husband and the subject children be supervised. "The 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 and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Samuel L.J. v Sherry H.*, 206 AD2d 886, 886, *lv denied* 84 NY2d 810). Here, the record supports the court's conclusion that the mother repeatedly violated the court's orders directing her not to discuss the litigation with the subject children, as well as the orders awarding temporary custody of the subject children to their paternal grandfather. Based on those violations and the dangers to the subject children discussed above, we conclude that the court's determination

with respect to custody, limited visitation and supervised contact is in the best interests of the children (*see generally Eschbach v Eschbach*, 56 NY2d 167, 172-173).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

278

CAF 13-00115

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

IN THE MATTER OF GRAYLON K. WILLIAMS,
PETITIONER-RESPONDENT,

V ORDER

MERIAH L. WILLIAMS, RESPONDENT-APPELLANT.

SCOTT A. OTIS, WATERTOWN, FOR RESPONDENT-APPELLANT.

A.J. BOSMAN, ATTORNEY FOR THE CHILD, ROME.

Appeal from an order of the Family Court, Lewis County (Donald E. Todd, A.J.), entered December 18, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner physical custody of the parties' son, with authority to relocate to Texas.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

282

CA 13-01682

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

IN THE MATTER OF PHILIP J. ROCHE, PUBLIC DEFENDER, COUNTY OF STEUBEN, PETITIONER-APPELLANT,

V ORDER

BROOKS T. BAKER, DISTRICT ATTORNEY, COUNTY OF STEUBEN, RESPONDENT-RESPONDENT.

ALAN P. REED, COUNTY ATTORNEY, BATH, FOR PETITIONER-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH, RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Steuben County Court (Peter C. Bradstreet, J.), entered January 10, 2013. The order denied the application of petitioner to quash a subpoena duces tecum.

Now, upon reading and filing the stipulation of discontinuance signed by petitioner-appellant on December 19, 2013, by respondent-respondent on December 18, 2013 and by the attorney for petitioner-appellant on December 17, 2013,

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

289

KA 12-00707

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMAR DAVIS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered July 10, 2008. 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 modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for resentencing.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that County Court failed to apprehend the extent of its sentencing discretion. We agree. Contrary to the People's contention, defendant's contention survives his waiver of the right to appeal and does not require preservation (*see People v Dunham*, 83 AD3d 1423, 1424-1425, *lv denied* 17 NY3d 794). The court informed defendant during the plea proceeding that the minimum sentence it could impose was 5 years of incarceration and 5 years of postrelease supervision, when in fact the court had the authority to impose a period of postrelease supervision of between 2½ years and 5 years (*see* § 70.45 [2] [f]). "The failure of the court to apprehend the extent of its discretion deprived defendant of the right to be sentenced as provided by law" (*People v Hager*, 213 AD2d 1008, 1008; *see People v Slattery*, 81 AD3d 1415, 1416). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

290

KA 12-01863

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES BEYRAU, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ROBERT TUCKER, PALMYRA, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (JACQUELINE MCCORMICK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered May 22, 2012. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of marihuana in the second degree (Penal Law § 221.25) and two counts of criminal possession of a weapon in the fourth degree (§ 265.01 [4]). We note at the outset that defendant's contentions on appeal concern only the judgment in appeal No. 1, and we therefore affirm the judgment in appeal No. 2.

With respect to the judgment in appeal No. 1, the record establishes that County Court was aware that it had discretion to impose an ignition interlock period between six months and three years (*cf. People v Vidaurrazaga*, 100 AD3d 664, 666-667). "Penal Law § 65.05 (3) (a) requires that the period of the conditional discharge in the case of a felony shall be three years, while Vehicle and Traffic Law § 1193 (1) (c) (iii) requires that the ignition interlock device condition shall be for a period not less than six months but not exceeding the duration of the conditional discharge, and the court complied with those statutes" (*People v Marvin*, 108 AD3d 1109, 1109).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

291

KA 12-01900

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES BEYRAU, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ROBERT TUCKER, PALMYRA, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (JACQUELINE MCCORMICK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered May 22, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of marihuana in the second degree and criminal possession of a weapon in the fourth degree (two counts).

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

Same Memorandum as in *People v Beyrau* ([appeal No. 1] ___ AD3d ___ [Mar. 21, 2014]).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

292

KA 12-01482

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TEVIN MORROW, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE 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 (Michael L. D'Amico, J.), rendered June 13, 2012. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree, criminal possession of a weapon in the second degree and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, assault in the first degree (Penal Law § 120.10 [3]), defendant contends that his waiver of the right to appeal was not knowingly, voluntarily, and intelligently entered. We reject that contention (*see generally People v Lopez*, 6 NY3d 248, 256; *People v Ripley*, 94 AD3d 1554, 1554, *lv denied* 19 NY3d 976). The valid waiver by defendant of the right to appeal encompasses his contention concerning the severity of the sentence (*see People v Lococo*, 92 NY2d 825, 827; *People v Raynor*, 107 AD3d 1567, 1568). Contrary to defendant's further contention, even assuming, arguendo, that there was sufficient evidence of "mitigating circumstances that bear directly upon the manner in which the crime was committed" to render defendant eligible for youthful offender status (CPL 720.10 [3] [i]), we nevertheless conclude that County Court did not abuse its discretion in declining to grant him youthful offender status under the circumstances of this case (*see People v Fowler-Graham*, 92 AD3d 1225, 1226, *lv denied* 19 NY3d 960; *People v Scott*, 31 AD3d 1190, 1191; *People v Terry*, 19 AD3d 1039, 1040, *lv denied* 5 NY3d 833).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

294

KA 10-00701

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KARL MCCALLA, ALSO KNOW AS FRANCIS NEWTON,
DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a new sentence of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered December 9, 2009 imposed upon defendant's conviction of criminal possession of a controlled substance in the second degree and criminal possession of a controlled substance in the third degree. Defendant was resentenced pursuant to the 2005 Drug Law Reform Act upon his 1996 conviction.

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

Memorandum: Defendant appeals from a new sentence imposed by County Court pursuant to the 2005 Drug Law Reform Act (L 2005, ch 643, § 1), upon his 1996 conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). He was sentenced as a second felony offender and contends that he did not knowingly and voluntarily waive his right to challenge the constitutionality of his predicate conviction before being adjudicated a second felony offender. Defendant's contention is not preserved for our review and, in any event, we conclude that it lacks merit.

After reading the second felony offender information into the record, the prosecutor asked defendant if he had any constitutional challenges to the conviction, and he answered, "No ma'am." Defendant confirmed that he had spoken with defense counsel about the prior conviction, and he admitted that he was the same person who had been previously convicted. Subsequently, the court again asked defendant if he had any constitutional challenges to the predicate conviction, to which defendant answered, "Not pending, your Honor."

Defendant's contention, i.e., that the court should have

conducted a further inquiry or held a hearing on any purported challenge to the constitutionality of the predicate conviction, " 'relate[s] to presentence procedures' . . . , and thus requires preservation" (*People v Smith*, 83 AD3d 470, 470, *lv denied* 17 NY3d 801, quoting *People v Samms*, 95 NY2d 52, 58). Defendant correctly concedes that he did not preserve his contention for our review (*see People v Butler*, 96 AD3d 1367, 1368, *lv denied* 20 NY3d 931; *People v Fidler*, 28 AD3d 1220, 1221, *lv denied* 7 NY3d 755; *see generally People v Anderson*, 48 AD3d 1065, 1066, *lv denied* 10 NY3d 955).

In any event, defendant affirmatively waived any constitutional challenge to the predicate conviction when he informed the prosecutor that he did not have any challenges to the predicate conviction and admitted that conviction (*see* CPL 400.21 [7] [b]; *People v Woolley*, 289 AD2d 1084, 1084-1085, *lv denied* 98 NY2d 682). Moreover, his subsequent statement to the court, i.e., that he had no "present basis for challenging" the predicate conviction, is sufficient to constitute a waiver of the right to challenge the predicate conviction (*People v Carter*, 76 AD3d 1139, 1140, *lv denied* 15 NY3d 952). Regardless whether defendant stated that he had no challenges or no "pending" challenges to the predicate conviction, he "fail[ed] to challenge the underlying felony conviction at sentencing," and was therefore properly sentenced as a second felony offender (*People v Vandenburg*, 254 AD2d 532, 535, *lv denied* 93 NY2d 858; *see People v Pane*, 292 AD2d 850, 851, *lv denied* 98 NY2d 653).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

306

CA 13-00005

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND WHALEN, JJ.

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF MIGUEL COLON, CONSECUTIVE NO. 177673, FROM
CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT
TO MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-APPELLANT,

V ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Joseph E. Fahey, A.J.), entered November 1, 2012 in a proceeding pursuant to Mental Hygiene Law article 10. The order continued the commitment of petitioner to a secure treatment facility.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

307

CA 13-01656

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND WHALEN, JJ.

NANCY MARRERO, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

PAUL FREDERICK GANDOLFO,
DEFENDANT-RESPONDENT-APPELLANT.

PAUL FREDERICK GANDOLFO, THIRD-PARTY
PLAINTIFF-RESPONDENT-APPELLANT,

V

ALBA A. BAEZ, THIRD-PARTY
DEFENDANT-RESPONDENT-APPELLANT.

BARRY J. DONOHUE, TONAWANDA, FOR PLAINTIFF-APPELLANT-RESPONDENT.

LAW OFFICES OF DANIEL R. ARCHILLA, BUFFALO (JOAN M. RICHTER OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT AND THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeals from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered March 25, 2013. The order denied the motions of the respective parties for summary judgment.

Now, upon reading and filing the stipulation to withdraw appeal signed by the attorneys for the parties,

It is hereby ORDERED that said cross appeal taken by third-party defendant is unanimously dismissed upon stipulation and the order is affirmed without costs.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

311

KA 10-00521

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LANCE R. BISHOP, DEFENDANT-APPELLANT.

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

LANCE R. BISHOP, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered June 4, 2009. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]). Although the defendant's contention that his plea was not knowing, intelligent, or voluntary survives his waiver of the right to appeal, defendant failed to preserve his contention for our review inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Watkins*, 77 AD3d 1403, 1403, *lv denied* 15 NY3d 956). Furthermore, "[n]othing in the plea allocution raised the possibility that [a justification defense was] applicable in this case, and defendant's contention therefore does not fall within the narrow exception to the preservation rule" (*People v Hart*, 114 AD3d 1273, ___; *cf. People v Ponder*, 34 AD3d 1314, 1315; *see generally People v Lopez*, 71 NY2d 662, 666).

Defendant's challenge to the alleged amendment to the indictment is similarly unavailing. Although the indictment was amended at the beginning of the plea proceeding to reflect the charge to which defendant ultimately pleaded guilty under the agreement, we conclude that County Court's reference to an incorrect Penal Law provision, while referring to the crime of manslaughter in the first degree by name, was akin to a mere "misnomer in the designation of the crime charged," which does not create a jurisdictional defect (*People v Rodriguez*, 97 AD3d 246, 252, *lv denied* 19 NY3d 1028). Thus,

defendant's uncontested waiver of the right to appeal precludes his challenge to the court's failure to recite the applicable provision (*see People v Cullen*, 62 AD3d 1155, 1157, *lv denied* 13 NY3d 795) and, in any event, the court's misstatement " '[is] an irregularity' " that does not survive defendant's plea of guilty (*Rodriguez*, 97 AD3d at 252; *see People v Judd*, 111 AD3d 1421, 1422; *see generally People v Iannone*, 45 NY2d 589, 600-601).

The ineffective assistance of counsel claims contained in defendant's pro se supplemental brief do not survive his plea and waiver of the right to appeal, because defense counsel's allegedly poor performance did not infect the plea bargaining process (*see People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912; *see also People v Hodge*, 85 AD3d 1680, 1681, *lv denied* 18 NY3d 883; *People v Kearns*, 50 AD3d 1514, 1515, *lv denied* 11 NY3d 790). Furthermore, to the extent that many of his contentions involve matters outside the record on appeal, we note that they must be raised by way of a motion pursuant to CPL 440.10 (*see People v Russell*, 83 AD3d 1463, 1465, *lv denied* 17 NY3d 800).

We have reviewed defendant's remaining contentions in his pro se supplemental brief and conclude that none requires modification or reversal of the judgment.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

312

KA 12-01054

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JUSTIN REID, 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 (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered June 1, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed for reasons stated in the decision at suppression court.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

313

KA 11-01295

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HENRY WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered October 20, 2010. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [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: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

316

KA 10-01030

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LATASHA D. BRIGGS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Stephen T. Miller, A.J.), rendered March 19, 2010. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that her plea was not knowingly, voluntarily, and intelligently entered. According to defendant, her equivocal responses during the plea colloquy negated her intent to sell, which is an essential element of the crime to which she pleaded guilty, and the court failed to conduct the requisite further inquiry to ensure that the plea was knowing, voluntary and intelligent. We note at the outset that defendant's waiver of the right to appeal is invalid and thus does not encompass her contention (*see People v McCoy*, 107 AD3d 1454, 1454-1455, *lv denied 22* NY3d 957). Although the record establishes that defendant executed a written waiver and County Court ensured that defendant had signed that written waiver voluntarily, the court's "failure to make any inquiry on the record as to whether the defendant understood the implication of the appellate rights [s]he was waiving renders the waiver invalid" (*People v Grant*, 83 AD3d 862, 862-863, *lv denied* 17 NY3d 795; *see McCoy*, 107 AD3d at 1454; *see generally People v Bradshaw*, 18 NY3d 257, 264-267). Nevertheless, defendant failed to preserve her contention for our review by moving to withdraw the plea or to vacate the judgment of conviction (*see People v Theall*, 109 AD3d 1107, 1108). This case does not fall within the rare exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666) because, " '[a]lthough the initial statements of defendant during the

factual allocution may have negated the essential element of h[er] intent to [sell], h[er] further statements removed any doubt regarding that intent' " (*Theall*, 109 AD3d at 1108). In any event, the record establishes that the court conducted a " 'further inquiry to ensure that defendant understood the nature of the charge and that the plea was intelligently entered' " (*id.*).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

319

CAF 12-01103

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

IN THE MATTER OF TREYVONE C.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHAMEEL P., RESPONDENT-APPELLANT.

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

JOHN A. HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered May 29, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: Respondent mother appeals from an order granting the petition alleging that she violated the terms of a suspended judgment and terminating her parental rights on the ground of permanent neglect. The record belies the mother's contention that Family Court failed to consider whether termination of her parental rights was in the best interests of the child, and we agree with the court that termination was in the child's best interests (*see Matter of Ronald O.*, 43 AD3d 1351, 1352; *Matter of Saboor C.*, 303 AD2d 1022, 1023). Finally, we note that petitioner's contention that we should vacate that part of the order granting the mother access to posttermination photographs of the child is not properly before us inasmuch as petitioner did not cross-appeal from the order (*see Matter of Cayden L.R. [Melissa R.]*, 108 AD3d 1154, 1156).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

321

CAF 12-01823

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

IN THE MATTER OF MAKAYLA S.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ALECIA P., RESPONDENT-APPELLANT,
AND DAVID S., RESPONDENT.

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-APPELLANT.

MICHELLE COOKE, BATH, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered September 25, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred guardianship and custody of the subject child to petitioner.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child and ordered that the child be freed for adoption. We reject the mother's contention that Family Court erred in finding that the child is a permanently neglected child and in terminating the mother's parental rights with respect to her. "Petitioner met its burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and [the child] by providing 'services and other assistance aimed at ameliorating or resolving the problems preventing [the child's] return to [the mother's] care' . . . , and that the mother failed substantially and continuously to plan for the future of the child although physically and financially able to do so . . . Although the mother participated in the services offered by petitioner, she did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243, *lv denied* 12 NY3d 715; *see* § 384-b [7] [a]; *cf. Matter of Olivia L.*, 41 AD3d 1226, 1226-1227). Contrary to the mother's further contention, the court properly denied her request for a suspended judgment (*see Matter of*

Lilliana G. [Orena G.], 104 AD3d 1224, 1225; *Matter of Dahmani M. [Jana M.]*, 104 AD3d 1245, 1246).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

324

CA 13-01364

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

DAVID M. AHLERS, ET AL., PLAINTIFFS-APPELLANTS,

V ORDER

ECOVATION, INC., W. JEROME FRAUTSCHI, W. JEROME FRAUTSCHI LIVING TRUST, PLEASANT T. ROWLAND, PLEASANT T. ROWLAND REVOCABLE TRUST, THE PLEASANT T. ROWLAND FOUNDATION, INC., THE OVERTURE FOUNDATION, INC., DIANE C. CREEL, GEORGE SLOCUM, DAVID CALL, DAVID PATCHEN, CREIGHTON K. (KIM) EARLY, RICHARD KOLLAUF, RITA OBERLE, ROBERT SHEH AND PHILIP STRAWBRIDGE, DEFENDANTS-RESPONDENTS.

DENTONS US LLP, NEW YORK CITY (JONATHAN D. FORSTOT OF COUNSEL), AND WOODS OVIATT GILMAN LLP, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

DORSEY & WHITNEY LLP, MINNEAPOLIS, MINNESOTA (DAVID Y. TREVOR, OF THE MINNESOTA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER, HODGSON RUSS LLP, BUFFALO, THE WOLFORD LAW FIRM LLP, ROCHESTER, AND PEPPER HAMILTON LLP, PHILADELPHIA, PENNSYLVANIA, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Matthew A. Rosenbaum, J.), entered May 23, 2013. The order, among other things, granted defendants' cross motions for partial summary judgment and dismissed plaintiffs' fifth cause of action.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

328

CA 13-01390

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

SHARELLE REYNOLDS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD KELLY, BETTE KELLY AND MARK KELLY,
DEFENDANTS-RESPONDENTS.

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

BOEGGEMAN, GEORGE & CORDE, P.C., ALBANY (PAUL A. HURLEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered November 29, 2012 in a personal injury action. The order, among other things, denied plaintiff's cross motion for a protective order disqualifying the designated defense examiner.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained as the result of her exposure to lead paint as a child while residing in an apartment owned by defendants. Plaintiff contends on appeal that Supreme Court erred in denying her cross motion for a protective order seeking disqualification of the designated defense examiner, a neuropsychologist, or, in the alternative, directing that the examination be recorded. While this appeal was pending, the challenged examination was conducted and the examiner has since issued a report. We conclude that plaintiff's appeal is moot as a result of those intervening circumstances, and this case does not fall within any exception to the mootness doctrine (*see Cuevas v 1738 Assoc., L.L.C.*, 111 AD3d 416, 416; *see also Hughes v Farrey*, 39 AD3d 431, 431; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). We therefore dismiss the appeal.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

329

CA 13-01560

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, AND SCONIERS, JJ.

STATE FARM FIRE & CASUALTY COMPANY, AS SUBROGEE
OF ROBERT ROMANO, PLAINTIFF-APPELLANT,

V ORDER

NATIONAL GRID POWER CORPORATION,
DEFENDANT-RESPONDENT.

LAW OFFICES OF STUART D. MARKOWITZ, P.C., JERICHO (JOHN J. GILBERT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (TIMOTHY J. DEMORE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered January 14, 2013. The order granted defendant's motion for summary judgment, denied plaintiff's cross motion for summary judgment and dismissed the complaint.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

330

CA 13-01668

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND SCONIERS, JJ.

FRANCINE MANN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WEGMANS FOOD MARKETS, INC., DEFENDANT-APPELLANT.

THE LAW FIRM OF JANICE M. IATI, P.C., ROCHESTER (JANICE M. IATI OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCHIANO LAW OFFICE, P.C., ROCHESTER (CHARLES A. SCHIANO, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered May 3, 2013. The amended order denied defendant's motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell on ice in defendant's parking lot. Defendant moved for summary judgment dismissing the complaint, contending that it had no duty to correct the hazardous condition of the parking lot because the storm had ceased for only 15 minutes at the time of the accident, and Supreme Court denied the motion. We reverse.

We conclude that defendant met its initial burden by submitting evidence that a storm was in progress at the time of the accident and, thus, that defendant "had no duty to remove the snow and ice 'until a reasonable time ha[d] elapsed after cessation of the storm' " (*Glover v Botsford*, 109 AD3d 1182, 1183). The accident occurred at approximately 5:15 p.m. on December 22, 2010, when plaintiff exited defendant's store. According to defendant's expert meteorologist and the weather reports upon which he relied, light snow mixed with a freezing drizzle fell from 3:00 to at least 5:00 p.m. Contrary to plaintiff's contention, she failed to raise an issue of fact by submitting evidence that the precipitation had eased or ceased at the time of her accident. " '[E]ven if there was a lull or break in the storm around the time of plaintiff's accident, this does not establish that defendant had a reasonable time after the cessation of the storm to correct hazardous snow or ice-related conditions' " (*Baia v Allright Parking Buffalo, Inc.*, 27 AD3d 1153, 1154; *see Brierley v*

Great Lakes Motor Corp., 41 AD3d 1159, 1160). Plaintiff further failed to raise an issue of fact whether the ice that caused the accident existed prior to the storm (*see Chapman v Pyramid Co. of Buffalo*, 63 AD3d 1623, 1624; *Martin v Wagner*, 30 AD3d 733, 735).

In view of our decision, we do not address defendant's contention concerning plaintiff's affidavit submitted in opposition to the motion.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

331

KA 12-01249

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHAN MERRITT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

STEPHAN MERRITT, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 11, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the first degree, robbery in the second degree, attempted robbery in the second degree and robbery in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [2]) and robbery in the second degree (§ 160.10 [2] [a]). Contrary to defendant's contention, defense counsel did not coerce him to plead guilty by denigrating his pro se motion to withdraw his plea, which motion was based upon defendant's claims of innocence and ineffective assistance of counsel. Instead, defense counsel adopted the motion and advised Supreme Court that he and defendant had discussed defendant's concerns (*cf. People v Mitchell*, 21 NY3d 964, 966). The court "was presented with a credibility determination when defendant moved to withdraw his plea and advanced his belated claims of innocence and coercion," and we conclude that it did not abuse its discretion in discrediting those claims (*People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746). " 'Only in the rare instance will defendant be entitled to an evidentiary hearing' " on a motion to withdraw a plea of guilty (*Mitchell*, 21 NY3d at 966), and we conclude that, here, there is no basis for such a hearing. We therefore reject defendant's further contention in his main and pro se supplemental briefs that we should remit this matter for the assignment of new counsel and a de novo determination of the motion.

To the extent that defendant contends in his pro se supplemental brief that his plea was not voluntary because it was coerced by defense counsel, that contention survives the valid waiver of the right to appeal (*see People v Seaberg*, 74 NY2d 1, 10; *Sparcino*, 78 AD3d at 1509), and it is preserved for our review by his motion to withdraw his plea (*see People v Lopez*, 71 NY2d 662, 665). We nevertheless conclude that the contention is without merit inasmuch as it is belied by the record (*see People v Culver*, 94 AD3d 1427, 1427-1428, *lv denied* 19 NY3d 1025). During the thorough plea colloquy, defendant advised the court that he was satisfied with the services of his attorneys, that he had enough time to discuss his plea with those attorneys, that no one had forced him to plead guilty, and that he was pleading guilty voluntarily (*see People v Wolf*, 88 AD3d 1266, 1266-1267, *lv denied* 18 NY3d 863). To the extent that defendant contends in his pro se supplemental brief that conversations with his attorneys gave rise to ineffective assistance of counsel because he was "stressed out" and "could not think straight" and, thus, that he was coerced into pleading guilty, that contention is based on matters outside the record and must therefore be raised by way of a motion pursuant to CPL article 440 (*see Culver*, 94 AD3d at 1428).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 12-01520

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN M. WAPNIEWSKI, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (GREGORY A. KILBURN OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Wyoming County Court (Michael F. Griffith, J.), rendered July 24, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree and welfare fraud 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 his plea of guilty of, inter alia, welfare fraud in the fifth degree (Penal Law § 158.05). Defendant's valid waiver of the right to appeal encompasses his contention that County Court erred in directing him to pay a specified amount of restitution without conducting a hearing "inasmuch as that amount was an explicit part of defendant's agreed-upon plea bargain" (*People v Taylor*, 70 AD3d 1121, 1122, *lv denied* 14 NY3d 845; *see People v Thomas*, 77 AD3d 1325, 1326, *lv denied* 16 NY3d 800).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00354

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

ROBERT C. RAIMONDO, PLAINTIFF-RESPONDENT,

V ORDER

THOMAS DOUGLAS, DEFENDANT-APPELLANT.

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

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL LONGSTREET OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered May 9, 2012 in a declaratory judgment action. The judgment, among other things, granted plaintiff's motion for summary judgment.

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

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01393

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

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

V MEMORANDUM AND ORDER

BUFFALO MUNICIPAL HOUSING AUTHORITY, ELAINE GARBE, BISILOLA F. JACKSON, ADMINISTRATOR OF THE ESTATE OF JERELINE ELIZABETH GIWA, DECEASED, GRACE MANOR HEALTH CARE FACILITY, INC., DAVID J. GENTNER, MARY STEPHAN, KATHY RANDALL, TIFFANY MATTHEWS AND PHILLIP J. RADOS, M.D., DEFENDANTS-RESPONDENTS.

LAW OFFICE OF FRANK S. FALZONE, BUFFALO (LOUIS ROSADO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (JOHN J. MARCHESE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BUFFALO MUNICIPAL HOUSING AUTHORITY, ELAINE GARBE AND BISILOLA F. JACKSON, ADMINISTRATOR OF THE ESTATE OF JERELINE ELIZABETH GIWA, DECEASED.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS GRACE MANOR HEALTH CARE FACILITY, INC., DAVID J. GENTNER, MARY STEPHAN, KATHY RANDALL AND TIFFANY MATTHEWS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (ELIZABETH G. ADYMY OF COUNSEL), FOR DEFENDANT-RESPONDENT PHILLIP J. RADOS, M.D.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 6, 2013. The order denied the motion of plaintiff seeking "to renew" and to vacate a prior order.

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

Memorandum: Plaintiff appeals from an order that denied her motion seeking "to renew" and to vacate a prior order in which Supreme Court granted the respective motion and cross motions (motions) of defendants seeking, inter alia, summary judgment dismissing the second amended complaint against them. We previously dismissed plaintiff's appeal from the prior order, determining that, because plaintiff failed to respond to defendants' motions or to appear on the return date for oral argument, the prior order was entered upon plaintiff's

default, and no appeal could be taken therefrom (*Britt v Buffalo Mun. Hous. Auth.*, 109 AD3d 1195, 1196). Although plaintiff characterized her motion herein as a motion "to renew," she does not raise a new question of law or fact (*see* CPLR 2221 [e] [2]), and thus we conclude that she sought only leave to reargue (*see Hilliard v Highland Hosp.*, 88 AD3d 1291, 1292-1293). Inasmuch as no appeal lies from the denial of a motion seeking leave to reargue, we dismiss the appeal (*see id.; Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

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

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CAF 12-01509

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

IN THE MATTER OF GILBERT QUINONES,
PETITIONER-RESPONDENT,

V ORDER

SIOBHAN LEONARD, RESPONDENT-APPELLANT.

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

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (RUPAK R. SHAH OF COUNSEL), FOR PETITIONER-RESPONDENT.

THEODORE W. STENUF, ATTORNEY FOR THE CHILD, MINOA.

Appeal from an order of the Supreme Court, Onondaga County (Martha E. Mulroy, A.J.), entered July 9, 2012 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole legal and residential custody of the parties' child to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at Supreme Court.

Entered: March 21, 2014

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1806/98) KA 97-05046. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT C. HINTON, JR., DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (265/01) KA 98-05230. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NORBERT JACKSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND WHALEN, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (1507/01) KA 98-05285. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHON LUCIUS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND WHALEN, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (1541/02) KA 00-01679. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT HINTON, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (1542/02) KA 00-00528. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT HINTON, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (390/11) KA 10-00665. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICKY L. WINTERS, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, AND LINDLEY, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (90/13) KA 11-00190. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MEL T. WILKINS, ALSO KNOWN AS MELZER WILKINS, ALSO KNOWN AS MELZEE WILKINS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (1029/13) KA 09-02512. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TYQUAN L. RIVERA, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (1057/13) KA 11-02354. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOHN COLE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (1060/13) CA 13-00705. -- LAURA HARDEN, PLAINTIFF-APPELLANT, V JAMES W. FAULK, M.D., DEFENDANT-RESPONDENT. -- Motion insofar as it seeks in the alternative leave to appeal to the Court of Appeals is denied and the motion insofar as it seeks leave to reargue is granted in part and,

upon reargument, the memorandum and order entered November 15, 2013 (111 AD3d 1380) is amended by deleting the first two sentences of the third paragraph of the memorandum and substituting the following in place thereof: "Contrary to plaintiff's further contention, the court properly denied her motion for a directed verdict at the close of proof. Sufficient conflicting factual and expert proof was presented at trial and, '[a]ccording defendant[] every favorable inference from the evidence, there was indeed a rational process by which the jury could find in [his] favor' (*Wolfe v St. Clare's Hosp. of Schenectady*, 57 AD3d 1124, 1126)." PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (1170/13) CA 12-01605. -- IN THE MATTER OF THE ESTATE OF ROBYN R. LEWIS, DECEASED. JAMES ROBERT SIMMONS, PETITIONER-RESPONDENT; MEREDITH M. STEWART, RONALD L. LEWIS, RONALD L. LEWIS, II, AND JONATHAN K. LEWIS, OBJECTANTS-APPELLANTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (1171/13) CA 13-00497. -- IN THE MATTER OF THE ESTATE OF ROBYN R. LEWIS, DECEASED. JAMES ROBERT SIMMONS, PETITIONER-RESPONDENT; MEREDITH M. STEWART, RONALD L. LEWIS, RONALD L. LEWIS, II, AND JONATHAN K. LEWIS, OBJECTANTS-APPELLANTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (1172/13) CA 13-00498. -- IN THE MATTER OF THE ESTATE OF ROBYN R. LEWIS, DECEASED. JAMES ROBERT SIMMONS, PETITIONER-RESPONDENT; MEREDITH M. STEWART, RONALD L. LEWIS, RONALD L. LEWIS, II, AND JONATHAN K. LEWIS, OBJECTANTS-APPELLANTS. (APPEAL NO. 3.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (1214/13) CA 13-00594. -- REMET CORPORATION, PLAINTIFF-RESPONDENT, V THE ESTATE OF JAMES R. PYNE, DECEASED, KATHERINE B. PYNE, INDIVIDUALLY AND AS THE EXECUTOR OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE AND AS TRUSTEE OF THE TRUST ESTABLISHED UNDER PARAGRAPH THIRD OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE, EDWARD R. WIEHL, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE AND AS TRUSTEE OF THE TRUST ESTABLISHED UNDER PARAGRAPH THIRD OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE, THE TRUST ESTABLISHED UNDER PARAGRAPH THIRD OF THE LAST WILL AND TESTAMENT OF JAMES R. PYNE, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (1274/13) CA 12-00128. -- SUSAN GATELY, PLAINTIFF-RESPONDENT, V JAMES GATELY, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (1281/13) CA 13-00845. -- ONE FLINT ST., LLC AND DHD VENTURES NEW YORK, LLC, PLAINTIFFS-APPELLANTS, V EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (1305/13) CA 13-01063. -- IN THE MATTER OF BATTAGLIA DEMOLITION, INC., BATTAGLIA TRUCKING, INC. AND PETER BATTAGLIA, PETITIONERS-APPELLANTS, V CITY OF BUFFALO, CITY OF BUFFALO COMMON COUNCIL, CITY OF BUFFALO DEPARTMENT OF ECONOMIC DEVELOPMENT, PERMIT & INSPECTION SERVICES, AND PATRICK SOLE, JR., AS DIRECTOR OF PERMIT & INSPECTION SERVICES, RESPONDENTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (1306/13) CA 13-00807. -- CELESTE SWIETLIK, PLAINTIFF-RESPONDENT, V TOWN OF HAMBURG, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (1322/13) CA 13-01038. -- MICHAEL J. DIFABIO, PLAINTIFF-RESPONDENT, V JAMES M. JORDAN, DEFENDANT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Mar. 21, 2014.)

MOTION NO. (1333/13) KA 12-01723. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DERICK W. BARKER, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument of the appeal is granted to the extent that, upon reargument, the memorandum and order entered January 3, 2014 (113 AD3d 1114) is amended by deleting the fourth sentence of the memorandum. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ. (Filed Mar. 21, 2014.)

KA 10-01154. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHAD R. DALCIN, DEFENDANT-APPELLANT. -- Resentence unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Resentence of Livingston County Court, Dennis S. Cohen, J. - Burglary, 2nd Degree). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND WHALEN, JJ. (Filed Mar. 21, 2014.)