SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 1, 2015

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

126

CA 14-01142

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

CHRISTOPHER HAMILTON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN MILLER, DAVID MILLER, JULES MUSINGER, DOUG MUSINGER AND SINGER ASSOCIATES, DEFENDANTS-RESPONDENTS.

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

SLIWA & LANE, BUFFALO (STANLEY J. SLIWA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JOHN MILLER AND DAVID MILLER.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (JOSHUA M. AGINS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JULES MUSINGER, DOUG MUSINGER AND SINGER ASSOCIATES.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered December 5, 2013. The order granted the motion of defendants John Miller and David Miller for summary judgment and dismissed the complaint against those defendants, and denied the cross motion of plaintiff for, inter alia, partial summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as the result of exposure to lead paint in apartments rented by his mother from defendants when he was a child. Defendants John Miller and David Miller moved for summary judgment dismissing plaintiff's complaint as against them. Plaintiff cross-moved for, inter alia, partial summary judgment against the Millers, as well as the remaining defendants (Musinger defendants), on the issues of "liability (notice, negligence and substantial factor)," and dismissal of various affirmative defenses. Supreme Court granted the Millers' motion and denied plaintiff's cross motion. We affirm.

"In order for a landlord to be held liable for a lead paint condition, it must be established that the landlord had actual or constructive notice of the hazardous condition and a reasonable opportunity to remedy it, but failed to do so" (*Spain v Holl*, 115 AD3d 1368, 1369; *see Pagan v Rafter*, 107 AD3d 1505, 1506; *see generally Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646). We agree with the

Millers that they met their burden on their motion with respect to the cause of action for negligent ownership and maintenance of the premises by establishing that they did not have actual or constructive notice of the hazardous lead paint condition, and plaintiff failed to raise a triable issue of fact (*see Spain*, 115 AD3d at 1369; *see generally Chapman v Silber*, 97 NY2d 9, 15). We further agree with the Millers that they "met their burden with respect to the negligent abatement cause of action by establishing that they abated the lead paint hazard in a reasonable manner, and plaintiff failed to raise a triable issue of fact" (*Moye v Giambra*, 125 AD3d 1411, 1412; *cf. Pagan*, 107 AD3d at 1506-1507). For the same reasons, we conclude that the court properly denied plaintiff's cross motion for partial summary judgment against the Millers.

Plaintiff further contends that the court erred in denying that part of his cross motion for partial summary judgment against the Musinger defendants on the issues of "liability (notice, negligence and substantial factor)." We reject that contention. Under the circumstances of this case, we conclude that there is an issue of fact whether the Musinger defendants had notice of the dangerous lead paint condition in the subject apartment "for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez*, 88 NY2d at 646; *see Heyward v Shanne*, 114 AD3d 1212, 1213). With regard to constructive notice, we conclude that there are issues of fact with respect to the first *Chapman* factor, i.e., whether the Musinger defendants retained a right of entry to the premises, and the third *Chapman* factor, i.e., whether the Musinger defendants were aware that paint was peeling on the premises (*see Watson v Priore*, 104 AD3d 1304, 1305-1306, *lv dismissed in part and denied in part* 21 NY3d 1052; *see also Heyward*, 114 AD3d at 1214; *see generally Chapman*, 97 NY2d at 15, 20-21). We also conclude that there is an issue of fact as to causation (*see Heyward*, 114 AD3d at 1214; *Robinson v Bartlett*, 95 AD3d 1531, 1534-1535).

Finally, the court properly denied that part of plaintiff's cross motion seeking to dismiss certain affirmative defenses asserted by the Musinger defendants inasmuch as plaintiff failed to show that those defenses lacked merit as a matter of law (*see Heyward*, 114 AD3d at 1214-1215; *Pagan*, 107 AD3d at 1507).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

237

CA 14-01446

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

MICHAEL D. FILER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KEYSTONE CORPORATION, ABS MACHINING, LTD., ARTHUR SIMMONS AND SUPERIOR TECHNICAL RESOURCES, INC., DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (ALBERT J. D'AQUINO OF COUNSEL), FOR DEFENDANT-APPELLANT KEYSTONE CORPORATION.

DAMON MOREY LLP, BUFFALO (HEDWIG M. AULETTA OF COUNSEL), FOR DEFENDANTS-APPELLANTS ARTHUR SIMMONS AND SUPERIOR TECHNICAL RESOURCES, INC.

HURWITZ & FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR DEFENDANT-APPELLANT ABS MACHINING, LTD.

PROVOST UMPHREY LAW FIRM, L.L.P., BEAUMONT, TEXAS (JENNIFER J. SEALE, OF THE TEXAS BAR, ADMITTED PRO HAC VICE, OF COUNSEL), DELDUCHETTO & POTTER, SYRACUSE, FOR PLAINTIFF-RESPONDENT.

Appeals from an order and judgment (one paper) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered February 7, 2014. The order and judgment denied the motions of defendants for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by granting the motion of defendants Arthur Simmons and Superior Technical Resources, Inc. and dismissing the third amended complaint against them, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while employed by nonparty Dresser-Rand Company (Dresser), which manufacturers compressors used in oil and gas production. Plaintiff was unloading a crate containing industrial diaphragm sections when the crate collapsed and the diaphragms spilled out, knocking him to the ground. The diaphragms were manufactured by defendant ABS Machining, Ltd. (ABS) pursuant to a contract with Dresser, which required that the diaphragms be nickel-plated. ABS contracted with defendant Keystone Corporation (Keystone), an industrial metal finisher, to perform that portion of the work.

Both ABS and Keystone contend that Supreme Court erred in denying their respective motions for summary judgment dismissing the third amended complaint against them because they did not owe a duty of care to plaintiff. We reject those contentions. ABS and Keystone were part of the manufacturing and distribution of the diaphragms and thus owed a duty to plaintiff based on common-law negligence and strict products liability principles (*see Hoover v New Holland N. Am., Inc.*, 23 NY3d 41, 53; *Codling v Paglia*, 32 NY2d 330, 339; *MacPherson v Buick Motor Co.*, 217 NY 382, 388). ABS manufactured the diaphragms, and designed and provided the crate, blocking and banding used for packaging and shipping the diaphragms to Keystone. After nickel-plating the diaphragms, Keystone repackaged the product and shipped it directly to the end user, Dresser, in the crate provided by ABS. Both ABS and Keystone had duties to comply with standard industry practices with respect to packaging and shipping of the product, and neither placed any instructions or warnings on or with the crate regarding safe methods of uncrating the product. ABS failed to establish as a matter of law that it used reasonable care in the design and testing of the packaging for its product, i.e., the crate, and that it provided adequate warnings with the product regarding the safe uncrating of it. Keystone, likewise, failed to establish as a matter of law that it used reasonable care in repackaging the product after performing its nickel-plating process, or that it provided adequate warnings regarding safe methods of uncrating the product.

ABS and Keystone also failed to establish as a matter of law that they had no duty to plaintiff arising out of the subject contracts. It is well established that " 'a contractual obligation . . . impose[s] a duty . . . in favor of the promisee and intended third-party beneficiaries' " of the contract (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140) and, contrary to the contention of ABS, we conclude that plaintiff was an intended third-party beneficiary of the contract between ABS and Dresser (*see id.*; *cf. Hughey v RHM-88, LLC*, 77 AD3d 520, 522; *Betancourt v Trump Empire State Partners*, 27 AD3d 604, 605-606). The contract required that "all packaging materials be of sufficient construction to ensure that the integrity and stability of the entire package provides for *safe handling upon delivery to* [*Dresser*]" (emphasis added). It therefore "clearly appear[s]" from the language of the contract that Dresser and ABS "intended to confer a direct benefit" on Dresser employees such as plaintiff who would be unloading the crates "to protect [them] from physical injury" (*Bernal v Pinkerton's, Inc.*, 52 AD2d 760, 760, *affd* 41 NY2d 938; *see All Am. Moving & Stor., Inc. v Andrews*, 96 AD3d 674, 674-675).

With respect to Keystone, although plaintiff was neither a party to the contract between Keystone and ABS nor an intended third-party beneficiary thereof (*see Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 241-242; *Hughey*, 77 AD3d at 522; *Gerbino v Tinseltown USA*, 13 AD3d 1068, 1070), we conclude that Keystone failed to establish as a matter of law that it did not assume a duty of care to plaintiff by " 'launch[ing] a force or instrument of harm' " (*Church v Callanan Indus.*, 99 NY2d 104, 111; *see Espinal*, 98 NY2d at 139; *Dunleavy v Tuttle*, 83 AD3d 995, 996). It is undisputed that diaphragm sections

were typically shipped flat on pallets. Here, however, Keystone required ABS to ship the diaphragms in an upright position, curved-side down, for Keystone's convenience. Keystone then repackaged the diaphragms vertically in the crates provided by ABS for pickup by Dresser, even though Dresser did not ask Keystone to do so and Keystone's production manager testified at his deposition that he knew of no reason why Keystone had to ship the diaphragms to Dresser upright in a crate as opposed to flat on pallets. There is also an issue of fact whether Keystone repackaged the crates in the same manner as the crates were received from ABS. Although Keystone's vice president of operations and production manager testified at his deposition that Keystone "returns all parts in the packaging or containers supplied by the customer," plaintiff's coworker testified that there was no wood "blocking" in the crate that broke open and injured plaintiff. We therefore conclude that there is an issue of fact whether Keystone "create[d] an unreasonable risk of harm to others, or increase[d] that risk," by packaging the diaphragms in a vertical position without adequate stabilization (*Church*, 99 NY2d at 111; *see Meyers-Kraft v Keem*, 64 AD3d 1172, 1173). Finally, we conclude that ABS and Keystone failed to meet their initial burden of establishing as a matter of law that any acts or omissions on their part were not a proximate cause of the accident (*see Malamas v Toys "R" Us-Delaware, Inc.*, 94 AD3d 1438, 1438-1439).

We agree with defendants Arthur Simmons and Superior Technical Resources, Inc. (Superior), however, that the court erred in denying their motion for summary judgment dismissing the third amended complaint against them, and we therefore modify the order and judgment accordingly. Simmons and Superior established as a matter of law that Simmons was a special employee of Dresser at the time of his alleged negligence, and plaintiff failed to raise a triable issue of fact in opposition (*see Munion v Trustees of Columbia Univ. in City of N.Y.*, 120 AD3d 779, 780-781; *Davis v Butler*, 262 AD2d 1039, 1039-1040). Simmons had been employed by Dresser for over 30 years until his retirement in 2004. In 2006, he returned to work for Dresser pursuant to a contract with Superior, an employment agency. Simmons testified at his deposition that he "never . . . met anybody from Superior," and that his entire relationship with Superior consisted of sending timesheets to Superior and receiving a paycheck in return. At all times relevant to the instant action, Simmons worked exclusively at Dresser under Dresser's supervision, with all training, assignments, instruction, evaluation, and oversight coming from Dresser. Those facts, which are undisputed, " 'establish surrender of complete control by the general employer [Superior] and assumption of control by the special employer [Dresser]' " (*Cobb v AMF Bowling Prods., Inc.*, 19 AD3d 1162, 1163). In opposition to the motion, plaintiff relied solely on language in the Superior-Dresser contract stating that Simmons was an employee of Superior, not Dresser, which is insufficient to raise an issue of fact under the circumstances of this case (*see generally Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 559-560).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

239

CA 14-01721

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

J. RICHARD WILSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

REBECCA P. WILSON, DEFENDANT-APPELLANT.

M W MOODY LLC, NEW YORK CITY (MARK WARREN MOODY OF COUNSEL), FOR DEFENDANT-APPELLANT.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN LLP, ROCHESTER (MICHAEL G. PAUL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John M. Owens, J.), entered April 3, 2014. The order, insofar as appealed from, denied defendant's request that plaintiff be compelled to pay defendant for, inter alia, her moving and storage costs and counsel fees.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs, judgment is ordered imposing a sanction on defendant, and the matter is remitted to Supreme Court, Monroe County, to determine the amount of the sanction in accordance with the following memorandum: In this postjudgment matrimonial proceeding, defendant appeals from an order that, insofar as appealed from, denied her request for counsel and expert fees, as well as moving and storage costs. Upon entry of the underlying judgment of divorce, defendant received, inter alia, maintenance, plaintiff's 401(k) account, and the marital residence. The parties agreed that they would attempt to resolve any disputes over undistributed property before seeking judicial intervention, and plaintiff commenced this proceeding only when they were unable to do so. The parties stipulated that Supreme Court would determine on the parties' written submissions the contested issue regarding distribution of certain personal property. The court resolved the dispute by distributing the property at issue and denying each parties' request for ancillary relief.

We reject defendant's contention that the court abused its discretion in denying her request for counsel and expert fees because she is the less monied spouse. Although "[a]n award of [counsel] and expert fees pursuant to Domestic Relations Law § 237 (a) will generally be warranted where there is a significant disparity in the financial circumstances of the parties" (*Vitale v Vitale*, 112 AD3d 614, 615; *see Leonard v Leonard*, 109 AD3d 126, 129-130), the ultimate

decision whether to award such fees "lies, in the first instance, in the discretion of the trial court and then in the Appellate Division whose discretionary authority is as broad as [that of] the trial court[]" (*O'Brien v O'Brien*, 66 NY2d 576, 590). "[I]n exercising its discretionary power to award counsel [and expert] fees, a court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions" (*DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881; *see Gilliam v Gilliam*, 109 AD3d 871, 873; *Ciampa v Ciampa*, 47 AD3d 745, 748). "A court may consider whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation" (*Vitale*, 112 AD3d at 615). Here, we conclude that the court did not abuse its discretion in declining to award counsel and expert fees to defendant inasmuch as this postjudgment proceeding was the result of her obstructionist conduct (*see Johnson v Chapin*, 12 NY3d 461, 467, *rearg denied* 13 NY3d 888; *Vitale*, 112 AD3d at 615; *Blake v Blake* [appeal No. 1], 83 AD3d 1509, 1509). In addition, the relative merit of plaintiff's position in the underlying litigation weighs in favor of denying defendant's application for counsel and expert fees (*see generally DeCabrera*, 70 NY2d at 881-882; *Chesner v Chesner*, 95 AD3d 1252, 1253).

Similarly, we conclude that the court did not abuse its discretion in denying defendant's request for moving and storage costs where, as here, the record establishes that the costs incurred by defendant were entirely avoidable, and were the result of her own obstructionist tactics (*see generally Blake*, 83 AD3d at 1509).

Finally, we agree with plaintiff that it is appropriate to sanction defendant in this case because the appendix provided by defendant, as the appellant, failed to include "such parts of the record on appeal as are necessary to consider the questions involved, including those parts the appellant reasonably assumes will be relied upon by the respondent" (CPLR 5528 [a] [5]; *see* 22 NYCRR 1000.4 [d] [2] [i]; *Mure v Mure*, 92 AD3d 653, 653; *Wittig v Wittig*, 258 AD2d 883, 884-885; *cf. Grossman v Composto-Longhi*, 96 AD3d 1000, 1001). Because of her failure to comply with this requirement, we sanction defendant by imposing costs equal to the amount incurred by plaintiff in the preparation and submission of his own appendix to defend this appeal (*see* CPLR 5528 [e]; *Wittig*, 258 AD2d at 885; *see generally Mure*, 92 AD3d at 653), and we remit the matter to Supreme Court to determine that amount, excluding attorneys' fees (*see Wittig*, 258 AD2d at 885).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

258

OP 14-01594

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

IN THE MATTER OF ROBERT CASE, JR., PETITIONER,

V MEMORANDUM AND ORDER

FRANK A. SEDITA, III, ERIE COUNTY DISTRICT ATTORNEY, AND HONORABLE JOHN L. MICHALSKI, ERIE COUNTY SUPREME COURT JUSTICE, RESPONDENTS.

LAW OFFICE OF JOSEPH A. ABLES, JR., ORCHARD PARK (JOSEPH A. ABLES, JR., OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to prohibit the continued prosecution of Erie County Indictment No. 01158-2012.

It is hereby ORDERED that said petition is unanimously granted in part without costs, and judgment is granted in accordance with the following memorandum: Petitioner commenced this CPLR article 78 proceeding in this Court pursuant to CPLR 506 (b) (1), seeking, inter alia, to prohibit his prosecution in Supreme Court, Erie County, on that count of an indictment charging him with driving while intoxicated, per se, as a class E felony ([DWI, per se] Vehicle and Traffic Law §§ 1192 [2]; 1193 [1] [c] [i] [A]). Petitioner alleges that such prosecution is barred by double jeopardy. Initially, we agree with petitioner that relief in the nature of prohibition pursuant to CPLR article 78, under the appropriate circumstances, is "available to bar a retrial on double jeopardy grounds" (*Matter of Plummer v Rothwax*, 63 NY2d 243, 249 n 4). We further agree with petitioner that he is entitled to relief in the nature of prohibition barring his retrial on the charge of DWI, per se, and we therefore grant the petition to that extent.

Defendant was charged with DWI, per se, along with driving while intoxicated as a class E felony ([common-law DWI] Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]), and related charges, and the matter proceeded to a bench trial in Erie County Court. Defendant objected during the trial to the introduction of the results of a breathalyzer test, but the court overruled the objection. Before deliberations, defendant asked the court to consider the lesser included offense of driving while ability impaired ([DWAI] § 1192

[1]). After deliberating, the court acquitted defendant of common-law DWI, but convicted him of DWI, per se, and speeding. After the verdict was rendered, defendant moved pursuant to CPL 330.30 (1) to set aside the verdict on the ground that the documents concerning the breathalyzer test results were improperly admitted in evidence, and the court agreed. Then, in an order from which the People did not appeal, the court determined that the remaining trial evidence is legally insufficient to establish petitioner's guilt of DWI, per se, and dismissed that charge (*cf.* CPL 330.50 [1]; 470.20 [1]; *People v Carter*, 63 NY2d 530, 536-538). We therefore conclude that, under the circumstances of this case, the trial court's finding of legal insufficiency was tantamount to an acquittal for purposes of double jeopardy and bars petitioner's retrial on that charge (*see People v Biggs*, 1 NY3d 225, 229; *see also Burks v United States*, 437 US 1, 18).

Petitioner contends that the prohibition against double jeopardy bars the People from prosecuting him for the lesser included offense of DWAI. We reject that contention. "[I]n a bench trial, it is presumed that the Judge sitting as the trier of fact made his [or her] decision based upon appropriate legal criteria" (*People v Lucas*, 291 AD2d 890, 891 [internal quotation marks omitted]). Here, the court, upon acquitting defendant of common-law DWI, would have applied the "acquit-first" rule (*see generally People v Helliger*, 96 NY2d 462, 464-465; *see also Matter of Rivera v Firetog*, 11 NY3d 501, 509 n 4), and next considered DWI, per se, before reaching DWAI as a lesser included offense under either count of DWI (*see generally People v Johnson*, 87 NY2d 357, 359-360). Inasmuch as the court convicted defendant of the count charging DWI, per se, it could not have reached the lesser included offense of DWAI. Consequently, we conclude that "double jeopardy concerns . . . are not present in the case at hand . . . [because] the People here d[o] not seek to retry defendant on the count[, i.e., DWI, per se, or common-law DWI] of which he was acquitted at the first trial. Rather, the only count at issue in the retrial [will be] the lesser [DWAI] charge for which the [court did not] reach a verdict. At no point during the retrial [will] defendant [be] in jeopardy of conviction of the greater offense. Thus, there [i]s no constitutional double jeopardy bar to [a] second trial" on the lesser included offense of DWAI (*People v Green*, 96 NY2d 195, 199).

Finally, although not raised by the parties, we note that "the accusatory instrument in the present case [was not] rendered a nullity by defendant's acquittal of [both counts of DWI] at his first trial . . . Vehicle and Traffic Law § 1192 (9) specifically permits a conviction of [DWAI] on an instrument charging driving while intoxicated. Thus, the original instrument charging driving while intoxicated also, by operation of law, charged the offense of [DWAI]. No new accusatory instrument [is] required" (*Green*, 96 NY2d at 199).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

259

CA 14-01722

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

JOHN C. RICH, DOING BUSINESS AS RICH HOME BUILDING AND DEVELOPMENT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GREG ORLANDO AND LISA ORLANDO, DEFENDANTS-APPELLANTS.

WILLIAM M. BORRILL, NEW HARTFORD, FOR DEFENDANTS-APPELLANTS.

RALPH W. FUSCO, UTICA, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered January 24, 2014. The judgment dismissed the first counterclaim stated in defendants' answer.

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

Memorandum: Plaintiff commenced this breach of contract action to recover the unpaid balance allegedly due from defendants under a custom home building contract. In their answer, defendants asserted, inter alia, a counterclaim for breach of the housing merchant implied warranty (first counterclaim), and defendants now appeal from a judgment dismissing that counterclaim. On a prior appeal, we granted those parts of plaintiff's summary judgment motion seeking dismissal of two other counterclaims, and we remitted the matter to Supreme Court for a trial to determine the last date on which plaintiff performed repairs on defendants' home with respect to each defect raised by defendants in the first counterclaim, thereby allowing the court to determine whether defendants raised the first counterclaim within the applicable limitations period (*Rich v Orlando*, 108 AD3d 1039). On remittal, and insofar as relevant to this appeal, the court concluded that plaintiff had last performed repairs on the alleged defect on the back deck of defendants' home in June 2006, almost three years prior to the filing of the complaint. The court therefore dismissed the first counterclaim as time-barred under General Business Law § 777-a (4) (b).

We reject defendants' contention that the doctrine of equitable estoppel should preclude plaintiff from asserting the statute of limitations as a defense. The doctrine of equitable estoppel requires "three elements on the part of the party estopped: (1) conduct which is calculated to convey the impression that the facts are otherwise

than, and inconsistent with, those which the party subsequently attempts to assert; (2) intent that such conduct (representation) will be acted upon; and (3) knowledge, actual or constructive, of the true facts. The elements pertaining to the party asserting estoppel are (1) lack of knowledge of the true facts; (2) good faith reliance; and (3) a change of position" (*Holm v C.M.P. Sheet Metal*, 89 AD2d 229, 234-235; *see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552-553). Here, the evidence established that plaintiff did not conduct any repairs to the alleged defects to the back deck area of the house after June 2006, despite the continuance of leaking water in that area. Although both defendants testified at trial that they continued to notify plaintiff of leaks after the June 2006 repairs, neither defendant testified that plaintiff made any representations that he would correct the defect. To the contrary, the evidence established that plaintiff informed defendants that the water leak problem had been fixed, but that defendants knew that such assertion was false. Thus, there is no evidence that defendants "lack[ed] knowledge of the true facts," or that they relied in good faith on plaintiff's statements that the problem had been fixed, and the "essential element" of detrimental reliance "is lacking on the record before us" (*Holm*, 89 AD2d at 235).

We reject defendants' further contention that applying the statute of limitations to bar their first counterclaim is against public policy. The application of the statute of limitations in this matter is consistent with its purpose, which is "to afford protection to [a party] against defending stale claims after a reasonable period of time ha[s] elapsed during which a person of ordinary diligence would [have brought] an action" (*Flanagan v Mount Eden Gen. Hosp.*, 24 NY2d 427, 429; *see Matter of Depczynski v Adsco/Farrar & Trefts*, 84 NY2d 593, 596-597).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

266

CA 14-01289

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

BARBARA HALE GONZALEZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROYALTON EQUINE VETERINARY SERVICES, P.C., JEANNE BEST, DVM, NIAGARA COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, INC., STACEY BAILEY AND ROBERT A. WINSLOW, DEFENDANTS-RESPONDENTS.

MUSCATO, DIMILLO & VONA, LLP, LOCKPORT (BRIAN J. HUTCHISON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JONES, HOGAN & BROOKS, LLP, LOCKPORT (MORGAN L. JONES, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ROYALTON EQUINE VETERINARY SERVICES, P.C. AND JEANNE BEST, DVM.

WILLIAM C. MORAN & ASSOCIATES, P.C., WILLIAMSVILLE (WILLIAM JAMES HARDY OF COUNSEL), FOR DEFENDANT-RESPONDENT NIAGARA COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, INC.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ROBERT A. CRAWFORD, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT STACEY BAILEY.

HISCOCK & BARCLAY, LLP, ALBANY (JONATHAN H. BARD OF COUNSEL), FOR DEFENDANT-RESPONDENT ROBERT A. WINSLOW.

Appeal from an order of the Niagara County Court (Sara S. Farkas, J.), entered October 2, 2013. The order reversed an order of the Lockport City Court.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reinstating the order of Lockport City Court to the extent that it granted that part of plaintiff's motion seeking dismissal of the counterclaim asserted by defendant Stacey Bailey pursuant to Lien Law § 183, and as modified the order is affirmed without costs.

Memorandum: In 2009, defendant Jeanne Best, DVM, allegedly observed deplorable conditions in plaintiff's barn and contacted the State Police, who subsequently conducted a search of plaintiff's premises and removed a horse and three dogs therefrom with the assistance of defendant Niagara County Society for the Prevention of Cruelty to Animals, Inc. (SPCA). Best fostered one of the dogs, which

thereafter died, and subsequently adopted the horse. Defendants Stacey Bailey and Robert A. Winslow each fostered, then subsequently adopted, another dog. Plaintiff commenced an action in City Court for, inter alia, replevin, and several defendants asserted counterclaims based on Lien Law § 183. City Court granted plaintiff's motion for, inter alia, partial summary judgment on her cause of action for replevin, ordered the return of the horse and the two living dogs, and dismissed all counterclaims. On appeal, County Court reversed City Court's order, finding triable issues of fact with respect to the cause of action for replevin and reinstating the counterclaims based on Lien Law § 183. Plaintiff contends on appeal to this Court that she was entitled to summary judgment dismissing those counterclaims, as well as summary judgment on her replevin cause of action and the return of the seized animals.

Addressing first Lien Law § 183, we note at the outset that defendants Royalton Equine Veterinary Services, P.C., and Best have abandoned their counterclaims based on that statute. With respect to Bailey's counterclaim based on section 183, we agree with plaintiff that County Court erred in determining that City Court improperly dismissed that counterclaim, and we therefore modify the order accordingly. Plaintiff established the inapplicability of Lien Law § 183 inasmuch as plaintiff did not have an agreement with Bailey for services rendered prior to the seizure of the animals (*see id.*), and Bailey failed to raise a triable issue of fact in opposition (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Plaintiff contends that the SPCA was required to bring a forfeiture action to divest her of ownership of the seized animals, and that its failure to do so renders her their rightful owner and entitles her to summary judgment on the cause of action for replevin. We reject that contention. The animals at issue were seized pursuant to a warrant because plaintiff was keeping them in unhealthful or unsanitary surroundings and was not properly caring for them (*see* Agriculture and Markets Law § 373 [2]). At that point, plaintiff had five days in which to redeem the animals before the SPCA was authorized to make the animals available for adoption (*see* § 374 [2]; *Montgomery County Socy. for Prevention of Cruelty to Animals v Bennett-Blue*, 255 AD2d 705, 706). Thus, contrary to plaintiff's contention, it was not necessary for the SPCA to bring a forfeiture action. Rather, it was plaintiff's burden on her motion to establish as a matter of law that she either redeemed the animals within the statutory redemption period or that she did not abandon them. She failed to meet that burden, and she therefore failed to establish as a matter of law that she was lawfully entitled to possess the animals or that defendants had unlawfully withheld them from her (*see* §§ 373 [2]; 374 [2], [6]; *see also Khoury v Khoury*, 78 AD3d 903, 904; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

285

CA 14-01485

PRESENT: SCUDDER, P.J., LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

SCOTT BOWMAN, PLAINTIFF-APPELLANT,

V ORDER

JEANETTE E. ZUMPANO, ET AL., DEFENDANTS,
KATHI WHEATLEY AND RANDY K. WHEATLEY,
DEFENDANTS-RESPONDENTS.

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

HISCOCK & BARCLAY, LLP, ALBANY (AUBREY A. ROMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered January 2, 2014. The order, among other things, granted the cross motion of defendants Kathi Wheatley and Randy K. Wheatley to dismiss the complaint against them.

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

305

CA 14-01590

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

LEONA JOHNSON, FORMERLY KNOWN AS LEONA BERL, AS PARENT AND NATURAL GUARDIAN OF ANTHONY JONES, AN INFANT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL GILES, DEFENDANT-RESPONDENT.

LIPSITZ & PONTERIO, LLC, BUFFALO (ZACHARY JAMES WOODS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (ROBERT M. SHADDOCK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered November 22, 2013. The order, insofar as appealed from, granted in part the motion of defendant for summary judgment by dismissing all claims for the period from October 1, 1995 through July 29, 1996.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries allegedly sustained by her infant child as a result of the child's exposure to hazardous lead paint conditions at a property owned by defendant. Defendant moved for summary judgment dismissing the complaint, and Supreme Court granted the motion in part by dismissing plaintiff's claims for the period from October 1, 1995, the date of plaintiff's first occupancy, through July 29, 1996, the date of a municipal inspection of the premises. We affirm.

"In order for a landlord to be held liable for a lead paint condition, it must be established that the landlord had actual or constructive notice of the hazardous condition and a reasonable opportunity to remedy it, but failed to do so" (*Spain v Holl*, 115 AD3d 1368, 1369; *see generally Chapman v Silber*, 97 NY2d 9, 19-20). A plaintiff can establish that the landlord had notice of a hazardous lead paint condition by showing that the landlord: "(1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment"

(*Chapman*, 97 NY2d at 15).

Here, we conclude that defendant met his initial burden of establishing that he did not have actual or constructive notice of a hazardous lead paint condition on the premises prior to an inspection conducted by the Monroe County Department of Health (MCDH) on July 29, 1996 (*see Spain*, 115 AD3d at 1369; *Stokely v Wright*, 111 AD3d 1382, 1382-1383; *cf. Watson v Priore*, 104 AD3d 1304, 1305-1306, *lv dismissed in part and denied in part* 21 NY3d 1052). Defendant testified during a deposition that he was not aware of any peeling or chipping paint on the premises prior to the inspection conducted by the MCDH, and that plaintiff never complained to him of any peeling or chipping paint. Plaintiff likewise testified that she did not recall any peeling or chipping paint on the premises.

We further conclude that plaintiff failed to raise a triable issue of fact in opposition (*see Spain*, 115 AD3d at 1369; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff did not challenge defendant's position that he did not have actual notice, but she contended that defendant should be charged with constructive notice because there was peeling or chipping paint in common areas. Although a landlord "is generally chargeable with notice of [a] dangerous condition[] which a reasonable inspection would have discovered" (*Wynn v T.R.I.P. Redevelopment Assoc.*, 296 AD2d 176, 181), plaintiff failed to present any evidence that the peeling or chipping paint here was " 'visible and apparent [or that] it . . . exist[ed] for a sufficient length of time' " to allow defendant to remedy it (*id.* at 182, quoting *Gordon v American Museum of Natural History*, 67 NY2d 836, 837). We reject plaintiff's contention that defendant should have been aware of the peeling or chipping paint based upon prior repairs that he had been required to make by the City of Rochester Department of Community Development (City) in another apartment in the building. The documents issued by the City concerning those repairs are vague and give no indication whether the repairs were to address the presence of lead paint in the apartment (*cf. Rodriguez v Amigo*, 244 AD2d 323, 324-325).

Plaintiff's further contention that defendant should have been aware of the peeling or chipping paint based upon his visits to the house is not properly before us inasmuch as it was raised for the first time on appeal (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

325

CAF 14-01382

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

IN THE MATTER OF JULIE WRAY JACOBSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KEITH H. WILKINSON,
RESPONDENT-RESPONDENT.

LAW OFFICES OF ANNETTE G. HASAPIDIS, SOUTH SALEM (ANNETTE G. HASAPIDIS OF COUNSEL), FOR PETITIONER-APPELLANT.

THE SAGE LAW FIRM GROUP, PLLC, BUFFALO (KATHRYN FRIEDMAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

ELISABETH M. COLUCCI, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered December 6, 2013 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the parties joint custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating ordering paragraphs one and six, awarding petitioner sole legal and primary physical custody of the subject child and vacating the phrases “mother’s house” and “father’s house” in the eighth ordering paragraph and substituting therefor the phrase “a neutral location,” and as modified the order is affirmed without costs.

Memorandum: Petitioner mother appeals from an order that, inter alia, granted the parties joint custody of their child, and denied the mother’s request to relocate with the child to California. We note at the outset that, inasmuch as respondent father did not timely perfect a cross appeal seeking affirmative relief, his cross appeal was deemed dismissed (*see* 22 NYCRR 1000.12 [b]; *Edgett v Clarelli*, 72 AD3d 1635, 1635).

We further note that this case involves an initial custody determination and “ ‘cannot properly be characterized as a relocation case to which the application of the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) need be strictly applied’ ” (*Matter of Quistorf v Levesque*, 117 AD3d 1456, 1456). A court may consider relocation as part of a best interests analysis with respect to a custody determination, but it is one factor among

many (*see id.* at 1457).

Upon weighing the appropriate factors (*see Matter of Wissink v Wissink*, 301 AD2d 36, 39-40), we conclude that Family Court's determination that the child's best interests would be served by awarding joint custody to the parties lacks a sound and substantial basis in the record (*see Matter of Shannon J. v Aaron P.*, 111 AD3d 829, 830). "[W]here, as here, domestic violence is alleged, 'the court must consider the effect of such domestic violence upon the best interests of the child' " (*Matter of Moreno v Cruz*, 24 AD3d 780, 781, *lv denied* 6 NY3d 712, quoting Domestic Relations Law § 240 [1]). We conclude that the evidence of the father's acts of domestic violence demonstrates that he "possesses a character [that] is ill-suited to the difficult task of providing [his] young child with moral and intellectual guidance" (*id.*), and that the best interests of the child are served by awarding the mother sole legal custody and primary physical custody, with visitation to the father. We therefore modify the order accordingly. We further conclude, however, that the court properly denied the mother's request to relocate with the child to California (*see generally Matter of Murphy v Peace*, 72 AD3d 1626, 1626-1627).

We reject the mother's contention that the court erred in fashioning the parenting schedule, and we discern no basis for disturbing it as a visitation schedule in light of the modification of custody. The schedule permits meaningful interaction between the child and both parents, which the court properly determined was in the child's best interests (*see Matter of Rought v Palidar*, 6 AD3d 1112, 1112). Nevertheless, we agree with the mother that the exchanges of the child should occur at neutral locations, and we therefore further modify the order accordingly.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

328

CA 14-00908

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

GARY CHAMBERLAIN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MAC TRAILER MANUFACTURING, INC., DEFENDANT,
MODERN DISPOSAL SERVICE, INC.,
DEFENDANT-RESPONDENT,
AND CUSTOM CANVAS MFG. CO., INC.,
DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (C. CHRISTOPHER BRIDGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, LANCASTER (BRADLEY D. MARBLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

CARTAFALSA, SLATTERY, TURPIN & LENOFF, BUFFALO (PHYLISS A. HAFNER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered January 14, 2014. The order denied the motion of defendant Custom Canvas Mfg. Co., Inc., for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant Custom Canvas Mfg. Co., Inc. in part and dismissing the second cause of action against that defendant insofar as it is based on an alleged manufacturing defect, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while opening the back door of a trailer owned by defendant Modern Disposal Service, Inc. According to plaintiff, his injuries were caused by a defect in a roll top canvas tarp that covered the trailer. The tarp was designed, manufactured and installed by defendant Custom Canvas Mfg. Co., Inc. (Custom Canvas). The complaint asserts two causes of action, for negligence and strict products liability, the latter of which alleges, in relevant part, that Custom Canvas defectively designed and manufactured the canvas tarp. Following discovery, Custom Canvas moved for summary judgment dismissing the complaint against it, and Supreme Court denied the motion. We now modify the order by granting the motion to the extent that it seeks dismissal of the strict products liability cause of

action based on an alleged manufacturing defect.

At the outset, we note that plaintiff did not oppose the motion insofar as it sought dismissal of the strict products liability cause of action based on an alleged manufacturing defect; instead, plaintiff's opposition was focused exclusively on the defective design theory. In any event, we conclude that Custom Canvas met its initial burden by establishing that the product was not defectively manufactured as a matter of law (*see Preston v Peter Luger Enters., Inc.*, 51 AD3d 1322, 1324; *McArdle v Navistar Intl. Corp.*, 293 AD2d 931, 932), and in response plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

With respect to the alleged design defect, Custom Canvas had the burden of establishing through the affidavit of a person with "qualifications, experience, or personal knowledge in the design, manufacture or use" of the product that the product "complied with all applicable industry standards" (*Wesp v Carl Zeiss, Inc.*, 11 AD3d 965, 967; *see Steinbarth v Otis El. Co.*, 269 AD2d 751, 752), and that the product was "reasonably safe for its intended use when it was manufactured" consistent with those industry standards (*Gian v Cincinnati Inc.*, 17 AD3d 1014, 1016). Here, Custom Canvas failed to meet its initial burden because it presented no evidence concerning the industry standard for the construction of roll top canvas tarps. Moreover, an expert's opinion concerning the safety of a product must be supported by facts, and the expert may not simply assert in conclusory fashion that the product was not defective (*see generally Romano v Stanley*, 90 NY2d 444, 451; *Wesp*, 11 AD3d at 967), and Custom Canvas' expert did not address plaintiff's theory that Custom Canvas negligently designed the tarp by using aluminum, rather than steel, tarp catchers. We thus conclude that the court properly denied Custom Canvas' motion insofar as it sought summary judgment dismissing both the strict products liability cause of action based on an alleged design defect and the negligence cause of action. Because Custom Canvas failed to make a "threshold showing" that its tarp was not negligently designed, we need not address its alternative contention that the tarp was substantially modified after it was distributed (*Hoover v New Holland North Am., Inc.*, 23 NY3d 41, 56).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

331

CA 14-01426

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

MELBA STEWART, FORMERLY KNOWN AS MELBA SADDLER,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

KENNETH G. DUNKLEMAN, JR., ALSO KNOWN AS K.G. DUNKLEMAN, JR., AND TOM GREENAUER DEVELOPMENT, INC.,
DEFENDANTS-APPELLANTS-RESPONDENTS.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (HOWARD E. BERGER OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

DOLCE PANEPINTO, P.C., BUFFALO (JOHN B. LICATA OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered June 30, 2014. The order denied the motion of defendants for summary judgment, granted the motion of plaintiff for leave to serve an amended bill of particulars and denied in part and granted in part the cross motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, plaintiff's motion is denied and her cross motion is denied in its entirety, defendants' motion is granted, and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained in a 2009 motor vehicle accident with a tractor trailer owned by defendant Tom Greenauer Development, Inc., and operated by defendant Kenneth G. Dunkleman, Jr., also known as K.G. Dunkleman, Jr. Defendants appeal, as limited by their notice of appeal, from those parts of an order granting plaintiff's motion for leave to serve an amended bill of particulars, granting plaintiff's cross motion for partial summary judgment on the issue of defendants' negligence, and denying defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury under Insurance Law § 5102 (d). Plaintiff cross-appeals from those parts of the order denying her cross motion insofar as it sought partial summary judgment on the issues of serious injury and proximate cause.

We agree with defendants on their appeal that Supreme Court abused its discretion in granting plaintiff's motion for leave to

serve an amended bill of particulars. Even assuming, arguendo, that we agree with plaintiff that the second bill of particulars that she served prior to the motion at issue was a supplemental bill of particulars rather than an amended bill of particulars (*cf. Jurkowski v Sheehan Mem. Hosp.*, 85 AD3d 1672, 1673-1674; *see generally* CPLR 3043 [b]), we note that she was nevertheless required to seek leave to serve the instant amended bill of particulars because the note of issue had been filed by defendants (*see* CPLR 3042 [b]). Thus, we conclude that she mistakenly relies on the principle that she "may amend [her] bill of particulars once as of course before the filing of the note of issue" (*Fields v Lambert Houses Redevelopment Corp.*, 105 AD3d 668, 671; *see* CPLR 3042 [b]). Furthermore, we note that, contrary to plaintiff's contention that the amendment was merely to correct an "oversight in the pleadings" that does not require leave of court to correct, "the allegation in the [proposed third] bill of particulars that the injuries allegedly sustained in the [2009] accident aggravated a prior condition presents a new theory not raised either in the complaint or in the original bill of particulars. Accordingly, the plaintiff was not entitled to serve the [proposed third] bill of particulars after the note of issue was filed without leave of the court" (*Barrera v City of New York*, 265 AD2d 516, 518).

"Leave to serve an amended bill of particulars should not be granted where a [note of issue] has been filed, except upon a showing of special and extraordinary circumstances" (*Sampson v Barber Salvage Co.*, 78 AD2d 977, 977; *cf. Glionna v Kubota, Ltd.*, 154 AD2d 920, 920). Although "delay alone is insufficient to deny a motion [for leave] to amend, when unexcused lateness is coupled with prejudice to the opposing party, denial of the motion is justified" (*Clark v MGM Textiles Indus., Inc.*, 18 AD3d 1006, 1006; *see Raymond v Ryken*, 98 AD3d 1265, 1266; *Phipps v Michalak*, 57 AD3d 1374, 1376). Furthermore, a court should decline to exercise its discretion where there has been a delay in seeking leave to amend and " 'all the facts which might form the basis of the [amended bill of particulars] . . . were or should have been known' " to plaintiff when the original bill of particulars was served (*Dawley v McCumber*, 45 AD3d 1399, 1400; *see generally Morris v Queens Long Is. Med. Group, P.C.*, 49 AD3d 827, 828-829; *Blake v Wieczorek*, 305 AD2d 989, 991).

We agree with defendants that plaintiff failed to make the requisite "showing of special and extraordinary circumstances" that would permit them to amend their bill of particulars after the note of issue was filed (*Sampson*, 78 AD2d at 977). In their demand for a bill of particulars, defendants asked that, if plaintiff was seeking to recover damages for the exacerbation of any preexisting injury, she state all such injuries and the manner in which they were aggravated. In the original bill of particulars, plaintiff indicated that she "[i]s not presently claiming aggravation of a pre[]existing injury," and in her "supplemental verified bill of particulars," she averred that she "sustained a neck injury before [the 2009] collision[, but she] is not claiming an exacerbation of this injury." Discovery was conducted, and plaintiff testified at her deposition that she was not seeking to recover damages for exacerbation of the cervical spine

injuries that she sustained in a 2000 motor vehicle accident. Plaintiff sought to amend the bill of particulars by adding a claim for exacerbation of the preexisting neck injury only after the note of issue was filed and defendants had moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

Thus, here there was an extended delay in moving for leave to amend inasmuch as the motion was made more than a year after the "supplemental" bill of particulars was served, plaintiff made no showing of good cause for that delay, and she was or should have been aware when the first and second bills of particulars were filed of the facts that form the basis of the proposed amended bill of particulars. Indeed, plaintiff specifically discussed those facts but disavowed any intention to seek recovery under such facts. Furthermore, defendants would be prejudiced by the proposed amendment because "[t]he amendment, if permitted, would require . . . defendants to reorient the defense strategy, as the plaintiff initially maintained that the [pre-2009] injuries were irrelevant to the instant action" (*Barrera*, 265 AD2d at 518). Finally, it is well settled that where, as here, a party moves for summary judgment, a "court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded in the complaint" as amplified by the bill of particulars (*Mezger v Wyndham Homes, Inc.*, 81 AD3d 795, 796; *see Ostrov v Rozbruch*, 91 AD3d 147, 154), and, as discussed above, plaintiff seeks to raise a new theory in opposition to the motion for summary judgment by her motion to amend the bill of particulars or, alternatively, to vacate the note of issue filed by defendants. Consequently, we agree with defendants that the court abused its discretion in granting plaintiff's motion insofar as it sought leave to serve an amended bill of particulars.

Next, we note that plaintiff contends that the court erred in refusing to grant the alternative relief sought in her motion, i.e., to vacate the note of issue so that leave to serve the amended bill of particulars would not be required (*see* CPLR 3042 [b]; *Fields*, 105 AD3d at 671). Plaintiff "is not aggrieved by [that part of the] order . . . and . . . , therefore, has no right to bring an appeal [from that part, but she] is entitled to raise an error made below, for review by the appellate court, as long as that error has been properly preserved and would, if corrected, support a judgment in [her] favor . . . Any such error is reviewable once[, as here,] the final . . . order has been properly appealed from by the losing party" (*Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 546). We conclude that the issue raised by plaintiff was properly preserved and would warrant a determination in her favor in the event that it had merit. Although we therefore consider her contention as an alternate ground for affirmance, we reject that contention. A party seeking to vacate a note of issue must make such a motion within 20 days after service thereof (*see* 22 NYCRR 202.21 [e]; *Sansone v Sansone*, 114 AD3d 748, 748), and plaintiff concedes on appeal that her motion was untimely. The court may consider an untimely motion upon a showing of good cause (*see* 22 NYCRR 202.21 [e]), but plaintiff failed to address that issue, and thus the court properly refused to vacate the note of issue.

We also agree with defendants that the court erred in denying their motion for summary judgment dismissing the complaint against them. In support of their motion, defendants submitted plaintiff's medical records, including records from her treating physician and the reports from numerous X rays, an MRI, and an expert medical opinion establishing that each of the injuries for which she sought recovery existed prior to the subject motor vehicle accident. With respect to a claim for a serious injury under all of the relevant threshold categories of Insurance Law § 5102 (d), where a defendant seeking summary judgment submits " 'persuasive evidence that plaintiff's alleged pain and injuries were related to a preexisting condition, plaintiff ha[s] the burden to come forward with evidence addressing defendant[s'] claimed lack of causation' " (*Mendola v Doubrava*, 99 AD3d 1247, 1248, quoting *Carrasco v Mendez*, 4 NY3d 566, 580; *see e.g. Hawkins v Bryant*, 101 AD3d 1613, 1614; *Hartman-Jweid v Overbaugh*, 70 AD3d 1399, 1400). Here, plaintiff failed to meet that burden.

Contrary to plaintiff's contention, she failed to raise an issue of fact whether she sustained a serious injury based upon her allegation that she sustained a ligamentous instability from the subject accident. Even assuming, arguendo, that the medical records and expert opinion upon which she relies were properly considered by the court, we note that her treating physician merely opined that a digital motion X ray report, which is not included in the record on appeal and was not submitted to the motion court, showed "evidence of an anterior listhesis at C2-3 and C3-4 in full flexion suggesting ligamentous instability of the posterior longitudinal ligament." Inasmuch as the expert never opined that plaintiff sustained such an injury or connected it to the accident at issue, there is no evidence addressing defendants' proof of lack of serious injury.

With respect to her contention that she exhibited muscle spasms as the result of the subject accident, plaintiff's "submissions are likewise insufficient to raise an issue of fact [inasmuch as] they are based upon plaintiff's subjective complaints of pain" (*Fisher v Hill*, 114 AD3d 1193, 1194, *lv denied* 23 NY3d 909; *see Levinson v Mollah*, 105 AD3d 644, 644; *Dantini v Cuffie*, 59 AD3d 490, 491, *lv denied* 13 NY3d 702), and plaintiff's submissions also failed to address the opinion of defendants' expert that plaintiff exhibited such spasms prior to the 2009 accident. Plaintiff's contention that the subject accident caused an annular tear is also insufficient to raise an issue of fact. Defendants' expert established that such annular tear existed and was shown, inter alia, on an MRI taken a year before the subject accident, and plaintiff's expert failed to address that showing.

We have considered the remaining contentions of the parties on appeal and cross appeal, and conclude that they are without merit, or are academic in light of our determination.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

335

CA 14-01705

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

JILL SAVAGE AND CRAIG SAVAGE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KAREN BROWN, TRACY BROWN,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RYON D. FLEMING OF COUNSEL), FOR DEFENDANT-APPELLANT KAREN BROWN.

CHELUS HERDZIK SPEYER & MONTE, P.C., BUFFALO (KATIE L. RENDA OF COUNSEL), FOR DEFENDANT-APPELLANT TRACY BROWN.

SCHNITTER CICCARELLI MILLS PLLC, EAST AMHERST (BRITTANY A. NASRADINAJ OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered April 15, 2014. The order, inter alia, denied the motions of defendants Karen Brown and Tracy Brown for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she was struck in the legs by a sled on property owned by defendants Karen Brown, Patrick Walsh and Holly Walsh (property owners). Defendant Tracy Brown, Karen’s daughter, was on the sled with another person when it struck plaintiff. With the consent of the property owners, Tracy held a birthday party for herself at the property and invited approximately 15 guests, including plaintiff, who were informed that people would be sledding at the party. At the time of the accident, plaintiff was standing on the side of the hill watching the sledding. Following joinder of issue and discovery, Tracy and the property owners moved separately for summary judgment dismissing the complaint against them based on the doctrine of assumption of the risk. The property owners contended in the alternative that they are entitled to immunity under General Obligations Law § 9-103. We conclude that Supreme Court erred in denying the motions.

It is well settled that, "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks [that] are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484; *see Larson v Cuba Rushford Cent. Sch. Dist.*, 78 AD3d 1687, 1687-1688). The doctrine does not, however, shield defendants from liability for exposing participants to unreasonably increased risks of injury (*see Sheehan v Hicksville Union Free Sch. Dist.*, 229 AD2d 1026, 1026). To establish the defense, "a defendant must show that [the] plaintiff was aware of the defective or dangerous condition and the resultant risk, although it is not necessary to demonstrate that [the] plaintiff foresaw the exact manner in which his [or her] injury occurred" (*Lamey v Foley*, 188 AD2d 157, 164, citing *Maddox v City of New York*, 66 NY2d 270, 278). As defendants correctly note, " '[i]n a suit against participants in [an applicable activity], a spectator generally will be held to have assumed the risks inherent in the [activity], including the specific risk of being struck' " (*Kreil v County of Niagara*, 8 AD3d 1001, 1002; *see Roberts v Boys & Girls Republic, Inc.*, 51 AD3d 246, 247-248, *affd* 10 NY3d 889; *Muller v Spencerport Cent. Sch. Dist.*, 55 AD3d 1388, 1388; *Procopio v Town of Saugerties*, 20 AD3d 860, 861, *lv denied* 5 NY3d 716). For instance, it has been held that a spectator at a baseball game assumes the risk of being struck by a foul ball (*see Koenig v Town of Huntington*, 10 AD3d 632, 632-633).

Here, we similarly conclude that, by standing on the side of the hill while watching other people sledding, plaintiff assumed the risk of being struck by a sled. Plaintiff testified at her deposition that she had been sledding earlier in the day, and that she knew that the sleds went "fast, very, very fast" on that hill. Moreover, earlier in the day plaintiff observed someone else at the party lose control of her sled and crash into a snow bank, and she saw a sled strike another person. Plaintiff's sole argument in opposition to the motions was that she did not assume the risk of being struck by a sled because she was standing off to the side of the hill in an area where sleds were unlikely to go. That argument, however, is belied by plaintiff's deposition testimony that the sled was going straight down the hill "until the very end," and that she did "not even have a split second to react."

In light of our determination that the motions must be granted based on the doctrine of assumption of the risk, we need not address the property owners' alternative contention that they are immune from liability under General Obligations Law § 9-103.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

377

CA 14-00739

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

CARLA L. MURA, NOW KNOWN AS CARLA L. PICCARRETO,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID JAMES MURA, DEFENDANT-RESPONDENT.

MARK CHAUVIN BEZINQUE AND
DONALD A. WHITE, RESPONDENTS.

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-APPELLANT.

MARK CHAUVIN BEZINQUE, ROCHESTER, RESPONDENT PRO SE.

DAVIDSON FINK LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR RESPONDENT DONALD A. WHITE.

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered July 22, 2013. The order, among other things, granted Mark Chauvin Bezinque, Esq., a charging lien against plaintiff and denied the cross motion of plaintiff to disgorge funds paid to Mark Chauvin Bezinque, Esq., and Donald A. White, Esq.

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

Memorandum: Plaintiff appeals from an order that, inter alia, granted the motion of her former attorney, nonparty respondent Mark Chauvin Bezinque, Esq., for a charging lien pursuant to Judiciary Law § 475, and denied her cross motion to disgorge funds paid to Bezinque and nonparty respondent Donald A. White, Esq., defendant's former attorney. We affirm.

Plaintiff and defendant were divorced in 1993. The judgment of divorce awarded plaintiff child support and ordered defendant to pay $25,226.72 in child support arrears that had accrued from the commencement of the divorce action through entry of the judgment. For 16 years, the child support obligation was not enforced. In April 2011, plaintiff hired Bezinque to recover the accumulated child support arrears that, with interest, totaled $549,403.62 as of September 2011. At the time, defendant owned real property in Ontario County, and the judgment of divorce was filed in Monroe County. Bezinque filed the judgment in Ontario County and commenced actions in both Ontario County and Monroe County to restrain the sale of the

Ontario property. While those proceedings were ongoing, defendant sold the property in violation of a court order. Upon Bezinque's motion, defendant's share of the proceeds from the sale of the home was placed in escrow "in anticipation of a final judgment for unpaid child support" (hereafter, escrowed funds). In July 2012, the court awarded interim attorney's fees to White and Bezinque to be paid from the escrowed funds. No appeal was taken from that order. Bezinque referred plaintiff to another law firm for the preparation of executions and levies against the escrowed funds held by defendant's then attorneys, and requested payment of the outstanding balance of his legal fees from those funds. Plaintiff did not respond to that request. Bezinque thereafter moved by order to show cause seeking, inter alia, a charging lien pursuant to Judiciary Law § 475 against the escrowed funds sufficient to cover his outstanding fees. Plaintiff opposed Bezinque's motion and cross-moved for an order directing Bezinque and White to return the counsel fees they received pursuant to the interim order.

Under the common law, "the attorney's lien 'was a device invented by the courts for the protection of attorneys against the knavery of their clients, by disabling clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained' " (*Banque Indosuez v Sopwith Holdings Corp.*, 98 NY2d 34, 38, *rearg denied* 98 NY2d 693, quoting *Goodrich v McDonald*, 112 NY 157, 163). Judiciary Law § 475 "codifies and extends the common-law charging lien" (*Cataldo v Budget Rent A Car Corp.*, 226 AD2d 574, 574, *lv dismissed* 88 NY2d 1017, *lv denied* 89 NY2d 811; *see Banque Indosuez*, 98 NY2d at 37; *Robinson v Rogers*, 237 NY 467, 471), by providing an attorney with "*a lien upon his or her client's cause of action, claim or counterclaim*, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, *and the proceeds thereof in whatever hands they may come*" (§ 475 [emphases added]). The statute is remedial in nature and therefore must "be construed liberally in aid of the object sought by the [L]egislature, which was to furnish security to attorneys by giving them a lien upon the subject of the action" (*Fischer-Hansen v Brooklyn Hgts. R.R. Co.*, 173 NY 492, 499; *see Robinson*, 237 NY at 471-472; *Morgan v H.P. Drewry, S. A. R. L.*, 285 App Div 1, 4). "The lien comes into existence, without notice or filing, upon commencement of the action or proceeding," and "gives the attorney an equitable ownership interest in the client's cause of action" (*LMWT Realty Corp. v Davis Agency*, 85 NY2d 462, 467).

The only exception contained in the statute is for proceedings before "a department of labor" (Judiciary Law § 475). In addition to that statutory exception, the Court of Appeals has held that, as a matter of public policy, a charging lien may not attach to an award of alimony or maintenance (*see Turner v Woolworth*, 221 NY 425, 429-430; *see also Matter of Balanoff v Niosi*, 16 AD3d 53, 63; *Cohen v Cohen*, 160 AD2d 571, 572; *Theroux v Theroux*, 145 AD2d 625, 627). Plaintiff contends that child support awards should likewise be immune from attachment under Judiciary Law § 475, relying solely on *Shipman v City of N.Y. Support Collection Unit* (183 Misc 2d 478, 485). Contrary to plaintiff's characterization, the funds at issue are not a "child

support award" or "child support arrears." Rather, the escrowed funds constitute defendant's share of the net proceeds of the sale of his residence and, as the trial court recognized, "[t]here has been no determination [as to] what amount of the house sale proceeds are necessary to pay any child support arrears owed by [defendant]." In any event, we note that no New York appellate court has cited *Shipman* for the proposition relied upon by plaintiff, i.e., that child support awards are categorically excluded from an attorney's charging lien, and we conclude that *Shipman* is unpersuasive, particularly in the context of this case. Even assuming, arguendo, that there is a general public policy precluding the enforcement of a charging lien upon a child support award, we conclude that such a policy is not implicated under the unique circumstances of this case. In *Turner*, the Court of Appeals reasoned that alimony was beyond the reach of an attorney's lien because "[t]he purpose of alimony is support," and "[e]quity, which creates the fund, will not suffer its purpose to be nullified" (211 NY at 429-430). The purpose of child support, of course, is "to assist a custodial parent in providing the child with shelter, food and clothing" (*Rubin v Della Salla*, 107 AD3d 60, 70). Here, plaintiff did not seek to enforce the 16-year-old support obligation until the parties' children, who were the intended beneficiaries of the support, were either emancipated or nearly emancipated. This is therefore not a situation in which the enforcement of a lien pursuant to Judiciary Law § 475 will result in the depletion of monies necessary for the ongoing support of a minor child or children (*see Shipman*, 183 Misc 2d at 487).

Contrary to the further contention of plaintiff, we conclude that Bezinque's application for a charging lien was not jurisdictionally defective. "Where[, as here,] there has been substantial compliance with the matrimonial rules, an attorney will be allowed to recover the fees owed for services rendered, but not yet paid for" (*Daniele v Puntillo*, 97 AD3d 512, 513, *lv denied* 20 NY3d 851 [internal quotation marks omitted]). Plaintiff's further challenge to the alleged factual insufficiency of the application is not properly before us inasmuch as it is raised for the first time on appeal (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, we conclude that Bezinque established his prima facie entitlement to a charging lien in the amount of $30,545.91 by submitting, inter alia, his most recent billing statement and an affirmation in which he averred that he sent monthly billing statements to plaintiff, that plaintiff never raised an objection to those statements, and that she "repeatedly and persistently promised payment out of the proceeds of this litigation" (*see Wasserman v Wasserman*, 119 AD3d 932, 934).

We further conclude that the court properly denied plaintiff's cross motion for disgorgement of funds paid to Bezinque and White. As discussed above, the funds from which Bezinque and White were paid in 2012 did not constitute "child support." Moreover, the interim fee award was made upon plaintiff's motion, and no appeal was taken from that order (*see generally Vassilakos v Vassilakos*, 204 AD2d 1074, 1074). In any event, we agree with the court that plaintiff provided no factual or legal basis to support the equitable remedy of disgorgement (*see generally Law Off. of Sheldon Eisenberger v Blisko*,

106 AD3d 650, 652).

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

378

CA 14-00656

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

VIOLET REALTY, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GERSTER SALES & SERVICE, INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

HISCOCK & BARCLAY, LLP, BUFFALO (MICHAEL E. FERDMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (SEAN J. MACKENZIE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered August 13, 2013. The order, insofar as appealed from, granted that part of the motion of defendant seeking summary judgment dismissing the first cause of action for fraudulent inducement.

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

Same memorandum as in *Violet Realty, Inc. v Gerster Sales & Serv., Inc*. ([appeal No. 2] ___ AD3d ___ [May 1, 2015]).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

379

CA 14-01334

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

VIOLET REALTY, INC.,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

GERSTER SALES & SERVICE, INC.,
DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

HISCOCK & BARCLAY, LLP, BUFFALO (MICHAEL E. FERDMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

MAGAVERN MAGAVERN GRIMM, LLP, NIAGARA FALLS (SEAN J. MACKENZIE OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered July 18, 2014. The order, inter alia, denied the motion of plaintiff for leave to renew, and denied the cross motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the cross motion, dismissing the complaint in its entirety, and granting defendant judgment on its counterclaim, and as modified the order is affirmed without costs.

Memorandum: In October 2010, plaintiff and defendant entered into a contract pursuant to which defendant sold and installed a boiler at a commercial property owned by plaintiff. When plaintiff discovered that the boiler was not producing the energy savings anticipated at the time the contract was entered, it ceased payments under the contract and commenced this action, alleging causes of action for fraudulent inducement, breach of warranty, and breach of contract. By the order in appeal No. 1, Supreme Court, inter alia, granted that part of defendant's motion seeking summary judgment dismissing the fraudulent inducement cause of action and denied plaintiff's cross motion for leave to amend the complaint. By the order at issue in appeal No. 2, the court, inter alia, denied plaintiff's motion for leave to renew with respect to the motion and cross motion at issue in appeal No. 1 and denied defendant's cross motion for summary judgment dismissing plaintiff's remaining causes of action and for summary judgment on its counterclaim.

In appeal No. 1, plaintiff contends that the court erred in

granting that part of defendant's motion for summary judgment dismissing the fraudulent inducement cause of action. We reject that contention. To meet its initial burden, defendant was required to demonstrate that it did not make a " 'material representation, known to be false, made with the intention of inducing reliance, upon which [plaintiff] actually relie[d], consequently sustaining a detriment' " (*Wright v Selle*, 27 AD3d 1065, 1067). Defendant may also meet its initial burden by demonstrating that its statements were "opinion or predictions of something which it is hoped or expected will occur in the future" (*Koagel v Ryan Homes*, 167 AD2d 822, 822; *see American Food & Vending Corp. v International Bus. Machs. Corp.*, 245 AD2d 1089, 1090, *lv dismissed* 91 NY2d 956). Here, defendant established that it provided plaintiff with mere predictive estimates of cost savings from the new boiler. Plaintiff failed to meet its burden of raising an issue of fact with respect thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562), and plaintiff has not appealed from that part of the order denying its cross motion for leave to amend the complaint to replead that cause of action. Plaintiff's contention that defendant's alleged misrepresentations are more than mere opinion, in part because plaintiff allegedly relied upon defendant's special knowledge, is raised for the first time on appeal and thus is not properly before us (*see generally Accadia Site Contr., Inc. v Erie County Water Auth.*, 115 AD3d 1351, 1351).

We reject plaintiff's contention in appeal No. 2 that the court erred in denying that part of its motion for leave to renew with respect to defendant's motion in appeal No. 1 inasmuch as plaintiff's submissions on that motion were " 'merely cumulative' " of its submissions in opposition to the original motion (*Giangrosso v Kummer Dev. Corp.*, 16 AD3d 1094, 1094), and thus leave to renew was not warranted (*see Matter of Orange & Rockland Util. v Assessor of Town of Haverstraw*, 304 AD2d 668, 669). We further conclude that the court properly denied that part of its motion for leave to renew with respect to its cross motion in appeal No. 1. "Even assuming, arguendo, that plaintiff offered new facts in support of [that part of its] motion for leave to renew, we conclude that those 'new facts not offered on the prior [cross] motion . . . would [not] change the prior determination' " (*Chiappone v William Penn Life Ins. Co. of N.Y.*, 96 AD3d 1627, 1628, quoting CPLR 2221 [e] [2]).

Finally, we agree with defendant in appeal No. 2 that the court erred in denying its cross motion for summary judgment dismissing the remaining causes of action, for breach of warranty and breach of contract, and for summary judgment on its counterclaim for breach of contract. We therefore modify the order in appeal No. 2 accordingly. Defendant met its initial burden by establishing the existence of a valid contract and that producing energy savings was not a requirement of that contract, and thus that there was no breach of that contract or the warranty provisions therein. Defendant also established that plaintiff breached the contract by failing to pay the balance due (*see Resetarits Constr. Corp. v Elizabeth Pierce Olmsted, M.D. Ctr. for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1455). In opposition, plaintiff failed to meet its burden of raising an issue of fact to defeat the cross motion (*see generally Zuckerman*, 49 NY2d at

562). Plaintiff's contention that the court properly denied the cross motion is based on new theories of liability that were raised for the first time in opposition to defendant's cross motion, and thus those theories of liability may not be considered to defeat the cross motion (*see McGrath v Bruce Bldrs., Inc.*, 38 AD3d 1278, 1278-1279; *Marchetti v East Rochester Cent. Sch. Dist.*, 26 AD3d 881, 881).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

386

KA 08-00886

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAZARUS CLYBURN-DAWSON, DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered February 27, 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 [3] [felony murder]). We reject defendant's contention that the evidence is legally insufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in the light most favorable to the People, as we must in the context of a legal sufficiency analysis (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to establish that defendant forcibly stole marihuana from the victim and that, during the course and commission of that robbery, he shot the victim to death. We reject defendant's further contention that County Court erred in refusing to suppress his statements to the police (*see People v Gutierrez*, 96 AD3d 1455, 1455, *lv denied* 19 NY3d 997). Even assuming, arguendo, that the police misled defendant by the representation that one of the investigators had been "trained in the mental health field," we conclude that such deception did not "create a substantial risk that the defendant might falsely incriminate himself" (*People v Alexander*, 51 AD3d 1380, 1382, *lv denied* 11 NY3d 733 [internal quotation marks omitted]), and it cannot be said that the alleged deception was " 'so fundamentally unfair as to deny [defendant] due process' " (*People v Brown*, 39 AD3d 886, 887, *lv denied* 9 NY3d 873, quoting *People v Tarsia*, 50 NY2d 1, 11). We likewise conclude that the circumstances and length of defendant's detention and questioning, spanning a period of approximately eight hours, did not render defendant's statement involuntary (*see People v*

McWilliams, 48 AD3d 1266, 1267, *lv denied* 10 NY3d 961).

Contrary to defendant's further contention, the court did not err in refusing to charge the jury with respect to the voluntariness of defendant's statements to the police. Such a charge is required only if defendant raises the issue of voluntariness at trial "by a proper objection, and evidence sufficient to raise a factual dispute [is] adduced either by direct [examination] or cross-examination" (*People v Cefaro*, 23 NY2d 283, 288-289; *see People v Medina*, 93 AD3d 459, 460, *lv denied* 19 NY3d 999). Because defendant did not submit any evidence presenting a genuine issue of fact concerning the voluntariness of his statements, the court was not required to instruct the jury on that issue (*see People v Canfield*, 111 AD3d 1396, 1396, *lv denied* 22 NY3d 1087; *People v Nathan*, 108 AD3d 1077, 1078, *lv denied* 23 NY3d 966).

Defendant failed to preserve his contention that one of the People's witnesses improperly referred to a written statement of an eyewitness to the crime (*see* CPL 470.05 [2]). In any event, the court properly permitted the People to elicit, during the testimony of a police investigator, that an eyewitness to the crime made a written statement, the contents of which were not revealed to the jury, and that the statement was shown to defendant during interrogation. The investigator did not testify that the out-of-court statement led him to arrest defendant. Rather, the investigator merely conveyed the circumstances under which defendant's own statement was given to the police (*see People v Gonzalez*, 249 AD2d 24, 24, *lv denied* 92 NY2d 1049). To the extent that defendant contends that defense counsel was ineffective in eliciting testimony about the written statement, we conclude that the record establishes that defense counsel pursued a legitimate strategy of implicating the party that had given the written statement as "the shooter." Thus, defendant failed to meet his burden of demonstrating " 'the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" with respect to the written statement (*People v Benevento*, 91 NY2d 708, 712; *see People v Loret*, 56 AD3d 1283, 1283, *lv denied* 11 NY3d 927).

Defendant failed to preserve his contention with respect to the admissibility of the photographs marked as People's exhibits Nos. 37 and 39 (*see* CPL 470.05 [2]). Although defense counsel initially objected to the admission of the photographs in evidence on the ground that the People had established no evidentiary foundation for them, no further objection was made after the People established a proper foundation. We reject defendant's further contention that the court erred in admitting in evidence the photograph marked as People's exhibit No. 40 because it was irrelevant and without foundation, and constituted an improper reenactment of the crime. We conclude that the court did not abuse its discretion in admitting the photograph as demonstrative evidence (*see People v Gorham*, 72 AD3d 1108, 1110, *lv denied* 15 NY3d 773). The photograph clarified other relevant evidence and corroborated the testimony of other witnesses (*see People v D'Lucca*, 243 AD2d 487, 488, *lv denied* 91 NY2d 872). Furthermore, any difference between the photograph and the circumstances under which the shooting occurred went to the question of weight rather than

admissibility (*see People v Davis*, 10 AD3d 583, 583, *lv denied* 4 NY3d 743).

Finally, defendant's sentence is not unduly harsh or severe.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

414

KA 13-01710

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL JUNE, DEFENDANT-APPELLANT.

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

MICHAEL JUNE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered April 15, 2013. 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]). In 2003, defendant was previously convicted, also upon his plea of guilty, of two counts of robbery in the first degree (§ 160.15 [2]), and one count of robbery in the second degree (§ 160.10 [2] [b]). This Court affirmed the prior judgment (*People v June*, 30 AD3d 1016, *lv denied* 7 NY3d 813, *reconsideration denied* 7 NY3d 868). After defendant was released on parole, his parole officer discovered during a routine home visit that defendant had violated multiple conditions of his parole. As a result of the multiple parole violations, the parole officer and her partner conducted a more thorough search of defendant's bedroom, and they ultimately discovered a handgun on defendant's bookshelf.

We reject defendant's contention that County Court erred in sentencing him as a second violent felony offender, inasmuch as he failed to meet his burden of establishing that his prior felony convictions were obtained unconstitutionally (*see* CPL 400.21 [7] [b]; *People v Harris*, 61 NY2d 9, 15). Defendant's constitutional challenges to his prior convictions have previously been litigated and were rejected on his direct appeal as well as in his numerous attempts at securing postconviction relief pursuant to CPL article 440 (*see*

e.g. June, 30 AD3d at 1017).

We also reject defendant's contention in his main and pro se supplemental briefs that the court erred in refusing to suppress the handgun recovered from his bedroom by the parole officers. It is well settled that a parole officer may conduct a warrantless search where, as here, " 'the conduct of the parole officer was rationally and reasonably related to the performance of the parole officer's duty' " (*People v Nappi*, 83 AD3d 1592, 1593, *lv denied* 17 NY3d 820, quoting *People v Huntley*, 43 NY2d 175, 181; *see People v Davis*, 101 AD3d 1778, 1779, *lv denied* 20 NY3d 1060; *People v Johnson*, 94 AD3d 1529, 1531-1532, *lv denied* 19 NY3d 974). As previously noted herein, the parole officers discovered multiple parole violations during a routine home visit, and they found the handgun after intensifying their search based on the increasing number of parole violations, some of which were indicative of the presence of contraband.

Contrary to defendant's contention in his pro se supplemental brief, we conclude that defendant's plea was knowingly, intelligently, and voluntarily entered, despite the fact that he was not specifically informed of a condition of his parole. Based on our review of the colloquy, we conclude that the court made " 'sure [that defendant] ha[d] full understanding of what the plea connot[ed] and of its consequence[s]' " (*Harris*, 61 NY2d at 19; *see People v Catu*, 4 NY3d 242, 244-245). Finally, we reject defendant's contention that he was deprived of effective assistance of counsel with regard to his motion to withdraw his guilty plea. Defense counsel "was under no obligation to amplify defendant's unsupported assertions" (*People v Castro*, 242 AD2d 445, 445, *lv denied* 90 NY2d 1010), and the record establishes that defense counsel's statements regarding the motion were not adverse to defendant (*see People v Wester*, 82 AD3d 1677, 1678, *lv denied* 17 NY3d 803). In any event, "even if defendant is correct that the statements were adverse to him, the record conclusively establishes that [County] Court's 'rejection of [the] motion was not influenced by' those statements" (*id.*).

We have considered defendant's remaining contention and conclude that it is without merit.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

431

TP 14-00414

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

IN THE MATTER OF NATHANIEL JAY, PETITIONER,

V ORDER

HAROLD GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, AND MICHAEL J. OUIMETTE, LIEUTENANT, RESPONDENTS.

NATHANIEL JAY, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered February 28, 2014) to review a determination of respondents. The determination found after a tier II hearing that petitioner had violated various inmate rules.

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

432

KA 11-00418

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRENTON A. COOK, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered January 5, 2011. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a controlled substance in the seventh degree.

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

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03), defendant contends that the evidence is legally insufficient to establish that he possessed cocaine. We reject that contention. The evidence at trial established that two police officers observed defendant walk to the rear of a house and remove a sandwich-sized plastic bag from under the siding. One officer observed defendant remove at least one smaller bag from the larger bag, and defendant then replaced the larger bag under the siding. The officers retrieved the bag, which contained 11 smaller bags of a white substance that tested positive for cocaine. We therefore conclude that there is a "valid line of reasoning and permissible inferences" from which County Court, in this nonjury trial, could find that defendant knowingly possessed cocaine (*People v Bleakley*, 69 NY2d 490, 495; *see People v Sierra*, 45 NY2d 56, 59-60).

Furthermore, viewing the evidence in light of the elements of the crime in this nonjury trial (*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 Bleakley*, 69 NY2d at 495). Issues of credibility and the weight to be accorded to the evidence presented are primarily to be determined by the factfinder (*see People v McCoy*, 100 AD3d 1422, 1422), and we perceive no reason to disturb

the court’s resolution of those issues.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

433

KA 12-01988

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID KITCHING, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered January 24, 2012. The judgment convicted defendant, upon his plea of guilty, of gang 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 gang assault in the second degree (Penal Law § 120.06), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. Although we agree with defendant that the waiver of the right to appeal is invalid because the perfunctory inquiry made by County Court was "insufficient to establish that the court 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767; *see People v Jones*, 107 AD3d 1589, 1589-1590, *lv denied* 21 NY3d 1075), we nevertheless conclude that the sentence is not unduly harsh or severe. "[T]he fact that . . . the codefendants received lesser sentences [is not germane because] the circumstances surrounding the sentencing of each were different" (*People v Purcell*, 8 AD3d 821, 822; *see People v Prial*, 118 AD3d 1498, 1499, *lv denied* 24 NY3d 963).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

434

KA 13-01647

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL E. HAUG, 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 (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 30, 2013. The judgment convicted defendant, upon his plea of guilty, of vehicular assault in the first degree and driving while intoxicated, a misdemeanor.

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, vehicular assault in the first degree (Penal Law § 120.04 [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 encompasses his challenge to the severity of the sentence (*see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

436

KA 13-02247

PRESENT: SCUDDER, P.J., PERADOTTO, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STACEY CASTOR, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Joseph E. Fahey, J.), dated December 5, 2013. The order denied the motion of defendant pursuant to CPL 440.10.

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

Memorandum: Defendant appeals from an order denying her motion pursuant to CPL 440.10 seeking to vacate the judgment convicting her of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), in connection with the murder of her husband (decedent) by antifreeze poisoning, and attempted murder in the second degree (§§ 110.00, 125.25 [1]), in connection with the attempted murder of her daughter by poisoning by prescription medication and alcohol. Defendant moved to vacate the judgment pursuant to CPL 440.10 (1) on the ground that her indelible right to counsel attached when the attorney she hired to probate decedent's purported will communicated with police with respect to the request that defendant and her daughters provide their fingerprints as part of the investigation of decedent's death, which was believed to be a suicide. Defendant alleged that the attorney therefore "entered" the investigation of decedent's death and thus that her indelible right to counsel attached (*see People v Grice*, 100 NY2d 318, 320-321). Defendant therefore alleged that a statement she made to police two years later was taken in violation of her right to counsel and should have been suppressed, and that the admission of the statement at trial was not harmless error.

On a prior appeal, we concluded that County Court erred in summarily denying the motion, and we reversed the order and remitted the matter for a hearing on the issue whether the attorney represented defendant in connection with a criminal investigation, or solely with

respect to the civil matter regarding decedent's estate (*People v Castor*, 99 AD3d 1177, 1183, *lv denied* 20 NY3d 1010). We conclude that the court properly determined, following the hearing on remittal, that defendant failed to meet her burden of establishing that her indelible right to counsel attached when counsel for decedent's estate spoke to the police (*see generally People v Augustine*, 89 AD3d 1238, 1239-1240, *affd* 21 NY3d 949).

The evidence established that defendant was the personal representative of the estate (*see Castor v Pulaski*, 117 AD3d 1552, 1553-1554), and that the attorney's representation of her was only with respect to her role as personal representative of the estate. The attorney testified that at no time did he know that defendant was a suspect in decedent's death, which he believed to have been a suicide; that he identified himself as the attorney for decedent's estate in his communications with the police; and that he would not have given defendant advice related to a criminal investigation because to do so would be a conflict of interest with his role as the attorney for the estate. It is well established that, although "an attorney-client relationship formed in one criminal matter may sometimes bar questioning in another matter in the absence of counsel . . . , a relationship formed in a civil matter is not entitled to the same deference" (*People v Lewie*, 17 NY3d 348, 361; *see People v Foster*, 72 AD3d 1652, 1653-1654, *lv dismissed* 15 NY3d 750).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

437

KA 12-01834

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUENTIN J. HICKS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered February 27, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted conspiracy in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted conspiracy in the second degree (Penal Law §§ 110.00, 105.15). Contrary to defendant's contention, the waiver of the right to appeal was knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256; *People v Rios*, 93 AD3d 1349, 1349, *lv denied* 19 NY3d 966; *People v Wackwitz*, 93 AD3d 1220, 1220-1221, *lv denied* 19 NY3d 868). Defendant further contends that the plea was not knowing, voluntary, and intelligent because he did not admit that he intended to kill the victim. That contention is actually a challenge to the factual sufficiency of the plea allocution, which is encompassed by the valid waiver of the right to appeal (*see People v Schmidli*, 118 AD3d 1491, 1491, *lv denied* 23 NY3d 1067; *People v Gardner*, 101 AD3d 1634, 1634; *Rios*, 93 AD3d at 1349). In any event, defendant also failed to preserve his contention for our review by failing to move to withdraw the plea or vacate the judgment of conviction on that ground (*see People v Lugg*, 108 AD3d 1074, 1075; *Gardner*, 101 AD3d at 1634).

Defendant failed to preserve for our review his contention that County Court improperly delegated its duty to conduct the plea allocution to defense counsel (*see People v Swontek* [appeal No. 1], 289 AD2d 989, 989, *lv denied* 97 NY2d 762). In any event, that contention and defendant's related contention that his right to counsel was violated are without merit (*see People v Rossborough*, 105 AD3d 1332, 1334, *lv denied* 21 NY3d 1045). Finally, the waiver of the

right to appeal encompasses defendant's contention that the sentence is unduly harsh and severe (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

438

KA 14-01022

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A.C., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MICHAEL A.C., DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered January 14, 2014. Defendant was adjudicated a youthful offender upon his plea of guilty of robbery in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Michael A.C.* ([appeal No. 2] ___ AD3d ___ [May 1, 2015]).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

439

KA 14-01023

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A.C., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MICHAEL A.C., DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered January 14, 2014. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals pro se from a youthful offender adjudication based upon his plea of guilty of robbery in the third degree (Penal Law § 160.05) and, in appeal No. 2, he appeals pro se from a judgment convicting him upon his plea of guilty of assault in the second degree (§ 120.05 [4]). Defendant does not raise any contentions with respect to the adjudication in appeal No. 1, and we therefore dismiss the appeal therefrom (*see generally People v Scholz*, 125 AD3d 1492, 1492).

Defendant contends in appeal No. 2 that Supreme Court was required to determine his eligibility for youthful offender status with respect to his conviction of assault in the second degree and erred in failing to do so. "[E]ligibility for youthful offender status is met at the time of conviction, not at the time of sentencing" (*People v Ramirez*, 115 AD3d 992, 993; *see People v Cecil Z.*, 57 NY2d 899, 901) and, because defendant had not yet been adjudicated a youthful offender on the robbery charge at the time of his guilty plea to the assault charge, he was an eligible youth with respect to both charges (*cf.* CPL 720.10 [2] [c]). Thus, contrary to the People's contention, the court was required to make a youthful offender determination at sentencing with respect to the assault conviction (*see* CPL 720.20 [1]; *People v Rudolph*, 21 NY3d 497, 501). Nevertheless, the record belies defendant's contention that the court failed to determine whether he was eligible for youthful offender

status (*cf. People v Brownell*, 109 AD3d 1172, 1173), and we conclude that the court did not abuse its discretion in refusing to grant defendant youthful offender status in appeal No. 2 (*see People v Guppy*, 92 AD3d 1243, 1243, *lv denied* 19 NY3d 961; *People v Potter*, 13 AD3d 1191, 1191, *lv denied* 4 NY3d 889). Defendant's adjudication as a youthful offender with respect to the robbery conviction in appeal No. 1 did not require that he be adjudicated a youthful offender with respect to the assault conviction where, as here, the robbery and assault charges were not set forth in separate counts of a single accusatory instrument or in two or more accusatory instruments consolidated for trial purposes (*see People v Shaquille Mc.*, 115 AD3d 772, 773; *cf.* CPL 720.20 [2]; *People v Cory T.*, 59 AD3d 1063, 1064).

We have considered defendant's contention in appeal No. 2 with respect to the sentence and conclude that it is without merit.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

442

CA 14-01751

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

JEFFREY CONSTANTINE, M.D.,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

STELLA MARIS INSURANCE COMPANY, LTD., CATHOLIC HEALTH EAST, CATHOLIC HEALTH SYSTEM, DOING BUSINESS AS SISTERS OF CHARITY HOSPITAL,
DEFENDANTS-APPELLANTS-RESPONDENTS,
MARY SERIO AND NICHOLAS SERIO, AS PARENTS AND NATURAL GUARDIANS OF NICOLE SERIO, AN INFANT,
DEFENDANTS-RESPONDENTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (KENNETH A. MANNING OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT STELLA MARIS INSURANCE COMPANY, LTD.

ZDARSKY, SAWICKI & AGOSTINELLI, LLP, BUFFALO (DAVID E. GUTOWSKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS CATHOLIC HEALTH EAST AND CATHOLIC HEALTH SYSTEM, DOING BUSINESS AS SISTERS OF CHARITY HOSPITAL.

THE TARANTINO LAW FIRM, LLP, BUFFALO (TAMSIN J. HAGER OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM A. QUINLAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeals and cross appeals from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered January 10, 2014. The order denied the respective motions and cross motion of the parties for summary judgment.

It is hereby ORDERED that said cross appeal by defendants Mary Serio and Nicholas Serio is unanimously dismissed and the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking a declaration that he is a "covered person" under a liability policy issued by defendant Stella Maris Insurance Company, Ltd. (SMI). As we explained in a prior appeal (*Constantine v Stella Maris Ins. Co., Ltd.*, 97 AD3d 1129), "SMI is a single-parent captive insurance company doing business in the Cayman Islands. Its sole shareholder, [defendant] Catholic Health East (CHE), a not-for-profit Pennsylvania corporation . . . , has a joint operating agreement with [defendant]

Catholic Health System, [doing business as Sisters of Charity Hospital (hereafter, Sisters Hospital)] . . . in Buffalo. CHE and its affiliates, including [CHS] and, in turn, Sisters Hospital, are named as 'covered persons' in the professional liability policy issued by SMI to CHE. In the underlying medical malpractice action, defendant Nicholas Serio alleges medical malpractice by, inter alia, plaintiff in connection with the birth of his daughter at Sisters Hospital. Plaintiff commenced this action seeking a declaration that SMI is obligated to indemnify him in connection with the underlying medical malpractice action" (*id.* at 1130).

SMI moved for summary judgment dismissing the complaint against it, alleging that plaintiff failed to provide timely notice pursuant to the provisions of the policy and that plaintiff is not a covered person under the policy because he was not employed by Sisters Hospital and he was not acting under his contract as an on-call physician when he was the attending physician at the labor and delivery. Plaintiff cross-moved for summary judgment with respect to the declaration sought in the complaint, asserting that the policy is ambiguous and must therefore be construed against SMI. Defendants Mary Serio and Nicholas Serio supported plaintiff's cross motion. CHE and Sisters Hospital moved for summary judgment dismissing the complaint and all cross claims against them on the ground that they are not insurers and thus there is no justiciable controversy between plaintiff and them. Supreme Court denied the respective motions and cross motion. SMI, CHE and Sisters Hospital appealed, and plaintiff cross-appealed. As a preliminary matter, we note that, although Mary Serio and Nicholas Serio also cross-appealed, they are not aggrieved by the order and thus their cross appeal is dismissed (*see* CPLR 5511).

We also note as a preliminary matter that the policy provides that its provisions are to be governed by Pennsylvania law. In addition, SMI contends that this declaratory judgment action is premature because the indemnification policy provides that no action shall lie against it until liability is established by judgment or settlement and, here, plaintiff's liability has not been determined in the underlying medical malpractice action. We agree with plaintiff that Pennsylvania law permits a declaratory judgment action regarding insurance coverage prior to a determination of liability (*see Foster v Mutual Fire, Marine & Inland Ins. Co.*, 154 Pa Commw 356, 360-361, 623 A2d 928, 930, *affd sub nom. Maleski v Evanston Ins. Co.,* 535 Pa 516, 636 A2d 627; *see also Eureka Fed. Sav. & Loan Assn. v American Cas. Co. of Reading, Pa.*, 873 F2d 229, 231 [9th Cir 1989]).

We reject the contention of CHE and Sisters Hospital that the court erred in denying their motion for summary judgment dismissing the complaint and cross claims against them. It is undisputed that CHE and Sisters Hospital are insured as covered persons by SMI. Inasmuch as CHE and Sisters Hospital possess information relevant both to the underlying medical malpractice action and to this declaratory judgment action, and Sisters Hospital is a defendant in the underlying medical malpractice action, we conclude that they are necessary parties to this action (*see generally White v Nationwide Mut. Ins.*

Co., 228 AD2d 940, 941).

We further conclude that the court properly denied SMI's motion based on plaintiff's alleged failure to provide timely notice pursuant to the provisions of the policy. Even assuming, arguendo, that SMI met its initial burden, we conclude that plaintiff raised an issue of fact sufficient to defeat the motion on that ground (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff asserted in an affidavit that he was unaware of the existence of the policy until SMI commenced a declaratory judgment action in federal court in 2010. Plaintiff also provided an excerpt from the deposition testimony of SMI's president and chief executive officer in the underlying medical malpractice action wherein SMI's counsel stated that "there's no issue about notice in this case . . . Notice has absolutely nothing to do with his case." Furthermore, there had been no discovery with respect to the timing of SMI's notice of the "medical incident" pursuant to the policy or notice of plaintiff's claim for excess coverage with respect to his potential liability in the underlying medical malpractice action.

We likewise conclude that there is an issue of fact whether plaintiff is a covered person under the policy, and thus that neither SMI nor plaintiff is entitled to summary judgment in that respect (*see generally id.*). Although the record establishes that plaintiff was not acting either as an employee of Sisters Hospital or as the scheduled on-call physician at the time of the alleged malpractice, we reject SMI's contention that the policy provides liability coverage for plaintiff only in the event that he was acting pursuant to his contract with Sisters Hospital to provide on-call coverage. Instead, we conclude that SMI itself raised an issue of fact whether plaintiff was acting pursuant to the policy provisions and thus is a covered person by providing plaintiff's deposition testimony in the underlying medical malpractice action, wherein he testified that it was a hospital rule that residents be present for the delivery of twins, as was the case here, for purposes of their education and to assist the attending physician (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). It is undisputed that two residents were present during Mary Serio's labor and the delivery of the twins, one of whom is the subject of the underlying action. SMI failed to establish that plaintiff lacked any responsibility with respect to the supervision or proctoring of the residents who were present for the labor and delivery of twins. Plaintiff, however, failed to establish that his contract with Sisters Hospital covers the situation herein, i.e., that he supervised or proctored residents while attending a private patient, or that he supervised or proctored residents who were present pursuant to a rule or policy of Sisters Hospital that residents be present for the delivery of twins for purposes of their education and to assist the attending physician. We conclude that plaintiff's affidavit stating that he provided "necessary supervision" is conclusory and thus is insufficient to establish his entitlement to judgment (*see id.*), and the physicians' affidavits provided by SMI regarding the responsibility of the on-call physician with respect to the residents treating hospital or other non-private patients are not relevant here. Furthermore, we reject plaintiff's contention that the

policy language is ambiguous and thus must be construed against SMI (*see generally 401 Fourth St., Inc. v Investors Ins. Group*, 583 Pa 445, 455, 879 A2d 166, 171).

We have reviewed SMI's remaining contention and conclude that it is without merit.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

444

CAF 14-00219

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

IN THE MATTER OF CYLE J.F. AND COREY A.F.

SENECA COUNTY DIVISION OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

ALEXANDER F., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

FRANKLIN & GABRIEL, OVID (STEVEN J. GETMAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

FRANK R. FISHER, COUNTY ATTORNEY, WATERLOO (DAVID R. MORABITO, JR., OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Seneca County (Dennis F. Bender, J.), entered January 10, 2014 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed respondent under the supervision of petitioner for a period of one year and placed the subject children in the custody of the Commissioner of Social Services of Seneca County.

It is hereby ORDERED that said appeal from the order insofar as it concerns disposition is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: Respondent father appeals from an order of disposition placing his children in the custody of petitioner upon a finding that he neglected the children by, inter alia, inflicting excessive corporal punishment and misusing a drug (*see* Family Ct Act § 1012 [f] [i] [B]). The father contends that Family Court denied him due process by allowing the children's mother, who was not a respondent in the neglect proceeding, to participate in the fact-finding hearing as a party even after she withdrew her custody petition (*see generally* § 1035 [d]; *Matter of Telsa Z. [Rickey Z.—Denise Z.]*, 71 AD3d 1246, 1250-1251). The father did not timely object to the mother's participation and thus failed to preserve his contention for our review (*see generally Matter of Lucinda A. [Luba A.]*, 120 AD3d 492, 494, *lv denied* ___ NY3d ___ [Apr. 2, 2015]; *Matter of Ashley L.C. [James L.C.]*, 68 AD3d 1742, 1743). In any event, we reject the father's related contention that the court erred in denying his motion to strike evidence elicited by the mother inasmuch as other evidence amply supports the finding of neglect (*see generally Matter of Kinara C. [Jerome C.]*, 89 AD3d 839, 840-841; *Matter of Mary S.*, 279

AD2d 896, 898). The father's remaining contentions relate only to the disposition, i.e., the placement of the children and the terms of his visitation with them, and we dismiss as moot the father's appeal from that part of the order inasmuch as it has expired by its own terms (*see Matter of Gabriella G. [Jeannine G.]*, 104 AD3d 1136, 1136; *Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1546, *lv denied* 18 NY3d 808).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

445

CAF 14-00178

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

IN THE MATTER OF DAVIANNA L.

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

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

DAVID R., RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE YOON OF COUNSEL), PRO BONO APPEALS PROGRAM, FOR RESPONDENT-APPELLANT.

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

BRYAN S. OATHOUT, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered January 10, 2014 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent had permanently neglected the subject child and 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 father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect and transferred guardianship and custody of the child to petitioner. We reject the father's contention that petitioner failed to establish that it made diligent efforts to encourage and strengthen the parental relationship. Upon our review of the record, we conclude that petitioner presented the requisite clear and convincing evidence that the assigned caseworker made repeated and diligent efforts to encourage and strengthen the parental relationship between the child and the father, who was incarcerated, including through written correspondence and telephonic communication (*see Matter of Jaylysia S.-W.*, 28 AD3d 1228, 1228-1229; *see generally Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1149-1150, *lv denied* 23 NY3d 901). Contrary to the father's further contention, petitioner established that, despite those efforts, the father failed substantially and continuously or repeatedly to maintain contact with or plan appropriately for the child's future (*see Alex C., Jr.*, 114 AD3d at 1150; *Matter of Whytnei B. [Jeffrey B.]*, 77 AD3d 1340, 1341).

"The [father's] failure . . . to provide any 'realistic and feasible' alternative to having the child[ ] remain in foster care until [his] release from prison . . . supports a finding of permanent neglect" (*Matter of Gena S. [Karen M.]*, 101 AD3d 1593, 1594, *lv dismissed* 21 NY3d 975).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

447

CA 14-01992

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

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE FINAL ACCOUNT OF RORY G. WHITE, AS SUCCESSOR TRUSTEE OF THE TRUST UNDER ARTICLE SIXTH OF THE LAURA M. GREEN TRUST AGREEMENT DATED FEBRUARY 15, 1995 FOR THE PERIOD FROM JANUARY 10, 2004 THROUGH JUNE 23, 2010 BY LAURA M. GREEN, GRANTOR.

RORY G. WHITE, PETITIONER-APPELLANT,

V

KIMBERLY G. VOWELL, OBJECTANT-RESPONDENT.

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE FINAL ACCOUNT OF RORY G. WHITE, AS SUCCESSOR TRUSTEE OF THE TRUST UNDER ARTICLE SECOND OF THE HOWARD C. GREEN TRUST AGREEMENT DATED FEBRUARY 15, 1995 FOR THE PERIOD FROM JANUARY 10, 2004 THROUGH MARCH 31, 2013 BY HOWARD C. GREEN, GRANTOR.

RORY G. WHITE, PETITIONER-APPELLANT,

V

KIMBERLY G. VOWELL, OBJECTANT-RESPONDENT.

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE FINAL ACCOUNT OF RORY G. WHITE, AS SUCCESSOR TRUSTEE OF THE TRUST UNDER ARTICLE THIRD OF THE HOWARD C. GREEN TRUST AGREEMENT DATED FEBRUARY 15, 1995 FOR THE PERIOD FROM JANUARY 10, 2004 THROUGH JUNE 22, 2010 BY HOWARD C. GREEN, GRANTOR.

RORY G. WHITE, PETITIONER-APPELLANT,

V

KIMBERLY G. VOWELL, OBJECTANT-RESPONDENT.

MEMORANDUM AND ORDER

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

WRIGHT, WRIGHT AND HAMPTON, JAMESTOWN (EDWARD P. WRIGHT OF COUNSEL), FOR OBJECTANT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Chautauqua County (Stephen W. Cass, S.), entered February 19, 2014. The order, among other things, denied the petition seeking an order approving the payment of reasonable attorneys' fees and related expenses incurred by the trusts.

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

Memorandum: Petitioner is the successor trustee of three trusts established by his grandparents, Laura M. Green and Howard C. Green. The trusts were established for the benefit of their daughter, Elaine Green, the mother of petitioner and objectant. Howard Green predeceased Laura Green, and, upon the death of Laura Green, Elaine Green succeeded her as trustee. According to article sixth of the Laura Green trust, upon the death of Elaine Green, in the event that Elaine Green did not exercise her right to dispose of the remainder of the trust by her will, the remainder of the trust was to pass to her children, per stirpes. Elaine Green's will provided that the remainder of the trusts be distributed to her children in equal shares. Upon the death of Elaine Green in 2010, petitioner replaced her as trustee and, prior to the probate of Elaine Green's will, he distributed the assets of the trusts, approximately $1.1 million, to himself and objectant as directed in the terms of article sixth of the Laura Green trust, i.e., in equal shares. Approximately 18 months thereafter, objectant sought an accounting of the disbursements Elaine Green, trustee, made to herself as beneficiary. Petitioner sought judicial approval of the accounting, alleging, inter alia, that he distributed the trust assets at objectant's request. In objecting to the accounting, objectant asserted, inter alia, that Elaine Green made disbursements of the trusts for the benefit of others and that petitioner failed to attempt to recover assets of the trusts from the estate of Elaine Green.

Petitioner filed a petition pursuant to SCPA 2110 (1) seeking approval of interim attorneys' fees and, because the trust assets were previously distributed to the parties as beneficiaries, also seeking an order requiring that he and objectant each contribute $40,000 to the trusts for necessary fees and costs associated with the litigation, and requesting that funds previously returned to the trusts by the parties be released to pay a portion of the fees generated by petitioner's counsel. Surrogate's Court denied the petition in its entirety. As a preliminary matter, we conclude that the Surrogate erred in determining that the fee application "simply sets forth the time slips" of the attorneys who worked on this matter. The record establishes that petitioner's attorney provided, in addition to the time records, his affirmation setting forth relevant information with respect to each attorney, including the area of practice, whether the attorney was a partner or an associate, the number of years the attorney had been admitted to practice and the hourly rate charged for each attorney. Further, the Surrogate was aware of the complexity of the discovery issues, resulting from the fact that neither of the parties reside in New York State, as well as

the fact that Elaine Green resided, and died, in New Mexico. We therefore conclude that the Surrogate had sufficient information upon which to determine the reasonableness of the request for attorneys' fees (*see Matter of Potts*, 213 App Div 59, 62, *affd* 241 NY 593).

We nevertheless further conclude that the Surrogate did not abuse his discretion in denying the application for interim fees without prejudice at the discovery stage of the proceeding (*see generally* SCPA 2110 [1]). "[A]n attorney may recover fees from the estate only where the services rendered benefit the estate" (*Betz v Blatt*, 116 AD3d 813, 816, *lv dismissed* 23 NY3d 1028; *see generally Matter of Hyde*, 15 NY3d 179, 186-187) and, here, the Surrogate did not abuse his discretion in determining that the application for fees would be determined following a hearing.

Although petitioner correctly contends that the Surrogate has the authority to direct that distributions be returned to the trusts where the expenses are in excess of the funds contained in the trusts (*see Matter of Dewar*, 62 AD2d 352, 355; *see also Matter of Allen*, 278 AD2d 412), we nevertheless conclude that the Surrogate did not abuse his discretion in denying that part of the petition seeking an order directing petitioner and objectant each to reimburse the trusts $40,000 for future attorneys' fees and expenses that may be incurred by petitioner. We note that a successor trustee "is only responsible for the assets which come into his [or her] hands, and has no particular legal duty to seek an accounting from his [or her] predecessors" (*Matter of William M. Kline Revocable Trust*, 196 Misc 2d 66, 75), in this case, his mother's estate. Although a successor trustee may be liable for failure to proceed against a predecessor trustee for breach of duty to the trust, it is within the discretion of the successor trustee to determine whether to exercise his or her power to " 'contest, compromise or otherwise settle' claims in favor of the trust" pursuant to EPTL 11-1.1 (b) (13) (*id*. at 76).

Here, it is undisputed that the predecessor trustee became severely disabled in 1999. Petitioner identified the funds that the predecessor trustee paid to herself from the corpus of the trusts; advised the Surrogate that he is unable to determine specifically how those funds were used; identified expenses associated with the disability of the predecessor trustee that exceed the amounts paid from the trust corpus; and advised the Surrogate that the estate of the predecessor trustee is insolvent. Objectant, therefore, has the burden to establish that the predecessor trustee failed to discharge her duties as trustee (*see Matter of Reckford*, 307 NY 165, 176, *rearg denied* 307 NY 842), and that the accounting is incomplete (*see generally Matter of Taylor*, 79 AD3d 766, 767; *Matter of Robinson*, 282 AD2d 607, 607). In the event that the Surrogate ultimately determines that costs associated with the litigation are properly charged to the trusts, the funds may be recouped from the beneficiaries (*see Dewar*, 62 AD2d at 355).

Petitioner contends for the first time on appeal that objectant is judicially estopped from challenging the accounting on the ground that she requested that he distribute the proceeds of the trusts to

the two of them, and thus that contention is not properly before us (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

448

CA 14-01952

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

ALICE YARGEAU AND ANDREW YARGEAU,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

LASERTRON, CYBER SPORT MANUFACTURING, LLC AND
LT JOINT VENTURES, INC., DEFENDANTS-RESPONDENTS.

DOLCE PANEPINTO, P.C., BUFFALO (STEPHEN C. HALPERN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

PINSKY & SKANDALIS, P.C., SYRACUSE (GEORGE SKANDALIS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS LASERTRON AND LT JOINT VENTURES, INC.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MAURICE L. SYKES OF COUNSEL), FOR DEFENDANT-RESPONDENT CYBER SPORT MANUFACTURING, LLC.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 4, 2014. The order, among other things, granted the respective motion and cross motion of defendants for summary judgment and dismissed plaintiffs' second amended complaint in its entirety against all defendants.

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

Memorandum: Plaintiffs commenced this action alleging, inter alia, strict products liability and negligence causes of action and seeking damages for injuries allegedly sustained by Alice Yargeau (plaintiff) while participating in a game called Cyber Sport. Defendant Cyber Sport Manufacturing, LLC (Cyber Sport Manufacturing) designed and manufactured Cyber Sport, and plaintiff's incident occurred at a facility owned and operated by defendants Lasertron and LT Joint Ventures, Inc. Participants in Cyber Sport drive cars that are similar to bumper cars while they attempt to scoop a ball into a hand-held basket and then shoot the ball to score points. A player uses a joystick to move the car, but there are no brakes on the cars; the cars will stop moving when the joystick is released, or when a signal is sent by an employee of Lasertron. The record establishes that Cyber Sport had multiple incidents in the year and a half prior to plaintiff's accident in which a car would fail to stop when a referee pressed the signal. On the day of plaintiff's accident, plaintiff first rode in her car during a warm-up period, and she then sat in her car while listening to the referee give instructions to the

players. The referee pressed the signal that was supposed to disable all of the cars, but at least one of the cars still had power and struck plaintiff's car from behind, allegedly resulting in injury to plaintiff.

Supreme Court properly granted the respective motion and cross motion of defendants seeking, inter alia, summary judgment dismissing the second amended complaint against them. The court properly dismissed the negligence and strict products liability claims based on design defect against Lasertron and LT Joint Ventures because they established that they "did not design, manufacture or sell the allegedly defective product and thus could not be held liable for either negligence or strict products liability" resulting from the defect (*Townley v Emerson Elec. Co.*, 269 AD2d 753, 753), and plaintiffs failed to raise a triable issue of fact. The court also properly dismissed those claims against Cyber Sport Manufacturing inasmuch as it established that the cars were reasonably safe (*see Kiersznowski v Gregory B. Shankman, M.D., P.C.*, 67 AD3d 1366, 1367; *see generally Ramos v Howard Indus., Inc.*, 10 NY3d 218, 223). In support of its motion, Cyber Sport Manufacturing submitted the affidavit of its expert who averred that the cars were safe and operated within applicable standards. He opined that the cars were not rendered unsafe by the remote shut-off's failure, noting that there was no accepted industry standard that mandated that a car must be totally inoperable during stoppage of play. In opposition to Cyber Sport Manufacturing's motion, plaintiffs failed to raise a triable issue because their expert did not identify any violation of a safety standard or deviation from industry standards regarding the signal used by the employees to stop the cars (*see Kiersznowski*, 67 AD3d at 1367; *McAllister v Raymond Corp.*, 36 AD3d 768, 768-769).

We reject plaintiffs' contention that the court erred in dismissing the products liability claims based on failure to warn. " 'There is no duty to warn of an open and obvious danger of which the product user is actually aware or should be aware as a result of ordinary observation or as a matter of common sense' " (*Cwiklinski v Sears, Roebuck & Co., Inc.*, 70 AD3d 1477, 1479). Here, the danger of being bumped from behind by another driver was an open and obvious danger in participating in Cyber Sport (*see Lauber v Sears, Roebuck & Co.*, 273 AD2d 922, 922).

We further conclude that the court also properly dismissed the negligence claims based on plaintiff's assumption of the risk. Based on the " 'primary assumption' of risk" category of assumption of the risk, which is applicable here, participants in a sporting or recreational activity "properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation" (*Turcotte v Fell*, 68 NY2d 432, 438-439; *see Custodi v Town of Amherst*, 20 NY3d 83, 88; *Close v Darien Lake Theme Park & Camping Resort, Inc.*, 96 AD3d 1445, 1445-1446). Plaintiff may be held to have assumed those risks that are "inherent in and arise out of the nature of the sport generally" (*Morgan v State of New York*, 90 NY2d 471, 484; *see Custodi*,

20 NY3d at 88; *Cole v New York Racing Assn.*, 24 AD2d 993, 994, *affd* 17 NY2d 761). "It is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results" (*Maddox v City of New York*, 66 NY2d 270, 278; *see Anand v Kapoor*, 15 NY3d 946, 948; *Cook v Komorowski*, 300 AD2d 1040, 1041).

Here, plaintiff testified that, before the incident, she had seen the cars bumping each other. She herself had struck a wall while driving her car and was also hit from behind. She understood that bumping other cars was part of Cyber Sport, and she expected it. Based on this evidence, the court properly determined that the risk of being bumped from behind, even during a stoppage in play, was a risk inherent in the game and that plaintiff assumed that risk (*see Cook*, 300 AD2d at 1041).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

451

CA 14-01252

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

JEFFREY NOVAK, PLAINTIFF-APPELLANT,

V ORDER

FREDERICK D. HICKS, DMD, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

HALL AND KARZ, CANANDAIGUA (PETER ROLPH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (RACHEL A. EMMINGER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered March 31, 2014. The order, inter alia, granted the motion of defendant Frederick D. Hicks, DMD, for summary judgment dismissing the complaint against him.

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: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

452

CA 14-02068

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

BENEDETTA MELNICK, FRANK H. BOEHM, JR.
AND CREATIVE NEUROSCIENCE APPLICATIONS, LLC,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PAUL J. FARRELL, ESQ., THE FARRELL LAW FIRM, LLP,
AND DILWORTH & BARRESE, LLP,
DEFENDANTS-RESPONDENTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KEVIN HULSLANDER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ROBERT J. SMITH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered February 10, 2014. The order granted the motion of defendants for summary judgment, dismissed the amended complaint and awarded defendants judgment for costs and disbursements.

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

Memorandum: Plaintiffs commenced this legal malpractice action alleging that defendants were negligent with respect to the negotiation of an agreement to license and sell intellectual property for a medical device developed by plaintiffs Frank H. Boehm, Jr. and Benedetta D. Melnick and transferred to plaintiff Creative Neuroscience Applications, LLC (CNA). Supreme Court granted defendants' motion seeking summary judgment dismissing the amended complaint both as time-barred and on the merits. Although we conclude that the court erred in determining that the action is time-barred, we agree with the court on the merits, and we therefore affirm.

"An action to recover damages for legal malpractice accrues when the malpractice is committed" (*Shumsky v Eisenstein*, 96 NY2d 164, 166). It is undisputed that defendants represented plaintiffs with respect to the agreement, executed on December 31, 2004 and the first amendment of the agreement, executed on June 28, 2005, and that the action was commenced on October 10, 2010. Defendants thus met their initial burden with respect to the statute of limitations by establishing that the action was commenced more than three years after the alleged malpractice (*see* CPLR 214 [6]). We nevertheless conclude

that plaintiffs raised an issue of fact whether the continuous representation doctrine tolled the statute of limitations (*see Electron Devices [USA] LLC v Menter, Rudin & Trivelpiece, P.C.*, 71 AD3d 1512, 1512-1513). Plaintiffs established that, in May 2008, Boehm and Melnick discussed with Paul J. Farrell, Esq. (defendant) their concerns regarding whether certain events would occur so as to trigger the future payments provisions of the first amendment of the agreement.

On the merits, plaintiffs allege that defendants engaged in legal malpractice by failing to include in the agreement, or in the first amendment of the agreement, a provision protecting their financial interest in the intellectual property in the event that the buyer became insolvent or filed for bankruptcy protection (bankruptcy/buyback provision). In order to establish a cause of action for legal malpractice, plaintiffs must prove that the attorney failed to exercise the degree of care, skill and diligence commonly possessed by a member of the legal community; that the failure to do so proximately caused plaintiffs' damages; and that plaintiffs would have been successful in the underlying action if the attorney had exercised due care (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442; *Phillips v Moran & Kufta, P.C.*, 53 AD3d 1044, 1044-1045). "To succeed on a motion for summary judgment dismissing the complaint in a legal malpractice action, the defendant must present evidence in admissible form establishing that the plaintiff is unable to prove at least one essential element of his or her cause of action alleging legal malpractice" (*Scartozzi v Potruch*, 72 AD3d 787, 789-790).

It is undisputed that the agreement and subsequent amendments, some of which were negotiated solely by Boehm, did not provide for the financial protection of plaintiffs with respect to the intellectual property in the event that the buyer filed for bankruptcy protection, which occurred here. It is also undisputed that plaintiffs received the scheduled payments pursuant to the agreement and subsequent amendments, but they did not receive any future payments pursuant to the amended agreement because the necessary triggering events did not occur. Further, it is undisputed that, in July 2008, plaintiffs retained different counsel and engaged in mediation with the buyer, which resulted in a settlement agreement that superseded the original agreement and amendments. The settlement agreement also did not contain a bankruptcy/buyback provision. Plaintiffs thereafter commenced a breach of contract action with respect to the settlement agreement in federal court, which ultimately was dismissed, and, while that action was pending, the buyer applied for bankruptcy protection. Although CNA was listed as an unsecured creditor in the bankruptcy proceeding, plaintiffs did not receive any proceeds from the sale of the buyer's assets. Those assets included over 50 patents, including the patent assigned by plaintiffs, products and inventory. The assets were sold for $9.2 million, which was not sufficient to satisfy the claims of secured creditors. Plaintiffs thereafter commenced this action seeking damages in the amount of $9.2 million.

In support of their motion seeking summary judgment dismissing

the amended complaint, defendants provided, inter alia, the deposition testimony of defendant in which he stated that he had previously represented plaintiffs with respect to a license and assignment agreement for a different patent in which a bankruptcy/buyback provision was included. He testified that Boehm was primarily responsible for negotiating and structuring the agreement and first amendment thereof with the buyer and that he advised Boehm to include a bankruptcy/buyback provision similar to what had been included in the previous agreement. Defendant testified that, when he spoke to the buyer while drafting the agreement for plaintiffs, he "pushed" for such a provision, but the buyer refused to include the provision. Defendants also provided the affidavit of the buyer's chief executive officer, stating that Boehm was primarily responsible for negotiating the agreement and that, although Boehm raised the issue of the bankruptcy/buyback provision several times, he informed Boehm and defendant that a bankruptcy/buyback provision "would be an absolute deal breaker." In addition, defendants provided the affidavit of a nonparty attorney with whom Boehm consulted, who stated that he knew that defendant explicitly addressed the issue of a bankruptcy/buyback provision with Boehm and that both defendant and Boehm advised him that the buyer "adamantly refused" to include such a provision in the agreement.

Defendants also presented excerpts from the depositions of Boehm and Melnick. Boehm testified that he knew that the buyer refused to include a bankruptcy/buyback provision in the agreement and that plaintiffs "were okay with that" because "it was a good deal, and we didn't want to have that as a sticking point." Melnick testified that she had concerns that the agreement provided that the licensing agreement converted to an assignment after a certain sum had been paid by the buyer and plaintiffs therefore would not have use of the technology, but that she was "outvoted" by Boehm. Both Boehm and Melnick testified that defendant advised them to sign the agreement if they wanted to close the deal with the buyer.

We conclude that defendants met their initial burden by establishing that they did not fail to exercise the degree of care, skill and diligence commonly possessed by members of the legal community with respect to their representation of plaintiffs (*cf*. *Scartozzi*, 72 AD3d at 790; *generally Rudolf*, 8 NY3d at 442). Defendants established that defendant recommended that a bankruptcy/buyback provision be included in the agreement, that the buyer refused to include the provision, and that plaintiffs were aware of the buyer's refusal and nevertheless executed the agreement and the first amendment without it. Even assuming, arguendo, that defendant should have advised plaintiffs not to execute the agreement without the bankruptcy/buyback provision, we conclude that defendants established "a 'reasonable strategic explanation' for the alleged negligence" (*Ackerman v Kesselman*, 100 AD3d 577, 579). We further conclude that defendants established that any negligence was not a proximate cause of plaintiffs' alleged damages because plaintiffs previously had entered into a similar agreement that included the relevant provision, and Boehm and Melnick knew that the agreement with this buyer would not include such a provision. Further, defendants

established that plaintiffs would not have prevailed in the underlying bankruptcy proceeding, even with a provision placing them in a secured creditor position, because they had been paid $885,000 pursuant to the terms of the agreement and the first amendment of the agreement, and none of the triggering events for future payments had occurred. We therefore conclude that defendants established that plaintiffs would be "unable to prove at least one essential element of [their] cause of action alleging legal malpractice" (*Scartozzi*, 72 AD3d at 790).

In opposition to the motion, plaintiffs failed to raise an issue of fact. They provided the deposition testimony of Boehm, Melnick and defendant, as well as the affidavits of Boehm and Melnick. Contrary to plaintiffs' contention, where, as here, the underlying facts are essentially undisputed and the "issue of proximate cause turns on the discrete factual question" whether plaintiffs' decision to execute the agreement and first amendment was based upon defendant's advice, or lack thereof, regarding the consequences of executing the agreement without the bankruptcy/buyback provision, the failure of defendants to provide an expert affidavit on the degree of care, skill and diligence commonly possessed by a member of the legal community was not fatal to their motion (*Wo Yee Hing Realty Corp. v Stern*, 99 AD3d 58, 63; *cf. Suppiah v Kalish*, 76 AD3d 829, 832; *see generally Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134, 141, *lv denied* 22 NY3d 855). The respective affidavits of Boehm and Melnick stating that, if they had known that the inclusion of a bankruptcy/buyback provision was a "deal breaker," CNA may not have executed the agreement or the first amendment are not sufficient to defeat the motion inasmuch as they are self-serving and contradicted by prior sworn deposition testimony (*see Richmond Farms Dairy, LLC v National Grange Mut. Ins. Co.,* 60 AD3d 1411, 1415). We therefore conclude that plaintiffs failed to raise an issue of fact sufficient to defeat the motion.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

454

CA 14-01772

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

HELEN F. DRISCOLL AND THOMAS DRISCOLL,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V ORDER

BJ'S WHOLESALE CLUB, INC.,
DEFENDANT-APPELLANT-RESPONDENT,
AND PAUL F. VITALE, INC., DEFENDANT-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (LORRAINE R. MERTELL OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

COSTELLO COONEY & FEARON, PLLC, SYRACUSE (ELIZABETH A. HOFFMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeals and cross appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered December 19, 2013. The order, inter alia, denied the motion of plaintiffs for sanctions against defendant BJ's Wholesale Club, Inc., for spoliation of evidence, and denied the motions of defendants for summary judgment dismissing the complaint.

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

455

TP 14-01741

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

IN THE MATTER OF RALPH ALICEA, PETITIONER,

V ORDER

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

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

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 [Michael M. Mohun, A.J.], entered September 26, 2014) 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: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

457

KA 13-02113

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SCOTT D. STANLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered October 28, 2013. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree.

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

458

KA 13-02127

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID L. ALFONSO, DEFENDANT-APPELLANT.

ROBERT M. GRAFF, LOCKPORT, 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 September 30, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [3]). The record establishes that defendant knowingly, voluntarily and intelligently waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver encompasses his challenge to the severity of the sentence (*see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

459

KA 11-01223

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN L. PATTERSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered April 8, 2011. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and criminal contempt in the first degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Patterson* ([appeal No. 2] ___ AD3d ___ [May 1, 2015]).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

460

KA 14-01527

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN L. PATTERSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered April 15, 2011. Defendant was resentenced upon his conviction of assault in the second degree and criminal contempt in the first degree.

It is hereby ORDERED that the resentence so appealed from is unanimously modified on the law by reducing the period of postrelease supervision to a period of five years and as modified the resentence is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [3]) and criminal contempt in the first degree (§ 215.51 [c]). We note at the outset that defendant's contention on appeal concerns only the resentence in appeal No. 2, and we therefore dismiss the appeal from the judgment (*see generally People v Scholz*, 125 AD3d 1492, 1492).

As the People correctly concede in appeal No. 2, the resentence is illegal insofar as it imposes a 10-year period of postrelease supervision on defendant as a second felony offender convicted of assault in the second degree (*see* Penal Law § 70.45 [2]). We therefore modify the resentence in appeal No. 2 by reducing the period of postrelease supervision to a period of five years.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

464

KA 13-00523

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES O. RICHARDSON, DEFENDANT-APPELLANT.

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

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered September 26, 2012. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree (two counts), criminal sale of a controlled substance in the third degree, criminal nuisance in the first degree and criminal possession of a controlled substance in the fifth degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence on the conviction of criminal sale of a controlled substance in the third degree and two counts of criminal possession of a controlled substance in the third degree is unanimously dismissed and the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and one count each of criminal sale of a controlled substance in the third degree (§ 220.39 [1]), criminal nuisance in the first degree (§ 240.46) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]). Defendant failed to preserve for our review his contention that County Court did not make an adequate finding of necessity for the use of a stun belt to restrain him during the trial (*see People v Schrock*, 108 AD3d 1221, 1225-1226, *lv denied* 22 NY3d 998, *reconsideration denied* 23 NY3d 1025; *see also People v Cooke*, 24 NY3d 1196, 1197). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's contention, the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support his conviction of criminal nuisance in the first degree.

Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence supporting his conviction of the remaining counts of the indictment, "inasmuch as his motion for a trial order of dismissal was not specifically directed at the same alleged shortcoming in the evidence raised on appeal" with respect to those counts (*People v Brown*, 96 AD3d 1561, 1562, *lv denied* 19 NY3d 1024 [internal quotation marks omitted]). 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).

Defendant failed to preserve for our review his contentions that he was denied a fair trial by prosecutorial misconduct (*see* CPL 470.05 [2]; *People v James*, 114 AD3d 1202, 1206-1207, *lv denied* 22 NY3d 1199), that the court erred in ordering him to pay restitution (*see People v Lewis*, 89 AD3d 1485, 1486), and that, in determining the sentence of incarceration, the court penalized him for exercising his right to a jury trial (*see People v Stubinger*, 87 AD3d 1316, 1317, *lv denied* 18 NY3d 862). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, the sentences imposed on the conviction of criminal nuisance in the first degree and criminal possession of a controlled substance in the fifth degree are not unduly harsh or severe. In light of defendant's resentencing on the conviction of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree, we do not consider his challenge to the severity of the original sentences imposed on those counts, and we dismiss the appeal from the judgment to that extent (*see People v Snagg*, 35 AD3d 1287, 1289, *lv denied* 8 NY3d 950; *People v Haywood*, 203 AD2d 966, 966, *lv denied* 83 NY2d 967).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

465

KA 10-02118

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALVIN E. SIMMONS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Joan S. Kohout, A.J.), rendered September 3, 2010. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]), defendant contends that the evidence is legally insufficient to support the conviction because the People failed to establish that he "actually possessed a dangerous instrument at the time of the crime" (*People v Pena*, 50 NY2d 400, 407, *rearg denied* 51 NY2d 770, *cert denied* 449 US 1087). We reject that contention. Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), we conclude that the victim's testimony that defendant removed a knife from his pocket immediately before asking for money is legally sufficient to establish that defendant possessed a dangerous instrument (*see generally People v Mitchell*, 59 AD3d 739, 739-740, *lv denied* 12 NY3d 918; *People v Thompson*, 273 AD2d 153, 153, *lv denied* 95 NY2d 908). Contrary to defendant's contention, any inconsistency between the victim's trial testimony and the victim's testimony from prior proceedings was not so great as to render his trial testimony incredible as a matter of law (*see People v Baker*, 30 AD3d 1102, 1102, *lv denied* 7 NY3d 846).

Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence with respect to whether he used or threatened to use a dangerous instrument inasmuch as he did not move for a trial order of dismissal on that ground (*see People v Gray*, 86 NY2d 10, 19; *People v Holloway*, 97 AD3d 1099, 1099, *lv denied* 19 NY3d 1026). In any event, that contention lacks merit inasmuch as "[t]he

jury could have reasonably concluded that defendant . . . made an implied threat to use the [knife] against the [victim]" (*People v Espada*, 94 AD3d 451, 452, *lv denied* 19 NY3d 1025; *see Mitchell*, 59 AD3d at 739-740; *People v Boisseau*, 33 AD3d 568, 568, *lv denied* 8 NY3d 844).

Finally, 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 People v Johnson*, 105 AD3d 1452, 1452-1453, *lv denied* 21 NY3d 1016; *see generally People v Bleakley*, 69 NY2d 490, 495). Although defendant testified that he did not possess a knife and that the victim voluntarily gave him the money, "[g]reat deference is to be accorded the [factfinder's] resolution of credibility issues based upon its superior vantage point and its opportunity to view witnesses, observe demeanor and hear the testimony" (*People v Curry*, 82 AD3d 1650, 1651, *lv denied* 17 NY3d 805 [internal quotation marks omitted]), and we see no basis to disturb the jury's credibility determinations.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

466

CA 14-01041

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

IN THE MATTER OF COUNTY OF GENESEE,
PETITIONER-PLAINTIFF-RESPONDENT,

V ORDER

NIRAV R. SHAH, M.D., M.P.H., COMMISSIONER,
NEW YORK STATE DEPARTMENT OF HEALTH AND
NEW YORK STATE DEPARTMENT OF HEALTH,
RESPONDENTS-DEFENDANTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER E. BUCKEY OF COUNSEL), AND NANCY ROSE STORMER, P.C., UTICA, FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered May 22, 2014 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment, among other things, directed respondents-defendants to pay petitioner-plaintiff's claims for reimbursement of overburden expenditures.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the petition-complaint in its entirety and granting judgment in favor of respondents-defendants as follows:

> It is ADJUDGED and DECLARED that section 61 of part D of section 1 of chapter 56 of the Laws of 2012 has not been shown to be unconstitutional,

and as modified the judgment is affirmed without costs (*see Matter of County of Chautauqua v Shah*, 126 AD3d 1317).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

467

CA 14-01440

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

VINCENT D. IOCOVOZZI, PLAINTIFF-APPELLANT,

V ORDER

BONNETTE IOCOVOZZI, DEFENDANT-RESPONDENT.

LORRAINE H. LEWANDROWSKI, HERKIMER, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Herkimer County (Erin P. Gall, J.), entered October 17, 2013. The order granted the motion of defendant for an award of expert fees and counsel fees.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 23, 2015,

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

470

CAF 13-01932

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

IN THE MATTER OF CANDIE A. FOSTER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANDREW J. FOSTER, RESPONDENT-RESPONDENT.

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

COHEN & COHEN LLP, UTICA (RICHARD A. COHEN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

JOHN J. RASPANTE, ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered October 11, 2013 in a proceeding pursuant to Family Court Act article 6. The order denied the petition.

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

Memorandum: Petitioner mother appeals from an order denying her petition, following a hearing, seeking to modify a prior custody order that, inter alia, granted primary physical custody of the subject child to respondent father. "A party seeking a change in an established custody arrangement must show a change in circumstances [that] reflects a real need for change to ensure the best interest[s] of the child" (*Matter of Gross v Gross*, 119 AD3d 1453, 1453 [internal quotation marks omitted]). Contrary to the mother's contention, we conclude that Family Court's determination that she failed to meet that burden has a sound and substantial basis in the record (*see Matter of Rauch v Keller*, 77 AD3d 1409, 1410).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

472

CA 14-01405

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

IN THE MATTER OF COUNTY OF ONEIDA,
PETITIONER-PLAINTIFF-RESPONDENT,

V ORDER

NIRAV R. SHAH, M.D., M.P.H., COMMISSIONER,
NEW YORK STATE DEPARTMENT OF HEALTH AND
NEW YORK STATE DEPARTMENT OF HEALTH,
RESPONDENTS-DEFENDANTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER E. BUCKEY OF COUNSEL), NANCY ROSE STORMER, P.C., UTICA, AND BOND SCHOENECK & KING, PLLC, FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered March 14, 2014 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, directed respondents-defendants to pay petitioner-plaintiff's pending claims for reimbursement in the amount of $3,123,878.56.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the petition-complaint in its entirety and granting judgment in favor of respondents-defendants as follows:

> It is ADJUDGED and DECLARED that section 61 of part D of section 1 of chapter 56 of the Laws of 2012 has not been shown to be unconstitutional,

and as modified the judgment is affirmed without costs (*see Matter of County of Chautauqua v Shah*, 126 AD3d 1317).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

475

CA 14-01003

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

LOTFI BELKHIR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SOUAD AMRANE-BELKHIR, DEFENDANT-RESPONDENT.

LOFTI BELKHIR, PLAINTIFF-APPELLANT PRO SE.

LEONARD A. ROSNER, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered May 30, 2014 in a divorce action. The order granted defendant's motion to hold plaintiff in civil contempt of court.

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

Memorandum: On appeal from an order that, inter alia, held him in contempt of court for failing to comply with a provision of an amended divorce decree obligating him to pay defendant $75,000, plaintiff contends that defendant failed to meet her burden of proof on her motion. We agree. "In order to prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the party charged with contempt violated a clear and unequivocal mandate of the court, thereby prejudicing the movant's rights . . . The movant has the burden of proving contempt by clear and convincing evidence" (*Wolfe v Wolfe*, 71 AD3d 878, 878; *see El-Dehdan v El-Dehdan*, 114 AD3d 4, 10). Here, the provision in the amended divorce decree stating that defendant is entitled to $75,000 "did not provide any time for payment and therefore, did not constitute a clear and unequivocal mandate" (*Rienzi v Rienzi*, 23 AD3d 447, 449; *see Wolfe*, 71 AD3d at 878; *Massimi v Massimi*, 56 AD3d 624, 624-625). In addition, the amended divorce decree contemplates that plaintiff's obligation to pay $75,000 to defendant may be satisfied from plaintiff's share of the proceeds of the sale of the marital residence, and the marital residence had not been sold at the time of the instant motion. Finally, the motion should not have been granted inasmuch as "defendant failed to show that [s]he had exhausted less drastic enforcement remedies, or that resort to such remedies would be ineffectual" (*Wolfe*, 71 AD3d at 879; *see* Domestic Relations Law § 245;

Klepp v Klepp, 35 AD3d 386, 387-388).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

480

TP 14-01740

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF JAMES ODAM, PETITIONER,

V ORDER

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

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

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 [Michael M. Mohun, A.J.], entered September 26, 2014) 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: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

481

TP 14-01811

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF RICARDO RICHARDS, PETITIONER,

V ORDER

THOMAS STICHT, SUPERINTENDENT, GOWANDA CORRECTIONAL FACILITY AND ANTHONY J. ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS.

RICARDO RICHARDS, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [M. William Boller, A.J.], entered June 17, 2014) to review a determination of respondents. 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: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

482

KA 13-01646

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DASHAWN L. RUSSELL, ALSO KNOWN AS SHAWN,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

DASHAWN L. RUSSELL, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered February 15, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third 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 his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). In appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (§ 220.16 [12]). In both appeals, defendant contends in his main and pro se supplemental briefs that County Court should have suppressed evidence found during a search of his residence because the search warrant was not supported by probable cause, was overbroad, and was not executed in a timely manner. Defendant's challenges to the search warrant are encompassed by his valid waiver of the right to appeal (*see People v Garland*, 69 AD3d 1122, 1123, *lv denied* 14 NY3d 887; *see also People v Frazier*, 63 AD3d 1633, 1633, *lv denied* 12 NY3d 925). Moreover, because defendant pleaded guilty before the court issued a suppression ruling with respect to the evidence seized from his home pursuant to the search warrant, he forfeited the right to raise the suppression issue on appeal (*see People v Fernandez*, 67 NY2d 686, 688; *People v Nunez*, 73 AD3d 1469, 1469, *lv denied* 15 NY3d 808). Defendant's contention in his main and pro se supplemental briefs that he was penalized for requesting a copy of the search warrant and the search warrant application "does not implicate the voluntariness of

the plea and thus it is also encompassed by his valid waiver of the right to appeal" (*People v Zolner*, 90 AD3d 1551, 1552; *see generally People v Muniz*, 91 NY2d 570, 573-574).

Finally, defendant's contention in his pro se supplemental brief that he was denied effective assistance of counsel because defense counsel failed to pursue a suppression hearing " 'does not survive [his] plea or [his] valid waiver of the right to appeal because [he] failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that [he] entered the plea because of [his] attorney['s] allegedly poor performance' " (*People v Smith*, 122 AD3d 1300, 1301; *see People v Leigh*, 71 AD3d 1288, 1288, *lv denied* 15 NY3d 775).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

483

KA 14-00381

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DASHAWN L. RUSSELL, ALSO KNOWN AS SHAWN,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

DASHAWN L. RUSSELL, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered February 15, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Same memorandum as in *People v Russell* ([appeal No. 1] ___ AD3d ___ [May 1, 2015]).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

485

KA 11-02492

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JASON POGROSKI, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN MCDERMOTT 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 (Jeffrey R. Merrill, A.J.), rendered October 4, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

486

KA 09-00853

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHARLES MARSHALL, DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered June 7, 2006. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree (two counts) and robbery in the second degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on March 16, 2015 and by the attorneys for the parties on March 24 and 25, 2015,

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

487

KA 13-01686

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HOWARD UNDERWOOD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered March 11, 2013. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (two counts) and robbery in third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the surcharge to 5% of the amount of restitution and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, two counts of robbery in the first degree (Penal Law § 160.15 [3]), defendant contends, among other things, that County Court committed several errors with respect to its restitution orders. Initially, we agree with defendant that his waiver of the right to appeal was not valid (*see e.g. People v Hassett*, 119 AD3d 1443, 1443-1444, *lv denied* 24 NY3d 961; *People v Mobley*, 118 AD3d 1336, 1336-1337, *lv denied* 24 NY3d 1121; *People v Blacknell*, 117 AD3d 1564, 1564-1565, *lv denied* 23 NY3d 1059), and thus that waiver does not bar his challenges to the restitution orders.

Insofar as defendant challenges the amount of restitution, we conclude that he "was not entitled to a hearing to determine the amount of restitution . . . inasmuch as the record establishes that he expressly agreed to the amount . . . at sentencing" (*People v Harris*, 31 AD3d 1194, 1195, *lv denied* 7 NY3d 848; *see People v Farewell*, 90 AD3d 1502, 1503, *lv denied* 18 NY3d 957).

We reject defendant's further contention that the court erred in ordering him to pay restitution "because the court did not order his codefendant to pay restitution. Defendant is liable for the entire amount under the doctrine of joint and several liability" (*People v Sanders*, 24 AD3d 1307, 1308, *lv denied* 6 NY3d 838, citing *People v*

Kim, 91 NY2d 407, 412). Furthermore, we reject defendant's contention that the court erred in directing that payment be made to one of the victims of his crimes because that victim submitted a claim for reimbursement to an insurer. There is no indication in the record that the victim has received any funds. In any event, "[a]lthough the award to the victim would [be] offset by any insurance funds [he] receive[s], defendant's obligation would not [be] reduced" (*People v Ford*, 77 AD3d 1176, 1178, *lv denied* 17 NY3d 816).

We agree with defendant, however, that the court erred in imposing a 10% surcharge on the restitution orders. An additional surcharge of 5% is authorized only "[u]pon the filing of an affidavit of the official or organization designated pursuant to [CPL 420.10 (8)] demonstrating that the actual cost of the collection and administration of restitution . . . in a particular case exceeds [5%] of the entire amount of the payment" (Penal Law § 60.27 [8]). "There is no affidavit in the record supporting the imposition of a 10% surcharge on the amount of restitution ordered in this case" (*People v Whitmore*, 234 AD2d 1008, 1008; *see People v Simonton*, 244 AD2d 1004, 1004-1005, *lv denied* 91 NY2d 930). Although defendant failed to preserve his contention for our review, we exercise our power to review it as a matter of discretion in the interest of justice (*cf. People v Kirkland*, 105 AD3d 1337, 1338-1339, *lv denied* 21 NY3d 1043), and we modify the judgment accordingly.

Finally, although the invalid waiver of the right to appeal does not bar defendant's challenge to the severity of his sentence, we conclude that the sentence is not unduly harsh or severe.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

492

CAF 14-00690

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF FRANCIS J. GILMAN, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

VICTORIA P. GILMAN, RESPONDENT-RESPONDENT.

MICHELLE A. COOKE, CORNING, FOR PETITIONER-APPELLANT.

BETZJITOMIR LAW OFFICE, BATH (SUSAN BETZJITOMIR OF COUNSEL), FOR RESPONDENT-RESPONDENT.

TRAVIS J. BARRY, ATTORNEY FOR THE CHILD, HAMMONDSPORT.

Appeal from an order of the Family Court, Steuben County (Gerard J. Alonzo, Jr., J.H.O.), entered March 28, 2014. The order, among other things, awarded respondent sole custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and facts without costs, the petition is granted, and the matter is remitted to Family Court, Steuben County, for further proceedings in accordance with the following memorandum: Petitioner father commenced this proceeding seeking, inter alia, to modify a prior consent order of joint legal custody and primary physical custody of the parties' child with respondent mother by instead awarding him sole legal and primary physical custody of the child. Family Court denied the petition and, instead, awarded the mother sole legal and primary physical custody of the child, and visitation to the father. We now reverse.

As a preliminary matter, we note that the father failed to include in the record on appeal the consent order that he sought to modify. "While omission from the record on appeal of the order sought to be modified ordinarily would result in dismissal of the appeal . . . , there is no dispute" concerning the custody provisions contained in that order, and we may therefore reach the merits of the issues raised on this appeal (*Matter of Dann v Dann*, 51 AD3d 1345, 1346-1347; *see Matter of Walker v Cameron*, 88 AD3d 1307, 1308).

We agree with the father and the Attorney for the Child (AFC) that the court's finding that the father failed to provide the child with required medication is against the weight of the evidence (*see Matter of Severo E. v Lizzette C.*, 157 AD2d 726, 727; *Matter of Robert T.F. v Rosemary F.*, 148 AD2d 449, 449-450). The father does not

dispute that he questioned certain diagnoses and was resistant to giving the child certain medication, especially when multiple pills were sent with the child in a plastic baggie without labels. The father adamantly and consistently testified, however, that he always gave the child the required medication. Admittedly, the father did not give the child a sleeping aid, but the mother and maternal grandmother admitted that the sleeping aid was prescribed on an as-needed basis only. According to the father, the child did not need the sleeping aid when the child visited with the father. There was no testimony to the contrary.

Inasmuch as that erroneous finding was central to the court's decision to award the mother sole custody of the child, we agree with the father and the AFC that the court's determination of custody "lacks a sound and substantial basis in the record" (*Fox v Fox*, 177 AD2d 209, 211-212; *see Matter of Cole v Nofri*, 107 AD3d 1510, 1511, *appeal dismissed* 22 NY3d 1083). Aside from finding that the father failed to give the child required medication, the court found in favor of the father on all other relevant factors (*see Fox*, 177 AD2d at 210). Indeed, we agree with the court that the evidence at the hearing established that the "[f]ather is much better able to manage [the child's] behavior." The mother resorts to physical discipline in order to control the child when he has anger management issues. As a result, there have been at least two indicated child protective services reports against the mother. The father, however, is able to calm the child down without resorting to physical discipline. Although the mother has been the primary residential parent for the past two years, we conclude that the father is better able to address the child's behavioral issues. We therefore reverse the order and grant the petition by awarding the father sole legal and primary physical custody of the child and visitation to the mother, and we remit the matter to Family Court to fashion an appropriate visitation schedule.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

497

CA 14-02072

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

DAVID E. WHITEHOUSE, PLAINTIFF-APPELLANT,

V ORDER

CINZIA INZINNA AND TIMOTHY WAGNER,
DEFENDANTS-RESPONDENTS.

BARRETT GREISBERGER, LLP, WEBSTER (JUSTIN P. ALEXANDER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (JOHN C. NUTTER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered August 20, 2014. The order, among other things, denied the motion of plaintiff for summary judgment in lieu of 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: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

499

OP 14-01988

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF COLEEN LAUZONIS AND
FLAHERTY & SHEA, PETITIONERS,

V ORDER

HONORABLE FRANK CARUSO, SUPREME COURT
JUSTICE, RESPONDENT.

FLAHERTY & SHEA, BUFFALO (KATHLEEN E. HOROHOE OF COUNSEL), FOR PETITIONERS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b][1]) for an order directing respondent to rule on pending motions.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 31, 2015,

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

503

CA 14-01938

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

AMY SHAUL, AS PARENT AND NATURAL GUARDIAN
OF ADDISON HERNQUIST, AN INFANT,
CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

HAMBURG CENTRAL SCHOOL DISTRICT,
RESPONDENT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (KINSEY A. O'BRIEN OF COUNSEL), FOR RESPONDENT-APPELLANT.

VIOLA, CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MATTHEW T. MOSHER OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered July 14, 2014. 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 unanimously affirmed without costs.

Memorandum: Contrary to respondent's contention, Supreme Court did not abuse its discretion in granting claimant's application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5). Although claimant failed to demonstrate a reasonable excuse for failing to serve a timely notice of claim (*see Matter of Hampson v Connetquot Cent. Sch. Dist.*, 114 AD3d 790, 791; *Brown v City of Buffalo*, 100 AD3d 1439, 1440), that failure " 'is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [respondent]' " (*Casale v Liverpool Cent. Sch. Dist.*, 99 AD3d 1246, 1246-1247; *see Matter of Maciejewski v North Collins Cent. Sch. Dist.*, 124 AD3d 1347, 1348). Here, claimant "made a persuasive showing that [respondent] acquired [timely] actual knowledge of the essential facts constituting the claim . . . [and respondent has] made no particularized or persuasive showing that the delay caused [it] substantial prejudice" (*Matter of Hall v Madison-Oneida County Bd. of Coop. Educ. Servs.*, 66 AD3d 1434, 1435 [internal quotation marks omitted]; *see* § 50-e [5]). In addition, contrary to respondent's contention, we cannot conclude at this stage of the action that the claim is "patently meritless" (*Matter of Catherine G. v County of Essex*, 3 NY3d 175, 179; *see generally Terrigino v Village of*

Brockport, 88 AD3d 1288, 1288-1289).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

505

KA 12-02113

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAKOTA W. BARNES, ALSO KNOWN AS “KNEES,”
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 (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered July 13, 2010. The appeal was held by this Court by order entered July 3, 2014, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (119 AD3d 1374). The proceedings were held and completed.

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]). We conclude that Supreme Court did not abuse its discretion in refusing to grant defendant youthful offender status (*see People v Frontuto*, 114 AD3d 1271, 1271, *lv denied* 23 NY3d 1036; *People v Johnson*, 109 AD3d 1191, 1191-1192, *lv denied* 22 NY3d 997), and we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see People v Guppy*, 92 AD3d 1243, 1243, *lv denied* 19 NY3d 961). Defendant’s valid waiver of the right to appeal “does not encompass his challenge to the severity of the sentence because no mention was made on the record during the course of the allocution concerning the waiver of defendant’s right to appeal with respect to his conviction that he was also waiving his right to appeal any issue concerning the severity of the sentence” (*People v Ayala*, 117 AD3d 1447, 1448, *lv denied* 23 NY3d 1033 [internal quotation marks omitted]; *see People v Maracle*, 19 NY3d 925, 928). Nevertheless, we reject that challenge.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

506

TP 14-01752

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

IN THE MATTER OF ERIC BARNES, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION, AND JOSEPH BELLINIER,
DEPUTY COMMISSIONER OF FACILITIES, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENTS.

ERIC BARNES, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Jefferson County [James P. McClusky, J.], entered September 26, 2014) 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: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

508

KA 12-01234

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MATTHEW J. WIGGINS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered January 12, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

511

KA 10-02099

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KATISHA BEATY, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Erie County Court (Michael F. Pietruszka, J.), rendered March 5, 2010. Defendant was resentenced upon her conviction of manslaughter in the first degree.

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

Memorandum: Defendant filed a pro se motion pursuant to CPL article 440 seeking to vacate the judgment of conviction and to set aside the sentence on the ground that the plea was defective and the sentence was illegal because she was never informed that she would be required to serve a term of postrelease supervision (PRS). The People conceded that the sentence was illegal and consented to County Court resentencing defendant pursuant to Penal Law § 70.85 to the original term of incarceration without PRS, which the court did. We granted assigned counsel's motion to be relieved as counsel and affirmed the resentence, but the Court of Appeals reversed and remitted the matter to us for a de novo appeal (*People v Beaty*, 96 AD3d 1515, *revd* 22 NY3d 490). We now affirm.

Defendant contends that she should be given the benefit of the law as it existed prior to the enactment of Penal Law § 70.85 and be allowed to withdraw her plea. We reject that contention. The court properly denied defendant's request to vacate the judgment of conviction and her plea of guilty and instead resentenced defendant to the sentence for which she had originally bargained (*see People v Williams*, 82 AD3d 1576, 1577, *lv denied* 17 NY3d 810). Indeed, we note that the purpose underlying the enactment of section 70.85 was to avoid vacaturs of pleas on the ground that they were involuntarily made because of the court's failure to advise of PRS at the time of the plea (*see People v Boyd*, 12 NY3d 390, 393-394). Defendant's further contention that Penal Law § 70.85 constitutes an impermissible ex post facto law is not preserved for our review (*see Williams*, 82

AD3d at 1578), and is without merit in any event (*see People ex rel. Mills v Lempke*, 112 AD3d 1365, 1366, *lv denied* 22 NY3d 864, *rearg denied* 23 NY3d 998; *see also People v Pignataro*, 22 NY3d 381, 387, *rearg denied* 22 NY3d 1135).

Defendant next contends that she was denied effective assistance of trial counsel, assigned counsel on her direct appeal, counsel at resentencing, and assigned counsel on her appeal from the resentencing. To the extent that defendant raised her contention regarding the alleged ineffectiveness of trial counsel in her CPL article 440 motion, we conclude that it is without merit (*see generally People v Baldi*, 54 NY2d 137, 147). Defendant's contention concerning the alleged ineffectiveness of appellate counsel on her direct appeal is reviewable by way of a coram nobis proceeding (*see People v Latimer*, 120 AD3d 1264, 1265; *People v McKinney*, 302 AD2d 993, 995, *lv denied* 100 NY2d 584). To the extent that such contention is reviewable on this record (*see McKinney*, 302 AD2d at 995), we conclude that it is also without merit (*see People v Stultz*, 2 NY3d 277, 285, *rearg denied* 3 NY3d 702). Appellate counsel cannot be faulted for following the law as it existed at the time of the representation (*see People v Orcutt*, 49 AD3d 1082, 1087, *lv denied* 10 NY3d 938). Finally, we conclude that defendant's contention regarding her counsel at resentencing and on appeal from that resentencing is also without merit (*see Williams*, 82 AD3d at 1577). Defendant contends that her counsel should have adopted her illegality argument at the resentencing, but there is no denial of effective assistance of 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; *see also People v Feliciano*, 17 NY3d 14, 28, *rearg denied* 17 NY3d 848).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

514

KA 11-02368

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MANNIX A. MITCHELL, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered August 26, 2011. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]), defendant contends that County Court violated *Crawford v Washington* (541 US 36, 50-54) and his rights under the Confrontation Clause of the Sixth Amendment of the United States Constitution when it admitted in evidence the order of protection. We reject that contention inasmuch as "the order of protection and the statements contained therein were not testimonial in nature . . . The order of protection, which indicated that the defendant was present in court when it was issued and that the defendant was advised of it, constituted a contemporaneous record of objective facts and was not directly accusatory" (*People v Lino*, 65 AD3d 1263, 1264, *lv denied* 13 NY3d 940; *see People v Myers*, 87 AD3d 826, 829, *lv denied* 17 NY3d 954; *see generally People v Pealer*, 20 NY3d 447, 453, *cert denied* ___ US ___, 134 S Ct 105, *rearg denied* 24 NY3d 993).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

515

KA 13-00975

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HERLAND W. BOUWENS, III, ALSO KNOWN AS BUTCH,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered May 30, 2013. The judgment convicted defendant, upon a jury verdict, of assault on a police officer, resisting arrest and obstructing governmental administration 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 following a jury trial of, inter alia, assault on a police officer (Penal Law § 120.08). The charges against defendant arose out of his actions incident to his arrest for a parole violation, during which a sergeant of the Ontario County Sheriff's Office was injured. Contrary to defendant's contention, viewing the evidence in light of the elements of the assault count as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict finding that defendant intended to prevent the sergeant from performing his lawful duty, thereby injuring him (*see* § 120.08; *People v Coombs*, 56 AD3d 1195-1196, *lv denied* 12 NY3d 782), is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The People's evidence at trial established that defendant was aware that he was the subject of an arrest warrant, had twice evaded the efforts of police officers to arrest him on that warrant, and had told his parole officer that he runs when he sees the police. Several police officers testified that defendant turned toward and ran into the sergeant attempting to apprehend defendant, and that defendant continued to resist their attempts to arrest him after he was brought to the ground. The People also presented evidence in the form of a nearby store's surveillance video showing defendant's encounter with the police and confirming the above testimony. Contrary to defendant's contention, there was no evidence that he was attempting to surrender, and any finding that he was attempting to surrender

"would have been both speculative and contrary to the evidence" (*People v Miranda*, 66 AD3d 509, 510, *lv denied* 13 NY3d 909).

Defendant's contention that he was denied effective assistance of counsel "is based on matters outside the record and thus is not reviewable on direct appeal" (*People v Davis*, 119 AD3d 1383, 1384, *lv denied* 24 NY3d 960).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

519

TP 14-01876

PRESENT: CENTRA, J.P., SCONIERS, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF TYRONE PITTS, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENT.

K. FELICIA PITTS-DAVIS, SYRACUSE, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN 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, Onondaga County [Hugh A. Gilbert, J.], entered October 8, 2014) to review a determination of respondent. The determination denied the request of petitioner to amend to "unfounded" two indicated reports of maltreatment with respect to his two stepsons, and to seal those amended reports.

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 to review a determination, made after a fair hearing, denying his request to amend to "unfounded" two indicated reports of maltreatment with respect to his two stepsons, and to seal those amended reports (*see* Social Services Law § 422 [8] [a] [v]; [c] [ii]). "At an administrative expungement hearing, a report of child . . . maltreatment must be established by a fair preponderance of the evidence" (*Matter of Reynolds v New York State Off. of Children & Family Servs.*, 101 AD3d 1738, 1738 [internal quotation marks omitted]), and "[o]ur review . . . is limited to whether the determination was supported by substantial evidence in the record on the petitioner['s] application for expungement" (*Matter of Mangus v Niagara County Dept. of Social Servs.*, 68 AD3d 1774, 1774, *lv denied* 15 NY3d 705 [internal quotation marks omitted]; *see Matter of Hattie G. v Monroe County Dept. of Social Servs., Children's Servs. Unit*, 48 AD3d 1292, 1293). Here, we conclude that the hearsay evidence of maltreatment constituted substantial evidence supporting the determination (*see Matter of Markman v Carrion*, 120 AD3d 1580, 1581; *Matter of Arbogast v New York State Off. of Children & Family Servs., Special Hearing Bur.*, 119 AD3d 1454, 1454-1455). Although the testimony of petitioner and his wife conflicted with the evidence

presented by respondent, "it is not within this Court's discretion to weigh conflicting testimony or substitute its own judgment for that of the administrative finder of fact" (*Matter of Ribya BB. v Wing*, 243 AD2d 1013, 1014; *see Matter of Crandall v New York State Off. of Children & Family Servs., Special Hearings Bur.*, 104 AD3d 1199, 1199; *see generally Matter of Berenhaus v Ward*, 70 NY2d 436, 443).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

521

CAF 14-00466

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

IN THE MATTER OF DREW F.-C.,
RESPONDENT-APPELLANT.

GENESEE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.
(APPEAL NO. 1.)

ORDER

PAUL B. WATKINS, ATTORNEY FOR THE CHILD, FAIRPORT, FOR RESPONDENT-APPELLANT.

CHARLES N. ZAMBITO, COUNTY ATTORNEY, BATAVIA (DURIN B. ROGERS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered February 10, 2014 in a proceeding pursuant to Family Court Act article 3. The order, among other things, placed respondent in a limited secure facility with an onsite mental health component/program.

Now, upon reading and filing the stipulation of discontinuance signed by appellant, and by the attorneys for the parties on February 5 and 9, 2015,

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

522

CAF 14-00467

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

IN THE MATTER OF DREW F.-C.,
RESPONDENT-APPELLANT.

GENESEE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.
(APPEAL NO. 2.)

ORDER

PAUL B. WATKINS, ATTORNEY FOR THE CHILD, FAIRPORT, FOR RESPONDENT-APPELLANT.

CHARLES N. ZAMBITO, COUNTY ATTORNEY, BATAVIA (DURIN B. ROGERS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered February 10, 2014 in a proceeding pursuant to Family Court Act article 3. The order, among other things, placed respondent in a limited secure facility with an onsite mental health component/program.

Now, upon reading and filing the stipulation of discontinuance signed by appellant, and by the attorneys for the parties on February 5 and 9, 2015,

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

523

CAF 13-01536

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

IN THE MATTER OF CHARLES L. HIGGINS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JESSE M. HIGGINS, RESPONDENT-APPELLANT.

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

CHARLES L. HIGGINS, PETITIONER-RESPONDENT PRO SE.

PETER M. CASEY, ATTORNEY FOR THE CHILDREN, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered August 15, 2013 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner primary physical placement of the subject children.

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

Memorandum: Respondent mother appeals from an order that, insofar as appealed from, awarded petitioner father primary physical placement of the subject children. The mother contends that Family Court erred in determining that there was the requisite showing of a change in circumstances to warrant modification of the existing custody arrangement. We reject that contention. " 'It is well established that alteration of an established custody arrangement will be ordered only upon a showing of a change in circumstances which reflects a real need for change to ensure the best interest[s] of the child[ren]' " (*Amy L.M. v Kevin M.M.*, 31 AD3d 1224, 1225). Here, the father established the requisite change in circumstances by showing that the mother's residence "had become a 'harried and chaotic environment' that did not provide the subject children with the focused attention and structure they needed" (*Matter of Graziani C.A. [Lisa A.]*, 117 AD3d 729, 730). Contrary to the mother's further contention, we conclude that there is a sound and substantial basis in the record to support the court's determination that it was in the children's best interests to award primary physical placement to the father (*see Matter of Marino v Marino*, 90 AD3d 1694, 1695-1696; *see also Matter of Tarrant v Ostrowski*, 96 AD3d 1580, 1582, *lv denied* 20 NY3d 855). Considering that "a court's determination regarding custody . . . issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled

to great weight" (*Marino*, 90 AD3d at 1695 [internal quotation marks omitted]), we perceive no basis upon which to set aside the court's award of primary physical placement of the children to the father.

Finally, we reject the mother's contention that she was deprived of a fair hearing because the court improperly admitted hearsay statements in evidence. Any error is harmless inasmuch as the court placed minimal, if any, reliance on those hearsay statements, and the evidence is otherwise sufficient to support the court's determination (*see Matter of Tracy v Tracy*, 309 AD2d 1252, 1253; *Matter of Jelenic v Jelenic*, 262 AD2d 676, 678; *Matter of Liza C. v Noel C.*, 207 AD2d 974, 974).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

529

CA 14-02069

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

SANTO S. SCRUFARI, PLAINTIFF-APPELLANT,

V ORDER

CHUBB CORPORATION, DOING BUSINESS AS
CHUBB GROUP OF INSURANCE COMPANIES, DEFENDANT,
AND FEDERAL INSURANCE COMPANIES, DEFENDANT-RESPONDENT.

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SHERRARD, GERMAN AND KELLY, P.C., PITTSBURGH, PENNSYLVANIA (KAREN Y. BONVALOT, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND NIXON PEABODY LLP, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Timothy J. Walker, A.J.), entered January 30, 2014. The order, among other things, granted the cross motion of defendant Federal Insurance Companies for summary judgment dismissing plaintiff's 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: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

530

CA 14-01785

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

IN THE MATTER OF THE APPLICATION FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND PROPERTY OF JUANITA QUINONES, AN ALLEGED INCOMPETENT PERSON.

---------- ORDER

CARMEN M. QUINONES, PETITIONER-APPELLANT;

MICHAEL J. SULLIVAN, ESQ., RESPONDENT-RESPONDENT.

BRAUTIGAM & BRAUTIGAM, LLP, FREDONIA (DARYL P. BRAUTIGAM OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order and judgment (one paper) of the Surrogate's Court, Chautauqua County (Stephen W. Cass, S.), entered December 2, 2013. The order and judgment directed petitioner to pay respondent the amount of $927.50, representing fees as guardian ad litem.

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

531

KA 14-00314

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDDIE WASHINGTON, DEFENDANT-APPELLANT.

EDDIE WASHINGTON, DEFENDANT-APPELLANT PRO SE.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Thomas J. Miller, J.), dated January 14, 2014. The order denied the motion of defendant pursuant to CPL 440.10.

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

Memorandum: Defendant appeals from an order summarily denying his motion pursuant to CPL 440.10 seeking to vacate the judgment convicting him of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The weapon was recovered from underneath the front passenger seat of a vehicle that the police had stopped for an alleged violation of Vehicle and Traffic Law § 375 (40). The driver was issued uniform traffic tickets for violations of sections 375 (40) and 511 (1) (a), and defendant, who was the front seat passenger, was charged in connection with the weapon. The traffic tickets against the driver were ultimately dismissed. Defendant contends that they were dismissed because City Court found that the stop of the vehicle was illegal.

Defense counsel moved to suppress the weapon, but defendant contends that defense counsel was ineffective for failing to investigate the stop, failing to call the driver as a witness at the suppression hearing, failing to cross-examine the police officer who stopped the vehicle concerning prior inconsistent statements and failing to obtain and utilize a police photograph allegedly establishing that the officer's claims with respect to the basis for the stop were false. County Court denied the suppression motion, and defendant contended in support of his CPL 440.10 motion, which was decided by the same County Court Judge, that he pleaded guilty "[d]ue

to the ineffective assistance provided by [trial counsel]."

We agree with defendant that the court erred in denying his CPL 440.10 motion without conducting a hearing. Attached to defendant's motion was an affidavit from the driver establishing that the rear lamp had been cracked, that she covered it with red tape on the advice of another police officer and that the light emanating from the lamp was red in accordance with the provisions of Vehicle and Traffic Law § 375 (40). The driver further stated that she informed defendant's attorney of the dismissal of the traffic tickets and provided him with supporting documentation. That documentation was also attached to defendant's motion and included a photograph establishing that the lamp in question emitted a red light. The driver was present in court on the day of the suppression hearing, but was never called to testify. According to the court's decision on the suppression motion, the only witness to testify at the suppression hearing was the police officer, who testified that, when the driver stepped on the brake, "the only light visible from the lamp was white." In the officer's narrative statement, which was also attached to defendant's motion, the officer wrote that he stopped the vehicle because "the stop lamp was out."

Contrary to the People's contention, defendant is not challenging the ruling on the suppression motion, which could be raised on the pending direct appeal and would thus require denial of the CPL 440.10 motion (*see* CPL 440.10 [2] [b]). Moreover, he is not contending that the court was required to grant suppression under the doctrine of collateral estoppel. Rather, defendant's main contention is that "defense counsel's failure to develop a sufficient factual record at the suppression hearing constitutes ineffective assistance of counsel. Because that contention rests upon matters outside the record, . . . 'the appropriate vehicle by which to obtain review of [that contention] is through the commencement of a proceeding pursuant to CPL article 440' " (*People v Simmons*, 221 AD2d 994, 994, *lv denied* 88 NY2d 885).

Contrary to the further contention of the People, defendant's failure to submit an affidavit from trial counsel is not fatal to the motion. "[D]efendant's application is adverse and hostile to his trial attorney. To require the defendant to secure an affidavit, or explain his failure to do so, [would be] wasteful and unnecessary" (*People v Radcliffe*, 298 AD2d 533, 534; *see generally People v Campbell*, 81 AD3d 1251, 1251).

Here, as with many possessory offenses, "suppression was the only viable defense strategy" (*People v Layou*, 114 AD3d 1195, 1198; *see generally People v Clermont*, 22 NY3d 931, 933-934), inasmuch as defendant's guilt follows directly from the seizure of the weapon. Based on the evidence in the record, "we can discern no tactical reason for trial counsel's failure to call [the driver] to testify," failure to investigate the dismissal of the driver's tickets on the ground that the stop was illegal, and failure to introduce a photograph that refuted the officer's allegations (*People v Dombrowski*, 87 AD3d 1267, 1268; *see Clermont*, 22 NY3d at 933-934;

People v Barber, 124 AD3d 1312, 1314). Indeed, it appears that here, as in *Clermont*, defense counsel "never supplied the hearing court with any legal rationale for granting suppression" (22 NY3d at 933). This is not a situation in which defendant's allegations are unsupported by other evidence and there is no reasonable possibility that his allegations are true (*cf. People v Santana*, 101 AD3d 1664, 1664-1665, *lv denied* 20 NY3d 1103). We thus conclude that "a hearing is required to afford defendant's trial counsel an opportunity . . . to provide a tactical explanation for the omission[s]" (*Dombrowski*, 87 AD3d at 1268 [internal quotation marks omitted]; *see Campbell*, 81 AD3d at 1252). Consequently, we reverse the order and remit the matter to County Court to conduct a hearing on defendant's CPL 440.10 motion (*see e.g. People v Conway*, 118 AD3d 1290, 1291).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

532

KA 12-01160

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRAVIS O. LEWIS, IV, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered March 29, 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: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends, inter alia, that County Court abused its discretion in refusing to grant him youthful offender status. Initially, we note that, because "defendant was convicted of an armed felony, and was the sole participant in the crime, he could only be adjudicated a youthful offender if 'mitigating circumstances' existed 'that [bore] directly upon the manner in which the crime was committed' " (*People v Stokes*, 28 AD3d 592, 592, quoting CPL 720.10 [3]). Here, even assuming, arguendo, that the court credited defendant's statements that he possessed the illegal handgun to protect his younger brother who had received threats, and that such a rationale would qualify as mitigating circumstances to permit a youthful offender adjudication (*see generally People v Amir W.*, 107 AD3d 1639, 1640-1641), we conclude that the court did not abuse its discretion in refusing to grant defendant youthful offender status (*see People v Mix*, 111 AD3d 1417, 1418). In addition, we decline to grant his request that we exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*see People v Facen*, 67 AD3d 1478, 1479, *lv denied* 14 NY3d 800, *reconsideration denied* 15 NY3d 749; *cf. People v Shrubsall*, 167 AD2d 929, 930-931). The record establishes that defendant had several prior arrests resulting in juvenile prosecutions and a previous youthful offender adjudication that replaced a misdemeanor conviction, upon which he had

been sentenced to, inter alia, a term of probation (*see Mix*, 111 AD3d at 1418). In addition, he violated that probationary sentence by, among other things, committing this crime, and he also twice violated the term of interim probation that the court imposed between the time of the plea and sentencing (*see People v Kocher*, 116 AD3d 1301, 1301-1303).

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

533

KA 13-01590

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE CAMPBELL, 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 (NATHANIEL C. KAPPERMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered May 10, 2013. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree, driving while intoxicated, a misdemeanor, driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs, improper automobile equipment and improper license plates.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We reject defendant's contention that the evidence is legally insufficient to establish the element of possession with respect to that crime (*see generally People v Bleakley*, 69 NY2d 490, 495). The loaded handgun was discovered inside a sock on the floor under the driver's seat of the vehicle defendant was driving, and DNA taken from the sock was consistent with defendant's DNA. That evidence, along with the statutory presumption of possession set forth in Penal Law § 265.15 (3), is legally sufficient to establish defendant's constructive possession of the handgun (*see People v Ward*, 104 AD3d 1323, 1324, *lv denied* 21 NY3d 1011). Defendant failed to preserve for our review his further challenge to the legal sufficiency of the evidence with respect to the operability of the weapon (*see People v Gray*, 86 NY2d 10, 19). Furthermore, inasmuch as that challenge to the legal sufficiency of the evidence lacks merit (*see People v Cavines*, 70 NY2d 882, 883; *see also People v Brown*, 107 AD3d 1477, 1478, *lv denied* 21 NY3d 1040), defense counsel's failure to preserve it for our review does not constitute ineffective assistance of counsel (*see People v Cole*, 111 AD3d 1301, 1302). Finally, viewing the evidence in light of

the elements of the crime of criminal possession of a weapon in the second degree in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence with respect to that crime (*see generally Bleakley*, 69 NY2d at 495).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

534

KA 12-01048

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CORY L. IVERSON, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered April 10, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

536

KA 12-00517

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES L. CARR, DEFENDANT-APPELLANT.

EVAN M. LUMLEY, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (M. William Boller, A.J.), dated February 21, 2012. The order denied the motion of defendant pursuant to CPL 440.10.

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

Memorandum: Defendant appeals from an order denying his motion pursuant to CPL article 440 seeking to vacate the judgment convicting him of two counts of murder in the second degree (Penal Law § 125.25 [3]) and one count of robbery in the first degree (§ 160.15 [1]), in connection with the stabbing death in 1993 of an 81-year-old man in his home. Defendant was charged by felony complaint with burglary in the second degree (§ 140.25 [2]), after giving inculpatory statements to police when confronted with evidence that his fingerprints were at the scene of the crime. Defendant waived immunity and testified before a grand jury in 1993. As part of the waiver of immunity, defendant stated that he understood that "this grand jury . . . is investigating the charges of burglary in the second degree, burglary in the first degree, murder in the second degree and any other matter of every nature pertaining thereto." The prosecutor charged the grand jury with a single count of burglary in the second degree. Defendant was convicted of that offense and, following his conviction, the People presented evidence to a second grand jury that included the testimony of an inmate that defendant had admitted to committing the murder. Defendant was indicted and, following a jury trial, convicted in connection with the victim's death. Defendant now contends on appeal that Supreme Court erred in denying his motion pursuant to CPL 440.10 seeking to vacate the judgment and dismiss the indictment on the ground that the People failed to seek leave to represent the matter to another grand jury, in violation of CPL 190.75 (3).

Contrary to the People's contention, defendant's failure to move, before trial, to dismiss the indictment on that ground does not constitute a waiver of his right to seek that relief. It is axiomatic that the failure to obtain leave of court to present a matter to a second grand jury, where required, deprives the grand jury of jurisdiction to hear the matter, thereby rendering the indictment void (*see People ex rel. Lalley v Barr*, 259 NY 104, 108; *People v Dinkins*, 104 AD3d 413, 414-415), which, in turn, deprives the court of jurisdiction (*see* CPL 210.05). Jurisdiction of the court cannot be waived by defendant (*see People v Smith*, 103 AD3d 430, 432-433; *see generally People v Patterson*, 39 NY2d 288, 295, *affd* 432 US 197).

We nevertheless conclude that, contrary to defendant's contention, the People did not withdraw from consideration of the first grand jury the charges of murder and robbery, which would have constituted the functional equivalent of a dismissal of those charges under *People v Wilkins* (68 NY2d 269, 274). Although the presentation had been completed (*see id.; cf. People v Davis*, 17 NY3d 633, 636), we conclude that charging the grand jury with only one offense did not constitute the functional equivalent of the dismissal of the murder and robbery counts. Indeed, although it was clear that defendant was a suspect in the victim's death, there was no direct evidence presented to the first grand jury tying defendant to those additional offenses. Instead, "the witnesses, at best, provided only an inferential link to [those additional crimes]" (*People v Gelman*, 93 NY2d 314, 319). Thus, we conclude that the " 'limited circumstances' " to which *Wilkins* applies are not present here (*Davis*, 17 NY3d at 638, quoting *Gelman*, 93 NY2d at 319).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

537

KA 13-01617

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY INGRAM, DEFENDANT-APPELLANT.

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

VALERIE G. GARDNER, DISTRICT ATTORNEY, PENN YAN (MEGAN P. DADD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered June 18, 2013. The judgment convicted defendant, upon his plea of guilty, of driving while ability impaired by drugs, driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs, aggravated unlicensed operation of a motor vehicle in the first degree and criminal mischief in the fourth 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, driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs as a class E felony (Vehicle and Traffic Law §§ 1192 [4-a]; 1193 [1] [c] [i]). Inasmuch as defendant entered a plea of guilty, he "forfeited his present challenge to County Court's *Sandoval* ruling" (*People v Condes*, 23 AD3d 1149, 1150, *lv denied* 6 NY3d 774; *see People v Johnson*, 104 AD3d 705, 706). Contrary to defendant's contention, the plea colloquy demonstrates that he knowingly, voluntarily and intelligently waived his right to appeal (*see People v Kosty*, 122 AD3d 1408, 1408, *lv denied* 24 NY3d 1220; *People v Estevez-Santos*, 114 AD3d 1174, 1175, *lv denied* 23 NY3d 1019). Although defendant's further contention that his plea was not voluntarily, knowingly, and intelligently entered because he gave inconsistent information concerning when he ingested the drugs on the day of the incident survives his waiver of the right to appeal, he failed to preserve that contention for our review (*see People v Davis*, 45 AD3d 1357, 1357-1358, *lv denied* 9 NY3d 1005). In any event, defendant's contention lacks merit. After defendant indicated that he took the drugs in the morning, well before this accident, the court asked him further questions about the drugs he took and when he took them. In

response, defendant admitted that he ingested several drugs closer to the time that he operated the vehicle, and he admitted that he was under the influence of those drugs when he drove the vehicle off the road and struck a house (*see* Vehicle and Traffic Law § 1192 [4-a]). Thus, "the court conducted an inquiry that 'was sufficient to ensure that the plea was voluntary' " (*People v Zuliani*, 68 AD3d 1731, 1732, *lv denied* 14 NY3d 894).

Finally, defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

541

KAH 14-00042

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
RICKY ORTA, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DALE ARTUS, SUPERINTENDENT, WENDE CORRECTIONAL
FACILITY, RESPONDENT-RESPONDENT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Christopher J. Burns, J.), entered June 12, 2013 in a habeas corpus proceeding. The judgment, insofar as appealed from, denied the petition.

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus on the ground that Supreme Court lacked jurisdiction to resentence him on his conviction of criminal possession of a weapon in the second degree (Penal Law § 265.03 [former (2)]), because of a long and unreasonable delay. Petitioner was convicted on March 12, 2002 following a jury trial of murder in the second degree (§ 125.25 [1]) and criminal possession of a weapon in the second degree (*People v Orta*, 12 AD3d 1147, 1147, *lv denied* 4 NY3d 801). Supreme Court (Mark, J.) resentenced petitioner on May 14, 2002 on the criminal possession of a weapon count to a five-year determinate term of imprisonment with 2½ years of postrelease supervision inasmuch as the court had erroneously imposed an indeterminate sentence on that count. The sentence ran concurrently with the sentence imposed on the murder count. Petitioner alleges that he was not present for the resentence and thus that it constituted an illegal sentence. Petitioner did not appeal from the resentence nor did he raise that contention in a CPL article 440 motion brought in 2006 or a habeas corpus proceeding he commenced in federal court (*Matter of Orta v Rivera*, 2009 WL 2383028 [WD NY]). He did, however, raise that contention in 2011, when he brought a second CPL article 440 motion. According to the records of this Court, of which we may take judicial notice (*see People v Comfort*, 278 AD2d 872, 873), Supreme Court (Doyle, J.) granted that part of petitioner's motion pursuant to CPL 440.20 (1) to set aside the sentence on the ground that he had not been present for sentencing, and resentenced him to a term of five years' imprisonment

and 2½ years of postrelease supervision (*see* CPL 440.20 [4]). Petitioner failed to provide that information as part of the record herein.

We conclude that "[h]abeas corpus relief is unavailable because petitioner's contention in support of the petition could have been, or [was], raised on direct appeal or by a motion pursuant to CPL article 440" (*People ex rel. Peoples v New York State Dept. of Corr. Servs.*, 117 AD3d 1486, 1487, *lv denied* 23 NY3d 909 [internal quotation marks omitted]). Indeed, the relief petitioner sought pursuant to CPL 440.20 (1) was granted. In any event, habeas corpus relief is not available because petitioner is serving a sentence on the murder count, and thus would not be entitled to immediate release even in the event that his instant motion had merit (*see People ex rel. Lewis v Graham*, 96 AD3d 1423, 1423, *lv denied* 19 NY3d 813).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

542

CAF 14-00271

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF LUNDYN S.

CAYUGA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

AL-RAHIM S., RESPONDENT-APPELLANT.

KARPINSKI, STAPLETON & TEHAN, P.C., AUBURN (ADAM H. VAN BUSKIRK OF COUNSEL), FOR RESPONDENT-APPELLANT.

FREDERICK R. WESTPHAL, COUNTY ATTORNEY, AUBURN (DANIEL A. TESTA, III, OF COUNSEL), FOR PETITIONER-RESPONDENT.

MICHELE R. DRISCOLL, ATTORNEY FOR THE CHILD, AUBURN.

Appeal from an order of the Family Court, Cayuga County (Mark H. Fandrich, A.J.), entered February 7, 2014 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: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights and placed the subject child in the custody of petitioner. Contrary to the father's contention, petitioner established by clear and convincing evidence that he "abandoned [the subject] child for the period of six months immediately prior to the date on which the petition [was] filed" (§ 384-b [4] [b]; *see Matter of Annette B.*, 4 NY3d 509, 514, *rearg denied* 5 NY3d 783), and it is well settled that "[t]his lack of contact evinces his intent to forego his parental rights" (*Matter of Gabrielle HH.*, 1 NY3d 549, 550; *see* § 384-b [5] [a]). Even assuming, arguendo, that the father is correct that he visited the child once within a few days after the six-month period commenced, we conclude that such "insubstantial contact[was] insufficient to defeat the claim of abandonment" (*Matter of Jamal B. [Johnny B.]*, 95 AD3d 1614, 1615-1616, *lv denied* 19 NY3d 812; *see Matter of Carter A. [Jason A.]*, 111 AD3d 1181, 1182-1183, *lv denied* 22 NY3d 862).

We reject the father's further contention that petitioner discouraged contact between the father and the subject child. Initially, we note that the father correctly concedes that, in this

abandonment proceeding, petitioner "was not 'obligated to contact [the father] and initiate efforts to encourage his parental relationship with [his child]' " (*Matter of Alexander B.*, 277 AD2d 937, 937; *see* Social Services Law § 384-b [5] [b]; *Gabrielle HH.*, 1 NY3d at 550). Furthermore, the father failed to establish "that he was unable to maintain contact with his [child], or that he was prevented or discouraged from doing so by petitioner" (*Matter of Christina S.*, 251 AD2d 982, 982; *see Matter of Jackie B. [Dennis B.]*, 75 AD3d 692, 693; *Matter of Regina A.*, 43 AD3d 725, 725). The father's contention that he attempted to communicate with certain of petitioner's representatives who were not called as witnesses at the hearing raised only a credibility issue that Family Court was entitled to resolve against him (*see Matter of Noah G. [Anthony G.]*, 118 AD3d 1355, 1355; *Matter of Rakim D.D.S.*, 50 AD3d 1521, 1522, *lv denied* 10 NY3d 717).

We also reject the father's contention that the court erred in denying his request to award custody of the subject child to the child's paternal grandmother, instead awarding custody to petitioner so that the child may be adopted by her foster parents. It is well settled that, in the context of a dispositional hearing after the termination of parental rights, "[a] nonparent relative of the child does not have 'a greater right to custody' than the child's foster parents" (*Matter of Matthew E. v Erie County Dept. of Social Servs.*, 41 AD3d 1240, 1241). Furthermore, contrary to the father's contention, the child's "blood relative does not take precedence over a prospective adoptive parent selected by [petitioner], and the fact that [the child's grandmother] would be a good caretaker is not a sufficient reason to remove the child from the only home she has ever known and from a family with whom she had bonded" (*Matter of Tiffany Malika B.*, 215 AD2d 200, 201, *lv denied* 86 NY2d 707). Thus, we agree with petitioner and the Attorney for the Child that it is in the child's best interests to award custody to petitioner (*see Matter of Donald W.*, 17 AD3d 728, 729-730, *lv denied* 5 NY3d 705; *see generally Matthew E.*, 41 AD3d at 1241-1242).

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

543

CAF 14-00328

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF JONATHAN D. VANSKIVER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MALLORY J. CLANCY, RESPONDENT-APPELLANT.

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

SAMANTHA PETERS SMITH, ATTORNEY FOR THE CHILD, CANISTEO.

Appeal from an order of the Family Court, Steuben County (Gerard J. Alonzo, Jr., J.H.O.), entered January 29, 2014 in a proceeding pursuant to Family Court Act article 6. The order granted petitioner sole legal custody and primary physical placement of the parties' child.

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

Memorandum: On appeal from an order modifying a prior custody order by, inter alia, awarding sole legal custody and primary physical placement of the parties' child to petitioner father, respondent mother contends that she was denied effective assistance of counsel. "[W]e note at the outset that, 'because the potential consequences are so drastic, the Family Court Act affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings' " (*Matter of Brown v Gandy*, 125 AD3d 1389, 1390). We nevertheless reject the mother's contention inasmuch as she did not " 'demonstrate the absence of strategy or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712; *see Matter of Reinhardt v Hardison*, 122 AD3d 1448, 1449).

Contrary to the mother's further contention, Family Court did not abuse its discretion in denying her attorney's request for an adjournment and in holding the hearing in her absence (*see Matter of O'Leary v Frangomihalos*, 89 AD3d 948, 949; *see generally Matter of Steven B.*, 6 NY3d 888, 889). The mother was aware of the hearing date, and her attorney's "vague claim that [she] was unable to attend the hearing due to [winter weather conditions] was unsupported by any detailed explanation or evidence from the [mother]" (*Matter of*

Braswell v Braswell, 80 AD3d 827, 829; *see O'Leary*, 89 AD3d at 949).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

553

CA 14-01991

PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF ARBITRATION BETWEEN GEICO INDEMNITY COMPANY, PETITIONER-APPELLANT,

AND ORDER

SHACARA M. PULLIAM, RESPONDENT-RESPONDENT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JEFFREY C. SENDZIAK OF COUNSEL), FOR PETITIONER-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (CHRISTOPHER D. D'AMATO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Thomas P. Franczyk, A.J.), entered February 19, 2014. The order denied that part of the petition seeking a stay of arbitration.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on February 10, 2015,

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

554

TP 14-01910

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

IN THE MATTER OF GILBERT ORTIZ, PETITIONER,

V ORDER

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

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

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 [Michael M. Mohun, A.J.], entered October 17, 2014) 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: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

555

KA 12-01515

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSE A. PADILLA, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered January 19, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

558

KA 14-01950

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT C. DIEHL, DEFENDANT-APPELLANT.

GARUFI LAW P.C., BINGHAMTON (CARMEN M. GARUFI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Donald E. Todd, A.J.), rendered December 4, 2013. The judgment convicted defendant, upon a nonjury verdict, of attempted grand larceny in the third degree, offering a false instrument for filing in the first degree and official misconduct.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of, inter alia, attempted grand larceny in the third degree (Penal Law §§ 110.00, 155.35). Contrary to defendant's contention, County Court did not abuse its discretion in allowing the People to reopen their proof to properly identify defendant (*see* CPL 260.30 [7]). Although defendant is correct that the People initially failed to ask their witnesses on direct examination to identify defendant, the identity of defendant was " 'simple to prove and not hotly contested' " (*People v Whipple*, 97 NY2d 1, 7).

By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve his challenge to the legal sufficiency of the evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People v Brown*, 120 AD3d 1545, 1546, *lv denied* 24 NY3d 1082). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The court "was entitled to reject defendant's version of the events 'and, upon our review of the record, we cannot say that the court failed to give the evidence the weight that it should be

accorded' " (*People v McCoy*, 100 AD3d 1422, 1422).

Frances E. Cafarell

Entered: May 1, 2015

Clerk of the Court

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

559

KA 10-01503

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMIE C. HARRISON, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, 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 June 20, 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 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]) for intentionally causing the death of Jamon Miller, whose body was found in defendant's home. In his statements to the police, defendant claimed that someone else, whom he would not identify, had killed Miller, and that he then killed the person who was responsible for killing Miller. That other person was referred to as "W" by the police during the interrogation of defendant. On appeal, defendant contends that reversal is required because he may have been convicted of an unindicted act of murder, i.e., the killing of "W." That contention is not preserved for our review (*see People v Allen*, 24 NY3d 441, 449-450), and is without merit in any event. The prosecutor and defense counsel reminded the jury during their opening and closing statements that defendant was charged with killing only Miller, and County Court gave similar instructions to the jury. There is therefore no danger that the jury convicted defendant of an unindicted act (*see People v Cooke*, 119 AD3d 1399, 1400, *affd* 24 NY3d 1196; *see also People v Rodriguez*, 32 AD3d 1203, 1205, *lv denied* 8 NY3d 849).

Defendant contends that his statements to the police were involuntarily made inasmuch as he was sleep-deprived and intoxicated during the 12-hour interrogation. Defendant failed to raise that specific contention as a ground for suppressing those statements in his motion papers or at the suppression hearing and thus failed to preserve that contention for our review (*see People v Brown*, 120 AD3d 954, 955, *lv denied* 24 NY3d 1118). In any event, we conclude that the

record does not support defendant's contention regarding the alleged involuntariness of his statements (*see People v Hunter*, 46 AD3d 1374, 1375, *lv denied* 10 NY3d 812; *People v Swimley*, 190 AD2d 1070, 1071, *lv denied* 81 NY2d 977).

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 contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, the sentence is not unduly harsh or severe.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

570

CA 14-00179

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

IN THE MATTER OF ERROL WEATHERS,
PETITIONER-APPELLANT,

V ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered December 16, 2013 in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the petition.

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

575

CA 14-01907

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

SYNAPSE SUSTAINABILITY TRUST, INC.,
PLAINTIFF-RESPONDENT,

V ORDER

CAR CHARGING GROUP, INC., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

THE BERNSTEIN LAW FIRM, BROOKLYN (MICHAEL I. BERNSTEIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

PERTZ & PERTZ, PLLC, REMSEN (RICHARD PERTZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered January 2, 2014. The order granted the motion of plaintiff for a preliminary injunction and enjoined defendant Car Charging Group, Inc., from impeding or preventing plaintiff's sale of certain stock pursuant to their contract.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on March 16, 2015, and filed in the Onondaga County Clerk's Office on March 16, 2015,

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

578

CA 14-01840

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

NICOLE MARTIN, INDIVIDUALLY, AND AS PARENT AND NATURAL GUARDIAN OF ANNA C. MARTIN, AN INFANT, PLAINTIFF-RESPONDENT,

V ORDER

TOWN OF GRAND ISLAND AND GRAND ISLAND RECREATION DEPARTMENT, DEFENDANTS-APPELLANTS.

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

WEBSTER SZANYI, LLP, BUFFALO (STEVEN HAMLIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered March 10, 2014. The order denied defendants' motion for summary judgment.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties,

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

579

KA 14-00118

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER M. AMRHEIN, DEFENDANT-APPELLANT.

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

ERIC R. SCHIENER, SPECIAL PROSECUTOR, GENESEO, FOR RESPONDENT.

Appeal from a judgment of the Allegany County Court (Terrence M. Parker, J.), rendered November 12, 2013. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the motion is granted, and the indictment is dismissed.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of criminal contempt in the second degree (Penal Law § 215.50 [3]). He was acquitted of all other charges, some of which were felonies. Defendant contends on appeal that he was denied his statutory right to a speedy trial and that County Court therefore erred in denying his motion to dismiss the indictment pursuant to CPL 30.30. We agree.

"A defendant seeking a speedy trial dismissal pursuant to CPL 30.30 meets his or her initial burden on the motion simply 'by alleging only that the prosecution failed to declare readiness within the statutorily prescribed time period' " (*People v Goode*, 87 NY2d 1045, 1047; *see People v Santos*, 68 NY2d 859, 861). Here, defendant met his initial burden. The criminal action was commenced by the filing of a felony complaint on July 8, 2011 (*see* CPL 1.20 [17]), and it is undisputed that the People did not announce their readiness for trial until defendant was arraigned on April 12, 2012. Excluding July 8, 2011 (*see* General Construction Law § 20; *People v Stiles*, 70 NY2d 765, 767), that period amounts to 278 days. By establishing that the People failed to announce their readiness within six months after July 8, 2011, which in this case totaled a period of 184 days (*see* CPL 30.30 [1] [a]), defendant met his initial burden on the motion (*see People v Beasley*, 16 NY3d 289, 292; *People v Wearen*, 98 AD3d 535, 537, *lv denied* 19 NY3d 1106; *cf. People v Welch*, 2 AD3d 1354, 1357-1358, *lv denied* 2 NY3d 747). "The burden then shift[ed] to the People to

establish that a period should be excluded in computing the time within which they were required to be prepared for trial" (*People v Sibblies*, 22 NY3d 1174, 1177; *see People v Sweet*, 79 AD3d 1772, 1772). We agree with defendant that the People failed to meet their burden of establishing sufficient excludable time.

Although the People established 66 days of excludable time for the "period during which the defendant [was] without counsel through no fault of the court" (CPL 30.30 [4] [f]), that amount of excludable time is insufficient to bring the People within the statutory deadline of 184 days. We reject the contention of the People that the period of time during which the local criminal court failed to transmit the order, felony complaint and other documents pursuant to CPL 180.30 (1) to County Court is excludable time under the exceptional circumstances exception (*see* CPL 30.30 [4] [g]). "[A]nalysis of cases where 'exceptional circumstances' have been found reveals two common factors: (1) that the delay was due to circumstances beyond the control of the District Attorney's office; and (2) that it prevented the prosecution from being ready for trial" (*People v LaBounty*, 104 AD2d 202, 204). Here, the failure of the local criminal court to transmit the divestiture documents did not prevent the prosecutor from presenting the case to a grand jury or being ready for trial (*see People v Talham*, 41 AD2d 354, 355-356; *cf. People v Mickewitz*, 210 AD2d 1004, 1004-1005, *lv denied* 85 NY2d 977; *LaBounty*, 104 AD2d at 204-205). "The [g]rand [j]ury derives its power from the Constitution and acts of the Legislature, and this power may not be interfered with or infringed upon or in any way curtailed, absent a clear constitutional or legislative expression" (*Talham*, 41 AD2d at 355).

We further conclude that the People cannot rely on any alleged consent of defendant to the delay inasmuch as "[c]onsent 'must be clearly expressed by the defendant or defense counsel to relieve the People of responsibility for' a delay" (*People v Suppe*, 224 AD2d 970, 971, quoting *People v Liotta*, 79 NY2d 841, 843). Here, as in *Suppe*, the lengthy period of preindictment delay cannot be deemed excludable time "on the ground that defendant requested or consented to the delay in connection with ongoing plea negotiations" (*id.*). Rather, the record establishes that "there was no continuance or adjournment of court proceedings, with or without the consent of defendant or at his request, and hence no period of exclusion pursuant to CPL 30.30 (4) (b)" (*id.*). Thus, over 200 days are chargeable to the People, which is well over the statutory maximum, and the court erred in denying defendant's motion to dismiss the indictment.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

580

KA 13-02109

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOMINGO E. CANDELARIA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered October 21, 2013. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [1]). Contrary to defendant's contention, the sentence is not unduly harsh or severe. Defendant waived his right to a restitution hearing and therefore waived his further contention that the amount of restitution is not supported by the record (*see People v Tessitore*, 101 AD3d 1621, 1621, *lv denied* 20 NY3d 1104).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

582

KA 13-01872

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN T. SHORT, DEFENDANT-APPELLANT.

CHARLES A. MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered August 20, 2013. The judgment convicted defendant, upon his plea of guilty, of assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the third degree (Penal Law § 120.00). Defendant's valid waiver of the right to appeal encompasses his contention that County Court erred in directing him to pay restitution to the assault victim inasmuch as that directive was part of the plea bargain (*see People v Kosty*, 122 AD3d 1408, 1409, *lv denied* 24 NY3d 1220). In any event, defendant failed to preserve for our review his contention that the court erred in failing to conduct a hearing with respect to the appropriate payee of the restitution because he did not request a hearing on that issue (*see id.*; *People v Robinson*, 112 AD3d 1349, 1350, *lv denied* 23 NY3d 1042). 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]).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

584

KA 13-01493

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTOINE HAILEY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 4, 2013. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that the minimal inquiry of Supreme Court failed to establish that defendant understood the critical right he was waiving when executing the waiver of the right to a jury trial. Inasmuch as defendant did not challenge the adequacy of the allocution related to that waiver, he failed to preserve for our review his challenge to the sufficiency of the court's inquiry (*see People v Lumpkins*, 11 AD3d 563, 564, *lv denied* 4 NY3d 746; *see also People v White*, 43 AD3d 1407, 1407, *lv denied* 9 NY3d 1010; *see generally People v Johnson*, 51 NY2d 986, 987). In any event, that challenge lacks merit. "Defendant waived his right to a jury trial in open court and in writing in accordance with the requirements of NY Constitution, art I, § 2 and CPL 320.10 (2) . . . , and the record establishes that defendant's waiver was knowing, voluntary and intelligent" (*People v Wegman*, 2 AD3d 1333, 1334, *lv denied* 2 NY3d 747; *see People v Dixon*, 50 AD3d 1519, 1520, *lv denied* 10 NY3d 958; *cf. People v Davidson*, 136 AD2d 66, 67-70; *see generally People v Smith*, 6 NY3d 827, 828, *cert denied* 548 US 905).

Defendant further contends that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence. With respect to the legal sufficiency of the evidence, defendant failed to preserve for our review his contention

that the firearm was not operable because his motion for a trial order of dismissal was not specifically directed at that alleged deficiency in the People's proof (*see People v Gray*, 86 NY2d 10, 19). In any event, we conclude that the evidence is legally sufficient to establish the operability of the firearm. Although the barrel of the firearm was loose and the loading gate would not remain closed, the People presented the testimony of the firearms examiner establishing that neither fact affected the operability of the firearm itself (*see People v Cavines*, 70 NY2d 882, 883; *cf. People v Shaffer*, 66 NY2d 663, 664). Indeed, the firearm was operational when the firearms examiner test-fired the firearm with the ammunition that had been loaded in the firearm at the time it was recovered (*see* Penal Law § 265.00 [15]).

We further conclude that the conviction is supported by legally sufficient evidence that defendant possessed the firearm (*see generally People v Bleakley*, 69 NY2d 490, 495). The People presented the testimony of an eyewitness who observed defendant in physical possession of the gun, as well as the testimony of a forensic biologist establishing that defendant "[was] the source of the major portion of the [DNA]" found on the firearm. Indeed, according to the testimony of the forensic biologist, the possibility of randomly selecting an unrelated individual with a matching DNA profile to the major DNA profile found on the firearm was "at least 1 in 13.43 quintillion." Finally, the evidence presented at trial established that the firearm was located in ceiling tiles directly above the area of the residence where defendant had been seated when the police entered the residence, and that no one else in the residence had been seated near defendant.

Contrary to defendant's contention, the testimony of the eyewitness was not incredible as a matter of law, i.e., "impossible of belief because it [was] manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Errington*, 121 AD3d 1553, 1555 [internal quotation marks omitted]; *see People v Ponzo*, 111 AD3d 1347, 1348; *People v Myers*, 87 AD3d 826, 827, *lv denied* 17 NY3d 954). Moreover, any inconsistencies in the testimony of the police officers did not concern material elements of the crime charged and were "not so substantial as to render the verdict against the weight of the evidence" (*People v Bailey*, 90 AD3d 1664, 1666, *lv denied* 19 NY3d 861; *see People v Hightower*, 286 AD2d 913, 915, *lv denied* 97 NY2d 656). We thus conclude that, upon viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

We reject defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to pursue a motion to suppress the firearm. It is well settled that "[a] defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *see People v Caban*, 5 NY3d 143, 152; *People v Rivera*, 71 NY2d 705, 709). "Where, as here, a defendant challenges

the effectiveness of counsel based on counsel's failure to make certain motions, the defendant must establish that the motions, if made, 'would have been successful and that counsel otherwise failed to provide meaningful representation' " (*People v Clark*, 6 AD3d 1066, 1067, *lv denied* 3 NY3d 638; *see People v Patterson*, 115 AD3d 1174, 1175-1176, *lv denied* 23 NY3d 1066). Here, defendant failed to meet his burden. The record establishes that defendant "had no expectation of privacy in the searched premises [because] he was only an occasional visitor there," and he thus lacked standing to object to the search (*People v Caprood*, 176 AD2d 982, 982; *see People v Sommerville*, 6 AD3d 1232, 1232, *lv denied* 3 NY3d 648; *People v Christian*, 248 AD2d 960, 960, *lv denied* 91 NY2d 1006; *cf. People v Brown*, 260 AD2d 390, 390, *lv denied* 93 NY2d 1001). Moreover, although defendant raises conclusory challenges to the owner's consent to the search of her home, "defendant has not advanced any arguable basis for suppression, which is fatal to his ineffective assistance of counsel claim" (*People v Clifford*, 295 AD2d 697, 698, *lv denied* 98 NY2d 709). We have reviewed defendant's remaining challenge to the effectiveness of counsel and conclude that it lacks merit. Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant was afforded meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

586

KA 13-01550

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY J. MANGIARELLA, DEFENDANT-APPELLANT.

TYSON BLUE, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered January 9, 2013. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of three counts of rape in the second degree (Penal Law § 130.30 [1]). Defendant contends that he was denied effective assistance of counsel because his first attorney failed to resolve the case pursuant to a preindictment plea offer that would have resulted in a less severe sentence (*see generally Lafler v Cooper*, ___ US ___, ___, 132 S Ct 1376, 1384-1385). Although that contention survives defendant's guilty plea inasmuch as he contends that his plea was infected by the alleged ineffective assistance (*see People v Peterson*, 56 AD3d 1230, 1230), it involves matters outside the record on appeal, including "attorney-client consultations and the attorney's plea-bargaining strategy" (*People v Harmon*, 50 AD3d 318, 319, *lv denied* 10 NY3d 935), and thus is properly raised by way of a motion pursuant to CPL 440.10 (*see People v Manor*, 121 AD3d 1581, 1583; *People v Flowers*, 309 AD2d 1237, 1238, *lv denied* 1 NY3d 571; *People v Bennett*, 277 AD2d 1008, 1008, *lv denied* 96 NY2d 780).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

587

KA 12-01232

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS A. NORMAN, DEFENDANT-APPELLANT.

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

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (ANDREW M. MOLITOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered March 19, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal trespass 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 criminal trespass in the first degree (Penal Law § 140.17 [2]), defendant contends that the plea allocution was factually insufficient because he did not admit a necessary element of the crime, i.e., possession of a firearm, rifle or shotgun. Defendant failed to preserve that contention for our review (*see People v Lopez*, 71 NY2d 662, 665), and we conclude in any event that defendant's challenge to the factual sufficiency of the plea allocution lacks merit. "Where[, as here], a defendant enters a negotiated plea to a lesser crime than one with which he is charged, no factual basis for the plea is required" (*People v Johnson*, 23 NY3d 973, 975). Further, the court's duty to make further inquiry was not triggered by defendant's failure "to recite every element of the crime pleaded to" (*Lopez*, 71 NY2d at 666 n 2; *see People v Evans*, 269 AD2d 797, 798, *lv denied* 95 NY2d 834).

We reject defendant's contention that County Court improperly refused to treat his motions pursuant to CPL article 440 as motions to withdraw the guilty plea. To the extent that defendant sought that relief after the imposition of sentence, his motions were untimely (*see* CPL 220.60 [3]; *People v Seader*, 278 AD2d 26, 26-27, *lv denied* 96 NY2d 806; *People v Ince*, 273 AD2d 101, 101, *lv denied* 95 NY2d 935). Defendant's CPL article 440 motions, moreover, are not properly before us on his direct appeal from the judgment of conviction (*see Seader*, 278 AD2d at 27).

Contrary to defendant's further contention, we conclude that he was afforded meaningful representation inasmuch as he " 'receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Parson*, 122 AD3d 1441, 1443, quoting *People v Ford*, 86 NY2d 397, 404). To the extent that defendant's contention is based upon matters outside the record, those matters should be addressed by a motion pursuant to CPL 440.10 (*see People v Volfson*, 69 AD3d 1123, 1125).

Finally, the sentence is not unduly harsh or severe.

Frances E. Cafarell

Entered: May 1, 2015

Clerk of the Court

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

592

CAF 14-00421

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF AMBER MEHTA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

FREDERICK FRANKLIN, JR.,
RESPONDENT-APPELLANT.

IN THE MATTER OF FREDERICK FRANKLIN, JR.,
PETITIONER-APPELLANT,

V

AMBER MEHTA, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

BOUVIER PARTNERSHIP, LLP, BUFFALO (EMILIO COLAIACOVO OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

VENZON LAW FIRM PC, BUFFALO (CATHARINE M. VENZON OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

JAMES A. CIMINELLI, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered July 31, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner-respondent primary physical custody of the subject child.

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

Memorandum: In appeal No. 1, respondent-petitioner father appeals from an order that, inter alia, awarded petitioner-respondent mother primary physical custody of the parties' child and, in appeal No. 2, the father appeals from an order denying his motion for leave to reargue and renew his opposition to Family Court's decision in appeal No. 1. We note at the outset that we dismiss the appeal from the order in appeal No. 2 to the extent that the court denied that part of the father's motion for leave to reargue inasmuch as no appeal lies from such an order (*see Matter of Wayne T.I. v Latisha T.C.*, 48 AD3d 1165, 1165; *Empire Ins. Co. v Food City*, 167 AD2d 983, 984). We otherwise affirm the order in appeal No. 2 inasmuch as the facts presented by the father in seeking leave to renew " 'would [not]

change the prior determination' " (*Chiappone v William Penn Life Ins. Co. of N.Y.*, 96 AD3d 1627, 1628, quoting CPLR 2221 [e] [2]).

Contrary to the father's contention in appeal No. 1, the court properly determined that there was a change in circumstances based on, inter alia, " 'the continued deterioration of the parties' relationship' " (*Lauzonis v Lauzonis*, 120 AD3d 922, 924). We further conclude that the court's determination awarding the mother primary physical custody is in the child's best interests. The court's determination is "entitled to great deference" and will not be disturbed where, as here, "the record establishes that it is the product of 'careful weighing of [the] appropriate factors' . . . , and it has a sound and substantial basis in the record" (*Matter of McLeod v McLeod*, 59 AD3d 1011, 1011).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

593

CAF 14-00422

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF AMBER MEHTA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

FREDERICK FRANKLIN, JR.,
RESPONDENT-APPELLANT.

IN THE MATTER OF FREDERICK FRANKLIN, JR.,
PETITIONER-APPELLANT,

V

AMBER MEHTA, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

BOUVIER PARTNERSHIP, LLP, BUFFALO (EMILIO COLAIACOVO OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

VENZON LAW FIRM PC, BUFFALO (CATHARINE M. VENZON OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

JAMES A. CIMINELLI, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 30, 2013 in a proceeding pursuant to Family Court Act article 6. The order denied the motion of respondent-petitioner for leave to reargue and renew his opposition to a prior decision of Family Court.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is affirmed without costs.

Same memorandum as in *Matter of Mehta v Franklin* ([appeal No. 1] ___ AD3d ___ [May 1, 2015]).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

595

CAF 14-00012

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF APRIL A. BURLEY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BERNARD D. BURLEY, RESPONDENT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

MARGARET M. RESTON, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (John J. Rivoli, J.H.O.), entered November 19, 2013 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 8, respondent appeals from an order of protection issued upon a finding that he willfully violated a prior order of protection issued in favor of petitioner directing him, inter alia, to refrain from forcible touching. Contrary to respondent's contention, petitioner met her burden of establishing that he was aware of the terms of that prior order of protection (*cf. Matter of Er-Mei Y.*, 29 AD3d 1013, 1016), and that he willfully violated it (*see Matter of Ferrusi v James*, 119 AD3d 1379, 1380). Respondent failed to preserve for our review his further contention that Family Court improperly considered testimony regarding an incident not alleged in the petition (*see generally Matter of Haley M.T.*, 96 AD3d 1549, 1550), and the record does not support that contention in any event (*see Matter of Chilbert v Soler*, 77 AD3d 1405, 1406, *lv denied* 16 NY3d 701). Finally, we reject respondent's contention that the court abused its discretion in issuing a stay away order of protection (*see Matter of Beck v Butler*, 87 AD3d 1410, 1411, *lv denied* 18 NY3d 801).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

604

CA 14-01396

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

CHRISTOPHER CANESTARO AND SUSAN YENSAN,
INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

V ORDER

RAYMOUR AND FLANIGAN FURNITURE COMPANY AND
RAYMOURS FURNITURE COMPANY, INC.,
DEFENDANTS-RESPONDENTS.

HODGSON RUSS LLP, BUFFALO (BENJAMIN ZUFFRANIERI, JR., OF COUNSEL), AND WEBSTER SZANYI LLP, FOR PLAINTIFFS-APPELLANTS.

HAHN & HESSEN LLP, NEW YORK CITY (JOHN P. AMATO OF COUNSEL), AND BOND SCHOENECK & KING, PLLC, BUFFALO, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 4, 2014. The order granted the motion of defendants to dismiss the complaint.

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

605

CA 14-02073

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND VALENTINO, JJ.

CATRINA SARAF, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROGER SMITH, JR., DEFENDANT-RESPONDENT.

SPADAFORA & VERRASTRO, LLP, BUFFALO (RICHARD E. UPDEGROVE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN TROP, BUFFALO, HURWITZ & FINE, P.C. (STEVEN E. PEIPER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered January 29, 2014 in a personal injury action. The order denied the motion of plaintiff to set aside a verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained in a three-vehicle accident. The accident occurred after defendant's vehicle struck the vehicle in front of him when that vehicle stopped to make a left turn. Plaintiff attempted to avoid a collision with defendant's vehicle by steering into the oncoming lane of traffic, but her vehicle struck the front driver's side of defendant's vehicle.

Supreme Court properly denied plaintiff's motion to set aside the verdict in favor of defendant as against the weight of the evidence. "A verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence" (*Krieger v McDonald's Rest. of N.Y., Inc.*, 79 AD3d 1827, 1828, *lv dismissed* 17 NY3d 734 [internal quotation marks omitted]). Here, a fair interpretation of the evidence supports the jury's determination that, with respect to the collision with plaintiff, defendant was not negligent (*see Pelletier v Lahm*, 111 AD3d 807, 808, *affd* 24 NY3d 966; *Flynn v Elrac, Inc.*, 98 AD3d 938, 940).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

624

CA 14-02040

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

LISA M. FRANKENBERGER, PLAINTIFF-RESPONDENT,

V ORDER

LYNNE M. OTWELL, DEFENDANT-APPELLANT.

THE LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (ELISE L. CASSAR OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID P. FELDMAN, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered August 4, 2014. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

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

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

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

629

CA 14-01108

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

IN THE MATTER OF DWAYNE SINGLETON,
PETITIONER-APPELLANT,

V ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered May 14, 2014 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of DeJesus v Evans*, 111 AD3d 1340).

Entered: May 1, 2015

Frances E. Cafarell
Clerk of the Court

MOTION NO. (649/91) KA 02-00858. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM J. BARNES, JR., DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND DEJOSEPH, JJ. (Filed May 1, 2015.)

MOTION NO. (484/97) KA 04-00304. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EARL STONE, DEFENDANT-APPELLANT. –- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND VALENTINO, JJ. (Filed May 1, 2015.)

MOTION NO. (1400/98) KA 14-02272. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JESSE HAMMOCK, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND DEJOSEPH. (Filed May 1, 2015.)

MOTION NO. (886/06) KA 04-00629. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM J. COKE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND WHALEN, JJ. (Filed May 1, 2015.)

MOTION NO. (738/07) KA 03-00814. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT A. GRIFFIN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, WHALEN, AND DEJOSEPH, JJ. (Filed May 1, 2015.)

MOTION NO. (608/08) KA 05-01153. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PRESTON BOYD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed May 1, 2015.)

MOTION NO. (9/09) KA 07-01853. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TERRENCE SLATER, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, WHALEN, AND DEJOSEPH, JJ. (Filed May 1, 2015.)

MOTION NO. (129/09) KA 06-01046. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KIM M. WILSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, AND DEJOSEPH, JJ. (Filed May 1, 2015.)

MOTION NO. (1374/11) KA 09-00310. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM MORRISON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal, specifically, whether the court erred when it failed to comply with CPL 310.30 in regard to Court Exhibit Nos. 8 and 9. Upon our review of the motion papers, we conclude that the issue may have merit. The order of December 23, 2011 is vacated and this Court will consider the appeal de novo (*see People v LeFrois*, 151 AD2d 1046).

Defendant is directed to file and serve his records and briefs with this Court on or before July 30, 2015. PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND LINDLEY, JJ. (Filed May 1, 2015.)

MOTION NO. (1271/12) CA 12-00731. -- IN THE MATTER OF THE ESTATE OF PERCY PERRY, DECEASED. REV. BARNEY B. PERRY, SR., PETITIONER-APPELLANT; TRACEE MEGNA, EXECUTRIX OF THE ESTATE OF PERCY PERRY, DECEASED, RESPONDENT-RESPONDENT. -- Motion for reargument denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed May 1, 2015.)

MOTION NO. (852/13) KA 11-00684. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ADAM THEALL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ. (Filed May 1, 2015.)

MOTION NO. (1050/14) KA 11-00299. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM J. MILLER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND DEJOSEPH, JJ. (Filed May 1, 2015.)

MOTION NO. (1232/14) CA 13-02197. -- IN THE MATTER OF ADIRONDACK HEALTH-UIHLEIN LIVING CENTER, ET AL., PETITIONERS-PLAINTIFFS-RESPONDENTS, V NIRAV R. SHAH, M.D., COMMISSIONER OF HEALTH, STATE OF NEW YORK, ROBERT L.

MEGNA, AS DIRECTOR OF BUDGET, AND ANDREW M. CUOMO, GOVERNOR, STATE OF NEW YORK, RESPONDENTS-DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed May 1, 2015.)

MOTION NO. (1306/14) TP 14-00907. -- IN THE MATTER OF SHAWN GREEN, PETITIONER, V THOMAS J. STICHT, ACTING SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT. -- Motion for reargument, resettlement, clarification or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed May 1, 2015.)

MOTION NO. (1344/14) CA 14-00367. -- IN THE MATTER OF ADIRONDACK HEALTH-UIHLEIN LIVING CENTER, ET AL., PETITIONERS-PLAINTIFFS-RESPONDENTS, V NIRAV R. SHAH, M.D., COMMISSIONER OF HEALTH, STATE OF NEW YORK, ROBERT L. MEGNA, DIRECTOR OF BUDGET, AND ANDREW M. CUOMO, GOVERNOR, STATE OF NEW YORK, RESPONDENTS-DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., VALENTINO, WHALEN, AND DEJOSEPH, JJ. (Filed May 1, 2015.)

MOTION NO. (1363/14) CA 14-00842. -- TAKISHA MOYE, PLAINTIFF-APPELLANT, V JOEL A. GIAMBRA AND MICHELLE M. GIAMBRA, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND DEJOSEPH, JJ. (Filed May 1,

2015.)

MOTION NO. (1391/14) CA 14-00871. -- IN THE MATTER OF MARGUERITE MITCHELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN K. MITCHELL, DECEASED, PLAINTIFF-APPELLANT-RESPONDENT, V NRG ENERGY, INC. AND DUNKIRK POWER LLC, DEFENDANTS-RESPONDENTS-APPELLANTS. -- Motion and cross motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed May 1, 2015.)

MOTION NO. (1421/14) CA 13-02000. -- DAVID H. KERNAN, KATHARINE H. KERNAN, EDWARD W. KERNAN, WILLIAM KERNAN, JR., ANGELA K. WISLER AND WARNICK J. KERNAN, PLAINTIFFS-RESPONDENTS, V TRAJANKA WILLIAMS, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for reargument, reconsideration or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, WHALEN, AND DEJOSEPH, JJ. (Filed May 1, 2015.)

MOTION NO. (1422/14) CA 13-02001. -- DAVID H. KERNAN, KATHARINE H. KERNAN, EDWARD W. KERNAN, WILLIAM KERNAN, JR., ANGELA K. WISLER AND WARNICK J. KERNAN, PLAINTIFFS-RESPONDENTS, V TRAJANKA WILLIAMS, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument, reconsideration or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, WHALEN, AND DEJOSEPH, JJ. (Filed May 1, 2015.)

MOTION NO. (1439/14) CA 14-00538. -- IN THE MATTER OF OBI IFEDIGBO, PETITIONER-APPELLANT, V BUFFALO PUBLIC SCHOOLS, RESPONDENT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND SCONIERS, JJ. (Filed May 1, 2015.)

MOTION NO. (43/15) CA 14-00318. -- IN THE MATTER OF COLONIAL SURETY COMPANY, PETITIONER-APPELLANT, V LAKEVIEW ADVISORS, LLC, ET AL., RESPONDENTS, RESOLUTION MANAGEMENT, LLC, NEAVERTH ENTERPRISES, LLC, ARENA DEVELOPMENT, LLC AND ROBERT J. GOODYEAR, RESPONDENTS-RESPONDENTS. (PROCEEDING NO. 1.) IN THE MATTER OF COLONIAL SURETY COMPANY, PETITIONER-APPELLANT, V LAKEVIEW ADVISORS, LLC, ET AL., RESPONDENTS, RESOLUTION MANAGEMENT, LLC, NEAVERTH ENTERPRISES, LLC, ARENA DEVELOPMENT, LLC AND ROBERT J. GOODYEAR, RESPONDENTS-RESPONDENTS. (PROCEEDING NO. 2.) (APPEAL NO. 1.) -- Motion for reargument or leave to Appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, VALENTINO, AND WHALEN, JJ. (Filed May 1, 2015.)

MOTION NO. (48/15) CA 14-01009. -- RYAN M. FORRESTEL, PLAINTIFF-RESPONDENT, V MARGUERITA M. FORRESTEL, DEFENDANT-APPELLANT. -- Motion for reargument or reconsideration denied. PRESENT: SMITH, J.P., CARNI, VALENTINO, AND WHALEN, JJ. (Filed May 1, 2015.)

MOTION NO. (61/15) CA 14-00963. -- MARGARET PASSUCCI, AS ADMINISTRATRIX OF THE ESTATE OF LUCILLE FIERLE, DECEASED, PLAINTIFF-RESPONDENT-APPELLANT, V ABSOLUT CENTER FOR NURSING AND REHABILITATION AT ALLEGANY, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT AURORA PARK, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT DUNKIRK, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT EDEN, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT ENDICOTT, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT GASPORT, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT HOUGHTON, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT ORCHARD PARK, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT SALAMANCA, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT THREE RIVERS, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT WESTFIELD, LLC, ABSOLUT FACILITIES MANAGEMENT, LLC, ISRAEL SHERMAN, AND JOHN DOES 1-200, DEFENDANTS-APPELLANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, AND WHALEN, JJ. (Filed May 1, 2015.)

MOTION NO. (148/15) TP 14-01377. -- IN THE MATTER OF SHAWN GREEN, PETITIONER, V HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT. -- Motion for reargument, resettlement, clarification or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ. (Filed May 1, 2015.)

MOTION NO. (212/15) CAF 13-02243. -- IN THE MATTER OF RICARDO SUAREZ AND LAURA SUAREZ, PETITIONERS-RESPONDENTS, V MELISSA WILLIAMS, RESPONDENT-APPELLANT, AND ERNESTO SUAREZ, RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, AND DEJOSEPH, JJ. (Filed May 1, 2015.)

CAF 14-00686. -- IN THE MATTER OF HERKIMER COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF COLLEEN G. GROOM, PETITIONER-RESPONDENT, V EDWARD R. MCGRADE, RESPONDENT-APPELLANT. -- Appeal dismissed without costs (*see Matter of Delong v Bristol*, 117 AD3d 1566, *lv denied* 24 NY3d 909). Counsel's motion to be relieved of assignment granted. (Appeal from Order of Family Court, Herkimer County, John J. Brennan, J. - Willful Violation). PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN AND DEJOSEPH, JJ. (Filed May 1, 2015.)

KA 14-00408. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT HAIGLER, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon his guilty plea of promoting prison contraband in the second degree (Penal Law § 205.20 [2]). Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38). We conclude that there is a nonfrivolous issue concerning whether the record contained sufficient evidence of guilt to support an *Alford* plea. We

therefore relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Wyoming County Court, Mark H. Dadd, J. - Promoting Prison Contraband, 2nd degree). PRESENT: SCUDDER, P.J., SMITH, SCONIERS, WHALEN, AND DEJOSEPH, JJ. (Filed May 1, 2015.)