SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 19, 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

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KA 13-02107

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL D. AGEE, 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 March 14, 2013. The judgment convicted defendant, upon a jury verdict, of attempted robbery in the first degree, robbery in the first degree, and robbery in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Niagara County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]), robbery in the first degree (§ 160.15 [4]) and robbery in the second degree (§ 160.10 [1]). The attempted robbery involved a store, and the robbery counts involved a food delivery person two days later.

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish his intent with respect to the attempted robbery count inasmuch as his motion for a trial order of dismissal was not specifically directed at that issue (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit. The evidence established that defendant entered the store in the company of another person, approached an employee behind a desk, claimed that he had gold to sell to the store, and called over a second employee. When the second employee approached, defendant pulled out a loaded revolver and pointed it at the second employee's face. When defendant turned to look at a third employee, the second employee tackled defendant. A scuffle ensued, and defendant and his companion fled. A witness testified that she saw defendant, who was holding a gun, and his companion flee from the vicinity of the store and enter a vehicle that was waiting with its engine running. There was also evidence that, several times before the attempted robbery of the store, defendant had tried to sell items to the store, but was unsuccessful in doing so. In addition, on the day before the attempted robbery, defendant entered the store and asked about its

hours of business. Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a " 'valid line of reasoning and permissible inferences [that] could lead a rational person' " to the conclusion reached by the jury, i.e., that defendant intended to forcibly steal property while displaying a firearm (*People v Bleakley*, 69 NY2d 490, 495; Penal Law § 160.15 [4]).

Defendant further contends that the verdict with respect to his conviction of the robbery counts is against the weight of the evidence. Although there was conflicting testimony whether defendant committed those crimes and, thus, "an acquittal would not have been unreasonable" (*People v Danielson*, 9 NY3d 342, 348; *see generally Bleakley*, 69 NY2d at 495), we conclude that, viewing the evidence in light of the elements of those crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). " '[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury' " (*People v West*, 118 AD3d 1450, 1451-1452, *lv denied* 24 NY3d 1048), and we see no reason to disturb the jury's determination of those issues in this case.

Defendant contends that the prosecutor violated County Court's *Sandoval* ruling by cross-examining him regarding an uncharged crime, and that he was thereby deprived of a fair trial by prosecutorial misconduct. That contention is without merit. The court struck the testimony concerning the uncharged crime and instructed the jury to disregard that testimony, and the jury is presumed to have followed the court's curative instruction (*see People v Mims*, 278 AD2d 822, 823, *lv denied* 96 NY2d 832; *see also People v O'Neal*, 38 AD3d 1305, 1307, *lv denied* 9 NY3d 848). We reject defendant's contention that cumulative errors deprived him of a fair trial (*see West*, 118 AD3d at 1452).

We reject defendant's further contention that he was denied due process and effective assistance of counsel during the sentencing proceeding when defense counsel declined to speak on his behalf. We conclude that "no statement made by defense counsel at sentencing 'would have had an impact on the sentence imposed' " (*People v Saladeen*, 12 AD3d 1179, 1180, *lv denied* 4 NY3d 767).

We agree with defendant, however, that the court erred in failing to determine whether he should be afforded youthful offender status (*see People v Rudolph*, 21 NY3d 497, 501). Defendant was convicted of an armed felony offense, and the court therefore was required "to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3) . . . [and] make such a determination on the record" (*People v Middlebrooks*, ___ NY3d ___, ___ [June 11, 2015]). Inasmuch as the court failed to do so here, we hold the case, reserve decision, and remit the matter to County Court to make and state for the record "a determination of whether defendant is a youthful offender"

(*Rudolph*, 21 NY3d at 503).

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

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

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CA 14-01650

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

MARLIN LYNDAKER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF WEST CANADA VALLEY CENTRAL SCHOOL DISTRICT, WEST CANADA VALLEY CENTRAL SCHOOL DISTRICT AND JOHN BANEK, SUPERINTENDENT, WEST CANADA VALLEY CENTRAL SCHOOL DISTRICT, DEFENDANTS-APPELLANTS.

GIRVIN & FERLAZZO, P.C., ALBANY (CHRISTOPHER J. HONEYWELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MARTIN & RAYHILL, P.C., UTICA (KEVIN G. MARTIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Erin P. Gall, J.), entered December 10, 2013. The order denied defendants' motion to dismiss the complaint against defendants Board of Education of West Canada Valley Central School District and West Canada Valley Central School District.

It is hereby ORDERED that said appeal by defendant John Banek, Superintendent, West Canada Valley Central School District is unanimously dismissed and the order is modified on the law by granting defendants' motion in part and dismissing the second and third causes of action in their entirety, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a retired teacher, commenced this action alleging that defendants failed to process his application for enrollment in the New York State & Local Retirement System (NYSLRS) and that such failure deprived him of additional service credit for his part-time employment with defendant West Canada Valley Central School District (District), which in turn resulted in him losing certain pension benefits. Defendants filed a pre-answer motion seeking to dismiss the complaint pursuant to CPLR 3211 (a) (5) and (7). During oral argument on the motion, plaintiff consented to dismissing the action against defendant John Banek, Superintendent, West Canada Valley Central School District. Supreme Court denied the motion with respect to the remaining defendants, and all three defendants appeal. We note at the outset that Banek is not aggrieved by the order appealed from, and we thus dismiss his appeal (*see* CPLR 5511). We agree with the remaining defendants that the court erred in

denying those parts of the motion seeking to dismiss the second and third causes of action against them for failure to state a cause of action, and we therefore modify the order accordingly.

We agree with defendants that the court erred in denying that part of the motion seeking dismissal of the second cause of action insofar as it alleges a breach of fiduciary duty. It is well settled that a fiduciary relationship does not exist between a school district as employer and a teacher as employee (*see Lasher v Albion Cent. Sch. Dist.*, 38 AD3d 1197, 1198; *see generally Matter of Lorie DeHimer Irrevocable Trust*, 122 AD3d 1352, 1352-1353). We also agree with defendants that the court erred in denying that part of the motion seeking dismissal of the second cause of action insofar as it alleges a violation of the Employee Retirement Income Security Act of 1974 ([ERISA] 29 USC § 1001 *et seq.*). ERISA does not apply where, as here, the employee benefit plan is a governmental plan (*see* § 1003 [b] [1]).

We further agree with defendants that the court erred in denying that part of their motion seeking to dismiss the third cause of action, which alleges violations of New York's Education Law and Retirement and Social Security Law. We conclude that plaintiff does not have a private right of action under those laws. Where, as here, the crux of plaintiff's third cause of action is that defendants' actions resulted in the improper reporting of his service credits to the State Retirement System, "the appropriate forum for resolution of this aspect of [plaintiff's cause of action] is the promised administrative hearing" pursuant to Retirement and Social Security Law § 74 (d) (*Matter of Cole-Hatchard v McCall*, 4 AD3d 715, 716). The State Comptroller has exclusive jurisdiction to determine such matters (*see Marsh v New York State & Local Employees' Retirement Sys.*, 291 AD2d 713, 714). Because Retirement and Social Security Law § 74 provides the exclusive remedy for the alleged wrongful act asserted in plaintiff's third cause of action, the court erred in recognizing a separate, private right of action inconsistent with the legislative scheme (*see generally McLean v City of New York*, 12 NY3d 194, 200-201; *Negrin v Norwest Mtge.*, 263 AD2d 39, 47).

Contrary to defendants' contention, we conclude that the court properly denied that part of the motion seeking dismissal of the remaining three causes of action as time-barred pursuant to CPLR 3211 (a) (5). With respect to that part of their motion, defendants had " 'the initial burden of establishing prima facie that the time in which to sue has expired' " (*Larkin v Rochester Hous. Auth.*, 81 AD3d 1354, 1355). The applicable limitations period for the first and fourth causes of action, alleging unjust enrichment, and breach of applicable collective bargaining agreements and implied contracts, respectively, is one year from accrual (*see* Education Law § 3813 [2-b]). We conclude that the limitations period for the first cause of action alleging unjust enrichment " 'start[ed] to run upon the occurrence of the wrongful act giving rise to a duty of restitution' " (*Boardman v Kennedy*, 105 AD3d 1375, 1376; *see North Salem Cent. Sch. Dist. v Mahopac Cent. Sch. Dist.*, 1 AD3d 418, 419, *lv dismissed in part and denied in part* 1 NY3d 620). We conclude that the alleged wrongful act occurred no earlier than May 18, 2012, when defendants

could have but failed to rectify the oversight that resulted in plaintiff losing certain pension benefits. The complaint alleges that, at a meeting on May 18, 2012, plaintiff received notification from the District that, despite being eligible for enrollment in NYSLRS, he was not going to be retroactively enrolled and thus would not receive certain pension benefits. The complaint further alleges that the District assured plaintiff that the error would be rectified. We conclude that, when the District thereafter failed to rectify the error, it wrongfully withheld property from plaintiff (*see generally Sitkowski v Petzing*, 175 AD2d 801, 802). Inasmuch as plaintiff served a timely notice of claim on August 17, 2012, and commenced this action within one year of that meeting, we conclude that the cause of action alleging unjust enrichment is not time-barred.

With respect to the fourth cause of action, alleging breach of applicable collective bargaining agreements and implied contracts, "a claim accrues when the damages accrue, i.e., when the extent of damages is readily ascertainable" (*Polce v Clinton Cent. Sch. Dist.*, 214 AD2d 997, 998, *lv denied* 86 NY2d 706; *see* Education Law § 3813 [1]). We conclude that plaintiff's claim with respect to the alleged breach accrued no earlier than May 18, 2012, when defendants notified plaintiff that his retirement benefits would not include the service credits for his part-time employment (*see Bellanca v Grand Is. Cent. Sch. Dist.*, 275 AD2d 944, 945). Inasmuch as plaintiff served a timely notice of claim on August 17, 2012 and commenced the action within one year of accrual, we conclude that the fourth cause of action is not time-barred.

We reject defendants' contention that the fifth cause of action, alleging negligence, is time-barred. "[A] tort cause of action cannot accrue until an injury is sustained . . . That, rather than the wrongful act of defendant or discovery of the injury by plaintiff, is the relevant date for marking accrual" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94). We conclude that plaintiff sustained an injury for purposes of the negligence cause of action when he received his retirement check that did not include benefits for his part-time employment; that is when all elements of the negligence action could be "truthfully alleged" (*id.*).

Defendants advance several other contentions on appeal in support of their position that the remaining causes of action fail to state a cause of action. We note, however, that defendants' submissions in support of their motion do not contain those contentions and, thus, the contentions are not properly before us (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985). To the extent that such contentions were included in defendants' memorandum of law submitted in support of the motion, we note that the memorandum of law is not part of the record on appeal, and "no issue of preservation of a legal issue is presented" (*Zawatski v Cheektowaga-Maryvale Union Free Sch. Dist.*, 261 AD2d 860, 860, *lv denied* 94 NY2d 754; *cf. Capretto v City of Buffalo*, 124 AD3d 1304, 1307; *see generally Oram v Capone*, 206 AD2d 839, 840).

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

remaining contention.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

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CA 14-01388

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

JOHN F. BOUCK, PLAINTIFF-RESPONDENT

V MEMORANDUM AND ORDER

SKANEATELES AERODROME, LLC, DEFENDANT-APPELLANT.

WILLIAMS & RUDDEROW, PLLC, SYRACUSE (MICHELLE RUDDEROW OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered March 11, 2014. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action to recover damages for personal injuries and property damage sustained when he was unsuccessful in his attempt to take off from the grass-surfaced runway of defendant's airport in his Cessna airplane. We agree with defendant that Supreme Court erred in denying its motion seeking summary judgment dismissing the complaint based on the doctrine of primary assumption of the risk.

The incident occurred while plaintiff was piloting and attempting a particular maneuver in the aviation field known as a "soft-field take off." Although it had not rained on the day of the incident, it had rained for several days prior thereto. Upon reaching a speed of approximately 50 miles per hour, the landing gear on plaintiff's airplane encountered a soft and/or wet area on the grass runway, and the aircraft "dug in" and "tipped over," causing damage to the airplane and personal injuries to plaintiff. Prior to the incident in question, plaintiff, a flight instructor and pilot with over 40 years of experience, had utilized defendant's grass runway in excess of 100 take offs and/or landings. Before attempting his take off, plaintiff inspected the grass runway because of his concern that the grass surface of it was soft and wet. Indeed, that is why he chose to utilize the "soft-field take off" procedure.

We agree with defendant that its airport is a designated venue

for the recreational activity of private aviation and that plaintiff's use thereof was in furtherance of his pursuit of that activity (*see Custodi v Town of Amherst*, 20 NY3d 83, 88-89). We thus conclude, as defendant contends, that plaintiff's recreational use of defendant's airport was a qualifying activity under the doctrine of primary assumption of the risk (*see id*. at 88). Primary assumption of the risk applies when a consenting participant in a qualified activity "is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks" (*Bukowski v Clarkson Univ*., 19 NY3d 353, 356 [internal quotation marks omitted]). "If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" (*Turcotte v Fell*, 68 NY2d 432, 439). "[A]wareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff" (*Maddox v City of New York*, 66 NY2d 270, 278). The primary assumption of the risk doctrine also encompasses risks involving less than optimal conditions (*see Sykes v County of Erie*, 94 NY2d 912, 913). "It is not necessary to the application of assumption of [the] 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*, 66 NY2d at 278).

Here, the undisputed facts establish that plaintiff, an experienced pilot, was well aware of the risk inherent in taking off from a soft, wet grass runway with the type of landing gear with which his aircraft was equipped. Plaintiff's awareness of the risk was amply established by his admitted preflight concern about the condition of the grass runway, and by his personal inspection thereof generated in part by his encounter with wet and muddy conditions while towing his aircraft to the runway by motor vehicle. Notwithstanding his awareness and concern, plaintiff nonetheless elected to proceed with his attempt to take off from the soft, wet grass runway. We reject plaintiff's effort to distinguish between the soft, wet grass and the mud in which his landing gear wheels became lodged because it is a matter of common experience that soft, wet grass following a period of rain may result in the earth beneath the grass being turned to mud (*see id.*).

In light of our determination, we need not address defendant's remaining contentions.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01929

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

KELLY G. SHERIDAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID E. SHERIDAN, DEFENDANT-APPELLANT.

KELLY M. CORBETT, ESQ., ATTORNEY FOR THE CHILD, APPELLANT.
(APPEAL NO. 1.)

PHILLIPS LYTLE LLP, BUFFALO (MICHAEL B. POWERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

KELLY M. CORBETT, ATTORNEY FOR THE CHILD, FAYETTEVILLE, APPELLANT PRO SE.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered September 4, 2013. The order, among other things, awarded plaintiff sole legal and physical custody of the subject child.

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

Memorandum: In appeal No. 1, defendant father and the appellate Attorney for the Child (AFC) appeal from an order that, inter alia, awarded sole custody of the subject 13-year-old child to plaintiff mother and visitation to the father. In appeal No. 2, the father appeals from an order that, inter alia, directed him to pay counsel fees to the mother's attorney in the amount of $44,977.34, directed him to pay sanctions in the amount of $7,000, and directed the father's attorney to pay sanctions in the amount of $3,000.

The father contends in appeal No. 1 that he did not receive a fair trial because of certain "errant" evidentiary rulings. We agree with the father that Supreme Court improperly curtailed his cross-examination of the court-appointed expert (*see* CPLR 4515); erred in prohibiting him from calling the child's therapist as a rebuttal witness; and erred in admitting certain EZ-Pass records because "[a] proper foundation for [their] admission . . . [was not] provided by someone with personal knowledge of the maker's business practices and

procedures" (*Palisades Collection, LLC v Kedik*, 67 AD3d 1329, 1330-1331 [internal quotation marks omitted]; *see also KG2, LLC v Weller*, 105 AD3d 1414, 1415), and there was no indication that the records were certified to comply with CPLR 4518 pursuant to CPLR 3122-a. We conclude, however, that those errors are harmless inasmuch as the excluded evidence " 'would [not] have had a substantial influence on the outcome of the case' " (*Nationstar Mtge., LLC v Davidson*, 116 AD3d 1294, 1296, *lv denied* 24 NY3d 905), and the errors " 'did not adversely affect a substantial right of the [father]' " (*Cor Can. Rd. Co., LLC v Dunn & Sgromo Engrs., PLLC*, 34 AD3d 1364, 1365; *Shahram v Horwitz*, 5 AD3d 1034, 1035).

Contrary to the father's further contention in appeal No. 1, the court did not err in admitting in evidence the reports of the court-appointed expert pursuant to 22 NYCRR 202.16 (g) (2). Although the reports themselves were not submitted "under oath" as required by that regulation, the expert was subsequently called, she testified under oath, and she was available for cross-examination (*cf. Matter of Kranock v Ranieri*, 17 AD3d 1104, 1105, *lv denied* 5 NY3d 709; *see generally Posporelis v Posporelis*, 41 AD3d 986, 992).

The father and the AFC further contend in appeal No. 1 that the court's custody determination is not in the child's best interests and that the court failed to give appropriate weight to the child's desire to live with the father. In making a custody determination, "the court must consider all factors that could impact the best interests of the child, including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of [the parties] to provide for the child's emotional and intellectual development and the wishes of the child . . . No one factor is determinative because the court must review the totality of the circumstances" (*Matter of Cross v Caswell*, 113 AD3d 1107, 1107 [internal quotation marks omitted]). A court's custody determination, including its evaluation of a child's best interests, is entitled to great deference and will not be disturbed as long as it is supported by a sound and substantial basis in the record (*see id.* at 1107-1108; *see also Matter of Thillman v Mayer*, 85 AD3d 1624, 1625).

"Here, although there are several factors that militate in favor of awarding custody to the [father]," we conclude that the court's determination that it is in the best interests of the child to remain in the custody of the mother is supported by a sound and substantial basis in the record (*Cross*, 113 AD3d at 1107). As noted by the court-appointed expert, a potential move from his mother's residence in Syracuse to his father's residence in Buffalo would put the child "at risk of experiencing a tremendous sense of loss and disruption" because he is "connected to his school[,] his mom[,] his community[,] his neighborhood[,] his friends and his pursuits [in Syracuse]." Furthermore, while we agree with the father and the AFC that the child's "wishes . . . [were] entitled to great weight, particularly where[, as here, his] age and maturity . . . make[s his] input particularly meaningful" (*Matter of Stevenson v Stevenson*, 70 AD3d 1515, 1516, *lv denied* 14 NY3d 712 [internal quotation marks omitted]), the court acknowledged the factor, and deemed it to be significant,

but noted why it was not entitled to the type of consideration that the father and the AFC had requested. Because the wishes of the child are "not . . . determinative," we perceive no error in how the court addressed that factor (*Dintruff v McGreevy*, 34 NY2d 887, 888).

Contrary to the AFC's contention in appeal No. 1 that the AFC at the trial level did not properly present the child's wishes to the court, we conclude that the AFC at the trial level fulfilled her representational obligations by voicing the child's wishes directly to the court without recommending any finding to the contrary. In addition, we note that the court held two *Lincoln* hearings, and the AFC did not prevent the child from voicing his wishes to the court (*see* 22 NYCRR 7.2 [d]; *Matter of Rosso v Gerouw-Rosso*, 79 AD3d 1726, 1728; *see also Matter of Gloria DD. [Brenda DD.]*, 99 AD3d 1044, 1046-1047; *Matter of Whitcomb v Seward*, 86 AD3d 741, 745).

Contrary to the father's further contention in appeal No. 1, with deference to the "court's determination and its 'firsthand assessment' of the parties," we cannot conclude that the court erred in fashioning a visitation schedule (*D'Ambra v D'Ambra* [appeal No. 2], 94 AD3d 1532, 1534). The court's creation of two equal Christmas visitation periods, which alternate annually, was an appropriate exercise of its discretion. In addition, the court appropriately exercised its discretion in providing for flexible weekday visitation to take into account the child's participation in extracurricular activities. We therefore see no basis to disturb the visitation schedule fashioned by the court (*see Matter of Rought v Palidar*, 6 AD3d 1112, 1112).

Lastly, with respect to appeal No. 2, we conclude that the court abused its discretion in awarding sanctions inasmuch as the conduct of the father and his counsel was not "frivolous" as defined in 22 NYCRR 130-1.1 (c) (*see Kimmel v State of New York*, 115 AD3d 1323, 1325), and we therefore modify the order accordingly. We further conclude that the court did not abuse its discretion in ordering the father to pay the mother's attorney's fees (*see Decker v Decker*, 91 AD3d 1291, 1291). We note, however, that there is a mathematical error in the computation of the award of attorney's fees, which should be reduced by $6,330.55, for a total of $38,646.79, and we therefore further modify the order accordingly.

All concur except CENTRA, J.P., and PERADOTTO, J., who dissent and vote to modify in accordance with the following memorandum: We respectfully dissent in appeal No. 1 because, in our view, Supreme Court's determination awarding sole legal and physical custody of the parties' child to plaintiff mother lacks a sound and substantial basis in the record (*see Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1449). We would therefore modify the order in appeal No. 1 by awarding sole custody to defendant father with visitation to the mother and remit the matter to Supreme Court for a different justice to fashion an appropriate visitation schedule (*see id.* at 1451; *see also Sitts v Sitts*, 74 AD3d 1722, 1723-1724, *lv dismissed* 15 NY3d 833, *lv denied* 18 NY3d 801). We agree with the majority's resolution of appeal No. 2.

Although, as a general rule, the custody determination of a trial court is entitled to great deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174), "[s]uch deference is not warranted . . . where[, as here,] the custody determination lacks a sound and substantial basis in the record" (*Fox v Fox*, 177 AD2d 209, 211-212; *see Sitts*, 74 AD3d at 1723). Ultimately, we must determine what is in the child's best interests " 'and what will best promote [his] welfare and happiness' " (*Eschbach*, 56 NY2d at 171). In making that determination "numerous factors are to be considered, including the continuity and stability of the existing custodial arrangement, the quality of the child's home environment and that of the parent seeking custody, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, and the individual needs and expressed desires of the child" (*Bryan K.B.*, 43 AD3d at 1450 [internal quotation marks omitted]; *see Eschbach*, 56 NY2d at 171-173).

In our view, the court erred in weighing those important factors, and its determination, therefore, lacks a sound and substantial basis in the record. Most glaringly, the court failed to give sufficient weight to the child's preference to live with the father (*see Matter of Rivera v LaSalle*, 84 AD3d 1436, 1437-1439). As the majority acknowledges, the expressed wishes of the child are "entitled to great weight" in light of his age and relative maturity (*Veronica S. v Philip R.S.*, 70 AD3d 1459, 1460; *see Matter of Mercado v Frye*, 104 AD3d 1340, 1342, *lv denied* 21 NY3d 859).

The child, who was already 13 at the time of the court's order in appeal No. 1, is now 15 years old. For the last six years, he has consistently expressed his desire to live with his father, and the Attorney for the Child on this appeal asserted in her brief and at oral argument that the child still wants to live with his father. The child's preference was expressed to the court-appointed custodial evaluator in his mother's presence. The custodial evaluator agreed that the child's disclosure in front of his mother was an indication that his preference was genuine. In addition, the custodial evaluator testified that the child's preference did not appear to be the result of influence or coercion by the father (*cf. generally Eschbach*, 56 NY2d at 173). Although the custodial evaluator further testified that the child's preference reflected "his wish to be loyal to the father [and] his wish to have his father be happy," we do not view such loyalty and attachment as a reasonable basis for disregarding the child's preference and maintaining custody with the mother.

The court's determination also lacks a sound and substantial basis in the record insofar as that determination is based on the conclusion that the mother was better equipped to handle the child's psychological and emotional needs. Although the mother has been the child's primary custodial parent for many years, her relationship with him has substantially deteriorated. The record reflects the mother's inability to handle the normal challenges of raising a teenager and her apparent failure to deal with those challenges without the use of force or profanity. The mother's difficulty in dealing with the child is further demonstrated by the fact that she was often compelled to

resort to contacting the father or others to assist in controlling the child's outbursts or "to get [the child] to do things." The custodial evaluator testified that the father, unlike the mother, had "no issues controlling [the child's] conduct." The progressively deteriorating and antagonistic relationship between the child and his mother is further evidenced by incidents in which the child kicked a hole in a wall at his mother's house and threw a phone at his mother. The antagonism between the child and his mother demonstrates "a total breakdown in communication . . . requir[ing] a change in custody" (*Eschbach*, 56 NY2d at 172; *see Matter of Maute v Maute*, 228 AD2d 444, 444-445).

The total breakdown in communication is further exemplified by evidence of the mother's physical violence against the child, and the court failed to address and adequately account for the undisputed evidence of physical confrontations between the mother and the child. For example, the mother admitted to slapping the child's face "[a] couple times" when he "got[ ] mouthy," disrespectful, or rude, and she testified that she was justified in striking the child for that reason. The court was required to consider the effect of domestic violence upon the best interests of the child (*see Matter of Moreno v Cruz*, 24 AD3d 780, 781, *lv denied* 6 NY3d 712, quoting Domestic Relations Law § 240 [1]), and it failed to do so here. We conclude that the evidence of domestic violence further supports an award of sole custody to the father (*see Moreno*, 24 AD3d at 781; *see also Matter of Caughill v Caughill*, 124 AD3d 1345, 1347).

The court also determined that the mother was more able and willing to meet the child's educational needs. During the academic year before the mother commenced her action for divorce, when the child was in second grade, the child achieved a final grade of A in all of his academic subjects. Since then, he has received more B and C grades primarily, it seems, because of a lack of discipline and focus. Whatever the reason, be it the ineffectiveness of the mother or the rebellion of the child, it is undeniable that his academic performance has declined while the mother has been the primary custodian.

"It is well settled that '[t]he authority of the Appellate Division in matters of custody is as broad as that' of the trial court" (*Sitts*, 74 AD3d at 1723, quoting *Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947). "[W]here . . . the record is sufficient for this Court to make a best interests determination . . . , we will do so in the interests of judicial economy and the well-being of the child" (*Caughill*, 124 AD3d at 1346 [internal quotation marks omitted]). We conclude that the record, which includes two *Lincoln* hearings, is sufficient for us to make a best interests determination here (*see Matter of Cole v Nofri*, 107 AD3d 1510, 1512, *appeal dismissed* 22 NY3d 1083) and, upon review of the relevant factors, we further conclude that it is in the child's best interests to award sole legal and physical custody to the father.

Finally, we note that the evidence to support an award of custody

to the father would likely have been even stronger had the trial level attorney for the child (AFC) properly acted as an advocate for her client. Contrary to the position of the majority, we conclude that the AFC "failed to fulfill [her] essential obligation" to her client (*Matter of Mark T. v Joyanna U.*, 64 AD3d 1092, 1095). The Rules of the Chief Judge provide that an AFC "must zealously advocate the child's position . . . even if the [AFC] believes that what the child wants is not in the child's best interests," unless the AFC "is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child" (22 NYCRR 7.2 [d] [2], [3]; *see Matter of Swinson v Dobson*, 101 AD3d 1686, 1687, *lv denied* 20 NY3d 862). Because neither exception allowing the AFC to substitute her own judgment for that of the child is implicated here, she was obligated to zealously advocate the child's position (*see Swinson*, 101 AD3d at 1687; *Mark T.*, 64 AD3d at 1095; *cf. Matter of Rosso v Gerouw-Rosso*, 79 AD3d 1726, 1728), and she failed to do so.

Despite the child's consistently expressed desire to live with the father, at trial the AFC objected repeatedly during direct-examination of the father and cross-examination of the mother, but did not object during direct examination of the mother or cross-examination of the father. The AFC also called as a witness a custodial evaluator whose recommendation was directly contrary to the child's preference to live with the father. We cannot agree with the majority that the AFC fulfilled her obligation to her client by merely informing the court of the child's wishes "without recommending any finding to the contrary." In our view, the AFC merely parroted the child's position to the court in a perfunctory fashion, and did not fulfill her ethical obligation to act as a zealous advocate for the child and to give voice to the child's wishes (*see* 22 NYCRR 7.2 [b], [d]; *see generally Mark T.*, 64 AD3d at 1094-1095; *Matter of Dominique A.W.*, 17 AD3d 1038, 1039-1040, *lv denied* 5 NY3d 706). The AFC's inadequate representation of the child at the trial level further justifies reversing the court's custody determination in appeal No. 1.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

313

CA 14-00764

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

KELLY G. SHERIDAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID E. SHERIDAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

PHILLIPS LYTLE LLP, BUFFALO (MICHAEL B. POWERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

KELLY M. CORBETT, ATTORNEY FOR THE CHILD, FAYETTEVILLE.

Appeal from an order of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered January 17, 2014. The order, among other things, directed defendant pay the sum of $44,977.34 to plaintiff's attorney.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the award of sanctions and reducing the award of attorney's fees to $38,646.79, and as modified the order is affirmed without costs.

Same memorandum as in *Sheridan v Sheridan* ([appeal No. 1] ___ AD3d ___ [June 19, 2015]).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

314

CA 14-00765

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

KELLY G. SHERIDAN, PLAINTIFF-RESPONDENT,

V ORDER

DAVID E. SHERIDAN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

PHILLIPS LYTLE LLP, BUFFALO (MICHAEL B. POWERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

KELLY M. CORBETT, ATTORNEY FOR THE CHILD, FAYETTEVILLE.

Appeal from an order of the Supreme Court, Onondaga County (Martha E. Mulroy, A.J.), entered February 3, 2014. The order denied defendant's motion to expand his parenting time with his son.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Abasciano v Dandrea*, 83 AD3d 1542, 1545).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

315

CA 14-00766

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

KELLY G. SHERIDAN, PLAINTIFF-RESPONDENT,

V ORDER

DAVID E. SHERIDAN, DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

PHILLIPS LYTLE LLP, BUFFALO (MICHAEL B. POWERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

KELLY M. CORBETT, ATTORNEY FOR THE CHILD, FAYETTEVILLE.

Appeal from an order of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered February 11, 2014. The order, among other things, denied defendant's motion for plaintiff to be held in contempt of court.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Abasciano v Dandrea*, 83 AD3d 1542, 1545).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

354

CA 14-01198

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

THEODORE J. SHAW, LANETTE SHAW AND THEODORE JAMES SHAW, DOING BUSINESS AS COLISEUM, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ROSHA ENTERPRISES, INC., DEFENDANT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (KEITH N. BOND OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered September 10, 2013. The order, among other things, granted plaintiffs' motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiffs' motion, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking monetary damages after a tractor-trailer owned by defendant and permissively operated by its employee crashed into a building that plaintiffs owned and operated as a roller skating rink. Following the collision, the building was engulfed in a fire and sustained significant damage. Plaintiffs have been directed by the Town of Genesee to demolish the building on the ground that, in its current condition, the "building poses a threat to public safety."

Plaintiffs moved for partial summary judgment on the issue of liability. Defendant opposed that motion and cross-moved for summary judgment seeking, inter alia, to limit damages to the market value of the property before the accident and to dismiss plaintiffs' claim for demolition costs. Supreme Court granted plaintiffs' motion and denied defendant's cross motion in part. We conclude that the court erred in granting plaintiffs' motion, and we therefore modify the order accordingly.

It is undisputed that the damage to plaintiffs' building was caused by the accident, but we nevertheless conclude that plaintiffs failed to meet their initial burden of establishing as a matter of law that the collision was caused by the negligence of defendant's

employee (hereafter, driver) (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Aside from a verified bill of particulars and an amended verified bill of particulars, neither of which contains evidence in admissible form related to the circumstances of the accident, the only other evidence submitted by plaintiffs related to the accident was a police accident report. "Although a police report generally is admissible as a business record . . . , statements contained in the report concerning the cause of an accident constitute inadmissible hearsay unless the reporting officer witnessed the accident . . . , the reporting officer is qualified as an expert . . . , or the statements meet some other exception to the hearsay rule" (*Huff v Rodriguez*, 45 AD3d 1430, 1432; *see Brady v Casilio*, 93 AD3d 1190, 1191). Inasmuch as the reporting officer did not witness the accident and was not qualified as an expert, the statements contained in the report, to be admissible, must fall within an exception to the hearsay rule. Plaintiffs failed to establish that the statements contained in the police report concerning the cause of the accident fall within such an exception, and thus the cause of the accident is a matter for speculation, which is insufficient to establish as a matter of law that the driver was negligent.

Even if we were to consider the inadmissible statements contained within the police accident report, we would nevertheless conclude that they raise triable issues of fact whether the driver, who has since passed away from unrelated causes, was negligent. Immediately after the accident, the driver informed the reporting officer that he "swerved to the left to avoid an unknown object in [the] roadway." In our view, that statement raises triable issues of fact on the applicability of the emergency doctrine and the driver's purported negligence (*see Fitz-Gerald v Rich*, 251 AD2d 1017, 1017-1018; *see also Ferris v Grogan*, 84 AD3d 1571, 1572, *lv denied* 17 NY3d 709; *Mazzarella v McVeigh*, 283 AD2d 557, 557; *Lanza v Wells*, 99 AD2d 506, 506). Contrary to plaintiffs' contention, this is not a situation in which defendant has opposed a motion for summary judgment by relying on hearsay (*cf. Weinstein v Nicolosi*, 117 AD3d 1036, 1037; *Candela v City of New York*, 8 AD3d 45, 47; *Sunfirst Fed. Credit Union v Empire Ins. Co./All City Ins. Co.*, 239 AD2d 894, 894-895). Rather, this is a situation in which plaintiffs, in support of their own motion, submitted hearsay statements raising a triable issue of fact and, in effect, "adopted [those statements] as accurate" (*Vetrano v J. Kokolakis Contr., Inc.*, 100 AD3d 984, 986; *see also Carey v Five Bros., Inc.*, 106 AD3d 938, 939-940).

In their reply papers, plaintiffs submitted evidence that, years before the motion, the driver had pleaded guilty to a change lane hazard (*see* Vehicle and Traffic Law § 1128 [d]) with respect to the accident. They also submitted portions of the deposition from a police officer who responded to the scene of the accident and interviewed the driver. According to the officer's testimony, the driver stated that "he saw something in the roadway and that he swerved to miss it." The driver repeated that statement to the officer several days later. Although it is well settled that courts may not consider evidence submitted in reply papers when determining whether a party met its initial burden on a summary judgment motion

(*see Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188; *Wonderling v CSX Transp., Inc.*, 34 AD3d 1244, 1245), plaintiffs' attorney contended at oral argument of this appeal that there had been an agreement to refile the motion following the officer's deposition.

Were we to consider the documents filed by plaintiffs in their "reply" papers in determining whether plaintiffs met their initial burden, we would nevertheless conclude that there are triable issues of fact whether the driver was negligent. It is well settled that "the fact that [the] driver entered a plea of guilty to a Vehicle and Traffic Law offense is only some evidence of negligence and does not establish his negligence per se" (*Verkey v Hebard*, 99 AD3d 1205, 1206; *see Kelley v Kronenberg* [appeal No. 2], 2 AD3d 1406, 1407; *Cullipher v Traffic Markings* [appeal No. 3], 259 AD2d 992, 992-993; *Canfield v Giles* [appeal No. 1], 182 AD2d 1075, 1075; *see generally Ando v Woodberry*, 8 NY2d 165, 171). Rather, it is the "*unexcused* violation of the Vehicle and Traffic Law [that] constitutes negligence per se" (*Long v Niagara Frontier Transp. Auth.*, 81 AD3d 1391, 1392 [emphasis added]; *see Stalikas v United Materials*, 306 AD2d 810, 811, *affd* 100 NY2d 626; *Arms v Halsey*, 43 AD3d 1419, 1419; *Heffernan v Logue*, 40 AD2d 1071, 1071). If a trier of fact accepts as true the position that the driver swerved to avoid an object in the road, the jury may excuse the driver's alleged negligence, in which case defendant would not have any vicarious liability for the accident (*see Fitz-Gerald*, 251 AD2d at 1017-1018; *see also Ferris*, 84 AD3d at 1572; *Mazzarella*, 283 AD2d at 557; *Lanza*, 99 AD2d at 506).

Even assuming, arguendo, that plaintiffs met their initial burden, we would still conclude that their motion should have been denied. A party opposing a motion for summary judgment "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which [the party] rests [its] claim or *must demonstrate [an] acceptable excuse for [its] failure to meet the requirement of tender in admissible form*" (*Zuckerman*, 49 NY2d at 562 [emphasis added]). Here, defendant established an acceptable excuse for its failure to submit evidence in admissible form to oppose plaintiffs' motion. Defendant's driver, who would be the person in possession of the relevant knowledge, was unavailable because he had passed away from unrelated causes before he could be deposed concerning the circumstances of the accident (*see e.g. Egleston v Kalamarides*, 58 NY2d 682, 684; *Gizzi v Hall*, 300 AD2d 879, 881; *Maldonado v Townsend Ave. Enters., Ltd. Partnership*, 294 AD2d 207, 208). While we agree with plaintiffs that defendant's reliance on the *Noseworthy* doctrine (*Noseworthy v City of New York*, 298 NY 76) is unpreserved for our review (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985) and, in any event, misplaced, defendant raised the unavailability of its driver in opposition to the motion and thus preserved for our review its contentions concerning its inability to oppose plaintiffs' motion with evidence in admissible form. This is not a situation in which the party opposing summary judgment "failed to submit any evidence other than hearsay in opposition to [plaintiffs'] motion *and* did not tender any excuse for the failure to do so" (*Sunfirst Fed. Credit Union*, 239 AD2d at 895 [emphasis added];

cf. Candela, 8 AD3d at 47; *Narvaez v NYRAC*, 290 AD2d 400, 400-401).

We agree with plaintiffs, however, that the court properly denied that part of defendant's cross motion for summary judgment seeking to limit damages. It is well settled that the standard for assessing damages to property is the lesser of replacement cost or diminution in market value (*see Fisher v Qualico Contr. Corp.* 98 NY2d 534, 540; *Hartshorn v Chaddock*, 135 NY 116, 122, *rearg denied* 32 NE 648; *Franklin Corp. v Prahler*, 91 AD3d 49, 57). Here, it is undisputed that the cost of the required demolition exceeds the fair market value of the property before the accident. Defendant contends that plaintiffs' damages are limited to the market value of the property before the accident, with no consideration of demolition costs, inasmuch as the full market value of the property before the accident is less than the repair or replacement cost. We agree with plaintiffs, however, that demolition costs are recoverable where the property to be demolished constitutes a "safety hazard beyond repair" (*Lichter v 349 Amsterdam Ave. Corp.*, 22 AD3d 394, 395, *lv denied* 6 NY3d 704). There are also situations in which a property may be deemed to have a negative market value, i.e., where the cost to remediate the property exceeds the market value of the property (*see Matter of Roth v City of Syracuse*, 21 NY3d 411, 415; *Matter of Commerce Holding Corp. v Board of Assessors of Town of Babylon*, 88 NY2d 724, 729-730). "It is well settled that the purpose of awarding damages in a tort action is to make the plaintiff whole" (*Franklin Corp.*, 91 AD3d at 54). Moreover, "valuation [is] largely a question of fact, and the [trial] courts have considerable discretion in reviewing the relevant evidence as to the specific propert[ies] before them" (*Matter of Consolidated Edison Co. of N.Y., Inc. v City of New York*, 8 NY3d 591, 597).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

416

CAF 14-01034

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

IN THE MATTER OF BROOKE S. BARONE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ELIZABETH A. CHAPMAN-CLELAND,
RESPONDENT-RESPONDENT.

R. THOMAS RANKIN, ESQ., ATTORNEY FOR
THE CHILD, APPELLANT.

R. THOMAS RANKIN, ATTORNEY FOR THE CHILD, JAMESTOWN, APPELLANT PRO SE.

BROOKE S. BARONE, PETITIONER-RESPONDENT PRO SE.

SHERRY A. BJORK, FREWSBURG, FOR RESPONDENT-RESPONDENT.

Appeal from an order of Family Court, Chautauqua County (Judith S. Claire, J.), entered January 24, 2014 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for custody and visitation.

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

Memorandum: Petitioner commenced this proceeding pursuant to Family Court Act article 6, seeking custody and visitation with the son of respondent, her former same-sex partner. The Attorney for the Child (AFC) appeals from an order dismissing the petition on the ground that petitioner was not married to respondent and did not adopt the child, and thus lacked standing to seek custody of, or visitation with, him. We affirm.

The AFC contends that, because the best interests of the child are paramount in custody and visitation disputes, "the standing accorded to parents should extend to those who have a recognized and operative parent-child relationship, regardless of their sexual orientation." The AFC further contends that the doctrine of equitable estoppel should apply to bar respondent from denying that petitioner is a parent of the subject child, and thus we should conclude that petitioner has standing to seek custody and visitation. Those contentions are without merit. "[T]he Court of Appeals has recently reiterated that a nonbiological, nonadoptive parent does not have standing to seek visitation when a biological parent who is fit

opposes it, and that equitable estoppel does not apply in such situations even where the nonparent has enjoyed a close relationship with the child and exercised some control over the child with the parent's consent" (*Matter of Palmatier v Dane*, 97 AD3d 864, 865; *see Debra H. v Janice R.*, 14 NY3d 576, 589-597, *rearg denied* 15 NY3d 767, *cert denied* ___ US ___, 131 S Ct 908; *Matter of White v Wilcox*, 109 AD3d 1145, 1146, *lv dismissed in part and denied in part* 22 NY3d 1085, 1086). It is well settled "that parentage under New York law derives from biology or adoption" (*Debra H.*, 14 NY3d at 593), and that the decision of the Court of Appeals in *Matter of Alison D. v Virginia M.* (77 NY2d 651, 656-657), "in conjunction with second-parent adoption, creates a bright-line rule that promotes certainty in the wake of domestic breakups otherwise fraught with the risk of 'disruptive . . . battles' . . . over parentage as a prelude to further potential combat over custody and visitation" (*Debra H.*, 14 NY3d at 593-594). We reiterate that, as the Court of Appeals unequivocally stated, "any change in the meaning of 'parent' under our law should come by way of legislative enactment rather than judicial revamping of precedent" (*id.* at 596). Finally, we note that petitioner "failed to sufficiently allege any extraordinary circumstances to establish her standing to seek custody" as a nonbiological, nonadoptive parent (*Matter of A.F. v K.H.*, 121 AD3d 683, 684).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

422

CA 13-01877

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

PHILLIP P. BATTEASE, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 120512.)

PHILLIP P. BATTEASE, CLAIMANT-APPELLANT PRO SE.

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

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered July 29, 2013. The order denied the motion of claimant to compel discovery.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by providing that the motion is denied without prejudice to serve more narrowly-tailored disclosure requests with respect to demand Nos. 5 through 8 and 10 through 12 and as modified the order is affirmed without costs in accordance with the following memorandum: Claimant commenced this action seeking damages after he allegedly was attacked in a correctional facility, and he then submitted a series of discovery demands. Defendant indicated in a general objection that demand Nos. 5 through 8 and 10 through 12 were too vague and ambiguous, and that they were not reasonably calculated to lead to admissible evidence, but otherwise responded to claimant's remaining demands. The Court of Claims denied claimant's motion to compel disclosure as moot, and this appeal ensued. We conclude that the court properly denied the motion, but our reasoning differs from that of the court. "Although CPLR 3101 (a) provides for 'full disclosure of all matter material and necessary in the prosecution or defense of an action,' it is well settled that a party need not respond to discovery demands that are overbroad" (*Kregg v Maldonado*, 98 AD3d 1289, 1290). We agree with defendant that demand Nos. 5 through 8 and 10 through 12 are vague and overbroad, and thus "the appropriate remedy is to vacate [them in their entirety] rather than to prune [them]" (*id.* [internal quotation marks omitted]). We thus conclude that the court should have denied the motion with respect to demand Nos. 5 through 8 and 10 through 12 without prejudice to serve more narrowly-tailored disclosure requests (*see id.*; *Kimberly-Clark Corp. v Power Auth. of State of N.Y.*, 28 AD2d 820, 820; *see also Sullivan v Smith*, 198 AD2d 749, 750). We therefore modify the order accordingly. Finally, contrary to claimant's further

contention, “there has been no showing of the requisite clear abuse of discretion [to] prompt appellate action with respect to claimant’s [remaining] disclosure requests” (*DeLeon v State of New York*, 52 AD3d 1282, 1282 [internal quotation marks omitted]).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

425

CA 14-01660

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

BRENDA C. HARRINGTON, PLAINTIFF-RESPONDENT,

V ORDER

MARY A. BRUNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

MORGENSTERN DEVOESICK, PLLC, PITTSFORD (ROBERT D. SCHULTZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered January 10, 2014. The order granted in part and denied in part the motion of plaintiff for summary judgment.

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

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

426

CA 14-01661

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

BRENDA C. HARRINGTON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARY A. BRUNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

MORGENSTERN DEVOESICK, PLLC, PITTSFORD (ROBERT D. SCHULTZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered January 29, 2014. The judgment granted in part the motion of plaintiff for summary judgment and awarded plaintiff money damages.

It is hereby ORDERED that the judgment so appealed from is modified on the law by denying plaintiff's motion except to the extent that it sought summary judgment on her claim in the amount of $3,000 transferred from Account No. 8665 following decedent's death, and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover funds that were transferred by defendant from two joint bank accounts (joint accounts) opened by plaintiff and her aunt, Hazel C. Smith (decedent), in 2006. In 2009 decedent executed a power of attorney naming defendant, decedent's sister, as her agent, and granting defendant powers including, inter alia, "banking transactions." Defendant thereafter added her name to the joint accounts, i.e., Account Numbers 8665 and 8601, and in 2012 defendant opened a new joint account (new account) in the names of decedent and defendant as decedent's power of attorney. Defendant then transferred funds from the joint accounts into the new account.

Plaintiff moved for summary judgment awarding her judgment in the amount of the funds transferred by defendant from the joint accounts, and Supreme Court granted the motion in part. At the outset, we reject defendant's contention that the court should have denied the motion in its entirety because the notice of motion failed to specify a return date (*see* CPLR 2214 [a]). Defendant failed even to allege that she was prejudiced by the omission of the return date on the notice of motion, and thus the court properly disregarded the omission

(*see Brummer v Barnes Firm, P.C.*, 56 AD3d 1177, 1178-1179). The court also properly disregarded plaintiff's failure to file a consent to substitution of counsel form pursuant to CPLR 321 (b) before her current attorney filed the summary judgment motion (*see Bevilacqua v Bloomberg, L.P.*, 70 AD3d 411, 412). In addition, inasmuch as plaintiff established good cause for her delay in making the motion two days after the period specified in CPLR 3211 (a) expired, the court properly entertained the motion (*see Cooper v Hodge*, 13 AD3d 1111, 1112; *see generally Brill v City of New York*, 2 NY3d 648, 652).

On the merits, we conclude that the court properly granted plaintiff's motion to the extent that it sought recovery of funds transferred after decedent's death by defendant. Defendant's power of attorney terminated by operation of law upon decedent's death (*see* General Obligations Law § 5-1511 [1] [a]; *Vellozzi v Brady*, 267 AD2d 695, 695). Plaintiff submitted undisputed evidence that, after decedent's death, defendant transferred $3,000 from Account No. 8665, and thereby established that she is entitled to recover that amount.

The court erred, however, in granting plaintiff's motion to the extent that it sought half of the funds transferred from the joint accounts by defendant prior to decedent's death. Contrary to the court's determination, we conclude that the statutory presumption of joint tenancy set forth in Banking Law § 675 does not apply to the joint account inasmuch as "the account documents do not contain the necessary survivorship language" (*Matter of Degnan*, 55 AD3d 1238, 1239; *see Matter of Randall*, 176 AD2d 1219, 1219).

We note in any event that the statutory presumption may be rebutted "by providing direct proof that no joint tenancy was intended or substantial circumstantial proof that the joint account[s] had been opened for convenience only" (*Wacikowski v Wacikowski*, 93 AD2d 885, 885, *lv denied* 60 NY2d 553). Even assuming, arguendo, that the statutory presumption of joint tenancy applies to the joint accounts, we conclude that defendant submitted evidence tending to rebut the statutory presumption that is sufficient to raise a triable issue of fact whether, "at the time the accounts were created, the accounts were opened as a matter of convenience" (*Matter of Harley*, 186 AD2d 1020, 1020; *see Matter of Yaros*, 90 AD3d 1063, 1064). In particular, defendant submitted evidence establishing, inter alia, that decedent was the sole depositor of the joint accounts, and that plaintiff never withdrew funds from the joint accounts during decedent's lifetime (*see Matter of Corcoran*, 63 AD3d 93, 97). In addition, defendant submitted evidence establishing that decedent's creation of a joint tenancy with the right of survivorship in the joint accounts "would represent a substantial deviation from [her] previously expressed testamentary plan" (*Yaros*, 90 AD3d at 1064).

We therefore modify the judgment by denying plaintiff's motion except to the extent that it sought recovery of $3,000 from Account No. 8665 transferred after decedent's death.

All concur except DEJOSEPH, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent. In my view,

Supreme Court properly granted plaintiff's motion for summary judgment. Therefore, I would affirm.

Specifically, I disagree with the majority on the issue whether the presumption under Banking Law § 675 applies. The majority, quoting *Matter of Degnan* (55 AD3d 1238, 1239), concludes that the statutory presumption does not apply to the joint accounts in this case inasmuch as " 'the account documents do not contain the necessary survivorship language.' " It was conceded by defendant, however, that there is language on the upper left corner of both signature cards that reads: "Accounts with multiple owners are joint, payable to either owner or the survivor." In my view, that language constitutes the "necessary survivorship language" referenced in *Degnan* and the presumption therefore applies (*see* § 675 [b]). Unlike in the cases relied on by the majority, the language on the signature cards in this case does not merely state that the accounts were "joint" (*cf. Degnan*, 55 AD3d at 1239; *Matter of Randall*, 176 AD2d 1219, 1219).

I further disagree with the majority that defendant submitted evidence tending to rebut the statutory presumption that is sufficient to raise a triable issue of fact. Rather, I agree with the court that defendant merely relied on her own conclusory assertions that the accounts were convenience accounts (*see Matter of Signature Bank v HSBC Bank USA, N.A.*, 67 AD3d 917, 918-919; *Matter of Stalter*, 270 AD2d 594, 596-597, *lv denied* 95 NY2d 760).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

440

KA 12-01580

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS WILLIAMS, DEFENDANT-APPELLANT.

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

MARCUS WILLIAMS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered January 10, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: 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 in his main and pro se supplemental briefs that Supreme Court erred in refusing to suppress his pre- and post-*Miranda* statements because the police arrested him without probable cause. We reject that contention. As an initial matter, we conclude that the police had the requisite reasonable suspicion that a crime had been committed to justify their pursuit and detention of defendant (*see People v Martinez*, 80 NY2d 444, 447; *see generally People v De Bour*, 40 NY2d 210, 223). A police captain heard gunshots, and an identified citizen then gave him a description of the shooter and his direction of flight from the area in which the gunshots originated. Other police officers who heard the broadcast description of the shooter observed defendant in a driveway approximately two blocks from the scene of the shooting, and he was nervous, sweating and breathing heavily. The police observed that he matched the description of the suspect, and he fled when he saw the unmarked patrol car. Defendant ran behind a house out of the sight of an officer who pursued him, but he emerged quickly with his hands up. Although defendant was frisked, no weapon was recovered from his person. He was handcuffed, and other police officers quickly recovered a gun inside a grill in the backyard of the house behind

which defendant had run. As the police were conducting a showup identification procedure with the identified citizen, who was brought to the scene where defendant was detained, defendant spontaneously yelled out to his family nearby the name of the identified citizen and that this person had seen defendant shoot the gun. Defendant was arrested and, after being advised of his *Miranda* rights, he gave an inculpatory statement to the police. "The information known to the police when they placed defendant in handcuffs and held him for a showup identification supported a reasonable suspicion of criminal activity . . . [, i.e.,] that quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*People v Dumbelton*, 67 AD3d 1451, 1452, *lv denied* 14 NY3d 770 [internal quotation marks omitted]). Based on defendant's spontaneous admission, the police had probable cause to arrest him during the showup identification procedure.

We have considered defendant's remaining contentions in his pro se supplemental brief and conclude that none requires modification or reversal. Defendant's challenge to the sufficiency of the evidence before the grand jury is forfeited by his guilty plea (*see People v Milliman*, 122 AD3d 1437, 1438). Finally, we conclude that the court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea because his "conclusory and unsubstantiated claim of innocence is belied by his admissions during the plea colloquy" (*People v Garner*, 86 AD3d 955, 955).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

450

CA 14-01916

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

TONYA TIEDE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FRONTIER SKYDIVERS, INC., ET AL., DEFENDANTS,
AND JOHN HUBER, DEFENDANT-APPELLANT.

BURGIO, KITA, CURVIN & BANKER, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FEROLETO LAW, BUFFALO (PAUL B. BECKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered August 20, 2014. The order, insofar as appealed from, denied the motion of defendant John Huber for summary judgment dismissing the second amended complaint and all cross claims against him.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted and the second amended complaint and cross claims against defendant John Huber are dismissed.

Memorandum: Plaintiff, a passenger on a plane used for skydiving jumps, commenced this action to recover damages for injuries she sustained when the plane crashed shortly after takeoff. We previously determined, inter alia, that Supreme Court properly granted the motions of five other defendants to the extent that they sought to dismiss the cause of action for gross negligence against them because plaintiff had not alleged conduct on the part of those defendants that "evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing" (*Tiede v Frontier Skydivers, Inc.*, 105 AD3d 1357, 1359 [internal quotation marks omitted]). As relevant to this appeal, John Huber (defendant), a skydiving instructor, moved for summary judgment dismissing the second amended complaint and cross claims against him. We agree with defendant that the court erred in denying the motion.

In addition to being a skydiving instructor, defendant was a "safety and training advisor" at defendant Frontier Skydivers, Inc. (Frontier) by appointment of the United States Parachute Association (USPA). In that capacity, he acted as a liaison between USPA and Frontier to ensure that there was a training program in accordance

with USPA curriculum in place at the drop zone, and that instructors followed it. He also administered tests for skydiving licenses and was responsible for the completion of accident reports and their transmission to USPA. A week before the accident, defendant instructed plaintiff at a one-hour course on skydiving. On the date of the accident, plaintiff boarded the plane with a jump instructor other than defendant, and she was seated farthest away from the "jump door." The last of three other skydivers to board the plane was a pro-rated skydiver, and he sat closest to the jump door. As the plane became airborne, the jump door opened unexpectedly and the pro-rated skydiver stood up, despite a requirement that he wear a seatbelt, and he repeatedly attempted to close the jump door. The pilot repeated commands to sit down and leave the jump door alone. Two of the other skydivers grabbed onto the pro-rated skydiver and tried to stop him, but he persisted in attempting to close the jump door to the point that his upper body was outside the fuselage. The pilot, with one hand on the yoke, reached over with his other hand and attempted to pull the pro-rated skydiver back into the plane. While the pilot's attention was diverted momentarily, the plane clipped a line of trees and crashed. The pro-rated skydiver died shortly thereafter, and plaintiff, the jump instructor, the pilot, and other skydivers survived.

At the outset, we agree with defendant that the court erred in denying his motion to the extent that he sought dismissal of the cause of action for gross negligence against him, for the reasons set forth in our prior decision in this action (*see id.*). Plaintiff has not alleged conduct against defendant that "evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing" (*id.* [internal quotation marks omitted]).

We further agree with defendant that the court erred in denying his motion with respect to the remainder of the second amended complaint against him. Plaintiff alleged that defendant, inter alia, breached his duty to provide proper training for the pilot, instructors, and other skydivers. Contrary to plaintiff's assertion, defendant contended in support of his motion that he owed no duty of care to plaintiff in his position as a safety and training advisor for the conduct that occurred on the plane. "The existence and scope of a duty of care is a question of law for the courts entailing the consideration of relevant policy factors" (*Church v Callanan Indus.*, 99 NY2d 104, 110-111; *see Sanchez v State of New York*, 99 NY2d 247, 252). In making such a determination, "the courts look to whether the relationship of the parties is such as to give rise to a duty of care . . . , whether the plaintiff was within the zone of foreseeable harm . . . and whether the accident was within the reasonably foreseeable risks" (*Di Ponzio v Riordan*, 89 NY2d 578, 583). "[T]he law draws a line between remote possibilities and those that are reasonably foreseeable because '[n]o person can be expected to guard against harm from events which are . . . so unlikely to occur that the risk . . . would commonly be disregarded' " (*id.*).

We conclude that defendant established as a matter of law that the plane crash at issue was not a reasonably foreseeable consequence

of defendant's alleged failure to provide adequate training. Although the risk may now readily be perceived with the benefit of hindsight, we conclude that the plane crash due to the hatch door opening and the response of the pro-rated skydiver was not "within the class of foreseeable hazards" associated with defendant's alleged failure to provide proper training (*id.* at 584). We thus conclude that defendant had "no cognizable legal duty to protect [plaintiff] against the injury-producing occurrence" (*id.* at 586; *see generally Lynfatt v Escobar*, 71 AD3d 743, 745, *lv denied* 15 NY3d 709). Plaintiff's submission of an expert's speculative and conclusory affidavit is insufficient to establish that defendant had a legal duty to train for such an incident (*see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544).

We further conclude that the court erred in denying defendant's motion with respect to plaintiff's claims in her bill of particulars that defendant failed to give notice or warn of the dangers involved in skydiving. Defendant met his initial burden regarding those claims by establishing that he warned plaintiff of the serious risks of injury or death, as evidenced by her initials and signature on the release and her signature on a document warning of the hazards of skydiving and parachuting and all "related activities." In addition, plaintiff testified at her deposition that she read those warnings and viewed a video that included the warning of the dangers of skydiving and its related activities, including the airplane ride. In opposition to the motion, plaintiff failed to raise a triable issue of fact with respect to those claims (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

479

CA 14-01989

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

CHARLES T. SITRIN HEALTH CARE CENTER, INC.,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

COMMISSIONER OF HEALTH OF STATE OF NEW YORK
AND DIRECTOR OF BUDGET OF STATE OF NEW YORK,
RESPONDENTS-APPELLANTS-RESPONDENTS.

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

BOND, SCHOENECK & KING, PLLC, ALBANY (RAUL A. TABORA, JR., OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered March 19, 2014 in a proceeding pursuant to CPLR article 78. The judgment granted the petition in part.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the petition in its entirety, and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, the annulment of a determination of respondents, made February 25, 2013, that retrospectively revised the capital cost component of petitioner's Medicaid reimbursement rate for the period beginning on September 1, 2009. Respondents appeal and petitioner cross-appeals from a judgment granting the petition in part and annulling that part of respondents' determination that revised the reimbursement rates for the period from September 1, 2009 through September 30, 2011. We conclude that Supreme Court also should have annulled respondents' determination for the period from October 1, 2011 through March 27, 2013, and we therefore modify the judgment accordingly.

Medicaid reimbursement rates for diagnostic and treatment centers such as petitioner are comprised of an operating cost component and a capital cost component (*see* Public Health Law § 2807 [2] [b]). In 2008, the legislature revised the methodology for calculating the reimbursement rate (*see* § 2807 [2-a], as amended by L 2008, ch 58, § 1, part C, § 18). Under the new methodology, the operating cost component of the reimbursement rate would be calculated using "the

ambulatory patient group (APG) methodology" (§ 2807 [2-a] [e] [i]), which would be phased-in gradually during an implementation period running from September 1, 2009 though January 1, 2012 (*see* § 2807 [2-a] [b] [i]-[iv]). Section 2807 (2-a) did not impose a new methodology for calculating the capital cost component of the reimbursement rate and simply provided that "such rates . . . shall . . . remain subject to the provisions of paragraph (b) of subdivision two of this section" (§ 2807 [2-a] [h] [ii]).

Under Public Health Law § 2807 (2) (b), the capital cost component of the reimbursement rate is "determined by adjusting the [capital] cost data of each facility for a base year" (*Anthony L. Jordan Health Corp. v Axelrod*, 67 NY2d 935, 936), and "[t]he base year for the rate period commencing on October [1, 1994] shall be [1992] and shall be advanced one year thereafter for each subsequent rate period" (§ 2807 [2] [b]). The legislature adopted legislation, however, that modified the effect of section 2807 (2) (b) by freezing the capital cost component of the reimbursement rates such that the "rates of payment for diagnostic and treatment centers established in accordance with paragraph[] (b) . . . of subdivision 2 of section 2807 of the public health law for the period ending September 30, 1995 shall continue in effect . . . through September 30, 2011" (L 2009, ch 58, § 1, part B, § 22). Thus, although section 2807 (2) (b) provides that the capital cost component of the reimbursement rate is recalculated annually by making an adjustment to the rate applicable to a base year that is two years prior to the rate year, the rate freeze legislation provides that the capital cost component would remain at the 1995 level through September 30, 2011.

On February 25, 2013, respondents notified petitioner that they were retrospectively revising the capital cost component of the reimbursement rate for the period beginning on September 1, 2009 by using a base year that was two years prior to the rate year. The court agreed with petitioner, however, that the legislature had frozen the reimbursement rates for the period from September 1, 2009 through September 30, 2011 at the 1995 level.

On appeal, respondents contend that the rate freeze legislation was not applicable during the period from September 1, 2009 through September 30, 2011 because it had been rendered inoperable when the legislature adopted Public Health Law § 2807 (2-a). We reject that contention. "The primary consideration of courts in interpreting a statute is to 'ascertain and give effect to the intention of the Legislature' " (*Riley v County of Broome*, 95 NY2d 455, 463, quoting McKinney's Cons Laws of NY, Book 1, Statutes § 92 [a], at 177). "The statutory text is the clearest indicator of legislative intent[,] and courts should construe unambiguous language to give effect to its plain meaning . . . And where, as here, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency" (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [internal quotation marks omitted]). Here, section 2807 (2-a) (h) (ii) provides that the capital cost component of the reimbursement rate is to be

calculated in accordance with section 2807 (2) (b), and the legislature also enacted a law that unambiguously provides that reimbursement rates calculated in accordance with section 2807 (2) (b) shall remain at the 1995 level through September 30, 2011 (*see* L 2009, ch 58, § 1, part B, § 22). Nothing in section 2807 (2-a) implies that the legislation freezing the capital cost component of the reimbursement rate was not operable after September 1, 2009, and we therefore conclude that respondents' determination to the contrary "runs counter to the clear wording of [the] statutory provision[s and] should not be accorded any weight" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459).

On cross appeal, petitioner contends that it was entitled to 30 days' notice of any change to the capital cost component of the reimbursement rate, and we agree. The Public Health Law provides that "the commissioner shall notify each diagnostic and treatment center of its approved rates of payment . . . at least thirty days prior to the beginning of the period for which such rates are to become effective" (§ 2807 [7-b] [a]). Although the legislature suspended the advance notice requirements for the purpose of implementing section 2807 (2-a) (*see* L 2010, ch 58, § 1, part B, § 49; L 2010, ch 109, § 1, part B, § 29), we conclude that the change to the reimbursement rate for the period beginning on October 1, 2011 is attributable to the expiration of the rate freeze legislation by its own terms on that date (*see* L 2009, ch 58, § 1, part B, § 22), and is not related to the implementation of section 2807 (2-a). The court therefore should have extended the annulment of respondents' determination through March 27, 2013, which is 30 days after the date of respondents' determination made February 25, 2013 (*see* § 2807 [7-b] [a]; *see generally Anthony L. Jordan Health Corp.*, 67 NY2d at 936).

In light of our determination, we do not address petitioner's remaining contentions on its cross appeal.

Frances E. Cafarell

Entered: June 19, 2015

Clerk of the Court

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

510

KA 12-00100

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNEDY D. WALKER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON 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 (Frank P. Geraci, Jr., J.), rendered November 9, 2011. 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 reversed on the law, the plea is vacated, that part of defendant's omnibus motion seeking to suppress his statements to the police is granted in its entirety, and the matter is remitted to Monroe County Court for further proceedings.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in denying that part of his omnibus motion seeking to suppress the statements that he made to the police after he received *Miranda* warnings. The testimony at the suppression hearing established that two police officers discovered defendant and a companion smoking marijuana in a parked vehicle. After exiting the vehicle at the request of the police, defendant consented to a search of the vehicle. The first officer discovered a gun in the glove box, handcuffed defendant, and proceeded to secure the gun. While escorting defendant toward a police car, the second officer asked defendant who owned the gun, and defendant responded by inculpating himself. Defendant sat in the back of the police car for less than 10 minutes before the first officer entered the car, provided *Miranda* warnings, and obtained a statement that was reduced to writing in which defendant again claimed ownership of the gun.

We conclude that the court properly granted that part of defendant's motion seeking to suppress his pre-*Miranda* statements, but erred in denying that part of the motion seeking to suppress the post-

Miranda statements. It is undisputed that defendant was in custody when he was handcuffed by the first officer and then escorted by the second officer to be placed in the police car (*see People v Evans*, 294 AD2d 918, 919, *lv dismissed* 98 NY2d 768; *People v Sanchez*, 280 AD2d 891, 891, *lv denied* 96 NY2d 806; *see generally People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851), and that defendant was subjected to pre-*Miranda* interrogation because his initial admission was made in response to a question by the second officer regarding ownership of the gun that was " 'reasonably likely to elicit an incriminating response' " (*People v Brown*, 52 AD3d 1175, 1176, *lv denied* 11 NY3d 923, quoting *Rhode Island v Innis*, 446 US 291, 301; *see People v Flowers*, 59 AD3d 1141, 1143; *see generally People v Ferro*, 63 NY2d 316, 321, *cert denied* 472 US 1007). "When, as part of a continuous chain of events, a defendant is subjected to custodial interrogation without *Miranda* warnings, any statements made in response as well as any additional statements made after the warnings are administered and questioning resumes must be suppressed" (*People v Moyer*, 292 AD2d 793, 795 [internal quotation marks omitted]; *see People v Paulman*, 5 NY3d 122, 130-131; *People v Bethea*, 67 NY2d 364, 367-368; *People v Chapple*, 38 NY2d 112, 114-115). Where, however, "there is such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning," his or her statements in response to renewed questioning after he or she has received *Miranda* warnings and waived his or her constitutional rights may be admitted (*Chapple*, 38 NY2d at 115; *see Moyer*, 292 AD2d at 795). Here, the initial questioning by the second officer, although brief, produced an inculpatory statement directly related to the instant crime (*cf. People v White*, 10 NY3d 286, 291-292, *cert denied* 555 US 897; *People v Smith*, 275 AD2d 951, 952, *lv denied* 96 NY2d 739), and the second interrogation, which produced another inculpatory statement, occurred less than 10 minutes later and in the same location (*see Moyer*, 292 AD2d at 795). Moreover, contrary to the People's contention, the record does not establish that "a reasonable suspect in defendant's position would have perceived a marked change in the tenor of his engagement with [the] police" (*Paulman*, 5 NY3d at 131; *see Bethea*, 67 NY2d at 367-368). We thus conclude that "it cannot be said that there was 'such a definite, pronounced break' in the interrogation that defendant was returned to the position of one who was not under the influence of the initial improper questioning" (*Moyer*, 292 AD2d at 795, quoting *Chapple*, 38 NY2d at 115; *see Evans*, 294 AD2d at 919).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

512

KA 10-01490

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD M. LEONARD, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN 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 (Richard A. Keenan, J.), rendered March 25, 2010. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree and unlawfully dealing with a child in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [2]) and unlawfully dealing with a child in the first degree (§ 260.20). In appeal No. 2, defendant appeals from an order denying his motion seeking to vacate the judgment of conviction pursuant to CPL 440.10 on the grounds that he was denied effective assistance of counsel and that the grand jury proceedings were impaired by prosecutorial misconduct.

Addressing first appeal No. 2, we conclude that County Court properly denied without a hearing that part of defendant's CPL 440.10 motion alleging that he was denied effective assistance of counsel "inasmuch as trial counsel, the only person who could have provided any material information not already before the motion court, was deceased" (*People v Abuhamra*, 107 AD3d 1630, 1630, *lv denied* 22 NY3d 1038 [internal quotation marks omitted]). With respect to the merits of the CPL 440.10 motion, defendant contends that he was denied effective assistance of counsel because trial counsel failed to utilize, as part of his defense strategy, certain prior statements made by a witness to the police that were allegedly inconsistent with the witness's trial testimony and because trial counsel failed to request a limiting instruction after introduction of certain evidence admitted under a *Molineux* exception (*see People v Molineux*, 168 NY

264, 293). We see no basis for granting postconviction relief to defendant on either ground.

Under New York's "flexible standard" of evaluating claims of ineffective representation (*People v Benevento*, 91 NY2d 708, 712), so long as "the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation," counsel's performance will not be found ineffective (*People v Baldi*, 54 NY2d 137, 147). "Isolated errors in counsel's representation generally will not rise to the level of ineffectiveness, unless the error is 'so serious that defendant did not receive a fair trial' " (*People v Henry*, 95 NY2d 563, 565-566; *see People v Flores*, 84 NY2d 184, 188-189). Moreover, a defendant advancing an ineffectiveness claim based on particular errors in counsel's performance must "demonstrate the absence of strategic or other legitimate explanations" for the alleged deficiencies (*People v Rivera*, 71 NY2d 705, 709; *see People v Taylor*, 1 NY3d 174, 177). With respect to the first ground asserted by defendant, even assuming, arguendo, that the evidence of the witness's prior statements to the police would have been admissible, either to impeach that witness or on defendant's direct case, we conclude that defendant has not established that trial counsel's failure to utilize those statements demonstrated a lack of strategy. Rather, we conclude that defendant's contention reflects a mere disagreement with trial strategy, which does not amount to ineffective assistance of counsel (*see People v Stepney*, 93 AD3d 1297, 1298, *lv denied* 19 NY3d 968; *People v Douglas*, 60 AD3d 1377, 1377, *lv denied* 12 NY3d 914).

With respect to the second ground asserted by defendant, we conclude that any error on trial counsel's part in not requesting a limiting instruction regarding the evidence of past uncharged crimes does not rise to the level of ineffective assistance of counsel when that error is viewed in light of trial counsel's "entire representation of defendant" (*People v Oathout*, 21 NY3d 127, 132; *see Flores*, 84 NY2d at 188). We reject defendant's related contention in appeal No. 2 that the integrity of the grand jury proceedings was impaired by the prosecutor's failure to introduce the witness's prior statements to the police. Dismissal of an indictment on the ground that "the integrity thereof is impaired and prejudice to the defendant may result" (CPL 210.35 [5]) is an "exceptional remedy" (*People v Darby*, 75 NY2d 449, 455). Dismissal is "limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the [g]rand [j]ury" (*People v Huston*, 88 NY2d 400, 409), and "[t]he People have broad discretion in presenting a case to the grand jury and need not 'present all of their evidence tending to exculpate the accused' " (*People v Radesi*, 11 AD3d 1007, 1007, *lv denied* 3 NY3d 760, quoting *People v Mitchell*, 82 NY2d 509, 515; *see People v Carr*, 99 AD3d 1173, 1176, *lv denied* 20 NY3d 1010). Here, we conclude that the prior statements made by the witness to the police were not "entirely exculpatory" (*People v Gibson*, 260 AD2d 399, 399, *lv denied* 93 NY2d 924), and that the failure to present those statements to the grand

jury "did not result in a needless or unfounded prosecution" (*People v Smith*, 289 AD2d 1056, 1057, *lv denied* 98 NY2d 641 [internal quotation marks omitted]).

We reject defendant's contention in appeal No. 1 that the court erred in admitting evidence of defendant's prior uncharged sexual abuse of the victim which, according to the victim's testimony, also occurred while she was unconscious from alcohol intoxication. "The general rule is that evidence of . . . uncharged crimes may not be offered to show defendant's bad character or his propensity towards crime but may be admitted only if the acts help establish some element of the crime under consideration or are relevant because of some recognized exception to the general rule" (*People v Lewis*, 69 NY2d 321, 325; *see Molineux*, 168 NY at 293). Here, we conclude that the evidence of uncharged crimes was admissible to establish intent and motive under the first two exceptions specifically identified in *Molineux's* illustrative and nonexhaustive list (*see id.* at 293; *see also People v Alvino*, 71 NY2d 233, 241-242; *People v Calvano*, 30 NY2d 199, 205-206). Specifically, the disputed evidence was relevant to the issue whether defendant intended to commit the instant crime for the purpose of sexual gratification (*see* Penal Law §§ 130.00 [3]; 130.65 [2]), and to establish defendant's motive in providing a large quantity of alcohol to the victim. Consequently, "the evidence in this case was not propensity evidence, but was probative of [defendant's] motive and intent to [sexually] assault his victim" (*People v Dorm*, 12 NY3d 16, 19). Moreover, the evidence was also admissible under a more recently recognized *Molineux* exception, i.e., to "provide[] necessary background information on the nature of the relationship" between defendant and the victim (*Dorm*, 12 NY3d at 19; *see People v Leeson*, 12 NY3d 823, 827) and thus, we conclude that the court did not abuse its discretion in allowing the People to present the evidence at issue (*see People v Ventimiglia*, 52 NY2d 350, 359-360). Furthermore, we reject defendant's contention in appeal No. 1 that the court abused its discretion in admitting the evidence of the prior uncharged sexual abuse because a grand jury did not indict defendant of that crime. Defendant has failed to provide any proof in the record to support that claim and, in any event, there is no such requirement for the admission of prior uncharged crimes under *Ventimiglia* (*see id.* at 359-362; *see also People v Richardson*, 148 AD2d 476, 477).

Finally, we agree with defendant and the People that the certificate of conviction, which recites that defendant was convicted of the crime of sexual abuse in the first degree occurring on or about June 5, 2005, must be amended to reflect the correct date on which the crime for which defendant was convicted occurred, namely, on or about October 6-7, 2007 (*see People v Young*, 74 AD3d 1864, 1865, *lv denied* 15 NY3d 811; *see also People v Brooks*, 46 AD3d 1374, 1374).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

513

KA 14-00376

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD M. LEONARD, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Monroe County Court (James J. Piampiano, J.), entered January 29, 2014. The order denied the motion of defendant seeking to vacate the judgment of conviction pursuant to CPL 440.10.

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

Same memorandum as in *People v Leonard* ([appeal No. 1] ___ AD3d ___ [June 19, 2015]).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

528

CA 14-01996

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

IN THE MATTER OF ARBITRATION BETWEEN TOWN OF SCRIBA, PETITIONER-RESPONDENT-RESPONDENT,

AND MEMORANDUM AND ORDER

TEAMSTERS LOCAL 317 AND MICHAEL BARRY, RESPONDENTS-PETITIONERS-APPELLANTS.

LAW OFFICES OF MAIREAD E. CONNOR, PLLC, SYRACUSE (MAIREAD E. CONNOR OF COUNSEL), FOR RESPONDENTS-PETITIONERS-APPELLANTS.

CARACCIOLI & ASSOCIATES, PLLC, OSWEGO (KEVIN C. CARACCIOLI OF COUNSEL), FOR PETITIONER-RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oswego County (James W. McCarthy, J.), entered April 22, 2014 in a proceeding pursuant to CPLR article 75. The order and judgment granted the petition of petitioner-respondent to vacate an arbitration award and denied the cross petition of respondents-petitioners to confirm the award.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the petition is denied, the cross petition is granted, and the arbitration award is confirmed.

Memorandum: Respondents-petitioners, Teamsters Local 317 (Union) and Michael Barry (grievant), appeal from an order and judgment granting the application of petitioner-respondent (petitioner) to vacate an arbitration award, and denying the cross petition of respondents-petitioners (respondents) to confirm the award. Among other things, the arbitrator determined that, although maintaining a commercial driver's license (CDL) was a minimum standard for employment, the terms of the collective bargaining agreement (CBA) did not mandate the grievant's discharge from employment upon forfeiture of his CDL and, thus, that petitioner did not have just cause to terminate the grievant. The arbitrator fashioned a remedy whereby the grievant would be suspended without pay, and petitioner could terminate his employment only if he did not regain a valid CDL on or before a particular date. Petitioner commenced this proceeding seeking to vacate the arbitration award on the ground that the award exceeded the scope of the arbitrator's power (*see* CPLR 7511 [b] [1] [iii]), and respondents filed a cross petition seeking to confirm the award pursuant to CPLR 7510. We agree with respondents that Supreme

Court erred in vacating the arbitration award, and we conclude that the arbitration award should be confirmed.

We agree with respondents that the arbitrator did not exceed a specifically enumerated limitation on his authority. "It is well established that an arbitrator has broad discretion to determine a dispute and fix a remedy[ ] and that any contractual limitation on that discretion must be contained, either explicitly or incorporated by reference, in the arbitration clause itself" (*Matter of Communication Workers of Am., Local 1170 v Town of Greece*, 85 AD3d 1668, 1669, *lv denied* 18 NY3d 802 [internal quotation marks omitted]). Here, the relevant part of the CBA stated only that "[i]f the dispute [regarding a grievance] cannot be satisfactorily resolved, the issue may be submitted to final and binding arbitration." Furthermore, the stipulated issue submitted to the arbitrator asked "[w]as the suspension and termination of the [g]rievant, Michael Barry, for just cause? If not, what shall be the remedy?" We conclude that the CBA provided no "specifically enumerated limitation on the arbitrator's power" (*Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336; *see Communication Workers of Am., Local 1170*, 85 AD3d at 1670-1671), and that "the remedy sought was expressed in open-ended terms that certainly did not limit the arbitrator's power to grant any specific relief" (*Matter of Correction Officers' Benevolent Assn. v City of New York*, 276 AD2d 394, 395).

We further agree with respondents that the award was not irrational. " 'An award is irrational if there is no proof whatever to justify the award' " (*Matter of Professional, Clerical, Tech., Empls. Assn. [Board of Educ. for Buffalo City Sch. Dist.]*, 103 AD3d 1120, 1122, *lv denied* 21 NY3d 863). "So long as an arbitrator 'offer[s] even a barely colorable justification for the outcome reached,' the arbitration award must be upheld" (*id.*). Here, the language of the CBA is " 'reasonably susceptible of the construction given it by the arbitrator[ ]' " (*id.* at 1125, quoting *Matter of National Cash Register Co. [Wilson]*, 8 NY2d 377, 383), and the arbitrator offered a " 'colorable justification for the outcome reached' " (*Professional, Clerical, Tech., Empls. Assn.*, 103 AD3d at 1122).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

538

KA 13-01797

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KURT J. HAZZARD, DEFENDANT-APPELLANT.

BRUCE R. BRYAN, SYRACUSE, 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 (Daniel R. King, J.), rendered August 16, 2013. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, rape in the third degree, criminal sexual act in the first degree, criminal sexual act in the third degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, rape in the first degree (Penal Law § 130.35 [1]), arising from allegations that he had sexual intercourse with a 15-year-old girl on December 25, 2011. On appeal, defendant contends that County Court abused its discretion in denying his recusal motion. We reject that contention. It is well settled that, "[u]nless disqualification is required under Judiciary Law § 14, a judge's decision on a recusal motion is one of discretion . . . 'This discretionary decision is within the personal conscience of the court when the alleged appearance of impropriety arises from inappropriate awareness of nonjuridical data' . . . [Thus,] for any alleged bias and prejudice to be disqualifying it 'must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his [or her] participation in the case' " (*People v Glynn*, 21 NY3d 614, 618; *see People v Alomar*, 93 NY2d 239, 246). "Even . . . when recusal is sought based upon 'impropriety as distinguished from legal disqualification, the judge . . . is the sole arbiter' " (*People v Moreno*, 70 NY2d 403, 406). Defendant does not contend that recusal was mandatory, and we agree with the People that the court did not abuse its discretion in denying defendant's motion.

We reject defendant's further contention that the court erred in refusing to suppress a towel upon which both the victim's DNA and

defendant's DNA, sperm, and seminal fluid were found. At the time of the offense, the victim's grandmother had custody of the victim and her siblings, and they and defendant all lived in the same house. The towel was found in that house by the victim and her mother's boyfriend, who went there to retrieve the victim's belongings after this incident was reported to the authorities. "It is well settled that a search by a private person, even an unlawful search, does not implicate Fourth Amendment considerations" (*People v Adler*, 50 NY2d 730, 736-737, *cert denied* 449 US 1014), unless the private conduct is "so pervaded by governmental involvement that it loses its character as such and invokes the full panoply of constitutional protections" (*People v Ray*, 65 NY2d 282, 286). Here, defendant failed to demonstrate "a clear connection between the police and the private investigation . . . ; completion of the private act at the instigation of the police . . . ; close supervision of the private conduct by the police . . . ; [or] a private act undertaken on behalf of the police to further a police objective" (*Ray*, 65 NY2d at 286; *see People v Ruppert*, 42 AD3d 817, 817-818, *lv denied* 9 NY3d 964).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes relating to the December incident 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). It is well settled that " 'those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record' " (*People v Woolson*, 122 AD3d 1353, 1354, quoting *People v Lane*, 7 NY3d 888, 890), and that "[t]he credibility of the victim and the weight to be accorded her testimony were matters for the jury" (*People v Halwig*, 288 AD2d 949, 949, *lv denied* 98 NY2d 710; *see People v Gray*, 15 AD3d 889, 890, *lv denied* 4 NY3d 831). Here, we conclude that the jury's determination to credit the victim's testimony with respect to this incident is supported by the weight of the evidence, including her testimony that defendant held her down and restrained her while forcing her to engage in sexual intercourse (*see People v Littebrant*, 55 AD3d 1151, 1154-1155, *lv denied* 12 NY3d 818), and DNA evidence linking defendant to the crimes (*see generally People v Mitchell*, 43 AD3d 1337, 1338, *lv denied* 9 NY3d 1036; *People v Griffin*, 41 AD3d 1285, 1287, *lv denied* 9 NY3d 923, *reconsideration denied* 9 NY3d 990). Indeed, we note that the People's DNA expert testified that, in "the semen-stained cutting from the bath towel, the sperm fraction is a mixture profile consistent with DNA from [defendant] mixed with DNA from" the victim.

Defendant further contends that the court erred in prohibiting him from questioning the People's expert regarding prior sexual conduct by the victim. We reject that contention. "Evidence of the victim's prior sexual conduct did not fall within any of the exceptions set forth in CPL 60.42 (1) through (4), and defendant failed to make an offer of proof demonstrating that such evidence was relevant and admissible pursuant to CPL 60.42 (5)" (*People v Brink*, 30 AD3d 1014, 1015, *lv denied* 7 NY3d 810; *see People v Wright*, 37 AD3d

1142, 1143, *lv denied* 8 NY3d 951; *see also People v Williams*, 61 AD3d 1383, 1383, *lv denied* 13 NY3d 751). Defendant failed to preserve for our review his contention that the court should have declared a mistrial after making a gesture that allegedly demeaned defense counsel, inasmuch as defense counsel initially made a motion for a mistrial regarding the alleged gesture but withdrew it "before the court rendered its decision" (*People v Corbett*, 258 AD2d 919, 919, *lv denied* 93 NY2d 898). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, the sentence is not unduly harsh or severe.

All concur except SCONIERS, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), I conclude that the verdict finding defendant guilty of the charges arising from the incident on December 25, 2011 is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). I would therefore reverse the judgment, dismiss the indictment, and remit the matter to County Court for proceedings pursuant to CPL 470.45.

"The Court of Appeals has recently reiterated that, in reviewing the weight of the evidence, we must 'affirmatively review the record; independently assess all of the proof; substitute [our] own credibility determinations for those made by the jury in an appropriate case; determine whether the verdict was factually correct; and acquit a defendant if [we are] not convinced that the jury was justified in finding that guilt was proven beyond a reasonable doubt' " (*People v Oberlander*, 94 AD3d 1459, 1459, quoting *People v Delamota*, 18 NY3d 107, 116-117). I am not convinced that guilt was proven beyond a reasonable doubt. Although I am cognizant that the jury's credibility determinations are entitled to great deference, in this case the credibility of certain prosecution witnesses, including the victim, is "manifestly suspect" (*People v O'Neil*, 66 AD3d 1131, 1133; *see People v Bastow*, 217 AD2d 930, 931, *lv denied* 86 NY2d 872). Indeed, "the jury evidently had little confidence in the victim's credibility since it acquitted defendant of all counts in connection with [two other] incidents" in August and November 2011 (*O'Neil*, 66 AD3d at 1134). Another prosecution witness admitted that she made a false allegation of rape against defendant, and gave conflicting accounts of defendant's whereabouts at the time of the December 25, 2011 incident.

In addition, the testimony concerning the discovery by the victim and her mother's boyfriend of the semen-stained bath towel, the crucial item of evidence against defendant, " 'is incredible and unbelievable, that is, impossible of belief because it is . . . contrary to experience' " (*People v Garafolo*, 44 AD2d 86, 88; *see People v Wallace*, 306 AD2d 802, 802-803). Moreover, the towel was discovered three days following the incident and, during the interim between the alleged crime and its discovery, the towel was accessible to persons who had an acrimonious relationship with defendant. Those

circumstances thoroughly undermined any weight that should otherwise have been accorded to the only physical evidence against defendant (*cf. People v Ortiz*, 80 AD3d 628, 629-630, *lv denied* 16 NY3d 862).

Finally, "[e]ven assuming that the verdict of guilt was not against the weight of the evidence, pursuant to our interest of justice jurisdiction (*see*, CPL 470.15 [3] [c]), [I] would reverse the judgment and dismiss the indictment because the evidence in this case leaves [me] with a very disturbing feeling that guilt has not been satisfactorily established; [that is,] that there is a grave risk that an innocent man has been convicted" (*People v Gioeli*, 288 AD2d 488, 489 [internal quotation marks omitted]; *see generally People v Carter*, 63 NY2d 530, 536; *People v Kidd*, 76 AD2d 665, 668, *lv dismissed* 51 NY2d 882).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

544

TP 14-01088

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

IN THE MATTER OF JOHN WILLIAMS, PETITIONER,

V MEMORANDUM AND ORDER

PETER TROIANO, COMMISSIONER, DEPARTMENT OF PERSONNEL, ONONDAGA COUNTY, STEPHANIE A. MINER, MAYOR, CITY OF SYRACUSE, AND PAUL LINNERTZ, FIRE CHIEF, DEPARTMENT OF FIRE, CITY OF SYRACUSE, RESPONDENTS.

BLITMAN & KING LLP, SYRACUSE (NATHANIEL G. LAMBRIGHT OF COUNSEL), FOR PETITIONER.

ROBERT P. STAMEY, CORPORATION COUNSEL, SYRACUSE (JAMES MCGINTY OF COUNSEL), FOR RESPONDENTS STEPHANIE A. MINER, MAYOR, CITY OF SYRACUSE AND PAUL LINNERTZ, FIRE CHIEF, DEPARTMENT OF FIRE, CITY OF SYRACUSE.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (THOMAS H. KUTZER OF COUNSEL), FOR RESPONDENT PETER TROIANO, COMMISSIONER, DEPARTMENT OF PERSONNEL, ONONDAGA COUNTY

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 [Walter W. Hafner, Jr., A.J.], entered June 4, 2014) to review a determination of respondent Peter Troiano, Commissioner, Department of Personnel, Onondaga County. The determination, among other things, affirmed the decision to place petitioner on involuntary leave.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by awarding petitioner back pay and reinstating all benefits for the period from August 26, 2011 to September 30, 2013, and as modified the determination is confirmed without costs in accordance with the following memorandum: In August 2011, petitioner, a firefighter employed by the City of Syracuse (City), was removed from active duty because of an on-the-job hypoglycemic incident caused by his diabetes. Although petitioner, his union, and the City's Fire Department subsequently engaged in negotiations regarding petitioner's status, petitioner was not formally notified that he had been placed on an immediate involuntary leave of absence pursuant to Civil Service Law § 72 (5) until April 2012. Petitioner opposed the decision and timely requested a hearing on the matter. Following a further delay during which time petitioner received his final paycheck, the Hearing Officer

determined that petitioner was properly placed on immediate involuntary leave, but additionally determined that petitioner should be allowed to return to work, and granted him some remedial relief. In September 2013, respondent Paul Linnertz, the City's Fire Department Chief, reviewed the Hearing Officer's determination and agreed with the City that petitioner should remain on involuntary leave, with no remedial relief. Petitioner appealed that determination to respondent Peter Troiano, Commissioner of the Department of Personnel for Onondaga County, who affirmed it. Petitioner thereafter commenced this CPLR article 78 proceeding seeking to annul the determination that he was unfit for active duty as a firefighter because of his inability to manage his diabetic symptoms. Supreme Court transferred the matter to this Court pursuant to CPLR 7804 (g).

We agree with petitioner that respondents did not strictly comply with the procedural requirements of the Civil Service Law. We conclude that the procedural protections contained in Civil Service Law § 72 (1) apply to proceedings brought pursuant Civil Service Law § 72 (5) based on the language in subdivision (1) that the provisions of notice and hearing therein apply to employees "placed on leave of absence pursuant to this *section*" (emphasis added), "which includes Civil Service Law § 72 (5)" (*Matter of Smith v New York State Dept. of Labor*, 191 Misc 2d 195, 197, *appeal dismissed as moot* 306 AD2d 745; *see generally Matter of Petix v New York State Off. of Mental Health*, 291 AD2d 846, 846). These procedures are necessary "to afford tenured civil servant employees . . . procedural protections prior to involuntary separation from service" (*Matter of Sheeran v New York State Dept. of Transp.*, 18 NY3d 61, 65). "Because of the significant due process implications of the statute, strict compliance with its procedures is required" (*Matter of Breen v Gunn*, 137 AD2d 685, 685). Here, it is undisputed that respondents did not strictly comply with the procedures pursuant to section 72 for placing petitioner on immediate involuntary leave inasmuch as it was not until April 2012 that petitioner was provided with "[w]ritten notice of the facts providing the basis for the judgment of the appointing authority that [petitioner was] not fit to perform the duties of" his position (§ 72 [1]). Although the parties had engaged in negotiations during the period before respondents provided petitioner with written notice, respondents concede that at no time did petitioner waive his rights under section 72 (*cf. Grandi v New York City Tr. Auth.*, 977 F Supp 590, 595-596, *affd* 175 F3d 1007). Additionally, petitioner did not receive the final notice of determination within 75 days from the receipt of his request for review (*see* § 72 [1]). The absence of strict compliance with these procedural requirements renders petitioner's alleged leave a nullity prior to September 30, 2013, when Linnertz issued his final determination after reviewing the Hearing Officer's decision (*see Matter of Briggs v Scoralick*, 147 AD2d 694, 695; *Breen*, 137 AD2d at 685), and petitioner is entitled to back pay and the restoration of benefits from August 26, 2011 until September 30, 2013. We therefore modify the determination accordingly.

We nevertheless conclude that the determination that petitioner was unfit for active duty is supported by substantial evidence (*see*

generally Matter of Ridge Rd. Fire Dist. v Schiano, 16 NY3d 494, 499; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-181). Based on the evidence introduced at the fact-finding hearing, we conclude that the "inference is reasonable and plausible" that petitioner was rendered unfit to serve as an active duty firefighter because of his inability to manage his diabetic symptoms (*Ridge Rd. Fire Dist.*, 16 NY3d at 499 [internal quotation marks omitted]). Although petitioner introduced some evidence to the contrary, we are mindful that, under the substantial evidence standard, the courts "may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists" (*Matter of Café La China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 280). However, inasmuch as respondents violated lawful procedure after initially determining that petitioner was unfit for active duty in August 2011, we conclude that petitioner is entitled to a hearing, should he request one, to determine his current fitness to be reinstated, provided that his application for reinstatement is made within one year of our decision herein. Although petitioner is not within the one-year time period for seeking reinstatement (*see* Civil Service Law § 72 [2], [3]), respondents are estopped from asserting that petitioner is time-barred from seeking such relief because the delay was caused by their failure to comply with the procedures (*see generally Matter of Steyer*, 70 NY2d 990, 992-993).

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

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

547

CA 14-01994

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

IN THE MATTER OF ANTHONY BOTTOM, ALSO KNOWN AS JALIL MUNTAQIM, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

MICHAEL KUZMA, BUFFALO, FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered December 26, 2013 in a CPLR article 78 proceeding. The judgment, insofar as appealed from, denied the petition in part.

It is hereby ORDERED that said appeal from the judgment insofar as it exempts from disclosure the May 16, 2012 letter is unanimously dismissed as moot, and the judgment is modified on the law by granting that part of the petition seeking reasonable attorney's fees and other litigation costs reasonably incurred by petitioner, and as modified the judgment is affirmed with costs, and the matter is remitted to Supreme Court, Wyoming County, to determine the amount of such attorney's fees and litigation costs.

Memorandum: Petitioner commenced this proceeding seeking, inter alia, an order directing respondent to comply with his request for documents under the Freedom of Information Law ([FOIL] Public Officers Law art 6). Respondent denied petitioner's request and thereafter denied his administrative appeal in its entirety on the ground that the documents sought were exempt from disclosure pursuant to Public Officers Law § 87 (2) (a), (f) and (g). In a prior order, Supreme Court directed respondent "to provide petitioner's counsel with affidavits or other proof supporting the application of the specific exemptions for the information which was withheld." Respondent then disclosed the majority of the records requested. The court thereafter granted the petition to the extent that, with the exception of the May 16, 2012 letter to the Division of Parole from the New York County District Attorney's Office, respondent was directed to provide access for inspection and copying redacted copies of those documents responsive to the FOIL request that had not previously been disclosed

to petitioner's counsel.

At the outset, we note that, inasmuch as petitioner has received a copy of the May 16, 2012 letter, his appeal from that part of the judgment exempting that letter from disclosure has been rendered moot (*see Matter of Usatynski v Daines*, 86 AD3d 914, 914-915). Contrary to petitioner's contention, we conclude that respondent was entitled to redact from certain documents the names of organizations that "if disclosed could endanger the life or safety of any person" belonging to such organizations (Public Officers Law § 87 [2] [f]; *see Matter of Bellamy v New York City Police Dept.*, 87 AD3d 874, 875, *affd* 20 NY3d 1028, *rearg denied* 21 NY3d 974).

We agree with petitioner, however, that the court abused its discretion in denying, without explanation, that part of his petition seeking an award of reasonable attorney's fees and other litigation costs reasonably incurred in this proceeding. Petitioner satisfied the prerequisites for such an award pursuant to Public Officers Law § 89 (4) (c). Inasmuch as respondent ultimately provided all but one of the documents in the FOIL request, petitioner "substantially prevailed" within the meaning of the statute (§ 89 [4] [c]; *see Matter of New York State Defenders Assn. v New York State Police*, 87 AD3d 193, 195-196; *Matter of New York Civ. Liberties Union v City of Saratoga Springs*, 87 AD3d 336, 338). Further, respondent had no reasonable basis for its blanket denial of petitioner's request (*see* § 89 [4] [c] [i]). Indeed, respondent's contention that it had a reasonable basis for denying access to all of the requested documents is belied by its release of the majority of those documents when the court directed it to justify their nondisclosure (*see New York State Defenders Assn.*, 87 AD3d at 197). We conclude, therefore, that petitioner "has been subjected to the very kinds of 'unreasonable delays and denials of access' which the counsel fee provision seeks to deter" (*Matter of Legal Aid Socy. v New York State Dept. of Corr. & Community Supervision*, 105 AD3d 1120, 1122). Thus, we modify the judgment by granting that part of the petition seeking an award of reasonable attorney's fees and other litigation costs reasonably incurred by petitioner, and we remit the matter to Supreme Court to determine the amount thereof.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

571

CA 14-01424

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

DONALD SCHULTZ AND KATHERINE SCHULTZ,
PLAINTIFFS-RESPONDENTS,

V ORDER

EXCELSIOR ORTHOPAEDICS, LLP, ET AL.,
DEFENDANTS,
MICHAEL A. PARENTIS, M.D., AND KEITH C.
STUBE, M.D., P.C., DOING BUSINESS AS KNEE
CENTER OF WESTERN NEW YORK,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

CONNORS & VILARDO, LLP, BUFFALO (LAWRENCE J. VILARDO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered July 18, 2014. The order, among other things, denied the motion of defendants Michael A. Parentis, M.D., and Keith C. Stube, M.D., P.C., doing business as Knee Center of Western New York, to set aside a jury verdict.

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

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

572

CA 14-01425

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

DONALD SCHULTZ AND KATHERINE SCHULTZ,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

EXCELSIOR ORTHOPAEDICS, LLP, ET AL.,
DEFENDANTS,
MICHAEL A. PARENTIS, M.D., AND KEITH C. STUBE, M.D., P.C., DOING BUSINESS AS KNEE CENTER OF WESTERN NEW YORK,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

CONNORS & VILARDO, LLP, BUFFALO (LAWRENCE J. VILARDO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from a judgment of the Supreme Court, Erie County (John M. Curran, J.), entered July 18, 2014. The judgment awarded plaintiffs money damages, upon a jury verdict, against defendants Michael A. Parentis, M.D., and Keith C. Stube, M.D., P.C., doing business as Knee Center of Western New York.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Donald Schultz (plaintiff) as the result of defendants' alleged medical malpractice resulting in an above-the-knee leg amputation after more than a dozen surgeries and numerous hospitalizations for postsurgical infections. Defendants Michael A. Parentis, M.D., and Keith C. Stube, M.D., P.C., doing business as Knee Center of Western New York (collectively, Dr. Parentis), appeal from a judgment awarding money damages to plaintiffs.

We reject Dr. Parentis's contention that Supreme Court erred in denying his posttrial motion seeking to set aside the verdict on the ground that plaintiffs failed to establish a prima facie case of medical malpractice. To establish his entitlement to that relief, Dr. Parentis was required to establish that the evidence was legally insufficient to support the verdict, i.e., "that there [was] simply no valid line of reasoning and permissible inferences which could

possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499). On this record, we conclude that "there is a valid line of reasoning supporting the jury's verdict that [Dr. Parentis] deviated from the applicable standard of care in [his treatment] of plaintiff . . . , and that such deviation was a proximate cause of plaintiff's injuries" (*Winiarski v Harris* [appeal No. 2], 78 AD3d 1556, 1557). We also reject Dr. Parentis's alternative contention in support of his posttrial motion that the verdict is against the weight of the evidence, i.e., that the verdict is "palpably wrong and there is no fair interpretation of the evidence to support the jury's conclusion" (*Petrovski v Fornes*, 125 AD2d 972, 973, *lv denied* 69 NY2d 608; *see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746). We conclude that "the trial was a prototypical battle of the experts, and the jury's acceptance of [plaintiffs'] case was a rational and fair interpretation of the evidence" (*Holstein v Community Gen. Hosp. of Greater Syracuse*, 86 AD3d 911, 912, *affd* 20 NY3d 892 [internal quotation marks omitted]).

We agree with Dr. Parentis's contention that the court erred in sustaining plaintiffs' hearsay objections to some of Dr. Parentis's testimony concerning conversations he had with other physicians, which led to his decisions and recommendations regarding plaintiff's care. We conclude, however, that any error in that regard is harmless because the substance of the other physicians' opinions, and Dr. Parentis's reliance on those opinions, "was presented to the jury on several other occasions" (*Prozeralik v Capital Cities Communications*, 222 AD2d 1020, 1020, *appeal dismissed* 88 NY2d 843, *lv denied* 88 NY2d 812). Thus, "[t]here is no possibility that the excluded [testimony] would have had a substantial influence in bringing about a different verdict" (*Mancuso v Koch* [appeal No. 2], 74 AD3d 1736, 1737 [internal quotation marks omitted]).

Contrary to the contention of Dr. Parentis, the court properly denied his request to instruct the jury on plaintiff's comparative negligence based on his claim that plaintiff misled the surgeon who performed the above-the-knee amputation after plaintiff's final visit with Dr. Parentis. The alleged culpable conduct by plaintiff occurred after the alleged malpractice and thus could only be considered in mitigation of damages (*see Dombrowski v Moore*, 299 AD2d 949, 951). Here, however, it would have been improper for the court to instruct the jury with respect to mitigation of damages based on Dr. Parentis's claim because, even assuming, arguendo, that the information plaintiff provided to the surgeon was incorrect or untruthful, there is no evidence that plaintiff's conduct contributed to his injuries (*cf. Dunn v Catholic Med. Ctr. of Brooklyn & Queens*, 55 AD2d 597, 597).

Contrary to the further contention of Dr. Parentis, we conclude that the court properly limited the jury's consideration of plaintiff's damages caused by defendant Andrew C. Stoeckl (Dr. Stoeckl), who treated plaintiff prior to Dr. Parentis, to only those damages sustained by plaintiff up to the conclusion of Dr. Stoeckl's treatment of plaintiff. Successive tortfeasors "who neither act in

concert nor concurrently may nevertheless be considered jointly and severally liable" where the plaintiff's injuries, "because of their nature, are incapable of any reasonable or practicable division or allocation among multiple tort[]feasors" (*Ravo v Rogatnick*, 70 NY2d 305, 310). Here, however, the evidence establishes that any injuries caused by Dr. Stoeckl's alleged negligence were separate and distinct from the injuries caused by Dr. Parentis's negligence. We reject the related contention of Dr. Parentis that the court erred in providing the jury with two verdict sheets, and that the separate consideration of damages and the separate verdict sheets prejudiced him and confused the jury. We conclude that, because "the injuries caused by [Dr. Stoeckl] and [Dr. Parentis] are capable of being separated from or divided between one another," the court's use of two different verdict sheets with respect to each defendant, while unconventional, was not error (*Cohen v New York City Health & Hosps. Corp.*, 293 AD2d 702, 703; *see generally Ravo*, 70 NY2d at 310). Contrary to Dr. Parentis's further contention, the court properly instructed the jury that it could consider emotional damages as a component of a pain and suffering award inasmuch as there was substantial evidence that plaintiff's injuries caused emotional or psychological sequelae (*see DiGeronimo v Fuchs*, 101 AD3d 933, 935; *cf. Tsamasiros v Hughes*, 5 AD3d 377, 377; *Kelly v Tarnowski*, 213 AD2d 1054, 1054).

We reject Dr. Parentis's further contention that the awards for pain and suffering, loss of services, and future economic loss are excessive inasmuch as they do not deviate materially from what would be reasonable compensation under the circumstances (*see Hoenig v Shyed*, 284 AD2d 225, 226; *see also Aguilar v New York City Tr. Auth.*, 81 AD3d 509, 509-510; *Firmes v Chase Manhattan Auto. Fin. Corp.*, 50 AD3d 18, 28, *lv denied* 11 NY3d 705; *Bondi v Bambrick*, 308 AD2d 330, 331; *cf. Garrison v Lapine*, 72 AD3d 1441, 1444). In addition, we reject Dr. Parentis's contention that he retains his contribution rights against Dr. Stoeckl. We agree with Dr. Stoeckl that the jury's verdict of no cause of action against him necessarily extinguishes any claim for contribution against him (*see Tapinekis v Rivington House Health Care Facility*, 17 AD3d 572, 574; *see also Kogan v North St. Community, LLC*, 81 AD3d 429, 431).

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

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

573

CA 14-01920

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

DONALD SCHULTZ AND KATHERINE SCHULTZ,
PLAINTIFFS,

V ORDER

EXCELSIOR ORTHOPAEDICS, LLP, ANDREW C. STOECKL, M.D., DEFENDANTS-RESPONDENTS, MICHAEL A. PARENTIS, M.D., KEITH C. STUBE, M.D., P.C., DOING BUSINESS AS KNEE CENTER OF WESTERN NEW YORK, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.
(APPEAL NO. 3.)

CONNORS & VILARDO, LLP, BUFFALO (LAWRENCE J. VILARDO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (GREGORY T. MILLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (John M. Curran, J.), entered June 18, 2014. The judgment dismissed the complaint against defendants Excelsior Orthopaedics, LLP, and Andrew C. Stoeckl, M.D.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Dublin v Prime*, 168 AD2d 597).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

576

CA 14-01993

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

LYUBOV KLEPANCHUK, NADIA FEFILOV, HOA NGO, KASEY GHARET, WILLIAM HILL, JR., AND THE ESTATE OF LE NGO, DECEASED, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

COUNTY OF MONROE AND MONROE COUNTY AIRPORT AUTHORITY, DEFENDANTS-APPELLANTS.

BOND SCHOENECK & KING, PLLC, SYRACUSE (STEPHANIE M. CAMPBELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., ROCHESTER (K. JOHN WRIGHT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS LYUBOV KLEPANCHUK, NADIA FEFILOV, HOA NGO, KASEY GHARET AND THE ESTATE OF LE NGO.

NICHOLAS, PEROT, SMITH, BERNHARDT & ZOSH, AKRON (ERIC FRIEDHABER OF COUNSEL), FOR PLAINTIFF-RESPONDENT WILLIAM HILL, JR.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered January 10, 2014. The order, insofar as appealed from, denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: On February 10, 2008, there was a multivehicle accident that occurred during "white-out" conditions on Interstate 390 (I-390) near the Greater Rochester International Airport (Airport). The decedent of plaintiff Estate of Le Ngo was killed in the accident, and the remaining plaintiffs sustained serious injuries. Plaintiffs brought suit against defendant County of Monroe, a municipal corporation, and defendant Monroe County Airport Authority, a public benefit corporation, which was created by the Monroe County Airport Authority Act (Public Authorities Law § 2750 *et seq.*). Plaintiffs alleged that defendants were negligent and that such negligence was the proximate cause of the accident and their injuries because of certain alterations and modifications made to the Airport property, including, inter alia, the addition of two tunnels and the construction of a retaining wall adjacent to the southbound lanes of I-390, which caused snow to blow across I-390 and create "white-out" conditions. Defendants moved for, inter alia, summary judgment

dismissing the complaint, and plaintiffs cross-moved for partial summary judgment on the issue of liability.

At the outset, we note that plaintiffs' contention regarding defendants' failure to assert governmental immunity as an affirmative defense in their answer was raised by plaintiffs for the first time on appeal and, therefore, that contention is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

We agree with defendants that Supreme Court erred in denying that part of their motion seeking dismissal of the complaint on the ground that they are immune from liability pursuant to the doctrine of governmental immunity. With respect to that doctrine, "[i]f the [municipal defendant] acted in a proprietary role, i.e., when its activities essentially substitute for or supplement traditionally private enterprises . . . , ordinary rules of negligence apply. If, however, the [defendant] acted in a governmental capacity, i.e., when its acts are undertaken for the protection and safety of the public pursuant to general police powers . . . , the court must undertake a separate inquiry to determine whether the [defendant] owes a special duty to the injured party. In the event that the plaintiff fails to prove such a duty, the [defendant] is insulated from liability" (*Gilberti v Town of Spafford*, 117 AD3d 1547, 1548-1549 [internal quotation marks and citations omitted]; *see generally Matter of World Trade Ctr. Bombing Litg.*, 17 NY3d 428, 446-448). A municipal defendant can therefore establish entitlement to judgment as a matter of law by showing that its allegedly negligent acts were undertaken in a governmental rather than a proprietary capacity, and that it did not owe the plaintiff a special duty.

We conclude that defendants established on their motion that the construction of the tunnels and retaining wall was undertaken in a governmental capacity (*see Gilberti*, 117 AD3d at 1548-1549; *see generally* Public Authorities Law § 2751 [5] [ii]; [6]), inasmuch as the construction was the result of defendants' discretionary decision-making after defendants consulted with experts to determine how to make improvements to the Airport property in compliance with, inter alia, safety regulations of the Federal Aviation Administration (*see Valdez v City of New York*, 18 NY3d 69, 79-80; *World Trade Ctr.*, 17 NY3d at 447-448). We further conclude that plaintiffs failed to raise a triable issue of fact whether defendants owed a special duty to plaintiffs or were acting in a proprietary capacity (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

In light of our determination, we see no need to address defendants' remaining contention.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

596

CA 14-01450

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

ROBERT GERRISH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STATE UNIVERSITY OF NEW YORK AT BUFFALO, ET AL.,
DEFENDANTS,
UB FOUNDATION SERVICES, INC., STEVEN R. GILL,
FRANK SCANNAPIECO AND MIRA EDGERTON,
DEFENDANTS-RESPONDENTS.

HOUSH LAW OFFICES, PLLC, BUFFALO (FRANK HOUSH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS STEVEN R. GILL, FRANK SCANNAPIECO AND MIRA EDGERTON.

HODGSON RUSS LLP, BUFFALO (BENJAMIN M. ZUFFRANIERI, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT UB FOUNDATION SERVICES, INC.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered May 5, 2014. The order, among other things, granted the respective motions of defendants State University of New York at Buffalo, Steven R. Gill, Frank Scannapieco and Mira Edgerton and of defendants University at Buffalo, Foundation, Inc. and UB Foundation Services, Inc. to dismiss plaintiff's complaint against them without leave to replead.

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

Memorandum: Plaintiff, a student who was terminated from a graduate program at defendant State University of New York at Buffalo (University), sued the University, three individual professors (University defendants) and three institutional foundations through which the professors were employed or through which their employment was administered, asserting claims for breach of contract in a single cause of action. Supreme Court properly granted the motions of the University defendants and defendants University at Buffalo, Foundation, Inc. and UB Foundation Services, Inc. (Foundation defendants) to dismiss the complaint against them.

Plaintiff contends that the court erred in granting the motions by assuming facts outside the record or, in the alternative, that the

court, upon granting the motions, erred in dismissing the complaint instead of granting his request for leave to replead. We reject those contentions. "In determining a CPLR 3211 motion, . . . the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one . . . The court may also consider affidavits and other evidentiary material to establish conclusively that plaintiff has no cause of action . . . Any facts in the complaint and submissions in opposition to the motion to dismiss are accepted as true" (*Mantione v Crazy Jakes, Inc.*, 101 AD3d 1719, 1720 [internal quotation marks omitted]). " 'It is well settled that bare legal conclusions and factual claims [that] are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action' " (*Olszewski v Waters of Orchard Park*, 303 AD2d 995, 995). We conclude that the court did not err in considering the decision and order of a court of coordinate jurisdiction determining that another professor was an employee of the University although a foundation at the University funded that professor's research. We further conclude that the court did not err in considering a letter ruling by the State Department of Labor, submitted as an attachment to an affirmation in support of one of the motions, determining that the Foundation defendants did not employ professors even though an institutional foundation was the conduit for funds to pay the professors and others.

We agree with defendants that the complaint fails to state a cause of action for breach of contract against the moving defendants, with the exception of the University. With respect to the Foundation defendants, we conclude that plaintiff failed to allege a contract with them or that they breached it. With respect to the individual professors, we conclude that the claim for breach of contract against them sounds in educational malpractice, which is not a cognizable cause of action in New York (*see Alligood v County of Erie*, 299 AD2d 840, 840-841). With respect to the University, although there is an implied contract between a student and the educational institution to which the student is admitted (*see Matter of Carr v St. John's Univ., N.Y.*, 17 AD2d 632, 633, *affd* 12 NY2d 802; *Prusack v State of New York*, 117 AD2d 729, 730), plaintiff seeks damages against a subsidiary of the State of New York, and thus his claim for breach of contract against the University is properly brought in the Court of Claims. The court therefore properly granted that part of the motion of the University defendants to dismiss the complaint against the University for lack of jurisdiction (*see Sinhogar v Parry*, 53 NY2d 424, 431; *see e.g. Baldridge v State of New York*, 293 AD2d 941, 942, *lv denied* 98 NY2d 608).

Finally, we conclude that the court properly denied plaintiff's request for leave to replead. The court lacked jurisdiction over the breach of contract claim against the University, the claim for breach of contract asserted against the other moving defendants lacked merit, and plaintiff submitted no proposed amendments to correct the pleading deficiencies (*cf. Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 27-28).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

607

KA 13-01885

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PETER DAVIS, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, 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 September 10, 2013. The judgment convicted defendant, upon his plea of guilty, of driving while ability impaired by drugs.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of driving while ability impaired by drugs (Vehicle and Traffic Law § 1192 [4]). Contrary to defendant's contention, the record establishes that he validly waived his right to appeal both orally and in writing before pleading guilty. The record establishes that County Court conducted " 'an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Glasper*, 46 AD3d 1401, 1401, *lv denied* 10 NY3d 863; *see People v Estevez-Santos*, 114 AD3d 1174, 1175, *lv denied* 23 NY3d 1019), and that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256).

Defendant contends that the court abused its discretion in denying his motion to withdraw his plea of guilty, which was premised on his allegations that he was under the influence of medication that impacted his ability to understand the plea proceedings and that, therefore, the plea was not knowing, intelligent and voluntary. That contention survives defendant's valid waiver of the right to appeal (*see People v Lawrence*, 118 AD3d 1501, 1501, *lv denied* 24 NY3d 1220; *People v Torres*, 117 AD3d 1497, 1498, *lv denied* 24 NY3d 965), and he preserved that contention for our review by moving to withdraw the plea (*see People v Lopez*, 71 NY2d 662, 665). We nevertheless reject defendant's contention. "Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit

withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Robertson*, 255 AD2d 968, 968, *lv denied* 92 NY2d 1053; *see People v Zimmerman*, 100 AD3d 1360, 1361, *lv denied* 20 NY3d 1015). Inasmuch as defendant tendered no such evidence on his motion, we perceive no abuse of discretion.

We reject defendant's further contention that the court should have conducted a hearing on his motion. Where, as here, "a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made" (*People v Brown*, 14 NY3d 113, 116 [internal quotation marks omitted]; *see People v Mitchell*, 21 NY3d 964, 966). "Only in the rare instance will a defendant be entitled to an evidentiary hearing" (*People v Tinsley*, 35 NY2d 926, 927). Here, we conclude that defendant was afforded a reasonable opportunity to present his contention that, because of the influence of his medication, his plea was not knowing, intelligent, and voluntary (*see People v Walker*, 114 AD3d 1257, 1258, *lv denied* 23 NY3d 1044). We note, however, that defendant failed to substantiate his contention inasmuch as he submitted only his self-serving statements and his attorney's assertions made upon information and belief (*see People v Ashley*, 71 AD3d 1286, 1287, *affd* 16 NY3d 725; *People v Watkins*, 107 AD3d 1416, 1417, *lv denied* 22 NY3d 959). Furthermore, "[d]efendant's contention is belied by the record of the plea proceeding, which establishes that his factual allocution was lucid and detailed and that defendant understood both the nature of the proceedings and that he was waiving various rights" (*People v Hayes*, 39 AD3d 1173, 1175, *lv denied* 9 NY3d 923). In light of those circumstances, we cannot conclude that this case is one of those "rare instance[s]" in which defendant was entitled to a hearing on his motion (*Tinsley*, 35 NY2d at 927).

Finally, defendant's valid waiver of the right to appeal encompasses his further contention that the sentence is unduly harsh and severe (*see People v Rodman*, 104 AD3d 1186, 1188, *lv denied* 22 NY3d 1202; *see generally Lopez*, 6 NY3d at 255-256).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

616

KA 12-00728

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS KITCHEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered March 2, 2012. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [4]), defendant contends that Supreme Court abused its discretion in denying his motion to withdraw the plea without hearing oral arguments. We reject that contention. We conclude that the court afforded defendant the requisite "reasonable opportunity to present his contentions" when it adjourned the proceedings to afford defense counsel the opportunity to prepare a written motion (*People v Tinsley*, 35 NY2d 926, 927; *see People v Carter-Doucette*, 124 AD3d 1323, 1324; *People v Rossborough*, 105 AD3d 1332, 1333, *lv denied* 21 NY3d 1045). In the written motion, defendant sought to withdraw his plea on the ground that it was not knowing, voluntary, or intelligent based on his assertions that he did not understand the terms of the plea agreement because of his treatment for depression. Defendant's conclusory and unsubstantiated assertions are not supported by the record and, indeed, they are refuted by his statements made during the plea proceeding (*see People v Adams*, 45 AD3d 1346, 1346; *People v McCawley*, 23 AD3d 1157, 1157, *lv denied* 6 NY3d 778; *People v McKinnon*, 5 AD3d 1076, 1076-1077, *lv denied* 2 NY3d 803).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

626

CA 14-02028

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

CAROL M. STONE AND ROGER E. STONE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JESSE D. NEUSTRADTER AND CRAIG E. BRITTIN,
DEFENDANTS-RESPONDENTS.

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (PHILIP J. O'SHEA, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

TIFFANY L. D'ANGELO, ROCHESTER, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 14, 2014. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Carol M. Stone (plaintiff) when her bicycle collided with the bicycle of her husband, Roger E. Stone (husband), after he took evasive action to avoid a vehicle driven by defendant Jesse D. Neustradter (driver) and owned by defendant Craig E. Brittin (owner). From the driveway of the owner's residence, the driver approached the road on which plaintiffs were bicycling and stopped. He looked right, then looked left, and to his left he observed the bicycles colliding. It is undisputed that the vehicle did not make contact with either of the plaintiffs or their bicycles. Following discovery, defendants moved for summary judgment dismissing the complaint on the grounds that the driver was not negligent, the sole proximate cause of the accident was the "uncontrolled" operation of the bicycle ridden by the husband, and plaintiff assumed the risk of bicycling.

We agree with plaintiffs that Supreme Court erred in granting the motion. We conclude that defendants failed to meet their burden of establishing as a matter of law that the driver was not negligent or that his actions were not a proximate cause of the accident (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Specifically, defendants' submissions failed to eliminate all questions of fact whether the driver was negligent in encroaching onto

the shoulder of the road, thereby blocking the pathway of the oncoming bicycles, or in operating the vehicle as it approached the road from the driveway that was partially obscured by landscaping. Defendants therefore also failed to establish as a matter of law that the husband's operation of his bicycle was the sole proximate cause of the accident. Defendants' submissions included the deposition testimony of the husband, who testified that he was bicycling just ahead of plaintiff, with both of them traveling to the right of the white fog line in a "bike lane." The husband further testified that plaintiffs were descending a hill when he saw the vehicle moving in the driveway approximately 15 feet ahead of them, and that the vehicle moved past the end of the driveway approximately two feet into the "bike lane." He also testified that when he first saw the vehicle, he yelled to the driver as loud as he could to alert the driver to their presence. He then veered to the left for fear of being struck by the vehicle, and plaintiff's bicycle struck his bicycle. After the bicycles collided, he yelled at the driver and occupants of the vehicle for "barreling out of [the] driveway" without looking. We conclude that there are questions of fact whether the driver was driving in a reasonable manner and whether the driver's actions set off a chain of events that caused the husband to take action in evading the vehicle, which led to the collision between the plaintiffs' bicycles (*see Sheffer v Critoph*, 13 AD3d 1185, 1186; *see generally Tutrani v County of Suffolk*, 10 NY3d 906, 907). We agree with plaintiffs that the lack of contact between a bicycle and the vehicle would not preclude a factual finding that the driver was negligent in his operation of the vehicle and that any such negligence proximately caused the accident (*see Tutrani*, 10 NY3d at 907).

Finally, we conclude that "assumption of the risk does not apply to the fact pattern in this appeal, which does not fit comfortably within the parameters of the doctrine" (*Custodi v Town of Amherst*, 20 NY3d 83, 89).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

627

CA 14-01404

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

GLENDA L. WILKINS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD C. WILKINS, DEFENDANT-APPELLANT.

DEGNAN LAW OFFICE, CANISTEO (ANDREW J. ROBY OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered October 18, 2013 in a divorce action. The judgment, among other things, awarded plaintiff lifetime maintenance.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law and as modified the judgment is affirmed without costs in accordance with the following memorandum: Defendant appeals from a judgment of divorce that, inter alia, incorporated the decision and order of the Matrimonial Referee (Referee), who was appointed to hear and determine the issues concerning the grounds for the divorce and spousal maintenance. "Although [a]s a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court, . . . the authority of this Court in determining issues of maintenance is as broad as that of [Supreme Court]" (*Martin v Martin*, 115 AD3d 1315, 1315 [internal quotation marks omitted]). To the extent that defendant contends that the amount of arrears was improperly imposed, we conclude that Supreme Court erred in incorporating that part of the Referee's decision and order directing that defendant pay plaintiff five months of arrears inasmuch as the record establishes that defendant was only five weeks in arrears at the time of the hearing, and a check for the unpaid temporary maintenance was scheduled to be delivered to plaintiff following the hearing. We therefore modify the judgment by vacating the eleventh decretal paragraph to the extent that it incorporated by reference that part of the Referee's decision and order directing defendant to pay $4,580 in arrears at a rate of $100 per month commencing September 1, 2013. Defendant is ordered to pay plaintiff the unpaid amount, if any, of the five weeks of arrears totaling $1,145.

We nevertheless reject defendant's contention that the court abused its discretion in awarding nondurational maintenance to plaintiff. "Where . . . the record establishes that [the court] gave appropriate consideration to the factors enumerated in Domestic

Relations Law § 236 (B) (6) (a), this Court will not disturb the determination of maintenance absent an abuse of discretion" (*Mayle v Mayle*, 299 AD2d 869, 869 [internal quotation marks omitted]). Furthermore, "credibility determinations of a referee are entitled to deference on appeal, since the referee had the opportunity to see and hear the witnesses" (*Tihomirovs v Tihomirovs*, 123 AD3d 808, 809, *lv denied* 25 NY3d 903). Here, the Referee properly considered plaintiff's "reasonable needs and predivorce standard of living in the context of the other enumerated statutory factors" set forth in the statute (*Hartog v Hartog*, 85 NY2d 36, 52), and the court properly incorporated that part of the Referee's decision and order determining the amount and duration of maintenance. Contrary to defendant's further contention, the Referee did not abuse his discretion in refusing to consider defendant's untimely posttrial submission because there is no indication in the record that defendant sought an extension of time to make that submission or that he proffered good cause for his untimeliness (*see* CPLR 2004). Given that it is impossible on this record to predict the income of defendant after he retires (*see Green v Green*, 13 AD3d 1178, 1178), and that defendant may obtain a downward modification upon a sufficient showing of "a substantial change in circumstance . . . , including financial hardship" (Domestic Relations Law § 236 [B] [9] [b] [1]; *see Taylor v Taylor*, 107 AD3d 785, 786), we perceive no basis to disturb the amount and duration of the maintenance award.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

639

KA 10-02418

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY BREWER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered October 4, 2010. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child (two counts) and sexual abuse in the first degree (two counts).

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

Memorandum: On appeal from a judgment convicting him, following a jury trial, of two counts each of predatory sexual assault against a child (Penal Law § 130.96) and sexual abuse in the first degree (§ 130.65 [3]), defendant contends that Supreme Court erred in allowing his former girlfriend (hereafter, witness) to testify at trial regarding the peculiar manner in which the couple engaged in consensual oral sex. We reject that contention. The charges arose from allegations that defendant, among other things, forced the two victims, ages nine and seven, to perform oral sex on him inside his apartment. The victims were the daughters of the witness, who lived with defendant at the time. One of the victims alleged that, while she performed oral sex on defendant, he was smoking crack cocaine and had his T-shirt pulled over his head. The other victim alleged that she was forced to perform oral sex on defendant in his bedroom closet, which he referred to as the "bat cave."

Prior to trial, the People filed a written "*Molineux* Proffer" seeking permission from the court to admit direct evidence at trial regarding defendant's frequent use of crack cocaine in the home, and his "unique habit of pulling his t-shirt over his head and securing it behind his neck, then zipping down his pants and receiving oral sex" while he smoked crack cocaine. According to the People, defendant engaged in such conduct with several women, including the witness, who

was prepared to testify to that effect at trial. Defense counsel opposed the application on the ground that the evidence was more prejudicial than probative. The court granted the application without explanation, and the witness subsequently testified at trial that she frequently performed oral sex on defendant in the "bat cave" while he smoked crack cocaine and had his T-shirt pulled over his head. She further testified that she witnessed defendant engaging in that same conduct in the "bat cave" with another woman. According to the witness, the victims were not allowed in defendant's bedroom, and therefore could not see any of the sexual activity taking place there or in the adjacent closet. Defendant testified at trial and denied the allegations. He acknowledged, however, that he had been addicted to crack cocaine, and that he sometimes smoked it in the "bat cave" while receiving oral sex with his T-shirt pulled over his head. The jury rendered a guilty verdict on all four counts of the indictment.

It is well settled that "evidence of uncharged crimes is inadmissible where its purpose is *only* to show a defendant's bad character or propensity towards crime" (*People v Morris*, 21 NY3d 588, 594 [emphasis added]). Stated otherwise, the rule is that, "if the only purpose of the evidence is to show bad character or propensity towards crime, it is not admissible" (*People v Alvino*, 71 NY2d 233, 241). Here, as a preliminary matter, we note that evidence of defendant's so-called "sexual proclivities" does not constitute *Molineux* evidence because it was neither a crime nor a prior bad act for him to receive consensual oral sex from an adult in a closet with his T-shirt pulled over his head. The only evidence of an uncharged crime or prior bad act concerned defendant's use of crack cocaine, which was not overly prejudicial to him in the overall context of the trial given that he was not charged with any drug offenses. In any event, the evidence was not proffered only to show defendant's bad character or propensity toward crime; rather, the stated purpose of the evidence was to corroborate details of the victims' testimony. As the prosecutor argued in her summation, the victims would not likely know of defendant's sexual proclivities unless they were sexually abused by him.

To the extent that defendant contends that the evidence is inadmissible on relevancy grounds, that contention is unpreserved for our review (*see* CPL 470.05 [2]). In any event, we reject that contention. "Evidence is relevant if it has any tendency in reason to prove the existence of any material fact, i.e., it makes determination of the action more probable or less probable than it would be without the evidence" (*People v Scarola*, 71 NY2d 769, 777). Here, the evidence was relevant because, as noted, it tended to show that the victims were abused in the manner they alleged.

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

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

642

KA 14-02078

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

CODY BACKUS, DEFENDANT-RESPONDENT.

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

FELASCO & CUOMO, FULTON (LUCILLE M. RIGNANESE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated March 19, 2014. The order granted the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is denied, and the judgment of conviction is reinstated.

Memorandum: The People appeal from an order granting defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting him upon a jury verdict, in 2008, of murder in the second degree (Penal Law § 125.25 [3]), burglary in the first degree (§ 140.30 [2]), and two counts of attempted robbery in the first degree (§§ 110.00, 160.15 [1], [2]), based on, inter alia, newly discovered evidence (*see* CPL 440.10 [1] [g]). We previously affirmed the judgment of conviction (*People v Backus*, 67 AD3d 1428, *lv denied* 13 NY3d 936). The evidence at trial included the testimony of a codefendant, who testified that he, defendant, and a third person planned to rob the victim, a Syracuse drug dealer. The codefendant testified that defendant entered the victim's apartment but left the entrance door unlocked and made a cell phone call to the codefendant, after which the codefendant and the third person entered the apartment and demanded drugs and money. The codefendant further testified that the victim and the third person struggled over a handgun, which discharged, causing the victim's death. The prosecution at trial introduced a statement that defendant made to the police, in which he admitted that he was present at the victim's apartment when two armed men burst into the apartment. Defendant's statement also indicated that he fled the scene prior to any shooting and did not see what happened thereafter. In addition, the prosecution presented the testimony of a woman who was present in the apartment when the perpetrators entered, who identified defendant

as also being present, and the prosecution presented cell phone records establishing that defendant made several calls to a cell phone allegedly possessed by the codefendant. Prior to trial, the codefendant identified a woman as the driver of the getaway car. Although that information was not introduced at trial, defendant's attorney was notified that the codefendant had identified the woman as the driver, and that the woman declined to talk with the police. The codefendant pleaded guilty to a reduced charge with a promise of a shorter prison sentence, conditioned on his agreement to testify against defendant and the third person, who was acquitted after a separate trial.

In June 2012, Kenneth Jackson, a member of a street gang in Syracuse, pleaded guilty to unrelated charges in federal court and was required, in accordance with the plea agreement, to provide information concerning his other illegal activities, albeit with the agreement that he would not be charged with any crimes arising from those activities. Jackson eventually gave a statement to Syracuse police investigators, in which he averred that he and another gang member robbed the victim, not the codefendant and the acquitted third person. Jackson also averred, however, that defendant went with them, that defendant had left the door unlocked so that Jackson and the other gang member could enter, and that defendant called the gang members by cell phone and informed them that the door was unlocked. Jackson averred that defendant looked surprised when the second gang member produced a handgun inside the victim's apartment, and defendant left the apartment before the victim was shot. Jackson further averred that the second gang member's girlfriend drove defendant, Jackson, and the other gang member back to an apartment after the crime, where they all ingested the drugs taken during the robbery and planned their alibis for the evening.

The investigators informed defendant that Jackson admitted participating in the crime, and defendant moved to vacate the judgment on the grounds that, inter alia, the information Jackson provided was newly discovered evidence. Supreme Court held a hearing on the motion, at which Jackson's statement was introduced. In addition, the woman who the codefendant identified at trial as the getaway driver testified and denied driving anyone to or from the crime, but she also testified that she was never contacted by the police. The second woman, who was identified as the driver in Jackson's statement, testified at the hearing that she drove defendant, Jackson and the other gang member to and from the crime. She further testified that she heard a gunshot after seeing defendant leave the victim's apartment, but before the two gang members left the apartment. Before she testified, the court assured her that she could not be prosecuted for any crime based on her testimony. Defendant testified at the hearing that he and his family had been threatened by the second gang member to ensure defendant's silence, and that the second gang member accompanied defendant's mother when she visited defendant in prison.

At the conclusion of the hearing, the court concluded that, although defendant was aware of the evidence at the time of trial, the evidence was newly discovered because he reasonably feared that the

two gang members would kill him or members of his family if he implicated them, and because Jackson and the second woman would have invoked their Fifth Amendment rights if called at trial. The court further concluded that, if such evidence had been received at trial, it would have created a reasonable probability that the verdict would have been more favorable to defendant. The court granted the motion and vacated defendant's judgment of conviction. The People appeal.

Pursuant to CPL 440.10 (1) (g), a court may vacate a judgment of conviction on the ground that "[n]ew evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence." "It is well settled that on a motion to vacate a judgment of conviction based on newly discovered evidence, the movant must establish, inter alia, that there is newly discovered evidence: (1) which will probably change the result if a new trial is granted; (2) which was discovered since the trial; (3) which could not have been discovered prior to trial; (4) which is material; (5) which is not cumulative; and[] (6) which does not merely impeach or contradict the record evidence" (*People v Smith*, 108 AD3d 1075, 1076, *lv denied* 21 NY3d 1077 [internal quotation marks omitted]; *see People v Salemi*, 309 NY 208, 215-216, *cert denied* 350 US 950). Defendant has the burden of establishing "by a preponderance of the evidence every fact essential to support the motion" (CPL 440.30 [6]). Furthermore, "[t]he power to grant an order for a new trial on the ground of newly discovered evidence is purely statutory. Such power may be exercised only when the requirements of the statute have been satisfied, the determination of which rests within the sound discretion of the court" (*Salemi*, 309 NY at 215; *see People v White*, 125 AD3d 1372, 1373; *People v Pugh*, 236 AD2d 810, 811, *lv denied* 89 NY2d 1099).

Here, we agree with the People that the court abused its discretion in determining that defendant met his burden on the motion. First, the court erred in admitting Jackson's statement in evidence at the hearing, and, in any event, the statement would not be admissible at trial. This is vital because " '[i]mplicit in th[e] ground for vacating a judgment of conviction is that the newly discovered evidence be admissible' " (*People v Tankleff*, 49 AD3d 160, 182; *see People v Mazyck*, 118 AD3d 728, 730, *lv denied* 24 NY3d 1086). Here, the court admitted the statement at the hearing as a declaration against penal interest, but it is well settled that "[f]or a statement against penal interest to be admissible the interest compromised must be such as to 'all but rule out' motive to falsify, [and] the declarant must be conscious of the consequences of his statement at the time it is made . . . Those assurances of probative value, which might in a proper case substitute for cross-examination, were not present in this case" (*People v Geoghegan*, 51 NY2d 45, 49). Although a less stringent standard applies where, as here, the declaration is offered by defendant to exonerate himself rather than by the People,

to inculpate him (*see People v Stevens*, 212 AD2d 746, 747, *lv denied* 85 NY2d 943), none of the requirements was met here. To the contrary, the statement of the gang member was provided only after he was assured that he would not be prosecuted for any information that he provided, thus removing any indicia of reliability regarding that information (*see People v Morgan*, 76 NY2d 493, 495).

Next, we conclude that the court erred in determining that the evidence upon which defendant relied was newly discovered. Even assuming, arguendo, that Jackson's statement was properly admitted at the hearing, and further assuming, arguendo, that the information he provided is material, noncumulative, and does not merely impeach or contradict the record evidence, we conclude that the information was known to defendant at the time of the trial (*see People v Taylor*, 246 AD2d 410, 411-412, *lv denied* 91 NY2d 978). We cannot agree with the court that it was in effect "newly discovered" based on defendant's fear of physical harm to himself and his family. "A defendant who chooses to withhold evidence should not be given a new trial 'on the basis of the evidence thus withheld' " (*People v Moore*, 147 AD2d 924, 924, *lv denied* 73 NY2d 1019; *see People v Cain*, 96 AD3d 1072, 1073-1074, *lv denied* 19 NY3d 1101). Therefore, the evidence does not satisfy the requirement that it was "discovered since the entry of a judgment based upon a verdict of guilty after trial" (CPL 440.10 [1] [g]; *see Cain*, 96 AD3d at 1073-1074; *see also People v Singleton*, 1 AD3d 1020, 1021, *lv denied* 1 NY3d 580).

In addition, again assuming, arguendo, that all of the evidence is admissible, we conclude that there is no probability that if such evidence had been received at the trial the verdict would have been more favorable to the defendant (*see* CPL 440.10 [1] [g]; *see generally People v Mooney* [appeal No. 2], 162 AD2d 951, 952-953, *lv denied* 76 NY2d 942). The purportedly new evidence upon which defendant relies establishes that he helped plan the robbery, provided material assistance in the commission of the crime, acted in concert with the perpetrators, and shared in the proceeds of the crime, thus providing sufficient evidence to support a verdict of guilty as an accomplice to the felony murder charge of which he was convicted (*see People v Reed*, 97 AD3d 1142, 1143, *affd* 22 NY3d 530, *rearg denied* 23 NY3d 1009; *People v Sanchez*, 167 AD2d 489, 490-491, *lv denied* 77 NY2d 881). " '[W]hether one is the actual perpetrator of the offense or an accomplice is, with respect to criminal liability for the offense, irrelevant' " (*People v Rivera*, 84 NY2d 766, 771; *see Cain*, 96 AD3d at 1074).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

644

KA 13-01863

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW B. HORTON, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARY P. DAVISON 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 (Marianne Furfure, A.J.), rendered July 9, 2013. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the second degree and attempted kidnapping 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 grand larceny in the second degree (Penal Law § 155.40 [1]) and attempted kidnapping in the second degree (§§ 110.00, 135.20), defendant contends that his negotiated sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal does not encompass his challenge to the severity of the sentence (*see People v Maracle*, 19 NY3d 925, 928), we reject that challenge.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

647

CAF 14-01318

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

IN THE MATTER OF SANDRA STIDHAM,
PETITIONER-APPELLANT,

V ORDER

GARY STIDHAM, RESPONDENT-RESPONDENT.

SANDRA STIDHAM, PETITIONER-APPELLANT PRO SE.

Appeal from an order of the Family Court, Monroe County (John B. Gallagher, Jr., J.), entered October 21, 2013 in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's written objections to the order of the Support Magistrate.

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

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

649

CA 13-00580

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

RUTH A. SHATZEL, AS ADMINISTRATRIX OF THE ESTATE OF RUTH RAYNAK, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

152 BUFFALO STREET, LTD., DEFENDANT-APPELLANT.

COHEN & LOMBARDO, P.C., BUFFALO (JONATHAN D. COX OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM A. QUINLAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 19, 2012. The order, insofar as appealed from, denied the motion of defendant for summary judgment and granted that part of the cross motion of plaintiff seeking partial summary judgment against defendant on the issue of negligence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion in its entirety and as modified the order is affirmed without costs.

Memorandum: In this negligence action, plaintiff seeks damages for injuries allegedly sustained by 81-year-old Ruth Raynak when she tripped and fell on an allegedly defective sidewalk abutting property owned by defendant. According to plaintiff, the sidewalk slabs of concrete were uneven, thus posing a tripping hazzard. Following discovery, defendant moved for summary judgment dismissing the complaint against it, contending that it had no duty to maintain or repair the sidewalk, and plaintiff cross-moved for, inter alia, partial summary judgment against defendant on the issue of negligence. As relevant to this appeal, Supreme Court denied defendant's motion and granted that part of the cross motion with respect to defendant. We modify the order by denying the cross motion in its entirety.

With respect to defendant's motion, "it is well established that, as an abutting landowner, [defendant] is not liable for injuries sustained as the result of a defect in the sidewalk unless[, inter alia,] . . . there is a local ordinance charging [defendant] with the duty to maintain and repair the sidewalk and imposing liability for injuries resulting from [defendant's] failure to do so" (*Guadagno v City of Niagara Falls*, 38 AD3d 1310, 1311; *see Hausser v Giunta*, 88 NY2d 449, 452-453). Here, in opposition to the motion, plaintiff

submitted relevant portions of the General Code of the Village of Hamburg (Village), which charges landowners such as defendant with the duty to "repair, keep safe and maintain any sidewalk abutting [the landowner's] premises," and imposes liability on the landowner "for any injury or damage by reason of omission or failure to repair, keep safe, and maintain such sidewalk" (Village of Hamburg General Code § 203-26 [B]; *see* § 203-28 [A] [2]).

We conclude that, by submitting that local ordinance, plaintiff raised an issue of fact whether defendant breached the duty imposed on it to maintain the sidewalk abutting its property. Although defendant contends that the alleged defect in the sidewalk was created by a tree root that it had no authority to disturb because it originated from a tree on property owned and maintained by the Village, we note that the local ordinance contains no exceptions to the duty imposed on abutting landowners to maintain the sidewalk, even if the allegedly dangerous condition was created by a root extending from Village property. In any event, it cannot be said as a matter of law that defendant could not have repaired the alleged defect in the sidewalk without cutting the tree root that purportedly created it (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We agree with defendant, however, that the court erred in granting that part of plaintiff's cross motion for partial summary judgment on the issue of negligence against defendant, and we therefore modify the order accordingly. "Generally, a sidewalk defect presents an issue of fact for a jury . . . , unless . . . the defect is so trivial as to warrant disposition [in defendant's favor] on summary judgment" (*Herrera v City of New York*, 262 AD2d 120, 120; *see Trincere v County of Suffolk*, 90 NY2d 976, 977-978). Here, we cannot conclude that the alleged defect, as depicted in photographs included in the record, is of such significance that defendant may be held liable as a matter of law (*see generally Davison v City of Buffalo*, 96 AD3d 1516, 1517-1518).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

654

CA 15-00060

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

MOLLY R. COURTNEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HEATHER G. HEBELER AND L.E. HEBELER, JR.,
DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROBERT E. SCOTT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MAXWELL MURPHY, LLC, BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 4, 2014. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment dismissing the complaint.

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 allegedly sustained when the motor vehicle in which she was a back-seat passenger was struck from behind by a vehicle operated by defendant Heather G. Hebeler and owned by her husband, defendant L.E. Hebeler, Jr. Following discovery, defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury in the accident within the meaning of Insurance Law § 5102 (d). We conclude that Supreme Court properly granted the motion only with respect to the 90/180 day category and denied it with respect to the other two categories of serious injury alleged by plaintiff, i.e., the permanent consequential limitation of use and significant limitation of use categories.

We conclude with respect to the permanent consequential limitation of use category that defendants, by submitting their expert's medical report and the medical records referenced therein, met their initial burden of demonstrating that plaintiff did not sustain a permanent injury. In opposition to the motion, however, plaintiff submitted an affirmation and related medical records from one of her treating physicians, who opined that plaintiff's accident-related injuries would be "permanent in nature" and that he did not "expect any change in her condition." We conclude that "the proof that plaintiff continue[s] to suffer from her accident-related

injuries [over seven] years after the accident and that no change in her condition [is] expected" raises an issue of fact whether her injuries are permanent (*Hawkins v Foshee*, 245 AD2d 1091, 1091).

With respect to the significant limitation of use category, we conclude that defendants' own submissions in support of the motion raise an issue of fact (*see Thomas v Huh*, 115 AD3d 1225, 1225). Those submissions included imaging studies demonstrating that plaintiff suffered from a bulging disc, and that proof was "accompanied by objective evidence of the extent of alleged physical limitations resulting from the disc injury" (*Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49), i.e., medical records from plaintiff's treating physicians designating numeric percentages of plaintiff's range of motion losses (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

663

KA 12-00719

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERWIE RICHARDSON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Joseph D. Valentino, J.), entered January 4, 2012. The order determined that there was an error in the sentencing transcript and clarified the sentence.

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

Memorandum: On a prior appeal, we affirmed defendant's judgment of conviction (*People v Richardson*, 203 AD2d 932, *lv denied* 84 NY2d 831). Defendant now appeals from an order settling the transcript of his sentencing proceeding, correcting the scrivener's errors therein, and correcting the sentence and commitment form to reflect the sentence imposed. Although no appeal as of right lies from the order (*see* CPL 450.15 [3]; 450.30 [3]; *see generally People v Stevens*, 91 NY2d 270, 277), we treat the notice of appeal as an application for leave to appeal pursuant to CPL 460.15 and grant the application (*see generally People v Stevenson*, 176 AD2d 516, 517, *lv denied* 79 NY2d 832; *People v Frizer*, 328 NYS2d 368, 368).

Contrary to defendant's contention, the record establishes that the sentencing transcript contained a clerical error, and Supreme Court properly exercised its inherent power to correct the transcript, as well as the sentence and commitment form (*see generally People v Richardson*, 100 NY2d 847, 850; *People ex rel. Davidson v Kelly*, 193 AD2d 1140, 1141). Finally, we reject defendant's further contention that he was deprived of effective assistance of counsel (*see People v Wester*, 82 AD3d 1677, 1678, *lv denied* 17 NY3d 803; *People v Moye*, 13 AD3d 1123, 1123, *lv denied* 4 NY3d 833).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

666

KA 10-01017

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS A. WEST, ALSO KNOWN AS EDWARD DESHAWN WEST, DEFENDANT-APPELLANT.

SHIRLEY A. GORMAN, BROCKPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered January 7, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, robbery in the first degree, robbery in the second degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the first degree (Penal Law § 140.30 [4]), robbery in the first degree (§ 160.15 [4]), robbery in the second degree (§ 160.10 [1]), and assault in the second degree (§ 120.05 [2]). The conviction arises out of an incident in which defendant and two codefendants broke into an apartment and stole money and property from a woman inside, and defendant used a shotgun to shoot two men—only one of whom (hereafter, shooting victim) testified at trial—as the men fled down a hallway after coming to the apartment door during the robbery (*see People v McCullough*, 128 AD3d 1510).

Contrary to defendant's contention, Supreme Court did not abuse its discretion in granting the People's challenge for cause of a prospective juror. "In the case of a challenge for cause of an unsworn juror, a trial court 'should lean toward disqualifying a prospective juror of dubious impartiality' " (*People v Traylor*, 283 AD2d 1013, 1013, *lv denied* 96 NY2d 869, quoting *People v Branch*, 46 NY2d 645, 651; *see People v Arnold*, 96 NY2d 358, 362). The prospective juror in question had worked at a law firm with codefendant's attorney several years before the trial and, "[a]lthough [such] a 'nodding acquaintance' with the [codefendant's] trial attorney does not compel disqualification as a matter of law" (*People v Purcell*, 103 AD2d 938, 939; *see People v Provenzano*, 50 NY2d 420,

425), it was within the court's discretion to determine that "the better choice [was] to exclude such a juror" (*Purcell*, 103 AD2d at 939).

Defendant failed to preserve for our review his contentions concerning alleged prosecutorial misconduct (*see People v Goley*, 113 AD3d 1083, 1084; *People v Golson*, 93 AD3d 1218, 1219-1220, *lv denied* 19 NY3d 864), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant also failed to preserve for our review his contention that he was denied a fair trial by the court's questioning of witnesses (*see People v Charleston*, 56 NY2d 886, 887-888; *People v Anderson*, 114 AD3d 1083, 1087, *lv denied* 22 NY3d 1196), and we conclude, in any event, that the court "did not unnecessarily or excessively interfere in the presentation of proof" or "convey to the jury [its] opinion concerning the credibility of the witnesses or the merits of the case" (*People v Brown*, 256 AD2d 1109, 1109, *lv denied* 93 NY2d 851; *see People v Jamison*, 47 NY2d 882, 883-884; *see generally People v Yut Wai Tom*, 53 NY2d 44, 56-58).

Contrary to defendant's contention with respect to his conviction of assault in the second degree, we conclude that the evidence is legally sufficient to establish that the shooting victim sustained a physical injury, i.e., that he experienced substantial pain (*see* Penal Law §§ 10.00 [9]; 120.05 [2]; *People v Chiddick*, 8 NY3d 445, 447). The shooting victim testified that he was shot in the arm and leg, that being shot "[h]urt like hell" and "[f]elt like a bee sting with a thousand pounds of pressure added to it," and that he received pain medication at a hospital, thereby establishing that the pain was "more than slight or trivial" (*Chiddick*, 8 NY3d at 447; *see People v Stillwagon*, 101 AD3d 1629, 1630, *lv denied* 21 NY3d 1020; *People v Henderson*, 77 AD3d 1311, 1311, *lv denied* 17 NY3d 953). Moreover, viewing the evidence in light of the elements of the crime of assault in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect thereto is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The jury was entitled to credit the shooting victim's description of his injuries and resulting pain (*see People v Guidice*, 83 NY2d 630, 636; *People v Smith*, 45 AD3d 1483, 1483, *lv denied* 10 NY3d 771). Finally, the sentence is not unduly harsh or severe.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

667

KA 12-02260

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TROY ROSE, 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 April 30, 2012. 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: Defendant appeals from a judgment convicting him following a nonjury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We conclude that County Court properly refused to suppress defendant's statement to the arresting officers, which was made without *Miranda* warnings. The officers' question concerning the location of the gun did not constitute interrogation (*see People v Chestnut*, 51 NY2d 14, 22-23, *cert denied* 449 US 1018; *People v Roseboro*, 124 AD3d 1374, 1375) and moreover, the public safety exception to the *Miranda* rule applied to that question (*see People v Gucla*, 18 AD3d 478, 479, *lv denied* 5 NY3d 789).

We further conclude that the court properly refused to suppress the gun seized from defendant's backpack during a search incident to defendant's lawful arrest (*see People v Smith*, 59 NY2d 454, 458-459; *People v Johnson*, 86 AD2d 165, 166-167, *affd* 59 NY2d 1014). Here, "the circumstances leading to the arrest support a reasonable belief that the suspect may [have been able to] gain possession of a weapon" (*People v Gokey*, 60 NY2d 309, 311; *see People v Capellan*, 38 AD3d 393, 394, *lv denied* 9 NY3d 873; *see generally People v Wylie*, 244 AD2d 247, 250-251, *lv denied* 91 NY2d 946), including defendant's statement that the gun was in his backpack (*see People v Alvarado*, 126 AD3d 803, 804-805).

Contrary to defendant's contention, the court properly curtailed

his cross-examination of one of the officers at the suppression hearing with respect to a confidential informant. Defendant was arrested pursuant to a warrant, and the existence or reliability of a confidential informant who allegedly provided information concerning defendant's location "had nothing to do with the legality of the [arrest or] search and it was, therefore, irrelevant" (*People v Lourdes*, 175 AD2d 958, 958; *see People v Alfone*, 206 AD2d 775, 776, *lv denied* 84 NY2d 1028). Inasmuch as a motion to reopen the suppression hearing would not have been successful, defendant was not denied effective assistance of counsel based upon counsel's failure to make such a motion (*see People v Crespo*, 117 AD3d 1538, 1539, *lv denied* 23 NY3d 1035).

Finally, the sentence is not unduly harsh or severe.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

669

KAH 14-02147

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DANIEL FINLAY, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

HONORABLE DAVID S. GIDEON, TOWN JUSTICE, TOWN
OF DEWITT, RESPONDENT-APPELLANT.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT.

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

CERIO LAW OFFICES, SYRACUSE (DAVID W. HERKALA OF COUNSEL), FOR RESPONDENT-APPELLANT.

STEVEN SHIFFRIN, ITHACA, FOR PETITIONER-RESPONDENT.

SATTER LAW FIRM, PLLC, SYRACUSE (MIMI C. SATTER OF COUNSEL), AND UCLA SCHOOL OF LAW, SCOTT & CYAN BANISTER FIRST AMENDMENT CLINIC, LOS ANGELES, CALIFORNIA (EUGENE VOLOKH, OF THE CALIFORNIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR PROFESSORS DAVID COLE, RICHARD GARNETT, MARTIN REDISH, MARK RIENZI, JONATHAN VARAT AND JAMES WEINSTEIN, AMICUS CURIAE.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR VERA HOUSE, INC., AMICUS CURIAE.

Appeals from a judgment (denominated order/judgment) of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), entered March 24, 2014 in a habeas corpus proceeding. The judgment granted the petition.

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

Memorandum: Petitioner commenced this habeas corpus proceeding seeking to challenge the terms of a temporary order of protection issued by respondent, a Town Court Justice. Respondent and the People appeal from a judgment discharging petitioner of all restraints imposed on his liberty by that temporary order. Initially, we agree with the dissent that a habeas corpus petition was not the proper vehicle to seek vacatur or review of the temporary order of protection herein because petitioner’s liberty was not “restrained to such a

degree as to entitle him to the extraordinary writ of habeas corpus" (*People ex rel. Murray v Bartlett*, 89 NY2d 1002, 1003). We note, however, that the order of protection at issue has expired by its own terms (*see Matter of Justin CC. [George CC.–Tina CC.]*, 86 AD3d 725, 726; *see generally Matter of Sarah C.B.*, 91 AD3d 1282, 1283), and the Town Court that issued it has issued a permanent order of protection in conjunction with the sentence imposed on petitioner upon his subsequent plea of guilty. Thus, "any corrective measures which this Court might undertake would have no practical effect" (*Matter of Leslie H. v Carol M.D.*, 47 AD3d 716, 716; *see Matter of Kristine Z. v Anthony C.*, 43 AD3d 1284, 1284, *lv denied* 10 NY3d 705). Finally, we conclude that the exception to the mootness doctrine does not apply herein (*see Justin CC.*, 86 AD3d at 726; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). We therefore dismiss the appeals.

All concur except CENTRA, J., who dissents and votes to reverse in accordance with the following memorandum: The People and respondent appeal from a judgment granting a petition for a writ of habeas corpus and ordering that petitioner is "discharged of all restraints imposed upon his liberty by" a temporary order of protection issued by respondent. Respondent issued the temporary order of protection after petitioner was arrested because of his participation in a demonstration at a New York Air National Guard Base (base). The temporary order of protection required petitioner to, inter alia, stay away from the home and workplace of the installation commander of the base.

I agree with the majority, as do the People and petitioner, that these appeals are moot inasmuch as the temporary order of protection has expired. Contrary to the conclusion of the majority, however, I further agree with the People and petitioner that the exception to the mootness doctrine applies herein. The preliminary issue raised on appeal by the People and respondent is whether habeas corpus relief is available to challenge a temporary order of protection. An appeal that is moot may nevertheless be considered on the merits when it is demonstrated that there is "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). In my view, the procedural issue whether a habeas corpus proceeding is a proper vehicle to challenge a temporary order of protection is an issue that is likely to repeat inasmuch as parties restrained by a temporary order of protection may now, on the authority of this case as it is decided by the majority, commence a habeas corpus proceeding seeking vacatur or review of such orders. The issue also will typically evade review because, by the time the appeal is before us, the temporary order will have expired. Finally, the issue whether a habeas corpus proceeding is the proper vehicle to seek vacatur or review of a temporary order of protection raises a novel issue for the courts.

I agree with the People and respondent that habeas corpus relief

is not available to petitioner because he was not sufficiently restrained in his liberty. A writ of habeas corpus is available to any person who is "illegally imprisoned or otherwise restrained in his [or her] liberty with the state" (CPLR 7002 [a]). In my view, petitioner here was not "restrained to such a degree as to entitle him to the extraordinary writ of habeas corpus" (*People ex rel. Murray v Bartlett*, 89 NY2d 1002, 1003). By way of example, habeas relief is not available to a person released to parole supervision (*see People ex rel. McBride v Alexander*, 54 AD3d 423, 424), and the level of restraint imposed on petitioner by the temporary order of protection is far less than that of a person subject to parole supervision. I would therefore reverse the judgment, vacate the writ of habeas corpus, and dismiss the petition.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

681

CA 14-02229

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

BUYER'S FIRST CHOICE, INC., DOING BUSINESS AS 2.5% REAL ESTATE DIRECT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOANNE SIMME, ALSO KNOWN AS JOANNE SIMME-GOOD, DOING BUSINESS AS GOOD CHOICE, DEFENDANT-RESPONDENT.

JED CARROL, DEPEW, FOR PLAINTIFF-APPELLANT.

WEISS & DETIG, GRAND ISLAND (NORTON T. LOWE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Erie County Court (Thomas P. Franczyk, J.), dated September 24, 2013. The order, among other things, denied plaintiff's motion for 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 defendant's alleged breach of her duty of loyalty to plaintiff during the time that she sold real estate on plaintiff's behalf. On a prior appeal, we affirmed an order that denied plaintiff's motion to dismiss the counterclaim in defendant's second amended answer for failure to state a cause of action (*Buyer's First Choice, Inc. v Simme*, 107 AD3d 1384). We conclude on this appeal that County Court properly denied plaintiff's subsequent motion for summary judgment dismissing the same counterclaim to the extent that it alleges plaintiff's violation of Labor Law article 6, inasmuch as plaintiff failed to meet its burden of establishing as a matter of law that defendant was not an employee entitled to the protection of the statute. " 'Employee' is defined in Labor Law article 6 as 'any person employed for hire by an employer in any employment' " (*Akgul v Prime Time Transp.*, 293 AD2d 631, 633, quoting Labor Law § 190 [2]). While we agree with plaintiff that the definition of "employee" excludes independent contractors (*see Hernandez v Chefs Diet Delivery, LLC*, 81 AD3d 596, 597; *Akgul*, 293 AD2d at 633), we reject plaintiff's further contention that it established defendant's status as an independent contractor as a matter of law. Rather, as the court properly determined, here "the nature of the [parties'] relationship is fact sensitive and . . . presents a question for the trier of fact" (*Hernandez*, 81 AD3d at

598).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

695

KA 11-00669

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NIXON ELIAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered January 6, 2011. The judgment convicted defendant, upon a jury verdict, of attempted aggravated murder (two counts), assault in the first degree (two counts), attempted robbery in the first degree, burglary in the first degree, criminal possession of a weapon in the second degree, assault in the second degree and criminal possession of stolen property 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 a jury verdict of, inter alia, two counts of attempted aggravated murder (Penal Law §§ 110.00, 125.26 [1] [a] [i]; [b]). We reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to request that Supreme Court charge attempted assault in the second degree (§§ 110.00, 120.05 [1]) as a lesser included offense of those two counts of the indictment. "It is well settled that '[a] defendant is not denied effective assistance of trial counsel [where defense] counsel does not make . . . a[n] argument that has little or no chance of success' " (*People v March*, 89 AD3d 1496, 1497, *lv denied* 18 NY3d 926, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Viewing the evidence in the light most favorable to defendant (*see People v Martin*, 59 NY2d 704, 705), we conclude that there is no reasonable view thereof to support a finding that defendant committed the lesser offense but not the greater (*see generally People v Glover*, 57 NY2d 61, 63). We reject defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to object to comments made by the prosecutor in his opening statement and on summation (*see People v Cox*, 21 AD3d 1361, 1364, *lv denied* 6 NY3d 753).

Defendant failed to preserve for our review his further contention that he was deprived of a fair trial by the admission in evidence of defendant's recorded statement in which he referenced an uncharged act of domestic violence. After defendant objected on the basis of a *Molineux* violation, the court gave curative instructions to the jury. Following those instructions, defense counsel neither objected further nor requested a mistrial, and thus, " '[u]nder these circumstances, the curative instructions must be deemed to have corrected the error to the defendant's satisfaction' " (*People v Lane*, 106 AD3d 1478, 1480-1481, *lv denied* 21 NY3d 1043, quoting *People v Heide*, 84 NY2d 943, 944). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

700

CA 14-01200

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

COUNTRY PARK CHILD CARE, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SMARTDESIGN ARCHITECTURE PLLC AND TODD
AUDSLEY, DEFENDANTS-RESPONDENTS.

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

HARTER SECREST & EMERY LLP, BUFFALO (DANIEL J. ALTIERI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (John A. Michalek, J.), entered January 28, 2014. The judgment dismissed the action upon a verdict of no cause of action.

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

Memorandum: Plaintiff commenced this action for professional malpractice against defendants, an architecture firm and one of its employees, alleging that they were negligent in preparing architectural drawings for renovations to plaintiff's daycare facility. Following a trial, the jury returned a verdict of no cause of action, and Supreme Court thereafter denied plaintiff's posttrial motion pursuant to CPLR 4404 (a) seeking to set aside the verdict. This appeal ensued, and we affirm.

Contrary to plaintiff's contention, the court properly denied its motion for a directed verdict at the close of proof (*see* CPLR 4401), and its posttrial motion to set aside the verdict (*see* CPLR 4404 [a]). The parties presented sharply conflicting expert testimony concerning whether defendants' actions constituted a deviation from accepted architectural standards of practice (*see generally Wilson v Mary Imogene Bassett Hosp.*, 307 AD2d 748, 748–749). Plaintiff was not entitled to a directed verdict pursuant to CPLR 4401 because, affording defendants every favorable inference to be drawn from the evidence, we conclude that there was a rational process by which the jury could base a finding in their favor (*see Szczerbiak v Pilat*, 90 NY2d 553, 556; *Wolfe v St. Clare's Hosp. of Schenectady*, 57 AD3d 1124, 1126), i.e., that they did not deviate from accepted architectural standards of practice. We further conclude that the court properly

refused to set aside the verdict as against the weight of the evidence because the evidence did not so greatly preponderate in favor of plaintiff that the verdict could not have been reached on any fair interpretation of the evidence (*see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746; *Wolfe*, 57 AD3d at 1126).

Plaintiff further contends that the court abused its discretion in denying its motion for a mistrial based on "repeated" references to settlement demands. There were in fact two such references and, although plaintiff objected to both, plaintiff requested a mistrial only with respect to the second reference, and then only as an alternative to a curative instruction. The court gave an explicit curative instruction to the jury in each instance, and plaintiff failed to object further. We thus conclude that plaintiff failed to preserve this contention for our review (*see Vingo v Rosner*, 29 AD3d 896, 897, *lv denied* 8 NY3d 803). In any event, we conclude that the curative instructions given after both references "were sufficient to neutralize the prejudicial effect of the error[s]" (*Dennis v Capital Dist. Transp. Auth.*, 274 AD2d 802, 803).

Finally, we reject plaintiff's contention that it was deprived of a fair trial by the court's comments and rulings. The court has broad discretion " 'to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and . . . admonish counsel and witnesses when necessary' " (*Messinger v Mount Sinai Med. Ctr.*, 15 AD3d 189, 189, *lv dismissed* 5 NY3d 820), and here the court's conduct did not deprive plaintiff of a fair trial.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

703

CA 14-02109

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

RICHARD E. ROLLS, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 119923.)

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Richard E. Sise, A.J.), entered July 22, 2014. The order denied the motion of claimant for partial summary judgment.

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

Memorandum: Claimant commenced this action seeking damages for injuries he sustained when a state-owned vehicle driven by defendant's employee pulled out in front of him at an intersection where claimant had the right-of-way. Claimant, who was riding a motorcycle, braked and swerved to avoid colliding with the vehicle, and the motorcycle tipped over. Claimant was not subject to any traffic control devices at the intersection, but defendant's employee was subject to a stop sign.

The Court of Claims erred in denying claimant's motion for partial summary judgment on the issue of negligence. "It is well settled that a driver 'who has the right[-]of[-]way is entitled to anticipate that [the drivers of] other vehicles will obey the traffic laws that require them to yield' " (*Lescenski v Williams*, 90 AD3d 1705, 1705, *lv denied* 18 NY3d 811). Here, claimant met his initial burden on the motion by establishing as a matter of law that the sole proximate cause of the accident was the failure of defendant's employee to yield the right-of-way to him at the intersection (*see* Vehicle and Traffic Law §§ 1142 [a]; 1172 [a]). In support of the motion, claimant submitted evidence demonstrating that he was traveling at a speed of approximately 50 miles per hour in a 55 mile per hour zone. As he approached the intersection, claimant began to brake when he saw defendant's employee roll forward at the stop sign.

Claimant released the brakes when defendant's employee stopped at the stop sign but, when claimant was within 25 feet of the intersection, defendant's employee suddenly pulled out in front of him, causing claimant to brake, swerve, and tip over (*see Guadagno v Norward*, 43 AD3d 1432, 1433; *Wallace v Kuhn*, 23 AD3d 1042, 1043).

In response, defendant failed to "raise[] a triable issue of fact whether [claimant] 'was at fault in the happening of the accident or whether he could have done anything to avoid the collision' " (*Wallace*, 23 AD3d at 1043). Defendant's contention that claimant failed to take action to avoid the accident is " 'based on speculation and is insufficient to defeat a motion for summary judgment' " (*Liskiewicz v Hameister*, 104 AD3d 1194, 1195).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

705

CA 14-00288

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

TOWN OF MACEDON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VILLAGE OF MACEDON, DEFENDANT-APPELLANT.

HARRIS, CHESWORTH, O'BRIEN, JOHNSTONE & WELCH, LLP, ROCHESTER (EUGENE WELCH OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANTHONY J. VILLANI, P.C., LYONS (ANTHONY J. VILLANI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered April 11, 2013. The order granted the application of plaintiff for a preliminary injunction and denied the cross motion of defendant to dismiss the amended complaint.

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

Memorandum: Plaintiff, Town of Macedon (Town), commenced this action seeking to enjoin defendant, Village of Macedon (Village), from terminating sewer service to the sewer units located within the Town. The Town also sought, "and/or," to require the Village continue to provide such service for reasonable compensation until the Town and the Village could agree on a contract pertaining to such service or until a court decided the rights and liabilities of the parties. The parties previously had executed an Intermunicipal Agreement for Sewage Treatment (Agreement), pursuant to which the Village provided sewage treatment services for 575 Town residents. The Agreement was set to expire by its terms in December 2012. As the expiration date approached, representatives from the Town and Village began discussing the possibility of either a replacement agreement or an interim agreement. The Village took the position that, when the Agreement expired, the Town's "rights under the [Agreement] expire[d]." The Village informed the Town that, if the Town refused to make payments for services after January 1, 2013, then the "current sewage treatment provided by the Village cannot continue[;] . . . no payment, no services rendered." The Town, however, contended that it could "make no payments to anyone in the absence of a contract." Shortly thereafter, the Town commenced this action. The Town also applied for a preliminary injunction seeking the same relief pending the determination of the action.

The Village opposed the application for a preliminary injunction and cross-moved to dismiss the complaint pursuant to CPLR 3211 (a) (5). Specifically, the Village contended that the action was barred by CPLR 9802 because the complaint was filed after the expiration of the statute of limitations and, further, because the Town failed to file a notice of claim related to this action. Supreme Court deemed the cross motion to apply to the amended complaint that was thereafter served by plaintiff, and the court granted the preliminary injunction and denied the cross motion. We now affirm.

We note at the outset that the Village's sole ground in opposition to the application for a preliminary injunction and in support of its cross motion was its contention that the action is barred by CPLR 9802. That section provides, in relevant part, that "no action shall be maintained against the village upon or arising out of a contract of the village unless the same shall be commenced within eighteen months after the cause of action therefor shall have accrued, nor unless a written verified claim shall have been filed with the village clerk within one year after the cause of action shall have accrued, and no other action shall be maintained against the village unless the same shall be commenced within one year after the cause of action therefor shall have accrued, nor unless a notice of claim shall have been made and served in compliance with section fifty-e of the general municipal law. The omission to present a claim or to commence an action thereon within the respective periods of time above stated applicable to such claim[] shall be a bar to any claim or action therefor against said village; but no action shall be brought upon any such claim until forty days have elapsed after the filing of the claim in the office of the village clerk."

The Village contends, as it did in opposition to the application for a preliminary injunction and in support of its cross motion to dismiss pursuant to CPLR 3211 (a) (5), that the action is time-barred under the strict statute of limitations contained in CPLR 9802. Specifically, the Village takes the position that the Town's action is based on an alleged breach of the Agreement, and any cause of action for such a breach would have accrued in 1989 when the Village failed to provide the Town with documentation concerning the Town's alleged ownership interest in the sewage treatment plant. The Town, however, responds that the instant action is not an action arising out of a contract but, rather, it is an action for a permanent injunction. The Town thus contends that the cause of action for a permanent injunction accrued when the Village threatened to terminate sewer service two weeks before the action was commenced.

"Although it is permissible to plead a cause of action for a permanent injunction . . . , permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted" (*Corsello v Verizon N.Y., Inc.*, 77 AD3d 344, 368, *mod on other grounds* 18 NY3d 777, *rearg denied* 19 NY3d 937; *see Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 59). Indeed, "injunctive relief is simply not available when the plaintiff does not have any substantive cause of action" (*Weinreb*, 97 AD3d at 58). Here, the Town seeks a permanent injunction based on its contentions that the Village improperly

threatened to discontinue sewage treatment service without reasonable notice (*see* 1983 Opns St Comp No. 83-200), and violated the Agreement when it refused to acknowledge the Town's ownership interest and to transfer proportional ownership to the Town. Inasmuch as this is a CPLR 3211 motion to dismiss, we must "[a]ccept[] the allegations in the [amended] complaint as true and accord[ ] [the Town] the benefit of every favorable inference" (*190 Murray St. Assoc., LLC v City of Rochester*, 19 AD3d 1116, 1116, citing *Leon v Martinez*, 84 NY2d 83, 87-88). The Town alleged that its cause of action for a permanent injunction accrued when the Village threatened to terminate sewage treatment services to the Town, i.e., when the Village first acted inconsistently with the provisions of the Agreement. Until that time, the Village had no " 'liability for [the] wrong' " (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 403). We thus conclude that the Town's allegations are sufficient to establish that the action is timely whether using the 18-month statute of limitations for actions "arising out of a contract" or the one-year statute of limitations for all other actions against a Village (CPLR 9802).

The Village further contends that this action is barred under CPLR 9802 because the Town failed to file the requisite notice of claim and is now time-barred from doing so. While we agree with the Village that the notice of claim requirements of CPLR 9802 apply to all actions, including actions in equity (*see Genesee Brewing Co. v Village of Sodus Point*, 126 Misc 2d 827, 831-833, *affd for reasons stated* 115 AD2d 313; *see also Mendik v Incorporated Vil. of Lattingtown*, 76 AD3d 616, 618; *Greco v Incorporated Vil. of Freeport*, 223 AD2d 674, 674), we agree with the Town that an exception to the notice of claim requirement exists where "compliance would prevent obtaining the relief required because of the immediacy [of] the relief warranted" (*Genesee Brewing Co.*, 126 Misc 2d at 832). Here, the Village threatened termination of sewage treatment services only two weeks before the Agreement was set to expire, and the Town contends that it was thus unable to wait the statutory 40 days between filing a notice of claim and commencing this action.

The Village also contends that the need for immediate relief was caused by the Town itself. While such a contention may ultimately have merit, we conclude that the Town sufficiently alleged that it was faced with an immediate need for relief and, therefore, the court properly denied the Village's cross motion (*see 190 Murray St. Assoc., LLC*, 19 AD3d at 1116; *see generally Leon*, 84 NY2d at 87-88).

In opposing the application for a preliminary injunction, the Village contended only that there was not a likelihood of success on the merits because the action was barred under CPLR 9802. Inasmuch as we have concluded that the Town's allegations, if true, are sufficient to establish that the action is not barred by CPLR 9802, we conclude that the court did not abuse its discretion in granting the Town's application for a preliminary injunction (*see generally Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212,

216).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

714

KA 14-00107

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MORRIS H. WHITE, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered April 24, 2013. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). The evidence at trial established that defendant sold five pills containing oxycodone to a police informant in the City of Canandaigua. We reject defendant's initial contention that County Court should have granted his motion for a mistrial during voir dire based on comments about defendant's sister made by a prospective juror who was later excused for cause. "It is well settled that the decision to declare a mistrial rests within the sound discretion of the trial court, which is in the best position to determine if this drastic remedy is truly necessary to protect the defendant's right to a fair trial" (*People v Lewis*, 247 AD2d 866, 866, *lv denied* 93 NY2d 1021 [internal quotation marks omitted]; *see People v Ortiz*, 54 NY2d 288, 292). Here, we conclude that, inasmuch as the prospective juror's comments did not relate directly to defendant and were not so prejudicial as to deprive him of a fair trial, the court did not abuse its discretion in denying the motion for a mistrial (*see generally Ortiz*, 54 NY2d at 292; *People v Boler*, 4 AD3d 768, 768, *lv denied* 2 NY3d 761). Defendant failed to preserve for our review his further contention that he was deprived of a fair trial because a police detective identified defendant's sister in the courtroom during the trial (*see People v Angona*, 119 AD3d 1406,

1409, *lv denied* 25 NY3d 987), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that the court should have granted his motion for a mistrial after a police detective testified that defendant, upon his arrest, asked to work as a police informant. The record establishes that the testimony was a " 'surprise to everyone' " and was not the result of any " 'willful misconduct by the People' " (*People v Lucie*, 49 AD3d 1253, 1255, *lv denied* 10 NY3d 936*; see People v Jacobs*, 37 AD3d 868, 870, *lv denied* 9 NY3d 923). Moreover, the court limited the prejudice to defendant by sustaining his objection, striking the testimony, and providing a curative instruction (*see Lucie*, 49 AD3d at 1255; *People v Mims*, 278 AD2d 822, 823, *lv denied* 96 NY2d 832).

Defendant failed to preserve for our review his contention that he was deprived of a fair trial by incidents of prosecutorial misconduct (*see* CPL 470.05 [2]; *People v Swan*, 126 AD3d 1527, 1527). In any event, we conclude that none of the alleged misconduct by the prosecutor was so egregious as to deprive defendant of a fair trial (*see People v Jackson*, 108 AD3d 1079, 1079-1080, *lv denied* 22 NY3d 997).

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

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

719

CAF 14-00693

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

IN THE MATTER OF ANDREA E. RAFFERTY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. RAFFERTY, RESPONDENT-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR RESPONDENT-APPELLANT.

LAW OFFICE OF TIMOTHY A. BENEDICT, ROME (TIMOTHY A. BENEDICT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered March 24, 2014 in a proceeding pursuant to Family Court Act article 4. The order committed respondent to jail for a period of six months.

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

Memorandum: Respondent father appeals from an order committing him to jail for six months based on a finding of the Support Magistrate that he willfully violated a prior child support order. Respondent contends that the Support Magistrate erred in finding that his admitted failure to pay child support was willful, inasmuch as he demonstrated at the violation hearing that he was unable to pay the amount due. Because respondent has appealed only from the order of commitment, and not from the order finding that he willfully violated the child support order, the appeal must be dismissed (*see Matter of McDowell v Domenech*, 31 AD3d 554, 555; *Matter of St. Lawrence County Dept. of Social Servs. v Pratt*, 24 AD3d 1050, 1050, *lv denied* 6 NY3d 713; *Matter of Dauria v Dauria*, 286 AD2d 879, 880).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

727

CA 14-00117

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

ACQUEST WEHRLE, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF AMHERST, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

E. THOMAS JONES, WILLIAMSVILLE, DEMARIE & SCHOENBORN, P.C., BUFFALO (JOSEPH DEMARIE OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John A. Michalek, J.), entered December 10, 2013. The order and judgment awarded plaintiff money damages and attorney's fees.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by granting that part of the motion seeking summary judgment dismissing the eighth cause of action and vacating the jury award on that cause of action, and as modified the order and judgment is affirmed without costs, and the matter is remitted for recalculation of the final judgment.

Memorandum: Plaintiff commenced this action against the Town of Amherst (defendant) and members of the Town of Amherst Town Board (Town Board) seeking, inter alia, monetary damages based on actions by the Town Board. Plaintiff is the owner of certain property located partially in a designated wetland. In 1983, the United States Environmental Protection Agency (EPA) gave defendant a $5.6 million grant that constituted more than 50% of defendant's cost to construct a sewer project. In exchange, the EPA sought defendant's agreement to prohibit for 50 years new development located in the identified wetlands from connecting to the sewers funded in part by the grant. Defendant agreed that no such sewer hook-up would be allowed unless approved by the EPA. In furtherance of that agreement, the Town Board on July 5, 1983 issued a resolution imposing a 50-year moratorium "on development of properties which are located wholly or partially within state or federal designated wetlands and which are tributary to [the subsidized sanitary sewer]." The Town Board "reserve[d] the right to appeal th[e] moratorium with respect to actual wetland boundaries on an individual parcel basis."

Sometime in the late 1990s and early 2000s, the property at issue was rezoned from residential to office business after a full review pursuant to the State Environmental Quality Review Act ([SEQRA] ECL art 8) based on plaintiff's proposal to develop the property into an office park. In February 2001, the Town Board passed a resolution authorizing a request for a sewer tap-in waiver from the EPA for the property and, in January 2002, defendant made the formal request to the EPA. In December 2004, the EPA denied defendant's tap-in waiver request for the property, leading plaintiff to revise its site plan. In April and May 2005, the EPA notified plaintiff that, based upon the revised site plan and issuance of a permit pursuant to section 404 of the Federal Water Pollution Control Act (33 USC § 1344) from the Army Corps of Engineers (ACE), a tap-in waiver would be approved. The EPA advised plaintiff that Town of Amherst Planning Board (Planning Board) approval of the revised site plan would constitute and be evidence of continuing approval and support by defendant of the tap-in waiver previously requested from the EPA. Various representatives of plaintiff and defendant agreed by way of a June 2, 2005 memorandum that the Planning Board's action would be sufficient and that Town Board approval was not required. The parties also agreed that the order of obtaining approvals would be first, a 404 permit from ACE; second, an approval from the Planning Board for the site plan; and third, approval from the EPA of the waiver. ACE issued a provisional 404 permit to plaintiff on March 14, 2006. On March 20, 2006, without any notice to plaintiff, the Town Board passed a resolution rescinding the tap-in waiver request and terminated the office park project.

Plaintiff commenced a federal action against defendant and others in September 2006, which was dismissed in March 2009 for lack of ripeness. Plaintiff then commenced this action in August 2009. Supreme Court granted in part defendants' motion for summary judgment dismissing the complaint and plaintiff's cross motion for partial summary judgment, then subsequently amended its order after granting in part defendants' motion to reargue. A jury trial was held on the remaining four causes of action based on violations of 42 USC § 1983, including deprivation of substantive due process and denial of equal protection under the constitutions of the United States and the State of New York. The individual members of the Town Board were released from the litigation. As relevant herein, the jury found that defendant violated plaintiff's right to substantive due process causing plaintiff damages in the amount of $1,459,411, and that defendant violated plaintiff's right to equal protection causing plaintiff damages in the amount of $1,588,000. Defendant now appeals.

Initially, we reject defendant's contention that plaintiff's exclusive remedy was a CPLR article 78 proceeding. Plaintiff sought monetary damages both for its expenses in attempting to develop the property and the diminished value of the property attributable to defendant's actions, and we conclude that it appropriately sought that relief through the 42 USC § 1983 causes of action (*see D & S Realty Dev. v Town of Huntington*, 295 AD2d 306, 307; *see generally Town of Orangetown v Magee*, 88 NY2d 41, 48, 52). We reject defendant's further contention that the complaint is time-barred. The present complaint is based upon the same transaction or occurrence, or the

same operative facts, as the federal action, and thus the action is timely pursuant to CPLR 205 (a) (*see Mulford v Fitzpatrick*, 68 AD3d 634, 635; *Kavanau v Virtis Co.*, 32 AD2d 754, 754-755). Defendant's further contention that plaintiff was not the real party in interest was not raised during the trial, and that defense is therefore waived (*see Stevenson Equip. v Chemig Constr. Corp.*, 170 AD2d 769, 771, *affd* 79 NY2d 989; *see generally Advanced Magnification Instruments of Oneonta v Minuteman Opt. Corp.*, 135 AD2d 889, 890). In any event, defendant failed to establish that plaintiff was not the real party in interest (*see generally Brignoli v Balch, Hardy & Scheinman*, 178 AD2d 290, 290-291).

Defendant contends that the court erred in denying its motion in part and granting the cross motion in part with respect to the seventh cause of action, alleging a violation of 42 USC § 1983 based on substantive due process. As a preliminary matter, we note that the Court of Appeals has set forth a two-part test for substantive due process violations: "[f]irst, [a plaintiff] must establish a cognizable property interest, meaning a vested property interest, or 'more than a mere expectation or hope to retain the permit and continue their improvements; they must show that pursuant to State or local law, they had a legitimate claim of entitlement to continue construction' . . . Second, [a plaintiff] must show that the governmental action was wholly without legal justification" (*Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 627; *see Schlossin v Town of Marilla*, 48 AD3d 1118, 1120). Under the first prong, "a legitimate claim of entitlement to a permit can exist only where there is either a 'certainty or a very strong likelihood' that an application for approval would have been granted" (*Bower Assoc.*, 2 NY3d at 628). "Where an issuing authority has discretion in approving or denying a permit, a clear entitlement can exist only when that discretion 'is so narrowly circumscribed that approval of a proper application is virtually assured' " (*id.*).

We conclude that the court properly granted that part of plaintiff's cross motion seeking partial summary judgment on the issue of a cognizable property interest pursuant to the first prong of the substantive due process test, holding that plaintiff established a constitutionally protectable property interest in the February 2001 sewer tap-in waiver request made by defendant on plaintiff's behalf. As noted by the EPA and agreed to by defendant, the Town Board had no further discretion to exercise after the EPA advised that plaintiff's revised site plan would form the basis of an acceptable waiver request. Defendant correctly notes that plaintiff still needed to obtain site plan approval by the Planning Board, and the EPA needed to grant the tap-in waiver request before the property could be developed, but plaintiff established that those actions were certainties (*see Magee*, 88 NY2d at 52-53).

We reject defendant's further contention that plaintiff failed to raise a triable issue of fact in opposition to defendants' motion for summary judgment, as well as failed to establish during the trial, that the Town Board's action on March 20, 2006 was wholly without justification under the second prong of the test. Under the second

prong, " 'only the most egregious official conduct can be said to be arbitrary in the constitutional sense' " (*Bower Assoc.*, 2 NY3d at 628). The Town Board's meeting itself and the timing of that meeting supports that conclusion. The Town Board did not give notice to plaintiff that it was planning on reconsidering the waiver request at the hearing. The Town Board, or at least the Town Supervisor, was aware through a neighborhood activist that the necessary approvals from ACE and the EPA were imminent, and that the Town Board needed to take action to stop it. The Town Supervisor admitted receiving a letter dated February 19, 2006 from the neighborhood activist opposed to any development in wetlands. In that letter, the activist stated that the EPA would likely grant plaintiff the waiver to tap into the sewer if ACE approved the permit application and the Town supported the project either by saying nothing or asking the EPA for a waiver. She indicated that ACE was going to grant the permit in approximately one or two weeks. ACE did, in fact, issue the provisional 404 permit to plaintiff on March 14, 2006 and, just six days later, the Town Board addressed the tap-in waiver request at the meeting. The Town Supervisor testified that, "when the new board came, these people [referring to neighborhood activists] just pushed it and we acted on it." No new studies had been done regarding traffic or impacts on the environment since the SEQRA review. The Town Supervisor testified that he did not look at the Planning Board's file or the SEQRA documents prior to the vote. He was also unaware that the EPA indicated that it was satisfied with the revised site plan and that it would form the basis of an acceptable waiver request. Finally, the resolution did not simply withdraw the tap-in waiver request, but emphatically stated that the Town Board was "terminat[ing] said commercial project." In sum, plaintiff submitted sufficient evidence that the Town's conduct was solely politically motivated and thus that the Town Board's action was without legal justification (*see Magee*, 88 NY2d at 53).

We agree with defendant, however, that the court erred in denying that part of defendants' motion for summary judgment seeking dismissal of the eighth cause of action, alleging a violation of 42 USC § 1983 based on equal protection, and we therefore modify the judgment by dismissing that cause of action and vacating the jury award to that extent. "The essence of a violation of the constitutional guarantee of equal protection is, of course, that all persons similarly situated must be treated alike" (*Bower Assoc.*, 2 NY3d at 630). Here, as in *Bower Assoc.*, plaintiff's equal protection claim "does not rest on differential treatment as a constitutionally protected suspect class . . . [but, r]ather[,] . . . sounds in selective enforcement" (*id.* at 630-631). In that situation, a violation of equal protection occurs when a person is selectively treated and such treatment is based on, inter alia, maliciousness or bad faith intent to injure a person (*see id.* at 631; *Matter of Northway 11 Communities v Town Bd. of Town of Malta*, 300 AD2d 786, 788). "The 'similarly situated' element of the [cause of action] asks 'whether a prudent person, looking objectively at the incidents, would think them roughly equivalent' " (*Bower Assoc.*, 2 NY3d at 631).

Here, we agree with defendant that it established as a matter of law that plaintiff's property was not similarly-situated to two other properties, thereby further establishing as a matter of law that plaintiff's property was not selectively treated in comparison to those two properties (*see Ruston v Town Bd. for the Town of Skaneateles*, 610 F3d 55, 60, *cert denied* ___ US ___, 131 S Ct 824). Plaintiff's proposed office building would be 234,000 square feet on a 25-acre parcel. The neighboring property, while also an office building, was a much smaller building on a 1.5-acre parcel. In addition, the building on that property had already been partially constructed at the time the Town Board, which had forgotten about the moratorium, requested the waiver from the EPA. The other property was a residential subdivision, not a commercial office park (*see id.*).

We reject defendant's contention that the state constitutional claims should be dismissed because defendant is entitled to qualified immunity. " 'A government official is entitled to qualified immunity provided his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known' " (*Linen v County of Rensselaer*, 274 AD2d 911, 914; *see Maio v Kralik*, 70 AD3d 1, 13; *Rigle v County of Onondaga*, 267 AD2d 1088, 1091, *lv denied* 94 NY2d 764). Defendant failed to establish that it was objectively reasonable for the Town Board to believe that its conduct in withdrawing the sewer tap-in waiver request on March 20, 2006 was appropriate (*see generally Linen*, 274 AD2d at 914-915). Instead, the evidence established that the Town Board members acted without knowing the history of the project and acted knowing that only the Planning Board had to take action, i.e., to give site plan approval for the property. Despite the existence of plaintiff's constitutionally protected property interest in the January 2002 tap-in waiver request, the Town Board acted on March 20, 2006 to withdraw that waiver request, which was a violation of plaintiff's constitutional rights. As such, defendant is not entitled to qualified immunity.

We reject defendant's further contention that alleged evidentiary errors require a new trial. The court did not abuse its discretion in excluding evidence of plaintiff's conduct with regard to the property after March 20, 2006 and evidence regarding the availability of non-EPA funded sewers (*see generally Salm v Moses*, 13 NY3d 816, 818). That evidence was not relevant in light of the Town Board's resolution withdrawing the tap-in waiver request, which prohibited plaintiff from obtaining Planning Board approval and the EPA waiver, and terminating the development. We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

728

CA 14-01436

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

ACQUEST WEHRLE, LLC, PLAINTIFF-RESPONDENT,

V ORDER

TOWN OF AMHERST, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

E. THOMAS JONES, WILLIAMSVILLE, DEMARIE & SCHOENBORN, P.C., BUFFALO (JOSEPH DEMARIE OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered November 26, 2013. The order awarded plaintiff attorney's fees.

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

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

730

CA 14-01011

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

CHRISTOPHER J. COLELLA, PLAINTIFF-APPELLANT

V MEMORANDUM AND ORDER

JAMIE L. COLELLA, DEFENDANT-RESPONDENT.

SAMUEL P. GIACONA, AUBURN, FOR PLAINTIFF-APPELLANT.

RALPH G. DEMASI, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Elma A. Bellini, J.), entered March 14, 2014 in a divorce action. The order denied the motion of plaintiff seeking an order directing defendant to pay him half of the money defendant saved on her income taxes since 2008 as a result of receiving child tax credits for their two children.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Supreme Court, Cayuga County, for further proceedings in accordance with the following memorandum: In this postjudgment matrimonial proceeding, plaintiff moved for an order directing defendant, his ex-wife, to pay him half of the money she saved on her income taxes since 2008 as a result of receiving child tax credits for their two children. According to plaintiff, he was entitled to share equally in the child tax credits pursuant to Article XIX (E) of the parties' separation agreement, which was incorporated but not merged into the judgment of divorce. Following a limited fact-finding hearing, Supreme Court denied plaintiff's motion, finding that, under the unambiguous terms of the separation agreement, plaintiff is not entitled to share in the child tax credits. We conclude that the disputed provision is ambiguous, and we therefore reverse the order and remit the matter to Supreme Court for a hearing to determine the parties' intent with respect thereto.

It is well settled that "[t]he fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent . . . [, and t]he best evidence of what the parties . . . intend is what they say in their writing" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [internal quotation marks omitted]). "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*id.*; *see Hall v Paez*, 77 AD3d 620, 621). Therefore, courts may consider extrinsic or parol evidence of the parties' intent only if

the contract is ambiguous (*see Boster-Burton v Burton*, 73 AD3d 671, 673). In determining whether a contract is ambiguous, a court considers whether the contract "on its face is reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573; *see St. Mary v Paul Smith's Coll. of Arts & Sciences*, 247 AD2d 859, 859).

Here, Article XIX (E) of the separation agreement reads: "Commencing with the 2008 tax year the Wife shall share with the Husband fifty percent of any child tax credit, or any such similar tax credit not based upon income or payments that the [W]ife may have made by or on behalf of a child, that she may receive relating to the filing of her federal and state income tax returns after 2008. The Wife shall also share with the Husband fifty percent of any future economic stimulus or any similar such payment she may receive as a result of her claiming the children on her federal income tax return."

The court concluded that the above provision unambiguously provides that plaintiff is not entitled to share in any child tax credits where the amount of such credit is based on defendant's income. Because it was unclear from the motion papers whether the child tax credits received by defendant were based on her income, the court conducted a hearing on that limited issue. The court rejected plaintiff's contention that the provision itself was ambiguous, and therefore precluded him from offering evidence regarding the parties' intent with respect to the provision. At the hearing, plaintiff's expert witness, a certified public accountant, acknowledged that, under the federal tax code, the amount of a child tax credit depends upon the income of the recipient taxpayer. The court therefore denied plaintiff's motion.

We agree with plaintiff that Article XIX (E) of the separation agreement is ambiguous because it is reasonably susceptible of more than one interpretation. Given the placement of the comma in the first sentence, one could reasonably interpret the provision as allowing plaintiff to share equally in the child tax credit regardless of whether it is based on defendant's income, and also share equally in "any such similar tax credits"—such as those for child care expenses—that are not based on defendant's income or payments she made on behalf of the children. The provision could also reasonably be interpreted as allowing plaintiff to share in any tax credits received by defendant except those that are based on money, i.e., "income or payments," she expended on behalf of the children.

In fact, plaintiff's interpretation appears more reasonable than that proffered by defendant, pursuant to which plaintiff is not entitled to share in the child tax credits because they are based on defendant's income. The amount of basic child tax credit is, indeed, always dependent on the income of the person claiming the credit. Thus, pursuant to the court's interpretation of the provision, plaintiff would never share in the child tax credit and, if that were the case, there would have been no need for the first phrase of the first sentence, i.e., "Commencing with the 2008 tax year the Wife shall share with the Husband fifty percent of any child tax credit."

We also note that defendant's own attorney, in a letter sent to opposing counsel approximately two years before this proceeding was commenced, acknowledged that plaintiff was entitled to share in the child tax credits. Although defendant later disavowed that apparent concession, the fact that defendant's attorney, who represented her in the divorce, thought that plaintiff was entitled to half of the child tax credits tends to show that plaintiff's interpretation of the separation agreement is not unreasonable.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

740

KA 12-01617

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONTA ALBERT, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ROMANA A. LAVALAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Donald E. Todd, A.J.), rendered May 8, 2012. The judgment convicted defendant, upon a jury verdict, 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: Defendant appeals from a judgment convicting him following a jury trial of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). 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). Two police officers testified at trial that they were on routine patrol in Syracuse when they observed defendant, whom they knew well from prior dealings, engage in what appeared to be a hand-to-hand drug transaction with another person. Following the transaction, defendant walked away from the scene, and the officers stopped the other person, who readily admitted that he had just purchased crack cocaine. The buyer said that the man who sold him cocaine gave him a telephone number to call if he needed more drugs. The officers wrote down that number and looked for defendant, who could not immediately be found. When one of the officers arrested defendant five days later, the officer dialed the number given to him by the drug purchaser, and a cell phone in defendant's possession began to ring. The officer ended the call and dialed the number a second time, and the phone rang again. At trial, both officers identified defendant at trial as the person they saw engage in the hand-to-hand transaction. Based on our independent review of the record, we conclude that, even assuming, arguendo, that a different verdict would not have been unreasonable, it cannot be

said that the jurors failed to give the evidence the weight it should be accorded (*see People v Ohse*, 114 AD3d 1285, 1286-1287, *lv denied* 23 NY3d 1041; *see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that County Court erred in allowing the police witnesses to testify that defendant's neighborhood, where the drug transaction took place, had high levels of criminal activity, and that the police regularly patrolled the area upon the request of the management of a nearby apartment complex (*see* CPL 470.05 [2]; *People v Permant*, 268 AD2d 230, 230, *lv denied* 94 NY2d 905). In any event, the court properly allowed that testimony because it tended to explain the presence and conduct of the police (*see People v Leak*, 66 AD3d 403, 404, *lv denied* 14 NY3d 802; *People v Grzebyk*, 253 AD2d 469, 469, *lv denied* 92 NY2d 925). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

741

KA 12-01873

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN C. HOWARD, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered August 6, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree, criminal mischief in the third degree and petit larceny.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of burglary in the third degree (Penal Law § 140.20), criminal mischief in the third degree (§ 145.05 [2]) and petit larceny (§ 155.25), defendant contends that Supreme Court erred in refusing to suppress physical evidence seized by the police as the result of an unlawful stop, detention, and arrest. We reject that contention.

According to the evidence presented at the suppression hearing, the Rochester Police Department received a call at approximately 10:00 a.m. that two black males had been seen walking around a neighborhood carrying bags and that they had gone behind one particular residence on Robin Street. The responding officer observed two men matching that description coming down the driveway of another residence on Robin Street. The officer, who was aware that there had been other burglaries in the surrounding area where copper plumbing had been targeted, approached the men and asked them “what they were doing.” The men responded that they were walking around the area looking for copper plumbing. The officer observed that defendant was carrying a book bag, and that the other man was carrying a three-foot-long duffel bag. The officer then asked “what was in the bag,” and the men responded that they had copper plumbing. Without further prompting, the man with defendant opened the duffel bag and showed the officer its contents, which consisted of numerous copper pipes of “different sizes[and] lengths,” with no other type of scrap metal. Within two

or three minutes of the officer's initial approach, her sergeant arrived on the scene. After frisking the men, the officer and sergeant placed the men in their patrol vehicles. The officer was unable to recall whether the men were handcuffed before being placed in the patrol vehicles. It is undisputed, however, that the two men were unable to exit the patrol vehicles from the inside.

Immediately after placing the men in the patrol vehicles, the officer and her sergeant checked the residence, whereupon they noticed that a window next to the side door of the residence was broken and the door was unlocked. The officer and her sergeant entered the residence and proceeded to the basement, where they noticed water running from copper pipes that had recently been cut, and they observed that the water was just beginning to spread on the basement floor. The pipes in the basement appeared to be the same size and description as those seen by the officer in the duffel bag. At that point, the officer and her sergeant returned to their vehicles, drove to the police station, and placed both men under arrest.

It is well established that, in evaluating the legality of police conduct, we "must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835, *lv denied* 92 NY2d 858, citing *People v De Bour*, 40 NY2d 210, 215). Here, contrary to defendant's contention, we conclude that "the information provided in the . . . dispatch coupled with the officer[']s] observations provided the [officer] with 'an objective, credible reason for initially approaching defendant [and the other man] and requesting information from [them]' " (*People v Burnett*, 126 AD3d 1491, 1492), and that the officer's first inquiry was a "nonthreatening question[] not indicative of criminality, and thus w[as] justified as a level one inquiry" (*People v Doll*, 98 AD3d 356, 367, *affd* 21 NY3d 665, *rearg denied* 22 NY3d 1053, *cert denied* ___ US ___, 134 S Ct 1552, citing *People v Hollman*, 79 NY2d 181, 185). We further conclude that the answer to that inquiry provided the officer with the requisite founded suspicion that criminal activity was afoot to justify her subsequent common-law inquiry regarding the contents of the bag (*see generally Hollman*, 79 NY2d at 191-192).

Contrary to defendant's contention, he was not subjected to a de facto arrest when he was placed in the back seat of the patrol vehicle. We conclude that "the police action fell short of the level of intrusion upon defendant's liberty and privacy that constitutes an arrest" (*People v Hicks*, 68 NY2d 234, 240; *see generally People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851). Here, the brief investigative detention of defendant by the police was "justified by reasonable suspicion that a crime [had] been, [was] being or [was] about to be committed" (*People v Roque*, 99 NY2d 50, 54; *see People v Williams*, 73 AD3d 1097, 1098, *lv denied* 15 NY3d 779), i.e., "that quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*People v Woods*, 98 NY2d 627, 628 [internal quotation marks omitted]; *see e.g. Williams*, 73 AD3d at 1098-1099; *People v Mazza*, 246 AD2d 671, 672; *cf. People v Lee*, 96 AD3d 1522, 1525-1526). Indeed, after the man with defendant displayed the contents of the

duffel bag, the officer had reasonable suspicion that defendant and the other man had committed a crime. The established circumstances at that point were that the officer had received a report that suspicious individuals carrying bags had gone behind a residence in an area where burglaries targeting copper pipe had previously occurred; the officer observed two men matching the description coming down a driveway carrying bags; the two men admitted that they were walking around looking for copper plumbing; and the contents of the duffel bag revealed their actual possession of numerous copper pipes of various sizes with no indication of other scrap metals. Under these circumstances, we conclude that the temporary detention of defendant was proper as "part of a continuum of permissible police intrusions in response to escalating evidence of criminal activity" (*Roque*, 99 NY2d at 54). Here, "the police diligently pursued a minimally intrusive means of investigation likely to confirm or dispel suspicion quickly, during which time it was necessary to detain the defendant" (*Hicks*, 68 NY2d at 242), and "a less intrusive means of fulfilling the police investigation was not readily apparent" (*Williams*, 73 AD3d at 1099).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

748

CAF 14-02146

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

IN THE MATTER OF CHRISTOPHER J. SCHIEBLE, SR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHELE R. SWANTEK, RESPONDENT-RESPONDENT.

MEADE H. VERSACE, ROME, FOR PETITIONER-APPELLANT.

DIANE MARTIN-GRANDE, ROME (LUCILLE M. RIGNANESE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered March 20, 2014 in a proceeding pursuant to Family Court Act article 6. The order, among other things, continued sole legal custody and primary physical custody of the child with respondent.

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

Memorandum: In this custody proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order that denied his petition to modify a prior custody order that awarded sole legal custody and primary physical custody of the parties' child to respondent mother, except to the extent that the father was awarded additional visitation. Although we agree with the father that Family Court properly determined that there was a change in circumstances based on, inter alia, "incidents of domestic violence in the mother's household" (*Matter of Pecore v Blodgett*, 111 AD3d 1405, 1405, *lv denied* 22 NY3d 864), we reject his contention that the court erred in determining that the existing custodial arrangement is in the child's best interests.

The father acknowledged at the hearing that the sole basis for his modification petition was that the mother was the victim of domestic abuse at the hands of her former boyfriend, with whom she had lived for several years. According to the father, the incidents of domestic violence in the mother's home rendered it unsafe for the child to reside there. The evidence at the hearing established, however, that the mother filed criminal charges against her abusive former boyfriend and obtained an order of protection against him. As

a result, he no longer resides with the mother and has no relationship with her. The father otherwise had no issues with the mother's custody, and the record establishes that the 11-year old child had primarily resided with the mother for most of his life. Under the circumstances, and because the child appears to be thriving under the existing custodial arrangement, we conclude that the court's refusal to modify the existing arrangement is supported by a sound and substantial basis in the record and thus should not be disturbed (*see Wideman v Wideman*, 38 AD3d 1318, 1319).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

750

CA 14-01337

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

TOWN OF AMHERST, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GRANITE STATE INSURANCE COMPANY, INC.,
DEFENDANT-APPELLANT.

KAUFMAN DOLOWICH & VOLUCK, LLP, NEW YORK CITY (MARC S. VOSES OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (JOHN G. SCHMIDT, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered May 16, 2014. The order denied the motion of defendant to compel arbitration and granted the cross motion of plaintiff for a permanent stay of arbitration.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant's motion to compel arbitration except insofar as it concerns defendant's counterclaim for equitable subrogation and denying plaintiff's cross motion to stay arbitration except insofar as it concerns that counterclaim and as modified the order is affirmed without costs.

Memorandum: Plaintiff, the Town of Amherst (Town), was insured under a special excess liability policy (Policy) issued by defendant, Granite State Insurance Company, Inc. (Granite State). Following a personal injury action in which the plaintiff was awarded a judgment in excess of $23 million, Granite State contributed the policy limit of $10 million toward satisfaction of that judgment (*see Town of Amherst v Hilger*, 106 AD3d 120, 122). Ultimately, a third party was ordered to indemnify the Town "for all amounts the Town paid" pursuant to that judgment (*id.* at 123).

The third party and its insurer settled the indemnification claims and agreed to pay the Town and Granite State $31 million, which represented the amount of the judgment plus postjudgment interest. The Town and Granite State dispute whether Granite State is entitled to recover any of the postjudgment interest under either the Policy's subrogation clause or principles of equitable subrogation.

The Policy contained an arbitration clause requiring the parties to arbitrate any "disagreement as to the interpretation of [the]

Policy." In August 2013, the parties entered into a handwritten agreement in which they "agree[d] to litigate the issue of the ownership" of the challenged amount of interest. Believing that the agreement constituted a waiver of the Policy's arbitration clause, the Town commenced this action in Supreme Court. Granite State, however, served the Town with a demand for arbitration based on Granite State's belief that the agreement did not waive or modify the arbitration clause of the Policy.

Granite State thereafter moved to compel arbitration, and the Town cross-moved for a permanent stay of arbitration. We conclude that the court erred in denying that part of Granite State's motion insofar as it sought to determine its subrogation rights under the Policy and in granting the Town's cross motion insofar as it sought to stay arbitration on that issue. We therefore modify the order accordingly.

"Once the parties to a broad arbitration clause have made a valid choice of forum, as here, all questions with respect to the validity and effect of subsequent documents purporting to work a modification or termination of the substantive provisions of their original agreement are to be resolved by the arbitrator" (*Matter of Schlaifer v Sedlow*, 51 NY2d 181, 185; *see Matter of Nassau Ins. Co. v McMorris*, 41 NY2d 701, 702-703; *Matter of Lipman [Haeuser Shellac Co.]*, 289 NY 76, 79-80, *rearg denied* 289 NY 647; *see also Vitals986, Inc. v Healthwave, Inc.*, 15 AD3d 571, 572). This is not a situation in which the parties engaged in litigation to such an extent that they "manifested a preference 'clearly inconsistent with [a] later claim that the parties were obligated to settle their differences by arbitration' " (*Sherrill v Grayco Bldrs.*, 64 NY2d 261, 272, quoting *Matter of Zimmerman [Cohen]*, 236 NY 15, 19; *see Les Constructions Beauce-Atlas v Tocci Bldg. Corp. of N.Y.*, 294 AD2d 409, 409-410). Nor is this a situation in which the entire contract containing the arbitration provision has been cancelled or terminated, such that "the designation of the arbitration forum for the resolution of disputes is no longer binding upon the parties" (*Bryan v Newman*, 237 AD2d 207, 207; *see Matter of Minkin [Halperin]*, 279 App Div 226, 227-228, *affd* 304 NY 617). We thus conclude that the determination of the arbitrability of the parties' claims under the Policy should be made by an arbitrator.

We note, however, that Granite State's counterclaim for equitable subrogation is not a claim based on any "disagreement as to the interpretation of [the] Policy" and, therefore, is not subject to arbitration.

We reject the Town's contention that the demand for arbitration, which was served by Federal Express, is jurisdictionally defective. Although we have previously held that service of a demand for arbitration by Federal Express was jurisdictionally defective because "Federal Express mail is not one of the permitted methods of service set forth in CPLR 7503 (c)" (*Matter of New York Cent. Mut. Fire Ins. Co. v Czumaj*, 9 AD3d 833, 834), we conclude that such service was proper in this case inasmuch as the provisions of CPLR 7503 (c) do not apply. Here, the parties had expressly agreed to be bound by the

procedural rules of the American Arbitration Association, which permits such service, and thus "New York law, which requires notice by registered mail or personal service, is inapplicable" (*Smith v Positive Prods.*, 419 F Supp 2d 437, 446; *see Volt Info. Sciences, Inc. v Board of Trustees of Leland Stanford Jr. Univ.*, 489 US 468, 479; *Matter of New York Merchants Protective Co. v Mima's Kitchen, Inc.*, 114 AD3d 796, 797).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

753

CA 14-00671

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

DETROY LIVINGSTON, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 120912.)

DETROY LIVINGSTON, CLAIMANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Court of Claims (Michael E. Hudson, J.), entered September 18, 2013. The judgment dismissed the claim after a trial.

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

Memorandum: Claimant commenced this negligence action, pro se, seeking damages for the value of property destroyed by a fire set inside his prison cell at Attica Correctional Facility. At trial, claimant testified that a particular correction officer set the fire or had someone do it for him, in retaliation for claimant having filed a grievance against him. The Court of Claims rendered a verdict in favor of defendant and dismissed the claim. We reject claimant's contention that the verdict is against the weight of the evidence.

"[T]he decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [internal quotation marks omitted], *rearg denied* 81 NY2d 835). Based on our review of the record, we conclude that the court's determination that claimant failed to prove that a correction officer or anyone else employed by defendant was involved in setting the fire in claimant's cell is supported by a fair interpretation of the evidence. As the court noted in its decision, claimant acknowledged at trial that he does not know who set the fire, and his allegations against the correction officer were based on mere speculation. Moreover, the court was entitled to credit the testimony of the correction officer at trial that he did not set the fire or have any involvement in the incident. Finally, we reject claimant's

further contention that he established defendant's negligence under 7 NYCRR 1700.7 (a).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

758

CA 14-01101

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

IN THE MATTER OF THE APPLICATION OF MARIA J., PETITIONER, FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND PROPERTY OF PETER J., PERSON ALLEGED TO BE INCAPACITATED.

MARIA J., PETITIONER-APPELLANT.

BERNHARDI & LUKASIK LAW OFFICES, AS COUNSEL TO PETER J., RESPONDENT-RESPONDENT.
(PROCEEDING NO. 1.)

MEMORANDUM AND ORDER

IN THE MATTER OF THE APPLICATION OF KALEIDA HEALTH, PETITIONER, FOR AN ORDER OVERRIDING THE HEALTH CARE DECISIONS OF GUARDIAN AND SURROGATE PETER J.

KALEIDA HEALTH, PETITIONER-RESPONDENT.

MARIA J., RESPONDENT, AND
BERNHARDI & LUKASIK LAW OFFICES, AS COUNSEL TO PETER J., RESPONDENT-RESPONDENT.
(PROCEEDING NO. 2.)

MARK E. LEWIS, CHEEKTOWAGA, FOR PETITIONER-APPELLANT.

BERNHARDI & LUKASIK LAW OFFICES, BUFFALO (JOSEPH L. NICASTRO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (AVEN RENNIE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered August 23, 2013. The order, among other things, adjudged that the appointment of Maria J. as guardian of the person and property of Peter J. is deemed to have ceased as of August 15, 2013.

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

Memorandum: In this guardianship proceeding pursuant to article 81 of the Mental Hygiene Law, Maria J. (petitioner) contends that Supreme Court erred in directing that her appointment as guardian of

her incapacitated son be terminated as of August 15, 2013. As petitioner acknowledges, however, she consented to that order, as well as to a subsequent order naming her other son as the successor guardian. The appeal must therefore be dismissed, inasmuch as " '[n]o appeal lies from an order entered by consent upon the stipulation of the appealing party' " (*Matter of Myers v Tracy*, 93 AD3d 1213, 1214; *see Johnson v State of New York*, 256 AD2d 1179, 1179). Although petitioner contends for the first time on appeal that her consent was not voluntary, the proper procedural vehicle for her to pursue that claim is a motion to vacate the order (*see Matter of Michelle F.*, 280 AD2d 969, 969).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

760

CA 14-01644

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

MICHAEL E. BLACK AND BRUNA BLACK, AS CO-EXECUTORS OF THE ESTATE OF PATRICK M. BLACK, DECEASED, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ADWAIT ATHALE, ET AL., DEFENDANTS, AND COUNTY OF ERIE, DEFENDANT-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY C. TOTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

LOTEMPIO & BROWN, P.C., BUFFALO (BRIAN J. BOGNER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered May 16, 2014. The order, insofar as appealed from, granted that part of the motion of plaintiffs seeking an order compelling defendant County of Erie to produce two individuals for depositions.

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

Memorandum: Plaintiffs' decedent was injured in a one-vehicle accident on North Forest Road in the Town of Amherst when the vehicle in which he was a passenger left the roadway and struck a utility pole. Plaintiffs thereafter commenced this action, alleging, inter alia, that defendant County of Erie (County) negligently maintained the section of North Forest Road where the accident occurred. In response to plaintiffs' discovery demands, the County produced two employees for depositions. Following those depositions, the County made additional document disclosures to plaintiffs, and plaintiffs thereafter sought to re-depose one of the employees (hereafter, employee) and to depose the County Commissioner of Public Works (Commissioner). When the County refused to produce those individuals, plaintiffs moved, inter alia, to strike the County's answer or to compel the re-production of the employee and the production of the Commissioner for depositions. Supreme Court granted plaintiffs' motion in part, ordering the County to re-produce the employee for a deposition regarding documents produced by the County after his initial deposition, and ordering the County to produce the Commissioner for a deposition. We now affirm.

"A trial court has broad discretion in supervising the discovery process, and its determinations will not be disturbed absent an abuse of that discretion" (*Finnegan v Peter, Sr. & Mary L. Liberatore Family Ltd. Partnership*, 90 AD3d 1676, 1677). We note with respect to the employee that he admitted at his initial deposition that he could not recall specific details relevant to plaintiffs' theory of the County's liability without reviewing the documents that subsequently were produced by the County. We thus conclude that the court did not abuse its discretion in directing the further deposition of the employee concerning those documents.

We likewise conclude that the court did not abuse its discretion in directing the County to produce the Commissioner for a deposition. "Although a municipality, in the first instance, has the right to determine which of its officers or employees with knowledge of the facts may appear for a deposition, a plaintiff may demand production of additional witnesses when (1) the officers or employees already deposed had insufficient knowledge or were otherwise inadequate, and (2) there is a substantial likelihood that the person sought for deposition possesses information which is material and necessary to the prosecution of the case" (*Brevetti v City of New York*, 79 AD3d 958, 958-959). Here, the record establishes that the two employees previously produced by the County have at most a general understanding of the reconstruction project contemplated by the County with respect to the section of road where the accident occurred and the reasons that the reconstruction project was abandoned, while the Commissioner has peculiar and specific knowledge about that project and the decision-making process pursuant to which it was abandoned. We therefore conclude that plaintiffs met their burden of demonstrating that the employees previously produced by the County "did not possess sufficient knowledge of the relevant facts or [were] otherwise inadequate" (*Seattle Pac. Indus., Inc. v Golden Val. Realty Assoc.*, 54 AD3d 930, 933).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

766

KA 11-01474

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID J. WEINSTOCK, DEFENDANT-APPELLANT.

SHIRLEY A. GORMAN, BROCKPORT, FOR DEFENDANT-APPELLANT.

DAVID J. WEINSTOCK, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered May 12, 2011. The judgment convicted defendant, upon his plea of guilty, of rape 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 rape in the first degree (Penal Law § 130.35 [1]). We reject defendant's contention in his main and pro se supplemental briefs that his waiver of the right to appeal was invalid. We agree with defendant that County Court's statement to defendant that, "by pleading guilty, [he was] giving up [his] right to allege that the police unlawfully collected evidence or did anything else illegal" was misleading insofar as it improperly implied that defendant's right to challenge the court's suppression ruling on appeal was forfeited upon entry of the guilty plea (*see People v Braxton*, ___ AD3d ___, ___ [June 19, 2015]; *see generally People v Moyett*, 7 NY3d 892, 892-893; *People v Billingslea*, 6 NY3d 248, 257). "Nevertheless, we conclude that [the court's] plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Braxton*, ___ AD3d at ___ [internal quotation marks omitted]; *see People v Buske*, 87 AD3d 1354, 1354, *lv denied* 18 NY3d 882). That valid waiver of the right to appeal encompasses his contention that the court erred in refusing to suppress identification testimony (*see People* v *Jenkins*, 117 AD3d 1528, 1529, *lv denied* 23 NY3d 1063). By pleading guilty, moreover, defendant forfeited his further contention that the court erred in refusing to reopen the *Wade* hearing (*see People v Fulton*, 30 AD3d 961, 962, *lv denied* 7 NY3d 789).

Contrary to the contentions in defendant's main and pro se supplemental briefs, the court afforded him a reasonable opportunity to advance the claims in his pro se motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520, 525; *People v Tinsley*, 35 NY2d 926, 927), and "the court did not abuse its discretion in discrediting those claims" (*People v Merritt*, 115 AD3d 1250, 1250-1251). Nor did the court abuse its discretion in denying defendant's request for new counsel on the motion to withdraw the guilty plea inasmuch as defense counsel did not take a position adverse to the motion (*see People v Rossborough*, 105 AD3d 1332, 1333, *lv denied* 21 NY3d 1045). Further, defense counsel's failure to join in the motion did not constitute ineffective assistance (*see People v Carpenter*, 93 AD3d 950, 952, *lv denied* 19 NY3d 863).

The contention in defendant's pro se supplemental brief that the court erred in imposing an enhanced sentence based upon an uncharged crime survives his waiver of the right to appeal (*see People v Williams*, 35 AD3d 1198, 1199, *lv denied* 8 NY3d 928). That contention lacks merit, however, inasmuch as "the record establishes that the court did not impose an enhanced sentence but in fact imposed the agreed-upon sentence" (*People v Ibrahim*, 48 AD3d 1095, 1095, *lv denied* 10 NY3d 864).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

769

KA 13-01574

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH MAXEY, JR., DEFENDANT-APPELLANT.

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

JOSEPH MAXEY, JR., DEFENDANT-APPELLANT PRO SE.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered July 11, 2013. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child, rape in the third degree (six counts), rape in the second degree (two counts), and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of predatory sexual assault against a child (Penal Law § 130.96), six counts of rape in the third degree (§ 130.25 [2]), two counts of rape in the second degree (§ 130.30 [1]), and two counts of endangering the welfare of a child (§ 260.10 [1]) in connection with offenses committed against his three stepdaughters over a 4½-year period. Defendant failed to preserve for our review his contention that the People were permitted to "overload" their case with *Molineux* evidence (*see People v Moore*, 50 AD3d 926, 927, *lv denied* 10 NY3d 937). In any event, defendant's contention is without merit. County Court permitted limited testimony regarding uncharged offenses, and that testimony was relevant to establish the nature of the relationship between defendant and the eldest victim (*see People v Washington*, 122 AD3d 1406, 1408). The court also properly permitted evidence establishing that defendant is the father of that victim's child, who was conceived when the victim was 17 years old, inasmuch as it
" 'placed the charged conduct in context' " (*People v Leeson*, 12 NY3d 823, 827; *see People v Cullen*, 110 AD3d 1474, 1475, *affd* 24 NY3d 1014). Evidence of other noncriminal conduct provided background information with respect to the nature of the relationship between defendant and the victims (*see Cullen*, 110 AD3d at 1475), and provided

information regarding the family dynamic, which explained why the victims delayed in reporting the abuse (*see People v Justice*, 99 AD3d 1213, 1215, *lv denied* 20 NY3d 1012). Contrary to defendant's contention, the probative value of the *Molineux* evidence outweighed the prejudicial effect, which was minimized by the court's repeated limiting instructions to the jury (*see Washington*, 122 AD3d at 1408).

We reject defendant's further contention that he was denied effective assistance of counsel based upon the failure of defense counsel to obtain an expert witness to rebut the testimony of the prosecution's expert witness regarding child sexual abuse accommodation syndrome. Defendant has failed to establish the absence of any strategic or other legitimate explanation for the failure of defense counsel to call an expert (*see generally People v Caban*, 5 NY3d 143, 152). Defendant has failed to demonstrate that such expert testimony was available, that it would have assisted the jury, or that he was prejudiced by the lack of such testimony (*see Washington*, 122 AD3d at 1407), especially in light of defense counsel's vigorous cross-examination of the People's expert witness. We reject defendant's additional contention in his pro se supplemental brief that he was denied effective assistance of counsel based upon defense counsel's failure to admit in evidence records of investigations of unfounded allegations of sexual abuse by Child Protective Services. The court properly determined that those records were not admissible (*see* Social Services Law § 422 [5] [b]), and properly sustained the People's objection to hearsay testimony of the caseworker called to testify on defendant's behalf that the victims had denied allegations of sexual abuse. In any event, we note that defense counsel cross-examined the eldest victim with respect to her prior denials to caseworkers and police that defendant was sexually abusing her. We conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Defense counsel made only one objection during the prosecutor's summation and thus has failed to preserve for our review his contention regarding two of the three statements that defendant now alleges constituted prosecutorial misconduct on summation (*see People v Johnson*, 121 AD3d 1578, 1579). In any event, we conclude that defendant's contention that alleged prosecutorial misconduct on summation deprived him of a fair trial is without merit. The prosecutor's remarks were a permissive response to the defense summation (*see People v Walker*, 117 AD3d 1441, 1441-1442, *lv denied* 23 NY3d 1044), and "did not exceed the bounds of legitimate advocacy" (*People v Miller*, 104 AD3d 1223, 1224, *lv denied* 21 NY3d 1017 [internal quotation marks omitted]).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

772

KA 14-02182

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JOACHIM S. SYLVESTER AND SHATEEK L. PAYNE,
DEFENDANTS-RESPONDENTS.

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

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-RESPONDENT SHATEEK L. PAYNE.

Appeal from an order of the Niagara County Court (Matthew J. Murphy, III, J.), dated April 2, 2014. The order granted the motions of defendants seeking to suppress physical evidence and certain oral statements made to the police following a traffic stop.

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

Memorandum: The People appeal from an order granting defendants' motions seeking to suppress physical evidence and certain oral statements made to the police following a traffic stop. The People failed to preserve for our review their contention that defendant Sylvester lacked standing to contest the legality of the search of the vehicle (*see People v Hunter*, 17 NY3d 725, 726-727). " '[A] defendant seeking to suppress evidence, on the basis that it was obtained by means of an illegal search, must allege standing to challenge the search and, *if the allegation is disputed*, must establish standing' " (*People v Johnson*, 94 AD3d 1529, 1531, *lv denied* 19 NY3d 974, quoting *People v Carter*, 86 NY2d 721, 722-723). The People's challenge to defendant Sylvester's standing, made after the proof at the suppression hearing was closed, was untimely (*see Hunter*, 17 NY3d at 727-728; *see generally People v Turner*, 73 AD3d 1282, 1283, *lv denied* 15 NY3d 896).

The People further contend that County Court erred in granting those parts of defendants' motions seeking to suppress physical evidence because the evidence at the suppression hearing established the requisite reasonable suspicion authorizing the request for consent to search the vehicle (*see People v Boler*, 106 AD3d 1119, 1122). We reject that contention inasmuch as it is premised upon the testimony of a police witness that the court did not find truthful. "It is well

settled that the suppression court's credibility determinations and choice between conflicting inferences to be drawn from the proof are granted deference and will not be disturbed unless unsupported by the record" (*People v Esquerdo*, 71 AD3d 1424, 1424, *lv denied* 14 NY3d 887 [internal quotation marks omitted]). Here, the ruling that the request for consent to search the vehicle was unlawful was based primarily upon the court's assessment of the credibility of the People's principal witness. The court refused to credit the testimony of the officer who initiated the traffic stop, concluding that he "tailored his testimony to justify the subsequent search." In our view, that credibility determination is supported by the record, and we see no basis to disturb it (*see People v Howington*, 96 AD3d 1440, 1441).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

773

KA 14-02287

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH R. FAFONE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John Lewis DeMarco, J.), rendered June 14, 2012. The judgment convicted defendant, after a nonjury trial, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, County Court did not abuse its discretion in refusing to admit in evidence the supporting deposition of a witness who did not appear at trial inasmuch as the content of the supporting deposition was cumulative to other trial testimony (*see People v Petty*, 7 NY3d 277, 286-287).

To the extent that defendant contends that the evidence is legally insufficient to support the conviction because the People failed to disprove the defense of justification beyond a reasonable doubt, we conclude that such contention is unpreserved for our review inasmuch as defendant failed to move for a trial order of dismissal on that ground (*see People v Bakerx*, 114 AD3d 1244, 1245, *lv denied* 22 NY3d 1196). To the extent that defendant preserved his challenge to the legal sufficiency of the evidence, we conclude that the evidence is legally sufficient to support the conviction of manslaughter in the first degree (*see id.*). Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

The sentence is not unduly harsh or severe.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

779

CA 14-01668

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

STEPHEN DIVITO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ZASTAWRNY LLC, DEFENDANT-RESPONDENT.

CHENEY & BLAIR, LLP, GENEVA (DAVID D. BENZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE WOLFORD LAW FIRM LLP, ROCHESTER (JAMES S. WOLFORD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered June 16, 2014. The order denied plaintiff's motion for summary judgment in lieu of complaint.

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

Memorandum: By motion for summary judgment in lieu of complaint (*see* CPLR 3213), plaintiff moved for judgment in the amount of $50,000, plus interest, pursuant to an agreement for the purchase of a chiropractic business. Contrary to plaintiff's contention, we conclude that Supreme Court properly denied the motion on the ground that plaintiff failed to establish that the agreement qualifies as "an instrument for the payment of money only" (CPLR 3213). "Where, as here, an agreement 'requires something in addition to [an] explicit promise to pay a sum of money, CPLR 3213 is unavailable' " (*Whitley v Pieri*, 48 AD3d 1175, 1176, quoting *Weissman v Sinorm Deli*, 88 NY2d 437, 444). In light of our determination, we do not address plaintiff's remaining contention.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

781

CA 14-02213

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

DANIEL V. GALLAWAY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF NORTH COLLINS, TOWN OF NORTH COLLINS HIGHWAY DEPARTMENT, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (MICHAEL T. REAGAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (PETER SNODGRASS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered September 18, 2014. The order, among other things, denied in part the motion of defendants Town of North Collins and Town of North Collins Highway Department for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when his motorcycle collided with a vehicle on a road owned by Town of North Collins and maintained by Town of North Collins Highway Department (collectively, defendants). We agree with defendants that Supreme Court erred in refusing to grant in its entirety their motion seeking summary judgment dismissing the complaint against them.

It is undisputed that plaintiff was traveling southbound on Boston Road, i.e., downhill, and that the other driver was traveling northbound when the collision occurred at a curve in the roadway. Each driver testified at his deposition that he was in his own lane of travel at the time of the collision. Defendants established with the affidavit of their expert that the signs warning of the curve and advising a lesser speed complied with the requirements of the Manual of Uniform Traffic Control Devices (MUTCD) (*see* 17 NYCRR 2C.05; 2C.08; *Martindale v Town of Brownville*, 55 AD3d 1387, 1387, *lv denied* 11 NY3d 715; *Cannarozzo v County of Livingston*, 13 AD3d 1180, 1181).

Defendants also established that there is no requirement or recommendation that they apply a center line marking on the roadway. Instead, the MUTCD provides that short sections of roadway without a continuous center line marking "may" be marked to control the position of traffic at specific locations, such as around curves (17 NYCRR 3B.01). The affidavits of plaintiff's experts, who averred that defendants failed to mark the center line of the roadway, without establishing that they were required to do so, are insufficient to raise an issue of fact whether defendants were negligent in failing to mark the center line of the roadway in the area of the collision (*see Jones v County of Niagara*, 15 AD3d 1002, 1003-1004).

Plaintiff also alleged that defendants were negligent by failing to clear loose stone from the roadway after oil and stone was applied as part of the regular maintenance of the roadway. We note that plaintiff testified at his deposition that he had observed gravel on the road earlier in the day as a result of the shoulder having been "washed out" by recent rain, which he explained was a common occurrence, and that he therefore stayed close to the center of the road to avoid the gravel. Plaintiff testified, however, that he maintained full control of his motorcycle and did not slide or skid on loose gravel. Defendants established that oil and stone was applied in an area north of the accident site and that there was no debris or excess stone in that area. It is undisputed that defendants had not received written notice of an alleged dangerous condition of the roadway. Thus, defendants cannot be liable for the alleged dangerous condition unless they affirmatively created the dangerous condition (*see Hume v Town of Jerusalem*, 114 AD3d 1141, 1141-1142), and we conclude that defendants established that they did not create the alleged dangerous condition. Plaintiff submitted the affidavits of two experts, who explained that the "gravelly condition" referred to by plaintiff was caused by excess stone along the right side of the roadway that defendants had not properly removed after applying the oil and stone to the roadway. Plaintiff's experts did not provide, however, evidence of the existence of excess stone as a result of the process. Even assuming, arguendo, that there was stone left along the edge of the roadway following the oil and stone process, as plaintiff's experts allege, we conclude that defendants established that any negligence in that respect was not a proximate cause of the accident (*see Swauger v White*, 1 AD3d 918, 919-920). Defendants established that the sole proximate cause of the accident is that one of the drivers crossed into the lane of the other driver (*see id.*). We note that the police report indicates that plaintiff appeared to have been traveling "just right" of the center line and that the other driver had crossed the center line by approximately four to six inches. We further conclude that the opinions of plaintiff's experts that the alleged presence of excess stone along the right side of the roadway required plaintiff to drive close to the center of the roadway, thereby placing him in danger of a collision, is conclusory and speculative (*see Martindale*, 55 AD3d at 1387-1388).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

784

CA 14-01774

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

UNIVERSAL RESOURCES HOLDINGS, INC., PLAINTIFF,

V MEMORANDUM AND ORDER

NORTH PENN PIPE & SUPPLY, INC., DEFENDANT.

NORTH PENN PIPE & SUPPLY, INC., THIRD-PARTY PLAINTIFF-RESPONDENT,

V

LAKESIDE STEEL CORP., LAKESIDE STEEL INC., LAKESIDE STEEL SERVICES, INC., THIRD-PARTY DEFENDANTS-APPELLANTS, ET AL., THIRD-PARTY DEFENDANTS.

ABRAMS, GORELICK, FRIEDMAN & JACOBSON, LLP, NEW YORK CITY (GLENN JACOBSON OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-APPELLANTS.

BURKE, SCOLAMIERO, MORTATI & HURD, LLP, ALBANY (PETER P. BALOUSKAS OF COUNSEL), FOR DEFENDANT AND THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered October 7, 2013. The order, inter alia, denied the motion of third-party defendants Lakeside Steel Corp., Lakeside Steel Inc., and Lakeside Steel Services, Inc., for summary judgment dismissing the third-party complaint against them.

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

Memorandum: Plaintiff commenced this action after its natural gas well sustained damage caused by an allegedly defective pipe installed by defendant-third-party plaintiff North Penn Pipe & Supply, Inc. (North Penn). Pipe used in the well was manufactured by third-party defendants Lakeside Steel Corp., Lakeside Steel Inc., and Lakeside Steel Services, Inc. (hereafter, Lakeside defendants) and other parties not relevant to the appeal. The Lakeside defendants moved for summary judgment dismissing the third-party complaint against them on the ground that they did not manufacture the pipe that caused the damage to plaintiff's natural gas well (*see Ebenezer Baptist Church v Little Giant Mfg. Co., Inc.*, 28 AD3d 1173, 1174). Supreme Court denied the motion, and we affirm. We conclude that the Lakeside defendants failed to submit "affirmative evidence that [they]

did not manufacture" the pipe at issue (*see Antonucci v Emeco Indus.*, 223 AD2d 913, 914). It is well settled that "a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (*George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615; *see Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980). Inasmuch as the Lakeside defendants failed to meet their initial burden on the motion, there is no need to consider the adequacy of North Penn's submissions in opposition (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

785

CA 14-01218

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

DEBORA KALBFLIESH AND KENNETH KALBFLIESH, JR.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ANDREA MCCANN, JOHN MCCANN,
DEFENDANTS-RESPONDENTS,
JOSEPH A. MOSES AND SMART RIDE LTD.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

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

CAMPBELL & SHELTON, LLP, EDEN, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

HAGELIN KENT, LLC, BUFFALO (BENJAMIN R. WOLF OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Mark A. Montour, J.), entered March 3, 2014 in a personal injury action. The order denied the motion of defendants Joseph A. Moses and Smart Ride Ltd. for summary judgment dismissing the complaint and the cross claim against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint and cross claim against defendants Joseph A. Moses and Smart Ride Ltd. are dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Debora Kalbfliesh (plaintiff) when she was a passenger in a van driven by defendant Joseph A. Moses and owned by defendant Smart Ride Ltd. (collectively, defendants) that was rear-ended by a vehicle driven by defendant Andrea McCann (McCann) and owned by defendant John McCann (collectively, McCann defendants). In appeal No. 1, defendants appeal from an order denying their motion for summary judgment dismissing the complaint and the McCann defendants' cross claim against them. In appeal No. 2, defendants appeal from an order denying their motion seeking to settle the record on appeal to exclude a letter to Supreme Court from plaintiffs' counsel. Addressing first the order in appeal No. 2, we perceive no abuse of discretion in the court's settlement of the record (*see Matter of*

Albright [appeal No. 2], 87 AD3d 1294, 1295).

With respect to the order in appeal No. 1, however, we agree with defendants that the court erred in denying their motion. Defendants met their initial burden of establishing that McCann's negligence was the sole proximate cause of the accident by submitting evidence that Moses was lawfully slowing to make a right-hand turn, and that the rear-end collision resulted from McCann's admitted failure to pay attention to the road as she retrieved her phone from the floor of her vehicle after it fell (*see Giangrasso v Callahan*, 87 AD3d 521, 522; *Newton v Perugini*, 16 AD3d 1087, 1088-1089; *see also Le Grand v Silberstein*, 123 AD3d 773, 775). In opposition to the motion, plaintiffs and the McCann defendants failed to raise a triable issue of fact whether any negligence attributable to Moses contributed to the accident (*see Le Grand*, 123 AD3d at 775; *Newton*, 16 AD3d at 1089; *see generally Prine v Santee*, 21 NY3d 923, 925). Any defect in the right rear turn signal of defendants' van was not a proximate cause of the accident in light of McCann's testimony that she did not see the van until it was too late to avoid it (*see Filippazzo v Santiago*, 277 AD2d 419, 420; *see generally Green v Mower*, 302 AD2d 1005, 1006, *affd* 100 NY2d 529; *Greene v Sivret*, 43 AD3d 1328, 1328-1329). We likewise conclude that, under the circumstances of this case, the other alleged acts of negligence by Moses, including any failure to wear corrective eyewear that was required as a restriction on his license (*see* Vehicle and Traffic Law § 509 [3]), did not contribute to the accident as a matter of law (*see Gray v Delaware Equip. Servs., Inc.*, 56 AD3d 1006, 1007; *Dance v Town of Southampton*, 95 AD2d 442, 445-446; *cf. Dalal v City of New York*, 262 AD2d 596, 598).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

786

CA 14-01885

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

DEBORA KALBFLIESH AND KENNETH KALBFLIESH, JR.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ANDREA MCCANN, JOHN MCCANN,
DEFENDANTS-RESPONDENTS,
JOSEPH A. MOSES AND SMART RIDE LTD.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

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

CAMPBELL & SHELTON, LLP, EDEN, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

HAGELIN KENT, LLC, BUFFALO (BENJAMIN R. WOLF OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Mark A. Montour, J.), entered September 29, 2014 in a personal injury action. The order denied the motion of defendants Joseph A. Moses and Smart Ride Ltd. seeking to settle the record on appeal to exclude a certain letter.

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

Same memorandum as in *Kalbfliesh v McCann* ([appeal No. 1] ___ AD3d ___ [June 19, 2015]).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

793

KA 14-00513

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALBERT J. WEBBER, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (RICHARD W. YOUNGMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wayne County Court (John B. Nesbitt, J.), entered January 15, 2014. The order directed defendant to pay restitution in the amount of $10,330.

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

Memorandum: Defendant was convicted upon his plea of guilty of, inter alia, criminal possession of stolen property in the fifth degree (Penal Law § 165.40). County Court sentenced him to a term of incarceration and scheduled a hearing to determine the amount of restitution to be imposed. Defendant did not appeal from the original judgment of conviction and now appeals from the order of restitution entered following a hearing. We note at the outset that, because the court bifurcated the sentencing proceeding by severing the issue of restitution for a separate hearing, defendant properly appeals as of right from the order of restitution (*see People v Connolly*, 100 AD3d 1419, 1419; *People v Brusie*, 70 AD3d 1395, 1396).

We agree with defendant that the court erred in imposing restitution based on the evidence presented at the restitution hearing. "Restitution may be based only on 'the offense for which a defendant was convicted, as well as any other offense that is part of the same criminal transaction or that is contained in any other accusatory instrument disposed of by any plea of guilty' " (*People v Visser*, 256 AD2d 1106, 1107, quoting Penal Law § 60.27 [4] [a]). Upon our review of the record, we conclude that the testimony of the owner of the stolen property that was the subject of the restitution hearing was insufficient to establish that such stolen property was part of the same criminal transaction as the stolen property that was the subject of defendant's plea of guilty, i.e., two pieces of blue painted steel. Indeed, no evidence was presented at the hearing

establishing that defendant's acquisition of the two pieces of blue painted steel found in his possession was part of the same criminal transaction involving the theft of numerous other items for which restitution was ordered. We conclude that "the court erred in imposing restitution arising from a charge of [larceny] because that charge was not contained in the indictment, nor was it related to an offense that was 'part of the same criminal transaction or . . . contained in any other accusatory instrument disposed of by' defendant's plea of guilty to the offense on appeal" (*People v Moore*, 124 AD3d 1386, 1387). We therefore vacate the order on appeal.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

794

KA 13-00500

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LESTER A. BRAXTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered June 7, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree and driving while intoxicated.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]) and driving while intoxicated (Vehicle and Traffic Law § 1192 [3]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). We agree with defendant that County Court's statement to defendant that, "by pleading guilty, [he would] give up the right to allege the police unlawfully collected evidence or did anything else illegal" was misleading to the extent that it improperly implied that defendant's right to challenge the court's suppression ruling on appeal was automatically extinguished upon the entry of his guilty plea (*see generally People v Moyett*, 7 NY3d 892, 892-893; *People v Williams*, 49 AD3d 1281, 1282, *lv denied* 10 NY3d 940). Nevertheless, we conclude that " 'County Court's plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Arney*, 120 AD3d 949, 949; *see People v Ramos*, 7 NY3d 737, 738; *Williams*, 49 AD3d at 1282). Defendant's valid waiver of the right to appeal encompasses his challenge to the court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833), and his challenge to the severity of the bargained-for sentence (*see Lopez*, 6

NY3d at 255).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

795

KA 08-01985

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DESMIN K. DIGGS, DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered August 20, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree, criminal mischief in the second degree (two counts), petit larceny, assault in the second degree (two counts), reckless endangerment in the first degree, and leaving the scene of an incident without reporting (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, inter alia, robbery in the second degree (Penal Law § 160.10 [3]). Defendant contends that his plea was not knowing, voluntary and intelligent because the sentence imposed did not comport with the plea agreement, i.e., he did not receive credit for cooperating with the prosecutor's office in an unrelated matter. Defendant failed to move to withdraw his plea of guilty or to vacate the judgment of conviction, and thus he failed to preserve that contention for our review (*see People v Abdallah*, 50 AD3d 1312, 1312; *People v Tatro*, 8 AD3d 823, 824, *lv denied* 3 NY3d 682). In any event, defendant's contention is without merit. During the plea colloquy, Supreme Court promised defendant a sentence of nine years' incarceration upon a plea to 10 of the 11 counts of the indictment, and defendant indicated that he understood that promise. Also at the time of the plea, defense counsel sought, and the court agreed to grant, an adjournment of sentencing to permit defense counsel to "discuss with the District Attorney's Office the potential of any type of credit due" for defendant's alleged prior cooperation. The court sentenced defendant to, inter alia, a determinate term of nine years' incarceration. Inasmuch as the court imposed the promised sentence, we reject his contention that his sentence violated the terms of his

plea agreement (*see Abdallah*, 50 AD3d at 1313; *Tatro*, 8 AD3d at 824).

The sentence is not unduly harsh or severe.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

797

KA 14-00471

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM M. COLLINS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered June 20, 2013. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony, and aggravated unlicensed operation of a motor vehicle 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 driving while intoxicated (DWI) as a class D felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]) and aggravated unlicensed operation of a motor vehicle in the first degree, a class E felony (§ 511 [3] [a] [i]; [b]). We agree with defendant that his waiver of the right to appeal was invalid inasmuch as he pleaded guilty to both charges in the superior court information without a sentencing commitment (*see People v Meiner*, 20 AD3d 778, 778 n; *People v Coles*, 13 AD3d 665, 666), but we nevertheless reject his challenge to the severity of the sentence, particularly in view of defendant's numerous driving and alcohol-related offenses.

Although defendant's contention that he received ineffective assistance of counsel during the plea bargaining stage survives his plea of guilty to the extent that he contends that his plea was infected by the ineffective assistance (*see People v Neil*, 112 AD3d 1335, 1336, *lv denied* 23 NY3d 1040), defendant's contention is without merit (*see generally People v Ford*, 86 NY2d 397, 404). Although defense counsel did not negotiate a lower sentence for defendant and he was sentenced to the maximum indeterminate term for the DWI conviction, given defendant's long history of drinking and driving offenses and the serious nature of the instant offense, it was unlikely that the court or the People would have extended a plea

offer. "Counsel will not be deemed ineffective for the failure to pursue a course of negotiation that was, at best, 'dubious' " (*People v Dimick*, 223 AD2d 808, 809, *lv denied* 89 NY2d 1034).

We reject defendant's contention that defense counsel's comments at the sentencing hearing rendered him ineffective. "Even assuming, arguendo, that the attorney took a position adverse to defendant, we conclude that reversal is not warranted because the statements did not 'contribute to any rulings against defendant' " (*People v Winters*, 82 AD3d 1691, 1692, *lv denied* 17 NY3d 810).

Defendant's contention that defense counsel was ineffective because defendant was misled into believing that he would benefit from the plea cannot be reviewed on direct appeal inasmuch as it is based on matters outside the record (*see People v Davis*, 119 AD3d 1383, 1384, *lv denied* 24 NY3d 960).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

798

KA 11-01345

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BETH A. FAILING, ALSO KNOWN AS BETH A. SPALLINA, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, HARRIS BEACH PLLC, PITTSFORD (KELLY S. FOSS 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 (Thomas R. Morse, A.J.), rendered April 20, 2011. The judgment convicted defendant, upon a jury verdict, of criminal mischief in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of criminal mischief in the third degree (Penal Law § 145.05), arising from an incident in which defendant intentionally scratched the vehicle of her former paramour. Defendant contends that the People failed to establish that the replacement cost of the vehicle or its damaged side panels exceeded $250 and thus that the evidence is legally insufficient to support the conviction. We reject that contention. " '[I]t is sufficient to define value in terms of the cost of repair of the property, so long as the property is repairable' " (*People v Woodard*, 148 AD2d 997, 998, *lv denied* 74 NY2d 749; *see People v Brown*, 177 AD2d 942, 942, *lv denied* 79 NY2d 944). The People presented the testimony of a witness certified by the State of New York to provide estimates for damage to vehicles, who estimated that, based on his 20 years of experience in auto repair work, the cost of repairing the vehicle was $1,145.75. Moreover, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's further contention that County Court abused its discretion in admitting testimony regarding her consumption of alcohol. The victim testified that he observed defendant on the night

in question and based upon his familiarity with her, she appeared to have been drinking but did not appear to be intoxicated, and he did not have concerns about her driving that night. Contrary to defendant's contention, that testimony did not implicate her in the commission of an uncharged crime, i.e., driving while intoxicated (*see People v Coppeta*, 125 AD3d 1304, 1304) and, in view of her defense that she was not at the victim's house on the night in question, it was relevant to the issues in the case. "The trial court is granted broad discretion in making evidentiary rulings in connection with the preclusion or admission of testimony and such rulings should not be disturbed absent an abuse of discretion[,]" and we discern no abuse of discretion here (*People v Almonor*, 93 NY2d 571, 583).

Defendant contends for the first time on appeal that the court erred in allowing the hearsay testimony of the victim concerning what the neighbor told him about defendant because it improperly bolstered the neighbor's testimony. Defendant objected to that testimony on a ground different from that now asserted on appeal, and she thus failed to preserve her contention for our review (*see People v Smith*, 24 AD3d 1253, 1253, *lv denied* 6 NY3d 818). In any event, defendant's contention lacks merit because the victim's testimony was not admitted for its truth but, rather, it was properly admitted to complete the narrative by explaining when and why the victim called the police (*see People v Cullen*, 110 AD3d 1474, 1475, *affd* 24 NY3d 1014).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

799

CAF 14-00688

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

IN THE MATTER OF DELSENIOR STRACHAN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-RESPONDENT.

SARA E. ROOK, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered July 19, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for a modification of an order of visitation.

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

Memorandum: In appeal Nos. 1 and 2, petitioner mother appeals from orders that dismissed her petitions seeking to modify a prior order of visitation. Contrary to the mother's contention in both appeals, we conclude that Family Court did not abuse its discretion in sua sponte dismissing the petitions without conducting a hearing. "A hearing is not automatically required whenever a parent seeks modification of a custody [or visitation] order . . . and, here, the mother failed to make a sufficient evidentiary showing of a change in circumstances to require a hearing" (*Matter of Consilio v Terrigino*, 114 AD3d 1248, 1248 [internal quotation marks omitted]; *see Matter of Sierak v Staring*, 124 AD3d 1397, 1398).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

800

CAF 14-00689

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

IN THE MATTER OF DELSENIOR STRACHAN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LINDA GILLIAM, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-RESPONDENT.

SARA E. ROOK, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered March 28, 2014 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for a modification of an order of visitation.

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

Same memorandum as in *Matter of Strachan v Gilliam* ([appeal No. 1] ___ AD3d ___ [June 19, 2015]).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

801

CAF 14-00341

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

IN THE MATTER OF ANGELO M. VISCUSO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SUSAN M. VISCUSO, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

BOUVIER PARTNERSHIP, LLP, BUFFALO (EMILIO COLAIACOVO OF COUNSEL), FOR RESPONDENT-APPELLANT.

FRANCINE E. MODICA, TONAWANDA, FOR PETITIONER-RESPONDENT.

LEIGH E. ANDERSON, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered December 3, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

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

Memorandum: These consolidated appeals arise from a custody proceeding pursuant to Family Court Act article 6, in which petitioner father sought sole custody of the parties' daughter. In appeal No. 1, respondent mother appeals from an order that, inter alia, granted the petition and awarded sole custody of the subject child to the father, with specified visitation to the mother. In appeal No. 2, the mother appeals from an order directing her to pay counsel fees to the father's attorney. We affirm the order in each appeal.

In appeal No. 1, the mother contends that the Attorney for the Child (AFC) violated her ethical duty to determine the subject child's position and advocate zealously in support of the child's wishes, because the AFC advocated for a result that was contrary to the child's expressed wishes in the absence of any justification for doing so. We reject that contention. The Rules of the Chief Judge provide that an AFC "must zealously advocate the child's position" and that, "[i]f the child is capable of knowing, voluntary and considered judgment, the [AFC] should be directed by the wishes of the child, even if the [AFC] for the child believes that what the child wants is not in the child's best interests" (22 NYCRR 7.2 [d] [2]; *see Matter of Swinson v Dobson*, 101 AD3d 1686, 1687, *lv denied* 20 NY3d 862). A

contrary rule arises where, as here, "the [AFC] is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child[. In such circumstances, the AFC] would be justified in advocating a position that is contrary to the child's wishes" (22 NYCRR 7.2 [d] [3]; *see generally Matter of Carballeira v Shumway*, 273 AD2d 753, 755-756, *lv denied* 95 NY2d 764). Here, "the evidence supports the court's conclusion that 'to follow [the child's] wishes would be tantamount to severing her relationship with her father, and [that] result would not be in [the child's] best interest[s]' " (*Matter of Marino v Marino,* 90 AD3d 1694, 1696). We conclude that the mother's persistent and pervasive pattern of alienating the child from the father "is likely to result in a substantial risk of imminent, serious harm to the child" (22 NYCRR 7.2 [d] [3]), and we conclude that the AFC acted in accordance with her ethical duties.

The mother further contends that Family Court erred in denying her motion to replace the AFC. The court denied the motion in a prior order from which the mother did not appeal, and we therefore do not consider the propriety of the court's denial of the motion (*see generally Hoffman v Hoffman*, 31 AD3d 1125, 1126; *Matter of St. Lawrence County Dept. of Social Servs. v Pratt*, 24 AD3d 1050, 1050, *lv denied* 6 NY3d 713). In any event, even assuming, arguendo, that the order on appeal brings up for review the prior order denying the mother's motion to replace the AFC (*see* CPLR 5501 [a] [1]; *cf. Abasciano v Dandrea*, 83 AD3d 1542, 1544-1545), we note that the court denied the motion on the ground that the mother's motion did not comply with CPLR 2214 (b), and thus the court's remaining discussion was dicta. On appeal, however, the mother confines her contentions to the court's remaining discussion, concerning the propriety of the actions of the AFC. Inasmuch as "no appeal lies from dicta" (*Companion Life Ins. Co. of N.Y. v All State Abstract Corp.*, 35 AD3d 518, 519; *see Matter of Khatib v Liverpool Cent. Sch. Dist.*, 244 AD2d 957, 957), the mother's contentions with respect to her motion to replace the AFC are not before us on this appeal for that reason as well.

Contrary to the mother's further contention, the court's determination to award custody of the subject child to the father is supported by a sound and substantial basis in the record. It is well settled that a " 'concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent' " (*Matter of Amanda B. v Anthony B.*, 13 AD3d 1126, 1127; *see Matter of Avdic v Avdic*, 125 AD3d 1534, 1536; *Marino*, 90 AD3d at 1695). Here, there is a sound and substantial basis in the record for the court's conclusion that the mother interfered with the father's relationship with the child by, inter alia, blatantly and repeatedly violating the court's directive not to discuss the litigation with the child, attempting to instill in the child a fear of the father, and encouraging the child to medicate herself before going to visit the father. We reject the mother's contention that the father's prior

domestic violence toward the mother requires that she have primary custody of the child. "There is no evidence in the record indicating that the domestic violence was anything other than an isolated incident with no negative repercussions on the child's well-being" (*Matter of Ilona H. [Elton H.]*, 93 AD3d 1165, 1166). Indeed, we note that the domestic violence occurred before the child was born, and there is no evidence that the father has engaged in any act of domestic violence in the presence of the child.

We reject the mother's contention that the court erred in denying her pretrial request to release certain materials, i.e., the report of a court-appointed psychological expert and the expert's notes. It is well settled that "the potential for abuse in matrimonial and custody cases is great, and the court has broad discretionary power to limit disclosure and grant protective orders" (*Matter of Worysz v Ratel*, 101 AD3d 893, 894; *see generally Wegman v Wegman*, 37 NY2d 940, 941). We conclude that the court did not abuse its discretion in denying the mother's request, particularly in light of the mother's repeated violations of the court's orders prohibiting her from disclosing confidential materials. Moreover, the court denied the request without prejudice to renewal, and thus the mother could have reapplied for release of the materials upon submitting evidence demonstrating that she had actually retained an expert who required access to the report prior to trial. In any event, any error in declining to release the materials prior to trial is harmless. The record establishes that the mother introduced the materials in evidence several months before the trial ended, and she therefore had more than ample access to the materials in time to use them at trial. Furthermore, she had the use of the materials for cross-examination purposes, and thus there was no denial of due process (*see Matter of Patrick H.*, 229 AD2d 682, 683).

The mother's final contention in appeal No. 1 is that the court's temporary order of primary physical custody was improperly entered without a full hearing in the midst of the trial. That contention is moot based on the court's issuance of the final order of custody (*see Matter of Dench-Layton v Dench-Layton*, 123 AD3d 1350, 1351; *see also Matter of Rodriguez v Feldman*, 126 AD3d 1557, 1558).

In appeal No. 2, the mother contends that the court erred in directing her to pay counsel fees to the father's attorney. Contrary to the mother's contention, a party seeking an award of attorney's fees need not demonstrate that he or she is unable to pay those fees (*see Griffin v Griffin*, 104 AD3d 1270, 1272; *see generally DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881). Furthermore, upon our review of the record, including the lengthy delays engendered by, inter alia, the mother's repeated replacement of her attorneys and her lengthy pro se litigation, much of which was unwarranted under the circumstances, we conclude that the court's award of counsel fees was a proper exercise of discretion that is supported by "the equities of the case and the financial circumstances of the parties" (*Popelaski v*

Popelaski, 22 AD3d 735, 738).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

802

CAF 14-00342

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

IN THE MATTER OF ANGELO M. VISCUSO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SUSAN M. VISCUSO, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

BOUVIER PARTNERSHIP, LLP, BUFFALO (EMILIO COLAIACOVO OF COUNSEL), FOR RESPONDENT-APPELLANT.

FRANCINE E. MODICA, TONAWANDA, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered December 18, 2013 in a proceeding pursuant to Family Court Act article 6. The order directed respondent to pay petitioner's attorney the sum of $12,500 in counsel fees.

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

Same memorandum as in *Matter of Viscuso v Viscuso* ([appeal No. 1] ___ AD3d ___ [June 19, 2015]).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

804

CA 14-01566

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

DONNA M. LATTUCA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN M. LATTUCA, DEFENDANT-APPELLANT.

STEINER & BLOTNIK, BUFFALO (RICHARD J. STEINER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BADACK & HARTNETT, SILVER CREEK (DONNA MARIE HARTNETT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John M. Curran, J.), entered December 17, 2013 in a divorce action. The judgment, insofar as appealed from, directed defendant to pay maintenance to plaintiff and directed plaintiff to pay child support in the amount of $300 per year to defendant.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the fifth decretal paragraph, and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Defendant husband appeals from a judgment of divorce that, inter alia, awarded plaintiff wife maintenance and ordered her to pay child support to defendant. Defendant contends that the Referee, whose Report and Recommendation was confirmed by Supreme Court, erred in excluding plaintiff's maintenance award from her income in calculating her child support obligation. We reject that contention, inasmuch as "there is no authority in the Child Support Standards Act (CSSA) for adding future maintenance payments to the recipient's income for the purpose of calculating child support" (*Huber v Huber*, 229 AD2d 904, 904; *see Lazar v Lazar*, 124 AD3d 1242, 1244-1245*; Burns v Burns*, 70 AD3d 1501, 1502-1503). We likewise reject defendant's contention that the Referee erred in declining to impute additional income to plaintiff based on her ability to work. There is no evidence that plaintiff "has reduced resources or income in order to reduce or avoid the parent's obligation for child support" (Domestic Relations Law § 240 [1-b] [b] [5] [v]).

We agree with defendant, however, that the Referee erred in failing to include the value of plaintiff's food stamps in her yearly income for purposes of calculating her child support obligation. Contrary to plaintiff's contention, food stamps are not "public

assistance" to be deducted from income pursuant to Domestic Relations Law § 240 (1-b) (b) (5) (vii) (E) inasmuch as Social Services Law article 5, which governs public assistance, refers to "public assistance or food stamps" (Social Services Law § 131 [12]), thereby distinguishing the two (*see generally Matter of Sorokina v Hansell*, 45 AD3d 1388, 1389, *appeal dismissed* 10 NY3d 806; *Matter of Kolodziejczyk v Wing*, 261 AD2d 927, 927-928; *Matter of Bryant v Perales*, 161 AD2d 1186, 1187, *lv denied* 76 NY2d 710). Because plaintiff's income does not fall below the poverty income guidelines when the value of her food stamps is included, we modify the judgment by vacating the award of child support, and we remit the matter to Supreme Court to recalculate plaintiff's child support obligation in compliance with the CSSA (*see Lauzonis v Lauzonis*, 105 AD3d 1351, 1354).

Finally, we reject defendant's contention that the duration of plaintiff's maintenance award should be reduced from 15 to five years. The Referee considered the appropriate statutory factors (*see* Domestic Relations Law § 236 [B] [6] [a]; *Lazar*, 124 AD3d at 1243) and, under the circumstances, including plaintiff's age, disability, and role as a homemaker for the majority of the parties' marriage, we cannot conclude that the duration of the maintenance award was an abuse of discretion (*see Myers v Myers*, 118 AD3d 1315, 1316; *Rooney v Rooney* [appeal No. 3], 92 AD3d 1294, 1295, *lv denied* 19 NY3d 810).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

805

CA 14-02145

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

IN THE MATTER OF JOSEPH MASCIA, INDIVIDUALLY AND IN HIS CAPACITIES AS TENANT MEMBER OF BUFFALO MUNICIPAL HOUSING AUTHORITY BOARD OF COMMISSIONERS AND CANDIDATE FOR REELECTION AS A TENANT MEMBER OF BUFFALO MUNICIPAL HOUSING AUTHORITY BOARD OF COMMISSIONERS,
PETITIONER-RESPONDENT,

V ORDER

LEAGUE OF WOMEN VOTERS OF BUFFALO/NIAGARA, INC.,
RESPONDENT,
BUFFALO MUNICIPAL HOUSING AUTHORITY, ET AL.,
RESPONDENTS-APPELLANTS.

KAVINOKY COOK LLP, BUFFALO (LAURENCE K. RUBIN OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

JOSEPH G. MAKOWSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Shirley Troutman, J.), entered June 25, 2014 in a CPLR article 78 proceeding. The judgment, among other things, directed respondents to reinstate petitioner as a candidate for reelection to the position of Tenant Member.

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

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

811

CA 14-01656

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

IN THE MATTER OF MARTIN T. KLINK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BARBARA J. FIALA, COMMISSIONER, NEW YORK
STATE DEPARTMENT OF MOTOR VEHICLES,
RESPONDENT-APPELLANT.

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

CHARLES D. STEINMAN, ESQ., PLLC, ROCHESTER (CHARLES D. STEINMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered November 26, 2013 in a CPLR article 78 proceeding. The judgment granted the petition.

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

Memorandum: Following the revocation of his driver's license based on his conviction of aggravated driving while intoxicated, petitioner applied to the Department of Motor Vehicles for a new license in May 2012. By that time, however, respondent was holding in abeyance the relicensing applications of all applicants, including petitioner, with three or more alcohol- or drug-related driving convictions during a period of emergency rulemaking pending finalization of new recidivism regulations. In December 2012, respondent denied petitioner's application under the new regulations (*see* 15 NYCRR 136.5 [a] [3]; [b] [3]). That determination was affirmed on petitioner's administrative appeal, and petitioner commenced this CPLR article 78 proceeding contending, inter alia, that respondent's decision to hold his application and apply the new regulations retroactively was contrary to law and arbitrary and capricious. Supreme Court annulled the determination and directed respondent to render a decision on petitioner's application for a driver's license based upon regulations that were in effect in May 2012. As petitioner correctly concedes on this appeal by respondent, the court erred in granting the petition.

"Impermissible retroactive application of a statute generally

occurs when a vested right is impaired or a past transaction is altered by such application" (*Matter of Kenny v Fiala*, 127 AD3d 1359, 1359; *see Matter of Scism v Fiala*, 122 AD3d 1197, 1198). "[H]owever, '[a] driver's license is not generally viewed as a vested right, but [it is] merely a personal privilege subject to reasonable restrictions' " (*Kenny*, 127 AD3d at 1360, quoting *Scism*, 122 AD3d at 1198). Here, "respondent remained free to apply her most recent regulations when exercising her discretion in deciding whether to grant or deny petitioner's application for relicensing. This is especially so in light of the rational, seven-month moratorium placed on all similarly-situated applicants for relicensing—i.e., persons with three or more alcohol-related driving convictions" (*Scism*, 122 AD3d at 1198). We thus conclude that "the delay in processing petitioner's application was neither unlawful nor an abuse of discretion . . . , and that [respondent] properly applied the '25 year look back period' " pursuant to the new regulations (*Matter of Dahlgren v New York State Dept. of Motor Veh.*, 124 AD3d 1400, 1402; *see* 15 NYCRR 136.5 [a] [3]).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

812

CA 14-02149

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

AFFINITY ELMWOOD GATEWAY PROPERTIES, LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AJC PROPERTIES LLC, ET AL., DEFENDANTS,
EVELYN BENCINICH, SUSAN M. DAVIS, STEVEN GATHERS, ANGELINE C. GENOVESE, SANDRA GIRAGE, ANDREW B. LANE AND LORENZ M. WUSTNER, DEFENDANTS-APPELLANTS.

ARTHUR J. GIACALONE, EAST AURORA, FOR DEFENDANTS-APPELLANTS.

LIPPES, MATHIAS, WEXLER, FRIEDMAN, LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered November 13, 2014. The order denied a motion by defendants Evelyn Bencinich, Susan M. Davis, Steven Gathers, Angeline C. Genovese, Sandra Girage, Lorenz M. Wustner, and Andrew B. Lane to settle the consolidated record on appeal.

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

Memorandum: Defendants-appellants (defendants) appeal from an order denying their motion to settle the consolidated record on appeal by excluding the 10-day trial transcript. We affirm. Contrary to defendants' contention, their appeal does not merely concern "exceptions to rulings on questions of law" such that no transcript is required (CPLR 5525 [b]). Rather, because "this appeal will necessarily involve questions of fact, an appeal without a transcript is not appropriate" (*Robinson & Carpenter v Gangl*, 31 AD2d 665, 666). "In the absence of a stipulation by the parties to the contrary, the court was required under CPLR 5525 to settle only a complete trial transcript" (*Rush v Insogna*, 170 AD2d 753, 753).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

814

CA 15-00049

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

INTERBORO INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FATIMA TAHIR, ET AL., DEFENDANTS,
BUSHRA NAZ, CLIFFSIDE PARK IMAGING &
DIAGNOSTIC CENTER, AND KIMBA MEDICAL
SUPPLY, LLC, DEFENDANTS-RESPONDENTS.

LAW OFFICE OF JASON TENENBAUM, P.C., GARDEN CITY (JASON TENENBAUM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered April 24, 2014. The order and judgment, among other things, denied that part of plaintiff's motion for leave to enter a default judgment against defendants Bushra Naz, Cliffside Park Imaging & Diagnostic Center and Kimba Medical Supply, LLC.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by granting that part of the motion for leave to enter a default judgment against defendant Cliffside Park Imaging & Diagnostic Center and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff appeals from an order and judgment that, inter alia, denied its motion pursuant to CPLR 3215 for leave to enter a default judgment against defendants Bushra Naz, Cliffside Park Imaging & Diagnostic Center (Cliffside), and Kimba Medical Supply, LLC (Kimba). Defendants Naz and Fatima Tahir made claims for no-fault benefits arising from injuries they allegedly sustained in an automobile accident covered by an insurance policy issued to plaintiff's policyholder. Naz and Tahir assigned their rights to collect no-fault benefits to certain medical providers, including Cliffside and Kimba, each of which made claims for services rendered to Naz and Tahir as a result of the alleged accident. Plaintiff disclaimed coverage based on the failure of Naz and Tahir to provide timely written notice of the accident pursuant to the insurance policy, and thereafter commenced this action seeking a declaration that there is no coverage. Plaintiff subsequently moved for leave to enter a default judgment against each defendant on the ground that the summons and verified complaint had been properly served and defendants did not timely serve an answer or otherwise appear in the action.

Supreme Court denied the motion with respect to Naz, Cliffside, and Kimba, and otherwise granted the motion.

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party's default in answering or appearing" (*Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651; *see* CPLR 3215 [f]). Here, plaintiff submitted sufficient proof of the facts constituting its claim through the affidavit of a claims representative establishing that Tahir and Naz failed to satisfy the notice requirement of the insurance policy, which constitutes a failure to comply with a condition precedent and vitiates the contract as a matter of law (*see generally New York & Presbyt. Hosp. v Country-Wide Ins. Co.*, 17 NY3d 586, 592-593; *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743; *Matter of Progressive Northeastern Ins. Co. [Heath]*, 41 AD3d 1321, 1322). Plaintiff also submitted proof of default in the form of "an affirmation from its attorney regarding . . . defendant[s'] default in appearing and answering" (*599 Ralph Ave. Dev., LLC v 799 Sterling Inc.*, 34 AD3d 726, 726).

We further conclude, however, that plaintiff submitted sufficient proof of service of process, the remaining required element of proof, only with respect to Cliffside, a corporation, and thus the court erred in denying plaintiff's motion to that extent. We therefore modify the order and judgment accordingly. Pursuant to CPLR 311 (a), "personal service on a corporation may be accomplished by, inter alia, delivering the summons 'to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service' " (*Rosario v NES Med. Servs. of N.Y., P.C.*, 105 AD3d 831, 832). Here, "[t]he process server's affidavit, which stated that the corporate defendant was personally served by delivering a copy of the summons and complaint to its '[authorized] agent' and provided a description of that person, constituted prima facie evidence of proper service pursuant to CPLR 311 (a) (1)" (*McIntyre v Emanuel Church of God In Christ, Inc.*, 37 AD3d 562, 562; *see Miterko v Peaslee*, 80 AD3d 736, 737; *see generally Halas v Dick's Sporting Goods*, 105 AD3d 1411, 1413-1414).

Contrary to plaintiff's contention, the court properly denied its motion with respect to Naz, who was allegedly served by the "nail and mail" method of service. CPLR 308 (4) allows that method of service only "when service pursuant to CPLR 308 (1) and (2) cannot be made with due diligence" (*Austin v Tri-County Mem. Hosp.*, 39 AD3d 1223, 1224) and, although a process server's affidavit of service ordinarily constitutes prima facie evidence of proper service, here the process server's affidavit submitted by plaintiff fails to demonstrate the requisite due diligence (*see D'Alesandro v Many*, 137 AD2d 484, 484; *see generally Matter of El Greco Socy. of Visual Arts, Inc. v Diamantidis*, 47 AD3d 929, 929-930). The affidavit failed to indicate whether there was an attempt to effectuate service at Naz's actual

"dwelling place or usual place of abode" (CPLR 308 [4]), and there is no indication that the process server made genuine inquiries to ascertain Naz's actual residence or place of employment (*see Prudence v Wright*, 94 AD3d 1073, 1074; *Earle v Valente*, 302 AD2d 353, 353-354).

We also reject plaintiff's contention that the court erred in denying its motion with respect to Kimba, a limited liability company. Plaintiff alleged that Kimba was served pursuant to Limited Liability Company Law § 304. That statute is substantively identical to Business Corporation Law § 307, and both statutes apply to foreign business entities not authorized to do business in New York. We conclude that, just as strict compliance with the procedures set forth in Business Corporation Law § 307 is required pursuant to *Flick v Stewart-Warner Corp.* (76 NY2d 50, 54-55, 57, *rearg denied* 76 NY2d 846), strict compliance is likewise required for the procedures set forth in Limited Liability Company Law § 304 (*see Elzofri v American Express Co.*, 29 Misc 3d 898, 901). Here, plaintiff failed to establish that it strictly complied with the filing requirements of Limited Liability Company Law § 304 (e).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

818

KA 14-00888

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYAN WASHINGTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered March 28, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of two counts of grand larceny in the fourth degree (Penal Law § 155.30 [1]) and sentencing him to concurrent indeterminate terms of incarceration. We affirm. Defendant failed to preserve for our review his contention that County Court improperly found, based solely on hearsay evidence, that he violated the conditions of his probation by leaving the county without the permission of his probation officer or the court (*see People v Serach*, 247 AD2d 885, 885, *lv denied* 92 NY2d 860; *People v Angel E.*, 233 AD2d 938, 938, *lv denied* 89 NY2d 939). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant's contention that the evidence failed to establish that he violated the conditions of his probation by failing to appear for a court date is likewise unpreserved for our review (*see People v Fusco*, 91 AD3d 985, 986; *People v Alvarez*, 26 AD3d 442, 442-443, *lv denied* 6 NY3d 892). In any event, we note that defendant does not challenge on appeal the court's finding that his failure to report to his probation officer constituted a violation of his probation (*see generally People v Walts*, 34 AD3d 1043, 1043, *lv denied* 8 NY3d 850). Finally, the sentence is not unduly harsh or severe.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

819

KA 10-01489

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES L. BLACKWELL, DEFENDANT-APPELLANT.

LAW OFFICES OF JOSEPH D. WALDORF, P.C., ROCHESTER (JOSEPH D. WALDORF 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 (Richard A. Keenan, J.), rendered June 10, 2010. The judgment convicted defendant, upon his plea of guilty, of forgery 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 forgery in the second degree (Penal Law § 170.10 [1]). We agree with defendant that his purported waiver of the right to appeal is invalid. The waiver was not mentioned until after defendant pleaded guilty and, in any event, the record fails to establish that County Court engaged him in an adequate colloquy to ensure that the waiver was a knowing and voluntary choice (*see People v Frysinger*, 111 AD3d 1397, 1398; *see generally People v Bradshaw*, 18 NY3d 257, 264-267). Contrary to defendant's further contention, however, the invalidity of the waiver of the right to appeal does not undermine the voluntariness of his guilty plea (*see generally People v Gruber*, 108 AD3d 877, 878, *lv denied* 22 NY3d 956).

Defendant contends that the court lacked jurisdiction over him because he did not enter a formal plea to the indictment (*see* CPL 210.50). That contention is not preserved for our review (*see People v Miller*, 27 AD3d 1017, 1017-1018), and we conclude that it would not warrant reversal in any event given that the parties at all times "proceeded . . . as if defendant had entered a formal plea of not guilty" (*People v Rodabaugh*, 26 AD3d 598, 600).

We reject defendant's contention that the court abused its discretion in denying his request to substitute counsel. Even assuming, arguendo, that defendant's factual allegations were specific enough to give rise to a duty on the part of the court to consider the

request (*see People v Porto*, 16 NY3d 93, 99-100; *cf. People v Lewicki*, 118 AD3d 1328, 1329, *lv denied* 23 NY3d 1064), we conclude that the court made the requisite "minimal inquiry" into defendant's objections concerning his attorney (*People v Sides*, 75 NY2d 822, 825; *see People v Adger*, 83 AD3d 1590, 1592, *lv denied* 17 NY3d 857), and reasonably determined that defendant had not shown good cause for substitution (*see People v Linares*, 2 NY3d 507, 510-512). " 'At most, defendant's allegations evinced disagreements with counsel over strategy . . . , which were not sufficient grounds for substitution' " (*People v Bradford*, 118 AD3d 1254, 1255, *lv denied* 24 NY3d 1082). In addition, the record does not establish that defendant made an unequivocal request to represent himself (*see generally People v Morgan*, 72 AD3d 1482, 1482-1483, *lv denied* 15 NY3d 854). We conclude that the court did not abuse its discretion in refusing to entertain defendant's other pro se motions (*see generally People v Rodriguez*, 95 NY2d 497, 501-502).

Finally, we reject defendant's contention that he was denied effective assistance of counsel. Defense counsel was not required to support defendant's various pro se motions (*see People v Adams*, 66 AD3d 1355, 1356, *lv denied* 13 NY3d 858; *see also People v Jones*, 261 AD2d 920, 920, *lv denied* 93 NY2d 972), and she did not take a position that was adverse to his interests merely by briefly defending her own performance in response to his request to substitute counsel (*see People v Fudge*, 104 AD3d 1169, 1170, *lv denied* 21 NY3d 1042; *see generally People v Nelson*, 7 NY3d 883, 884). To the extent that defendant contends that counsel was ineffective because she "misrepresented the initial plea offer and his ability to participate in the judicial diversion program," we conclude that such contention is based upon matters outside the record and thus may be raised only by way of a motion pursuant to CPL article 440 (*see generally People v Ross*, 118 AD3d 1413, 1416, *lv denied* 24 NY3d 964; *People v Snitzel*, 270 AD2d 836, 836-837, *lv denied* 95 NY2d 804).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

820

KA 13-02074

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAQUANN MORGAN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN C. RUSSO-MCLAUGHLIN 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 October 15, 2013. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). 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 People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

827

KA 11-00255

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARL J. HOLMES, DEFENDANT-APPELLANT.

FRANK S. FALZONE, BUFFALO (LOUIS ROSADO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered March 18, 2009. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him following a jury trial of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), defendant contends that the evidence was insufficient to convict him of attempted murder and that Supreme Court erred in its instructions to the jury. We reject those contentions.

The evidence at trial established that, on the morning of August 30, 2008, Corey Sparrow, James Houston, and a third unnamed man confronted defendant and Jaime Smith at Smith's store on Genesee Street in the City of Rochester, and demanded money from Smith. After an altercation, defendant disarmed the third man and secured his gun. Although defendant called 911, he left in a car with Smith before the police arrived. Smith and defendant initially followed a car occupied by Sparrow, Houston, and the third man toward a prearranged meeting spot but, at defendant's direction, Smith drove to the two-apartment house in which defendant's mother resided. Defendant testified that he so directed Smith because Sparrow and Houston, who were on parole and probation, respectively, had made threats against defendant's family when he called 911 at Smith's store. The car occupied by Sparrow, Houston, and the third man pulled up on the street near defendant and Smith, and Sparrow approached defendant, who was sitting

in the passenger seat of Smith's car. Sparrow, agitated, threatened defendant and, according to defendant, appeared to reach for a gun in his waistband. Defendant, using the gun acquired from the third man in the altercation at Smith's store, shot Sparrow three times, inflicting fatal injuries.

Defendant then climbed into the driver's seat of Smith's car and started to flee, but turned the car around and drove back toward Houston, who was in the side yard of the house where defendant's mother lived. Defendant fired gunshots at Houston from the moving vehicle. One bullet struck Houston in the elbow, and another bullet struck the side of the house. Defendant fled the scene, disposed of the gun and, after a few days, turned himself in to the police. Defendant was charged with second-degree murder and attempted second-degree murder with respect to the shootings of Sparrow and Houston, respectively, second-degree criminal possession of a weapon charges associated with each of those shootings, and an additional second-degree criminal possession of a weapon charge. At trial, defendant was acquitted of the murder and weapon possession charge related to the shooting of Sparrow, but was convicted of the attempted murder of Houston and the remaining two weapon possession charges.

Defendant contends that the evidence was insufficient to convict him of the attempted murder of Houston because there is no evidence that he intended to kill Houston instead of injuring him, and the injuries suffered by Houston did not place Houston at "actual risk of death." Not only is that contention unpreserved by a motion for a trial order of dismissal specifically directed at that alleged insufficiency (*see generally People v Hawkins*, 11 NY3d 484, 492), we conclude that it is without merit. "[T]he crime of attempted second degree murder is committed when, with the intent to cause the death of another person, one engages in conduct which tends to effect commission of that crime . . . Where those elements converge, an attempted murder has occurred, regardless of whether the defendant has killed or even injured his or her intended target. In other words, the crime of attempted murder does not require actual physical injury to a victim at all" (*People v Fernandez*, 88 NY2d 777, 783). Here, the testimony at trial, which included witness descriptions of defendant "chasing" Houston, who was "running for his life," and then firing gunshots at Houston as he drove toward him, was sufficient to support the jury's conclusion that defendant intended to kill Houston, regardless of the severity of the injury actually suffered by Houston.

Defendant further contends that the court erred in refusing to instruct the jury, pursuant to Penal Law § 35.20 (3), that it was required to determine if defendant was justified in using deadly physical force to prevent Houston from committing or attempting to commit a burglary of his mother's apartment. Even assuming, arguendo, that defendant was "licensed or privileged to be in" his mother's apartment for purposes of section 35.20 (3), we conclude that there is no reasonable view of the evidence that Houston was committing or attempting to commit a burglary therein, and thus defendant was not entitled to a jury instruction under that statute (*see generally People v Cox*, 92 NY2d 1002, 1004-1005). Defendant failed to preserve

for our review his contention that the court also should have given the jury a "choice of evils" instruction pursuant to Penal Law § 35.05 (*see People v LaPetina*, 9 NY3d 854, 855, *rearg denied* 13 NY3d 855), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, we reject defendant's contention that the court erred in refusing to instruct the jury on the defense of temporary innocent possession of the firearm as applicable to count five of the indictment. To warrant a jury instruction on that defense, "there must be proof in the record showing a legal excuse for having the weapon in [defendant's] possession as well as facts tending to establish that, once possession has been obtained, the weapon had not been used in a dangerous manner" (*People v Banks*, 76 NY2d 799, 801 [internal quotation marks omitted]). We conclude that, "although there is a reasonable view of the evidence upon which the jury could have found that defendant had a lawful basis for his initial possession of the firearm, there is no reasonable view of the evidence upon which the jury could have found that defendant's use of the firearm thereafter was lawful" (*People v Robinson*, 63 AD3d 1634, 1634, *lv denied* 13 NY3d 799). Indeed, defendant's decision to take the firearm with him after the initial altercation at Smith's store, despite having called 911, and keeping the firearm with him during his escalating confrontation with Sparrow is "utterly at odd's with [defendant's] claim of innocent possession" (*People v Snyder*, 73 NY2d 900, 902 [internal quotation marks omitted]; *see People v Ward*, 104 AD3d 1323, 1324-1325, *lv denied* 21 NY3d 1101). Despite defendant's contention to the contrary, "[i]t is well settled that justification is not a defense to a weapon possession count" (*People v Hawkins*, 113 AD3d 1123, 1124, *lv denied* 22 NY3d 1156 [internal quotation marks omitted]).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

829

KA 13-00057

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL WRIGHT, DEFENDANT-APPELLANT.

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

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 September 25, 2012. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [3]). As the People correctly concede, defendant's "purported waiver of the right to appeal is not valid inasmuch as [Supreme] Court failed to obtain a knowing and voluntary waiver of that right at the time of the plea, and instead obtained the purported waiver at sentencing" (*People v Pieper*, 104 AD3d 1225, 1225). We nonetheless reject defendant's contention that the court erred in refusing to suppress his statements to the police. "[T]he record of the suppression hearing supports the court's determination that the statements were not coerced, i.e., defendant received no promises in exchange for making the statements nor was he threatened in any way, and the court's determination is entitled to great deference" (*People v Peay*, 77 AD3d 1309, 1310, *lv denied* 15 NY3d 955; *see People v Brown*, 111 AD3d 1385, 1386, *lv denied* 22 NY3d 1155; *see generally People v Prochilo*, 41 NY2d 759, 761). The conflicting testimony of defendant and the investigator who testified at the hearing "merely raised an issue of credibility that the court was entitled to resolve in favor of the People" (*People v Coleman*, 306 AD2d 941, 941, *lv denied* 1 NY3d 596; *see People v Cass*, 43 AD3d 1272, 1273, *lv denied* 9 NY3d 1032).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

833

CA 14-02196

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

IN THE MATTER OF MEGHAN M. MAMBRETTI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN
RIGHTS, RESPONDENT,
AND WILLIAMSVILLE CENTRAL SCHOOL
DISTRICT, RESPONDENT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (KYLE W. STURGESS OF COUNSEL), FOR RESPONDENT-APPELLANT.

LAW OFFICE OF LINDY KORN, PLLC, BUFFALO (LINDY KORN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered July 14, 2014 in a proceeding pursuant to CPLR article 78. The judgment, among other things, granted the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of respondent New York State Division of Human Rights (SDHR) that there was no probable cause to believe that respondent Williamsville Central School District (District) discriminated against petitioner. Supreme Court granted the petition and remitted the matter to SDHR for a hearing. We affirm.

Petitioner alleged that the District discriminated against her on the basis of "sex/pregnancy" when it declined to renew her employment contract shortly after learning that she was pregnant. The record shows that petitioner was employed as a part-time counselor for the District for the 2011-2012 school year and that her appointment would end on June 30, 2012. Before her appointment expired, the District invited her to apply for a position for the following school year. Petitioner applied for continued employment with the District and also requested a "pregnancy/disability leave" from the end of August 2012 through January, 2013. According to petitioner, she thereafter met with District officials, who notified her that she would not be hired because of her anticipated absence. Petitioner filed a complaint with

SDHR, which dismissed the complaint without a hearing.

"Where, as here, 'a determination of no probable cause is rendered [by SDHR] without holding a public hearing pursuant to Executive Law § 297 (4) (a), the appropriate standard of review is whether the determination was arbitrary and capricious or lacking a rational basis' " (*Matter of Goston v American Airlines*, 295 AD2d 932, 932). "Probable cause exists only when, after giving full credence to the complainant's version of the events, there is some evidence of unlawful discrimination" (*Matter of Doin v Continental Ins. Co.*, 114 AD2d 724, 725). "There must be a *factual* basis in the evidence sufficient to warrant a cautious [person] to believe that discrimination had been practiced" (*id.*). The complainant's factual showing must be accepted as true on a probable cause determination (*see id.* at 725-726). While our standard of review is highly deferential to the agency's determination (*see Matter of Bowman v City of Niagara Falls*, 107 AD3d 1417, 1418), we agree with the court that SDHR's determination "was not rationally based upon the evidence presented" (*Matter of Schmidt v Putnam County Off. of Sheriff*, 49 AD3d 761, 761; *see State Div. of Human Rights v Hatch Assoc. Consultants*, 110 AD2d 1049, 1049).

Executive Law § 296 prohibits an employer from refusing to hire or employ an individual based on, inter alia, the individual's sex. In opposition to the petition, the District argued that it decided not to rehire petitioner because of her unavailability and its concern for continuity of counseling services for its students. Petitioner was unavailable to work, however, because of her pregnancy, and we conclude that discrimination could be inferred from the record before us (*see Hatch Assoc. Consultants*, 110 AD2d at 1050). The District relies on *Roslyn Union Free Sch. Dist. v State Div. of Human Rights* (72 AD2d 808) in support of its argument that it did not discriminate against petitioner. To the extent that *Roslyn* holds that a decision not to hire an individual because the individual is pregnant is not a form of discrimination (*see id.* at 809-810), we decline to follow it.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

838

CA 14-02124

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

CHERYL VOSS AND GREGORY VOSS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JEFFREY DUCHMANN, DOING BUSINESS AS TRADE
WINDS TENT & PARTY RENTAL,
DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MICELLE M. RAGUSA OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (BRIAN R. HOGAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered April 9, 2014. The order, insofar as appealed from, denied the motion of defendant to compel discovery responses from plaintiffs.

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

Memorandum: "It is well settled that a court is vested with broad discretion to control discovery and that the court's determination of discovery issues should be disturbed only upon a showing of clear abuse of discretion" (*Roswell Park Cancer Inst. Corp. v Sodexo Am., LLC*, 68 AD3d 1720, 1721). We perceive no such abuse of discretion in Supreme Court's denial of that part of the motion of defendant seeking to compel plaintiffs to provide authorizations permitting disclosure of the billing records of plaintiffs' private health care insurers. Plaintiffs previously had provided authorizations permitting defendant to obtain the billing records of the health care providers of Cheryl Voss, the injured plaintiff, and defendant "failed to show the relevancy of the demanded documents" to its defense (*Jordan v Blue Circle Atl.*, 296 AD2d 752, 753).

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

842.1

CAF 14-00951

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

IN THE MATTER OF DONNY BRETZINGER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ALICIA HATCHER, RESPONDENT-APPELLANT.

LISA DIPOALA HABER, SYRACUSE, FOR RESPONDENT-APPELLANT.

GOETTEL, POPLASKI & DUNN, PLLC, WATERTOWN (JASON POPLASKI OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN A. SOVIE, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered May 9, 2014. The order granted petitioner's motion for a default order, granted sole custody of the subject child to petitioner and suspended the right of respondent to parenting time.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, petitioner's motion is denied, respondent's motion is granted, and the petition is dismissed.

Memorandum: Pursuant to an order of custody issued by a Texas court, petitioner father had the exclusive right to designate the primary residence of the child. The father, who is in the military, thereafter relocated with the child to Fort Drum in New York, where he was stationed. Pursuant to the order, respondent mother had visitation with the child, and the father was to pay for the transportation of the child to the mother three times per year. In May 2013, the child's paternal grandmother filed a petition to modify the custody order by suspending the visitation rights of the mother, who still resided in Texas. The petition was later amended to name the father as the petitioner once he returned from deployment overseas. In August 2013, the mother moved to dismiss the petition for lack of jurisdiction, which Family Court denied. In October 2013, the court communicated with a Texas court, which declined jurisdiction. At a court appearance in April 2014, the mother indicated by telephone that she would not be able to appear personally for the hearing set later that month because of financial constraints, the court disconnected the call, and the father moved for a default order based on the mother's statements. The court granted the father's motion, and we now reverse.

Initially, we conclude that the court abused its discretion in granting the motion of the mother's attorney, made before the court took testimony from the father upon the default, to withdraw as counsel for the mother without notice to her (*see Matter of La'Derrick W.*, 63 AD3d 1538, 1539). " 'Because the purported withdrawal of counsel in this case was ineffective, the order entered by [the c]ourt was improperly entered as a default order and appeal therefrom is not precluded' " (*id.*).

We agree with the mother that the court erred in denying her motion to dismiss the petition. Texas had exclusive, continuing jurisdiction pursuant to Domestic Relations Law § 76-a at the time of the filing of the petition, and the father's allegations in the petition were insufficient for the court to exercise temporary emergency jurisdiction pursuant to Domestic Relations Law § 76-c (*see Matter of Segovia v Bushnell*, 85 AD3d 1267, 1268). In any event, the court did not "immediately" communicate with the Texas court, as required by section 76-c (4) (*see Matter of Callahan v Smith*, 23 AD3d 957, 958-959). Furthermore, the court erred in requiring the mother to seek an order from a Texas court inasmuch as it was the father's burden to do so (*see* § 76-c [3]). Although the court later acquired jurisdiction when it communicated with the Texas court, which declined jurisdiction over the petition (*see* § 76-b [1]), at the time the court issued its order denying the mother's motion to dismiss, it did not have temporary emergency jurisdiction and had not complied with the requirements of section 76-c. We therefore reverse the order, deny the father's motion for a default order, and grant the mother's motion to dismiss. In light of our determination, we do not consider the mother's remaining contention.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

1335/14

KA 12-00590

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS QUINONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered August 10, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03). We agree with defendant that County Court erred in failing to determine whether he should be afforded youthful offender status (*see People v Rudolph*, 21 NY3d 497, 501). Defendant was convicted of an armed felony offense, and the court therefore was required "to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3) . . . [and] make such a determination on the record" (*People v Middlebrooks*, ___ NY3d ___, ___ [June 11, 2015]). Inasmuch as the court failed to do so here, we hold the case, reserve decision, and remit the matter to County Court to make and state for the record "a determination of whether defendant is a youthful offender" (*Rudolph*, 21 NY3d at 503).

We also agree with defendant that his waiver of the right to appeal is not valid. The court informed defendant that, if he failed to sign a written waiver of the right to appeal, it would not be bound to honor the sentence promise of two consecutive five-year terms of incarceration and could impose up to the maximum sentence on him, i.e., a term of incarceration of 15 years. We conclude that the court thereby threatened defendant with a greater term of incarceration in the event that defendant did not sign the waiver, thus rendering the court's colloquy concerning the waiver impermissibly coercive (*see*

People v Trinidad-Ayala, 114 AD3d 1229, 1229, *lv denied* 23 NY3d 1044). We nevertheless reject defendant's contention that the sentence was harsh and excessive.

All concur, FAHEY, J., not participating.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court

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

1457/14

KA 11-01995

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY STEWART, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered August 29, 2011. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]). Contrary to defendant's contention, County Court did not err in refusing to suppress the showup identification of defendant by the victim. The transcript of the suppression hearing establishes that the victim saw defendant three days after the robbery and contacted the police after going to a friend's house. The police transported the victim back to the location where he saw defendant, and the victim identified him. Under the circumstances, the showup identification was merely confirmatory, and "[n]o possibility of suggestiveness was created by the police conduct in arranging the confirmation" (*People v Dade*, 187 AD2d 959, 960, *lv denied* 81 NY2d 838; *see People v McCray*, 298 AD2d 203, 204, *lv denied* 99 NY2d 583; *People v Anderson*, 260 AD2d 387, 387-388, *lv denied* 93 NY2d 922, 965). Defendant failed to preserve for our review his further contention that the evidence established that he did not possess a loaded weapon inasmuch as he raises that affirmative defense for the first time on appeal (*see* § 160.15 [4]; *People v Gordon*, 92 AD3d 580, 580-581, *lv denied* 19 NY3d 864; *People v Williams*, 15 AD3d 244, 245, *lv denied* 5 NY3d 771), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We agree with defendant, however, that the court erred in failing to determine whether he should be afforded youthful offender status (*see People v Rudolph*, 21 NY3d 497, 501). Defendant was convicted of

an armed felony offense, and the court therefore was required "to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3) . . . [and] make such a determination on the record" (*People v Middlebrooks*, ___ NY3d ___, ___ [June 11, 2015]). Inasmuch as the court failed to do so here, we hold the case, reserve decision, and remit the matter to County Court to make and state for the record "a determination of whether defendant is a youthful offender" (*Rudolph*, 21 NY3d at 503).

All concur, FAHEY, J., not participating.

Entered: June 19, 2015

Frances E. Cafarell
Clerk of the Court