SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 10, 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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CA 14-00715

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

TERESA A. WILLIAMS, PLAINTIFF,

V ORDER

DAVID KAUFFMAN, DEFENDANT.

DAVID KAUFFMAN, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

CYNTHIA M. RANCIER, THIRD-PARTY DEFENDANT-APPELLANT.

BARTH SULLIVAN BEHR, SYRACUSE (J. WILLIAM SAVAGE OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

LAW OFFICE OF FRED LUTZEN, EAST SYRACUSE (FRED LUTZEN OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

MICHAELS & SMOLAK, P.C., AUBURN (JAN SMOLAK OF COUNSEL), FOR PLAINTIFF.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered August 5, 2013. The order denied third-party defendant's motion for summary judgment dismissing the third-party complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on December 31, 2014, and filed in the Cayuga County Clerk's Office on February 25, 2015,

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

Entered: July 10, 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 14-01385

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

IN THE MATTER OF RITE AID CORPORATION,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN HAYWOOD, ASSESSOR, AND BOARD OF
ASSESSMENT REVIEW OF TOWN OF WILLIAMSON,
WAYNE COUNTY, RESPONDENTS-APPELLANTS.
(PROCEEDING NOS. 1 & 2.)

IN THE MATTER OF RITE AID CORPORATION,
PETITIONER-RESPONDENT,

V

TOWN OF WILLIAMSON BOARD OF ASSESSMENT
REVIEW, ASSESSOR OF TOWN OF WILLIAMSON
AND TOWN OF WILLIAMSON, WAYNE COUNTY,
RESPONDENTS-APPELLANTS.
(PROCEEDING NO. 3.)

HACKER MURPHY, LLP, LATHAM (PATRICK L. SEELY, JR., OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

ROBERT L. JACOBSON, PITTSFORD, FOR PETITIONER-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Wayne County (Matthew A. Rosenbaum, J.), entered January 31, 2014 in proceedings pursuant to RPTL article 7. The order and judgment determined tax assessments for tax years 2009/2010 through 2011/2012.

It is hereby ORDERED that the order and judgment so appealed from is modified on the law by dismissing the petitions challenging the assessments for the 2009/2010 and 2011/2012 tax years and by reducing the assessment for the 2010/2011 tax year to $3,610,100, and as modified the order and judgment is affirmed without costs.

Memorandum: Petitioner commenced these RPTL article 7 proceedings seeking review of the real property tax assessments for a commercial property located in respondent Town of Williamson for the tax years 2009/2010, 2010/2011, and 2011/2012. In each of the proceedings, respondents appeal from an order and judgment granting the respective petitions in part and ordering respondents to correct

the assessment rolls and to refund the tax overpayments with interest. Respondents concede that the assessment for the 2010/2011 tax year should be reduced to $3,610,100.

Petitioner is the lessee under a 20-year triple net lease of a 2.36 acre parcel of real property located at 4061 Route 104 in the Town of Williamson, which is improved by a 14,690-square-foot single-tenant retail pharmacy. Rent is $377,000 per annum or approximately $25.73 per square foot. The pharmacy building was constructed in 2003 under a build-to-suit arrangement with petitioner's predecessor, Eckerd Drugs. The build-to-suit arrangement in this case involved the assemblage of five separate parcels of real property situated on a corner lot with a traffic light. Under the terms of the lease, petitioner is responsible for, among other things, the payment of real property taxes. The property was sold in 2003 in what the parties agree was an arm's length sale for $4,650,000. In 2009, 2010, and 2011, the property was assigned an assessed value of $3,750,000 by respondent Stephen Haywood, assessor of the Town of Williamson. Petitioner commenced three proceedings pursuant to RPTL article 7 challenging those assessments. A nonjury trial was conducted at which the parties presented expert testimony. In granting the petitions in part, Supreme Court credited the appraisal and valuation approach of petitioner's expert and concluded, inter alia, that the 2003 sale of the subject property was of "no probative value" in determining the fair market value of the fee simple interest in the property. We conclude that the court's decision to credit the appraisal of petitioner's expert was against the weight of the evidence, and we modify the order and judgment accordingly (*see Matter of Rite Aid Corp. v Otis*, 102 AD3d 124, 127, *lv denied* 21 NY3d 855; *see also Matter of Kohl's Ill. Inc. #691 v Board of Assessors of the Town of Clifton Park*, 123 AD3d 1315, 1317).

We note at the outset that respondents do not dispute that petitioner came forth with substantial evidence, in the form of the appraisal report and testimony of its expert, to rebut the presumption of validity of the tax assessments (*see generally Matter of Techniplex III v Town & Vil. of E. Rochester*, 125 AD3d 1412, 1412-1413). Nor do respondents contend that the approach to valuation used by petitioner's expert, which rejects drugstore comparables on the ground that they are "build-to-suit" and, thus, subject to above-market leases which encompass purchasing, often at a premium, and assembling various pieces of property, demolition and construction costs, is not plausible (*see Matter of Brooks Drugs, Inc. v Board of Assessors of City of Schenectady*, 51 AD3d 1094, 1095, *lv denied* 11 NY3d 710).

Within this framework, an appellate court is empowered to make new findings of value where the trial court " 'has failed to give to conflicting evidence the relative weight which it should have' " (*People ex rel. MacCracken v Miller*, 291 NY 55, 61, quoting *Matter of City of New York [Newton Creek]*, 284 NY 493, 497 [emphasis omitted]), giving due deference to the trial court's power to resolve credibility issues by choosing among conflicting expert opinions (*see Brooks Drugs, Inc.*, 51 AD3d at 1095).

It is well settled that real "[p]roperty is assessed for tax purposes according to its condition [and ownership] on the taxable status date, without regard to future potentialities or possibilities and may not be assessed on the basis of some use contemplated in the future" (*Matter of Addis Co. v Srogi*, 79 AD2d 856, 857, *lv denied* 53 NY2d 603; *see* RPTL 302 [1]; *Matter of BCA-White Plains Lanes v Glaser*, 91 AD2d 633, 634-635, *appeal dismissed* 59 NY2d 673). Although several methods of valuing real property are acceptable, "the market value method of valuation is preferred as the most reliable measure of a property's full value for assessment purposes" (*Matter of General Elec. Co. v Town of Salina*, 69 NY2d 730, 731), because "[t]he best evidence of value, of course, is a recent sale of the subject property between a seller under no compulsion to sell and a buyer under no compulsion to buy" (*Matter of Allied Corp. v Town of Camillus*, 80 NY2d 351, 356, *rearg denied* 81 NY2d 784). A recent sale has been characterized as evidence of the "highest rank" in determining market value (*Matter of F. W. Woolworth Co. v Tax Commn. of City of N.Y.*, 20 NY2d 561, 565 [emphasis omitted]; *see Plaza Hotel Assoc. v Wellington Assoc.*, 37 NY2d 273, 277, *rearg denied* 37 NY2d 924). The scope of a "market" need not be limited to the locale of the subject property and, depending on the nature of the use, it may encompass national and/or international buyers and sellers (*see e.g. Matter of Saratoga Harness Racing v Williams*, 91 NY2d 639, 646).

In support of its case, petitioner presented the testimony of appraiser Christopher Harland, who concentrated his analysis on the fee simple value of the property, unencumbered by any leases. Harland employed the comparable sales approach and income capitalization approach in arriving at his valuation. He valued the subject property at $1.0 million to $1.1 million on the relevant taxable status dates. The comparable properties he used in his analysis consisted primarily of commercial retail properties located in the same general geographic area. None, however, were currently occupied by national pharmacy chains nor subject to build-to-suit leases. Indeed, Harland's sales comparables consisted of a Dollar Tree store; a Staples office supply store; a Salvation Army thrift shop; a retail bicycle shop; and a Dollar General store. Although Harland's appraisal recognized that 12 recent sales of retail drugstores had occurred in the region, he concluded that it was "not appropriate to use these sales" and gave them "little weight . . . in valuing the subject property."

On the other hand, respondents' expert, Ronald Rubino, testified, and his appraisal concluded, that there is an established national submarket for the sale and purchase of built-to-suit net lease national chain drugstores, which provides an abundance of drugstore comparable sales, both local and regional, for use in the sales comparison approach. Notably, petitioner's expert agreed that there is a wholly separate national net lease drugstore real estate submarket and further acknowledged that his appraisal cited to and relied upon a national "Net Lease Drugstore Market Report." This report is published by The Boulder Group, which describes itself as "a boutique investment real estate service firm specializing in single tenant net lease properties. The firm provides a full range of brokerage, advisory, and financing services nationwide to a

substantial and diversified client base, which includes high net worth individuals, developers, REITs, partnerships and institutional investment funds" (The Boulder Group, http://bouldergroup.com/ [accessed June 18, 2015]). Respondents' expert also included a reference to The Boulder Group net lease market report in his appraisal. In other words, there is no serious dispute that the submarket identified and relied upon by respondents' expert exists, and sales and rental data for that submarket are readily available (*see Brooks Drugs, Inc.*, 51 AD3d at 1095; *Matter of Eckerd Corp. v Gilchrist*, 44 AD3d 1239, 1240-1241, *lv denied* 10 NY3d 707). It is noteworthy that petitioner's expert also recognized that the boundaries of the applicable submarket "are not purely physical or geographical" and, "to the extent that the market is the meeting place for buyers and sellers of real estate of a given type, the participants who deal within its confines set the boundaries of the market." Nonetheless, in his appraisal, petitioner's expert disregarded the applicable submarket and relied upon properties that are clearly outside of the well-recognized parameters of the net lease national drugstore submarket.

On the other hand, in reaching his valuation through the use of the sales comparison approach, respondents' expert identified and used nine commercial properties, eight of which were improved and occupied as national retail drugstore chain locations. Those eight properties were clearly within the recognized parameters of the national net lease drugstore submarket. The average sale price for those comparables was $4,716,648. Respondents' expert gave the recent sale of the subject property the "most weight" as the "best indicator" of the market value of the subject property. Petitioner's expert considered the 2003 sale of the subject property but "did not put any weight on it."

Petitioner's expert also used the income capitalization method. When using that method, actual rental income is often, as a general rule, the best indicator of value (*see Techniplex III*, 125 AD3d at 1413; *Matter of Schoeneck v City of Syracuse*, 93 AD2d 988, 988; *see also Matter of Merrick Holding Corp. v Board of Assessors of County of Nassau*, 45 NY2d 538, 543). In reaching a valuation using the income capitalization method, petitioner's expert also rejected the actual contract rent, which he described as "substantially above market." Moreover, petitioner's expert rejected the rents of other net lease national drugstore properties in arriving at his determination of market rent. Instead, petitioner's expert identified "market rent" by using the following properties: a Goodwill Industries store and donation drop-off center, a nonprofit corporation serving community needs; a Petsmart store; an Old Navy clothing retail store; a Family Dollar retail store; and a Volunteers of America store, a nonprofit corporation that serves community needs and operates thrift or resale stores. Petitioner's expert did not use any operating national chain drugstore-occupied properties in his determination of "market rent" and arrived at a market rent of $8.00 per square foot.

On the other hand, respondents' expert utilized eight rental

comparables, seven of which were occupied and used as national chain drugstores. The use of those comparables demonstrated that the adjusted comparable median market rent for similar national chain drugstores was $33.86 per square foot, which yields a valuation of $4,130,000 for July 1, 2008, and $3,760,000 for July 1, 2009.

In light of the foregoing, we conclude that the failure of petitioner's expert to use the recent sale of the subject property as well as readily available comparable sales of national chain drugstore properties in the applicable submarket as evidence of value demonstrates the invalidity of the expert's conclusion with respect to the sales comparison valuation (*see Matter of Thomas v Davis*, 96 AD3d 1412, 1415, *lv denied* 21 NY3d 860). We further conclude that the use of sales not comparable to the subject and outside of the applicable market should have been rejected by the court as unreliable (*see Matter of Adcor Realty Corp. v Srogi*, 54 AD2d 1096, 1096, *lv denied* 41 NY2d 806). Moreover, the failure of petitioner's expert to use the actual rent, negotiated at arm's length and without duress or collusion, as well as the failure to use similar rental comparables from the applicable market as evidence of value, demonstrates the invalidity of the expert's conclusions using the income capitalization method (*see Matter of Conifer Baldwinsville Assoc. v Town of Van Buren*, 68 NY2d 783, 785; *see generally Techniplex III*, 125 AD3d at 1413).

All concur except SCUDDER, P.J., who dissents and votes to affirm in the following memorandum: I respectfully dissent. In my view, the valuation determination made by Supreme Court should be upheld, and I would therefore affirm the order and judgment. While it is well established that "a property valuation by the tax assessor is presumptively valid" (*Matter of FMC Corp. [Peroxygen Chems. Div.] v Unmack*, 92 NY2d 179, 187), I agree with the majority that petitioner came forward with substantial evidence to rebut the presumption by submitting "a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser" (*Matter of Niagara Mohawk Power Corp. v Assessor of Town of Geddes*, 92 NY2d 192, 196; *see Matter of Rite Aid Corp. v Otis*, 102 AD3d 124, 125-126, *lv denied* 21 NY3d 855). Once that presumption of validity is rebutted, "a court must weigh the entire record, including evidence of claimed deficiencies in the assessment, to determine whether petitioner has established by a preponderance of the evidence that its property has been overvalued" (*FMC Corp.*, 92 NY2d at 188; *see Rite Aid Corp.*, 102 AD3d at 126).

In tax certiorari proceedings, such as the one at issue on this appeal, the Court of Appeals has specifically held that the Appellate Division " 'may not set aside a finding of value made at Special Term, unless such finding is based upon [an] erroneous theory of law or [an] erroneous ruling in the admission or exclusion of evidence, or *unless it appears that the court at Special Term has failed to give to conflicting evidence the relative weight which it should have* and thus has arrived at a value which is excessive or inadequate' " (*People ex rel. MacCracken v Miller*, 291 NY 55, 61; *see Matter of Adirondack Mtn.*

Reserve v Board of Assessors of the Town of N. Hudson, 106 AD3d 1232, 1237; *Matter of Universal Packaging v Assessor of City of Saratoga Springs*, 259 AD2d 875, 875; *cf. Matter of Kohl's Ill. Inc. #691 v Board of Assessors of the Town of Clifton Park*, 123 AD3d 1315, 1317; *Matter of Al Turi Landfill, Inc. v Town of Goshen*, 93 AD3d 786, 791, *lv denied* 19 NY3d 815).

The crux of this appeal as well as the appeals in *Matter of Rite Aid Corp. v Huseby* (___ AD3d ___ [July 10, 2015]) and *Matter of Rite Aid Corp. v Huseby* (___ AD3d ___ [July 10, 2015]) are the method and manner of valuing first-generation, build-to-suit retail drugstores for tax assessment purposes. Petitioner's expert, Christopher Harland, concluded that the value of the leased fee interest, i.e., the value of the property with the lease, is different from the value of the fee simple interest, i.e., the value of the property itself without any attendant lease. He opted to use the value of the fee simple interest only and thus used retail properties not subject to long-term retail drugstore leases as comparables. The majority concludes that Harland's opinions and valuations are invalid because he used commercial retail properties instead of first-generation build-to-suit pharmacies in his sales comparison and income capitalization analyses. Harland, however, explained his reasons for doing so. As was stated succinctly by the Third Department in a similar appeal in which Harland's valuation method was credited, "[t]he exclusion of national retail drug stores from Harland's analysis was premised upon his designation of those properties as 'build-to-suit,' meaning that they often have above-market leases attributable to premiums being paid to acquire the land, as well as assembly, demolition and construction costs" (*Matter of Eckerd Corp. v Burin*, 83 AD3d 1239, 1242; *see Matter of Eckerd Corp. v Semon*, 35 AD3d 931, 934). Moreover, the testimony at the nonjury trial established that the price of the land before the retail drugstore was built was $1.59 million, and a similar retail drugstore, the lease of which had expired, had recently sold for only $1.4 million.

Respondents' expert, Ronald Rubino, gave considerable weight to the 2003 sale of the property for $4.65 million. At that time, however, the property was subject to a 20-year retail drugstore lease in the amount of $377,000 per year. In his sales comparison and income capitalization analyses, Rubino relied almost exclusively on first-generation, build-to-suit retail drugstores still subject to lease provisions.

Each expert used the sales comparison and income capitalization methods of valuation, but the fundamental difference in whether to consider the lease in their respective analyses explains their different valuations. Both approaches to valuation have been upheld by the Third Department and, where trial courts have accepted Harland's valuations, the Third Department has generally affirmed (*see e.g. Eckerd Corp.*, 83 AD3d at 1242-1243; *Matter of Eckerd Corp. v Semon*, 44 AD3d 1232, 1234; *Eckerd Corp.*, 35 AD3d at 934). Where trial courts have rejected Harland's valuations, the Third Department has also generally affirmed (*see Matter of Rite Aid of N.Y. No. 4928 v*

Assessor of Town of Colonie, 58 AD3d 963, 966, *lv denied* 12 NY3d 709; *Matter of Brooks Drugs, Inc. v Board of Assessors of City of Schenectady*, 51 AD3d 1094, 1095-1096, *lv denied* 11 NY3d 710; *Matter of Eckerd Corp. v Gilchrist*, 44 AD3d 1239, 1240, *lv denied* 10 NY3d 707). Notably, however, even when a trial court had rejected Harland's valuation, the Third Department wrote that Harland had "articulated a plausible reason for his failure to use the type of comparables adopted by" the respondent's expert and that he had "put forth a persuasive case for [his] . . . valuation[]" (*Rite Aid of N.Y. No. 4928*, 58 AD3d at 966).

The Third Department has concluded that the decision whether to credit Harland's testimony on the valuation of retail drugstore properties is "a credibility determination that [the Court] decline[s] to disturb" (*id.*; *see Eckerd Corp.*, 83 AD3d at 1243; *Eckerd Corp.*, 44 AD3d at 1241). The one exception is *Rite Aid Corp.* (102 AD3d 124). In that case, the trial court concluded that, because the recent sale price of the subject property was consistent with the value of the property as determined by respondents' expert, the trial court's "decision to credit the appraisal offered by petitioner was against the weight of the evidence" (*id.* at 127). While that case involved circumstances similar to the circumstances at issue in the instant appeal, I would decline to follow that decision. There, as here, Harland explained his reasoning for rejecting recent sales, i.e., that such sales do not reflect the value of the fee simple interest but, rather, inflated above-market leases. I thus conclude that, if one were to credit Harland's reasoning, a recent sale of the subject property while the lease was still in effect would not affect the valuation of the fee simple interest in the property.

Here, the court agreed with Harland's valuation, concluding that the lease was nothing more than a contract, i.e., "an intangible property right," not subject to taxation under RPTL 300. "Given that Harland provided a plausible reason for not relying on [the 2003 sale or] data from other national retail pharmacies in the area, [I] cannot say that [the court's] decision to credit Harland's report and testimony over [Rubino's] was against the weight of the evidence" (*Eckerd Corp.*, 35 AD3d at 934). I would thus decline to disturb "[t]he court's ultimate finding concerning the value of the property [because it] is within the range of the expert testimony and supported by substantial evidence, and the court adequately explained the basis for its ultimate finding" (*Matter of Markham v Comstock*, 38 AD3d 1262, 1263; *see Universal Packaging*, 259 AD2d at 875; *cf. Rite Aid Corp.*, 102 AD3d at 126-127).

Entered: July 10, 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 14-00961

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

IN THE MATTER OF RITE AID CORPORATION,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TERIE HUSEBY, ASSESSOR, AND BOARD OF ASSESSMENT
REVIEW OF TOWN OF IRONDEQUOIT,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

DAVIDSON FINK LLP, ROCHESTER (THOMAS A. FINK OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

ROBERT L. JACOBSON, PITTSFORD, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered March 27, 2014 in proceedings pursuant to RPTL article 7. The order, among other things, granted the petition to the extent that it directed that the assessment rolls be corrected to reflect reduced assessed values determined by the court for tax years 2008/2009 through 2012/2013 and directed that the overpayment of taxes be refunded with costs.

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

Same memorandum as in *Matter of Rite Aid Corp. v Huseby* ([appeal No. 2] ___ AD3d ___ [July 10, 2015]).

Entered: July 10, 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 14-00962

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

IN THE MATTER OF RITE AID CORPORATION,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TERIE HUSEBY, ASSESSOR, AND BOARD OF ASSESSMENT
REVIEW OF TOWN OF IRONDEQUOIT,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

DAVIDSON FINK LLP, ROCHESTER (THOMAS A. FINK OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

ROBERT L. JACOBSON, PITTSFORD, FOR PETITIONER-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered May 28, 2014 in proceedings pursuant to RPTL article 7. The order and judgment, among other things, adjudged that the assessment of petitioner's property, upon the rolls of assessment of the Town of Irondequoit for the years at issue, be reduced.

It is hereby ORDERED that the order and judgment so appealed from is reversed on the law without costs, and the petitions challenging the assessments for the 2008/2009 through 2012/2013 tax years are dismissed.

Memorandum: Petitioner commenced these RPTL article 7 proceedings seeking review of the real property tax assessments for a commercial property located in the Town of Irondequoit for the tax years 2008/2009 through 2012/2013. In appeal No. 1, respondents appeal from an order granting the respective petitions and ordering respondents to correct the assessment rolls and to refund the tax overpayments with costs. In appeal No. 2, respondents appeal from a final order and judgment incorporating the decision. We note at the outset that appeal No. 1 must be dismissed inasmuch as the order granting the petitions is subsumed in the final order and judgment in appeal No. 2 (*see M&T Bank v Choice Granite Products Ltd.* [appeal No. 2], 115 AD3d 1163, 1164).

Petitioner is the lessee under a 20-year triple net lease of a 1.39 acre parcel of real property located at 689 East Ridge Road in the Town of Irondequoit, which is improved by a 13,274-square-foot single-tenant retail pharmacy. Rent is $358,634 per annum or

approximately $27.02 per square foot. The pharmacy building was constructed in 2002 under a build-to-suit arrangement with petitioner's predecessor, Eckerd Drugs. The build-to-suit arrangement in this case involved the assemblage of two separate parcels of real property situated on a corner location in an established commercial corridor with good access from both roads. Under the terms of the lease, petitioner is responsible for, among other things, the payment of real property taxes. The property was sold in 2005 in what the parties agree was an arm's length sale for $4,903,634. At all relevant times, the property was assigned an assessed value of $3,650,000 by respondent Terie Huseby, assessor of the Town of Irondequoit. Petitioner commenced five proceedings pursuant to RPTL article 7 challenging those assessments. A nonjury trial was conducted at which the parties presented expert testimony. In granting the petitions, Supreme Court concluded, inter alia, that the 2005 sale of the subject property was not of "any probative value" in determining the fair market value of the fee simple interest in the property and that it was proper to disregard the actual rent in arriving at a value using the income capitalization method. We reverse.

We note at the outset that respondents do not dispute that petitioner came forth with substantial evidence, in the form of the appraisal report and testimony of its expert, to rebut the presumption of validity of the tax assessments (*see generally Matter of Techniplex III v Town & Vil. of E. Rochester*, 125 AD3d 1412, 1412-1413). Nor do respondents contend that the approach to valuation used by petitioner's expert, which rejects national chain drugstore comparables on the ground that they are "build-to-suit" and, thus, subject to above-market leases which encompass purchasing, often at a premium, and assembling various pieces of property, demolition and construction costs, is not plausible (*see Matter of Brooks Drugs, Inc. v Board of Assessors of City of Schenectady*, 51 AD3d 1094, 1095, *lv denied* 11 NY3d 710).

Within this framework, an appellate court is empowered to make new findings of value where the trial court " 'has failed to give to conflicting evidence the relative weight which it should have' " (*People ex rel. MacCracken v Miller*, 291 NY 55, 61, quoting *Matter of City of New York [Newton Creek]*, 284 NY 493, 497 [emphasis omitted]), giving due deference to the trial court's power to resolve credibility issues by choosing among conflicting expert opinions (*see Brooks Drugs, Inc.*, 51 AD3d at 1095).

It is well settled that real "[p]roperty is assessed for tax purposes according to its condition [and ownership] on the taxable status date, without regard to future potentialities or possibilities and may not be assessed on the basis of some use contemplated in the future" (*Matter of Addis Co. v Srogi*, 79 AD2d 856, 857, *lv denied* 53 NY2d 603; *see* RPTL 302 [1]; *Matter of BCA-White Plains Lanes v Glaser*, 91 AD2d 633, 634-635, *appeal dismissed* 59 NY2d 673). Although several methods of valuing real property are acceptable, "the market value method of valuation is preferred as the most reliable measure of a

property's full value for assessment purposes" (*Matter of General Elec. Co. v Town of Salina*, 69 NY2d 730, 731), because "[t]he best evidence of value, of course, is a recent sale of the subject property between a seller under no compulsion to sell and a buyer under no compulsion to buy" (*Matter of Allied Corp. v Town of Camillus*, 80 NY2d 351, 356, *rearg denied* 81 NY2d 784). A recent sale has been characterized as evidence of the "highest rank" in determining market value (*Matter of F. W. Woolworth Co. v Tax Commn. of City of N.Y.*, 20 NY2d 561, 565 [emphasis omitted]; *see Plaza Hotel Assoc. v Wellington Assoc.*, 37 NY2d 273, 277, *rearg denied* 37 NY2d 924). The scope of a "market" need not be limited to the locale of the subject property and, depending on the nature of the use, it may encompass national and/or international buyers and sellers (*see e.g. Matter of Saratoga Harness Racing v Williams*, 91 NY2d 639, 646).

In support of its case, petitioner presented the testimony of appraiser Christopher Harland, who valued the property unencumbered by any lease. Harland employed the comparable sales approach and income capitalization approach in arriving at his valuation. He valued the subject property at $1.44 million to $1.49 million on the relevant taxable status dates. The properties he used for comparison in his analysis consisted primarily of commercial retail properties located in the same general geographic area. None, however, were currently occupied by national pharmacy chains nor subject to build-to-suit leases. Indeed, Harland's sales comparables consisted of a Dollar Tree store; a Staples office supply store; a retail bicycle shop; and a kitchen retail store. Although Harland's appraisal recognized that a number of recent sales of retail drugstores had occurred in the region, he concluded that it was "not appropriate to use these sales" and gave them "little weight . . . in valuing the subject property."

On the other hand, respondents' expert, Ronald Rubino, testified, and his appraisal concluded, that there is an established national submarket for the sale and purchase of built-to-suit net lease national chain drugstores, which provides an abundance of drugstore comparable sales, both local and regional, for use in the sales comparison approach. Respondents' expert testified that such a submarket is the subject of a national real estate publication which he incorporated into his appraisal. The publication is published quarterly by PricewaterhouseCoopers, LLP, and provides detailed data for buyers and investors in numerous national submarkets including, inter alia, the National Net Lease Market, the National Medical Office Buildings Market, the National Retail Market, and the National Strip Shopping Center Market (*see* PwC Real Estate Investor Survey, http://www.pwc.com/us/en/asset-management/real-estate/publications/pwc-real-estate-investor-survey.jhtml [accessed June 18, 2015]). Respondents' expert specifically referenced the "National Net Lease Market Report" in his testimony and appraisal. Moreover, petitioner's expert also utilized the April 2005 "Net Lease Drug Store Market Report" as a source for capitalization rates and other market data. That report is published by The Boulder Group, which describes itself as "a boutique investment real estate service firm specializing in single tenant net lease properties. The firm provides a full range of

brokerage, advisory, and financing services nationwide to a substantial and diversified client base, which includes high net worth individuals, developers, REITs, partnerships and institutional investment funds" (The Boulder Group, http://bouldergroup.com/ [accessed June 18, 2015]). Thus, we conclude that there is no serious dispute that the submarket identified and relied upon by respondents' expert exists, and sales and rental data for that submarket is readily available (*see Brooks Drugs, Inc.*, 51 AD3d at 1095; *Matter of Eckerd Corp. v Gilchrist*, 44 AD3d 1239, 1241, *lv denied* 10 NY3d 707). It is noteworthy that petitioner's expert also recognized that the boundaries of the applicable submarket "are not purely physical or geographical" and, "to the extent that the market is the meeting place for buyers and sellers of real estate of a given type, the participants who deal within its confines set the boundaries of the market." Nonetheless, in his appraisal, petitioner's expert disregarded the applicable submarket and relied upon properties that are clearly outside of the well-recognized parameters of the net lease national drugstore market.

On the other hand, in reaching his valuation through the use of the sales comparison approach, respondents' expert identified and used nine commercial properties, eight of which were improved and occupied as national retail drugstore chain locations. Those eight properties were clearly within the recognized parameters of the national net lease submarket. The average sale price for those comparables was $4,924,378. Respondents' expert testified that the recent sale of the subject property was a "very good indicator" of the market value of the subject property, and was the "best comparable" to which he gave the "most weight." Petitioner's expert testified that the 2005 sale of the subject property played no role in his valuation.

Petitioner's expert also used the income capitalization method. When using that method, actual rental income is often, as a general rule, the best indicator of value (*see Techniplex III*, 125 AD3d at 1413; *Matter of Schoeneck v City of Syracuse*, 93 AD2d 988, 988; *see also Matter of Merrick Holding Corp. v Board of Assessors of County of Nassau*, 45 NY2d 538, 543). In reaching a valuation using the income capitalization method, petitioner's expert also rejected the actual contract rent, which he described as "substantially above market." Moreover, petitioner's expert rejected the rents of other net lease national drugstore properties in arriving at his determination of market rent. Instead, petitioner's expert identified "market rent" by using the following properties: a Goodwill Industries store and donation drop-off center, a non-profit corporation serving community needs; a Petsmart store; an Old Navy clothing retail store; a Gold's Gym; a Family Dollar retail store; and a Volunteers of America store, a nonprofit corporation that serves community needs and operates thrift or resale stores. Petitioner's expert did not use any operating national chain drugstore-occupied properties in his determination of "market rent" and arrived at a market rent of $12.00 per square foot.

On the other hand, respondents' expert utilized 11 rental

comparables, nine of which were occupied and used as national chain drugstores in the applicable market. The use of these comparables demonstrated that the adjusted comparable median market rent for these similar national chain drugstores was $36.76 per square foot, which yielded a valuation between $3,590,000 to $3,940,000 on the relevant valuation dates.

In light of the foregoing, we conclude that the failure of petitioner's expert to use the recent sale of the subject property, as well as readily available comparable sales of national chain drugstore properties in the applicable market, as evidence of value demonstrates the invalidity of the expert's conclusion with respect to the sales comparison valuation (*see Matter of Thomas v Davis*, 96 AD3d 1412, 1415, *lv denied* 21 NY3d 860). We further conclude that petitioner's expert's use of sales not comparable to the subject and outside of the applicable market should have been rejected by the court as unreliable (*see Matter of Adcor Realty Corp. v Srogi*, 54 AD2d 1096, 1096, *lv denied* 41 NY2d 806). Moreover, the failure of petitioner's expert to use the actual rent, negotiated at arm's length and without duress or collusion, as well as the failure to use similar rental comparables from the applicable submarket as evidence of value, demonstrates the invalidity of the expert's conclusions using the income capitalization method (*see Matter of Conifer Baldwinsville Assoc. v Town of Van Buren*, 68 NY2d 783, 785; *see generally Techniplex III*, 125 AD3d at 1413). We thus conclude that the court's decision to credit the appraisal of petitioner's expert was against the weight of the evidence (*see Matter of Rite Aid Corp. v Otis*, 102 AD3d 124, 127, *lv denied* 21 NY3d 855; *see also Matter of Kohl's Ill. Inc. #691 v Board of Assessors of the Town of Clifton Park*, 123 AD3d 1315, 1317).

All concur except SCUDDER, P.J., who dissents and votes to affirm in the following memorandum: I respectfully dissent for the reasons set forth in my dissent in *Matter of Rite Aid Corp. v Haywood* (___ AD3d ___ [July 10, 2015]).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

473

CA 14-02013

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

SARAH E. WOLF AND MICHAEL WOLF,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

ANDRE A. PERSAUD, M.D.,
DEFENDANT-APPELLANT-RESPONDENT,
COLLINS O. OSULA, M.D. AND G & P GYNECARE, P.C.,
DEFENDANTS-RESPONDENTS.

COLUCCI & GALLAHER, P.C., BUFFALO (MARYLOU K. ROSHIA OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT AND DEFENDANTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered February 26, 2014. The order and judgment, among other things, granted in part plaintiffs' posttrial motion to set aside the jury verdict.

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

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries sustained by Sarah E. Wolf (plaintiff), which plaintiffs alleged were caused by the failure of, inter alia, Andre A. Persaud, M.D. (defendant) to have timely diagnosed a deep vein thrombosis in plaintiff's iliac vein. Following a trial, the jury returned a verdict finding defendant negligent and awarded damages in the amounts of $1,050 for past medical expenses and $9,450 for future medical expenses. The jury awarded no damages for plaintiff's pain and suffering or for plaintiff Michael Wolf's alleged loss of consortium. During the trial, when plaintiffs rested and again at the close of proof, defendant made a motion for a directed verdict pursuant to CPLR 4401 on the ground that plaintiffs had failed to present a prima facie case on the issue of causation. Supreme Court denied both motions and defendant appeals from the order and judgment with respect thereto. Plaintiffs made a posttrial motion seeking to set aside the verdict with respect to the issues of past and future pain and suffering, future medical expenses, and loss of consortium. The court granted that part of plaintiffs' posttrial motion with respect to the issue of past and future pain and

suffering, and ordered a new trial on those items of damages. Plaintiffs cross-appeal from the order and judgment with respect to the denial of the remaining parts of their posttrial motion.

We reject defendant's contention on appeal that the court erred in denying his motions. In determining a motion for a directed verdict, the court must view the evidence in the light most favorable to the nonmoving party and resolve all issues of credibility in favor of the nonmoving party (*see Colburn v Blum*, 233 AD2d 888, 889-890), and may grant the motion only if there is no rational process by which the jury could find for the plaintiffs as against the moving defendant (*see Docteur v Belleville-Henderson Cent. Sch. Dist.*, 307 AD2d 751, 752; *Murphy v Kendig*, 295 AD2d 946, 947). Here, we conclude that plaintiffs presented a prima facie case on the issue of causation, i.e., legally sufficient evidence, through the testimony of their expert, from which a jury could conclude that defendant's failure to order a timely MRI study of plaintiff's iliac vein diminished her chance of a better outcome or increased the injury (*see Goldberg v Horowitz*, 73 AD3d 691, 694). Although defendant's expert offered a contrary opinion, the conflicting testimony merely presented a question of fact for the jury to resolve (*see Mazella v Beals*, 124 AD3d 1328, 1329).

Defendant's further contention that the court erred in permitting the use of a publication from the American College of Obstetricians and Gynecologists to be used during cross-examination because he did not recognize it as "authoritative" is not preserved for our review because he did not object to the publication on that specific ground (*see generally Carr v Burnwell Gas of Newark, Inc.*, 23 AD3d 998, 998). In any event, it is well settled that the use of scientific works and publications may be used for impeachment purposes during cross-examination if it has been demonstrated that the work is the type of material commonly relied upon in the profession and has been deemed authoritative by such expert (*see Lenzini v Kessler*, 48 AD3d 220, 220; *Egan v Dry Dock, E. Broadway & Battery R.R. Co.*, 12 App Div 556, 571). Here, defendant recognized the publication as a "standard of care" to which he attempted to "adhere" in his own practice. Although he did not use the word "authoritative" in describing the publication, we note that the modern trend, with which we agree, is to eschew a narrow and rigid reliance upon semantic choices when other words, and the testimony viewed as a whole, convey an equivalent meaning as that in the traditional verbal formulation (*see Linton v Nawaz*, 62 AD3d 434, 443, *affd* 14 NY3d 821; *Cholewinski v Wisnicki*, 21 AD3d 791, 792; *see also Matott v Ward*, 48 NY2d 455, 460-461). Thus, a physician may "not foreclose full cross-examination by the semantic trick of announcing that he did not find the work authoritative" where he has testified that it is reliable (*Spiegel v Levy*, 201 AD2d 378, 379, *lv denied* 83 NY2d 758; *see Lenzini*, 48 AD3d at 220), especially where, as here, he agreed that it constituted a "standard of care" to which he attempted to "adhere." Defendant's further contentions concerning plaintiffs' cross-examination of the remaining experts are without merit for the same reason.

We agree with plaintiffs that the court properly set aside the verdict with respect to the jury's failure to award any damages for past or future pain and suffering and ordered a new trial on those items of damages (*see Ramos v New York City Hous. Auth.*, 280 AD2d 325, 326). Contrary to defendant's contention, plaintiffs' posttrial motion to set aside that aspect of the verdict as against the weight of the evidence preserved this issue for our review (*see Simmons v Dendis Constr.*, 270 AD2d 919, 920-921). In light of the uncontradicted evidence of the chronic nature of plaintiff's condition and the pain and discomfort associated therewith, the jury's failure to award damages for pain and suffering "is contrary to a fair interpretation of the evidence and constitutes a material deviation from what would be reasonable compensation" (*Grasso v American Brass Co.*, 212 AD2d 994, 995). Defendant failed to preserve for our review his further contention that the jury verdict with respect to the issues of liability and damages for pain and suffering represented a "compromise" verdict (*see Wall v Shepard*, 53 AD3d 1050, 1050; *Ray v Oddo*, 175 AD2d 155, 157, *lv denied* 81 NY2d 702).

We reject plaintiffs' contention on their cross appeal that the jury's failure to award any damages on the cause of action for loss of consortium was against the weight of the evidence (*see Rivera v City of New York*, 40 AD3d 334, 344, *lv dismissed* 16 NY3d 782; *Gutierrez v City of New York*, 288 AD2d 86, 86). Finally, contrary to plaintiffs' further contention, we conclude that the award of $9,450 for future medical expenses does not deviate materially from what would be reasonable compensation (*see* CPLR 5501 [c]).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

477

CA 14-01406

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

ROBERT H. METCALF,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DAVID M. CUNNINGHAM, INDIVIDUALLY AND AS FIDUCIARY FOR THE ESTATE OF JOAN S. CUNNINGHAM, DECEASED, PETER CUNNINGHAM, KIM CUNNINGHAM, POSSIBLY KNOWN AS KIMBERLY CUNNINGHAM, DEFENDANTS-APPELLANTS-RESPONDENTS, ET AL., DEFENDANTS.

BOND, SCHOENECK & KING PLLC, ROCHESTER (JEFFREY F. ALLEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered October 29, 2013. The order, among other things, denied the motion of David M. Cunningham, individually and as fiduciary for the estate of Joan S. Cunningham, deceased, Peter Cunningham and Kim Cunningham seeking to dismiss plaintiff's amended complaint.

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

Memorandum: We affirm for reasons stated in the amended decision at Supreme Court. We write only to note that certain contentions of David M. Cunningham, individually and as fiduciary for the estate of Joan S. Cunningham, deceased, Peter Cunningham and Kim Cunningham, possibly known as Kimberly Cunningham (collectively, defendants), are not properly before us on this appeal. Defendants' contention that plaintiff either waived the right to sue defendants for their conduct occurring before plaintiff executed a purported easement, or is estopped from asserting a claim for such conduct, is raised for the first time on appeal, and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Similarly, defendants' contention that they are entitled to counsel fees arising from plaintiff's motion for summary judgment is raised for the first time in their reply brief on appeal, and "it is well settled that a contention raised for the first time in a reply brief is not properly before us" (*Becker-Manning, Inc. v Common Council of City of Utica*,

114 AD3d 1143, 1144; *see HSBC Bank USA, N.A. v Prime, L.L.C.*, 125 AD3d 1307, 1307-1308; *Przesiek v State of New York*, 118 AD3d 1326, 1327).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

677

CA 15-00059

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

IRONWOOD, L.L.C., PLAINTIFF-RESPONDENT,
ET AL., PLAINTIFF,

V ORDER

JGB PROPERTIES, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

SCHLATHER, STUMBAR, PARKS & SALK, LLP, ITHACA (RAYMOND M. SCHLATHER OF COUNSEL), AND CAMARDO LAW FIRM, P.C., AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered March 24, 2014. The order, among other things, awarded plaintiff Ironwood, L.L.C., punitive damages in the amount of $300,000.

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: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

678

CA 15-00079

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

IRONWOOD, L.L.C., PLAINTIFF-RESPONDENT-APPELLANT,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

JGB PROPERTIES, LLC, DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 2.)

SCHLATHER, STUMBAR, PARKS & SALK, LLP, ITHACA (RAYMOND M. SCHLATHER OF COUNSEL), AND CAMARDO LAW FIRM, P.C., AUBURN, FOR DEFENDANT-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from a judgment of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered March 27, 2014. The judgment awarded plaintiff Ironwood, L.L.C., punitive damages in the amount of $300,000, plus costs and disbursements.

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

Memorandum: Ironwood, L.L.C. (plaintiff) is the successor in interest to an easement granting a "permanent right of way for a railroad spur track" over property owned by defendant. The spur track connected plaintiff's property with the main railway line. After defendant removed the spur track over plaintiff's objections, plaintiff commenced this action seeking, inter alia, a declaratory judgment, injunctive relief, and damages based upon defendant's alleged unlawful interference with the easement.

This matter has been before this Court several times already (*Ironwood, L.L.C. v JGB Props., LLC* [appeal No. 2], 122 AD3d 1305, *lv dismissed* 24 NY3d 1113; *Ironwood, L.L.C. v JGB Props., LLC*, 122 AD3d 1306; *Ironwood, L.L.C. v JGB Props., LLC*, 99 AD3d 1192). Defendant now appeals from a judgment, entered after a hearing, awarding plaintiff punitive damages in the amount of $300,000, together with costs and disbursements. We affirm.

As a preliminary matter, we note that, "although plaintiff did not cross-appeal from the judgment in appeal No. 2, we exercise our discretion to treat [its] notice of [cross] appeal [in appeal No. 1] as valid and deem [its cross] appeal as taken from the . . . judgment

in appeal No. 2" (*Nary v Jonientz*, 110 AD3d 1448, 1448 [internal quotation marks omitted]; *see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988; *see also* CPLR 5520 [c]).

Defendant contends that Supreme Court erred in awarding more than nominal punitive damages. We reject that contention. We note that "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a grossly excessive punishment on a tortfeasor" (*BMW of N. Am., Inc. v Gore*, 517 US 559, 562 [internal quotation marks omitted]). The three factors to consider in evaluating whether an award is grossly excessive are "the degree of reprehensibility . . . ; the disparity between the harm or potential harm suffered . . . and [the] punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases" (*id*. at 575; *see Western N.Y. Land Conservancy, Inc. v Cullen*, 66 AD3d 1461, 1464, *appeal dismissed* 13 NY3d 904, *lv denied* 14 NY3d 705, *rearg denied* 15 NY3d 746). Defendant concedes that "[o]nly the first two . . . factors are relevant here." Upon our review of the punitive damages award, we conclude that it was neither excessive nor violative of defendant's due process rights. With respect to the first factor, we have already determined on a prior appeal that defendant's conduct was sufficiently reprehensible to entitle plaintiff to punitive damages inasmuch as "defendant acted with actual malice when it removed the spur track[,] and . . . its conduct rose to the level of a wanton, willful or reckless disregard of plaintiff['s] rights relative to the easement" (*Ironwood, L.L.C.*, 99 AD3d at 1195 [internal quotation marks omitted]), and that determination was binding on the court. Furthermore, our determination of defendant's reprehensibility constitutes the law of the case for this Court and it "cannot be disturbed on this appeal" (*Trisvan v County of Monroe*, 55 AD3d 1282, 1283, *lv denied* 11 NY3d 716 [internal quotation marks omitted]). With respect to the second factor, "we conclude that the award bears a reasonable relation to the harm done and the flagrancy of the conduct causing it" (*Western N.Y. Land Conservancy, Inc.*, 66 AD3d at 1464 [internal quotation marks omitted]; *see Fareway Hgts. v Hillock*, 300 AD2d 1023, 1025).

We reject defendant's further contention that the court could not use defendant's wealth to justify the punitive damages award inasmuch as the punitive damages award was not "otherwise unconstitutional" (*State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 427). We also reject defendant's contention that the court erred in "excluding all evidence, except evidence of defendant['s] . . . net worth, from the hearing held on punitive damages." The court properly determined that the excluded evidence was relevant only to issues that were either abandoned by defendant or previously decided against defendant on prior appeals (*see Ironwood, L.L.C.* [appeal No. 2], 122 AD3d at 1305-1306; *Ironwood, L.L.C.*, 122 AD3d at 1306; *Ironwood*, *L.L.C.*, 99 AD3d at 1195-1196; *see also Lipp v Port Auth. of N.Y. & N.J.*, 57 AD3d 953, 954; *Trisvan*, 55 AD3d at 1283; *Matter of Hicks v Schoetz*, 261 AD2d 944, 945; *see generally Cardo v Board of Mgrs., Jefferson Vil. Condo 3*, 67 AD3d 945, 945-946).

Although we have taken judicial notice, when necessary, of the briefs and records previously filed with us on the appeals taken in this action (*see Edward J. Minskoff Equities, Inc. v Crystal Window & Door Sys., Ltd.*, 108 AD3d 488, 490), we decline to take judicial notice of defendant's petition seeking declaratory relief before the Surface Transportation Board. We deem that petition to be dehors the record, and we have considered neither it nor references to it on this appeal (*see Sanders v Tim Hortons*, 57 AD3d 1419, 1420). In any event, we previously determined that the Interstate Commerce Commission Termination Act of 1995 (49 USC § 10101, *et seq.*) does not expressly or impliedly preempt the instant action (*Ironwood, L.L.C.*, 122 AD3d at 1306).

We reject plaintiff's contentions on its cross appeal that the court erred in precluding it from offering evidence of defendant's alleged wrongdoing committed after the commencement of this action and in denying plaintiff's request to include legal expenses, such as attorney's fees, as part of the punitive damages award. "Whether to award punitive damages in a particular case, as well as the amount of such damages, if any, are primarily questions which reside in the sound discretion of the original trier of the facts" (*Nardelli v Stamberg*, 44 NY2d 500, 503; *see Baity v General Elec. Co.*, 86 AD3d 948, 950). Contrary to plaintiff's contentions, we conclude that the court did not abuse its discretion.

We have reviewed the parties' remaining contentions and conclude that they are without merit.

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

679

CA 14-01763

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

CANANDAIGUA EMERGENCY SQUAD, INC., PENFIELD VOLUNTEER EMERGENCY AMBULANCE SERVICE, INC., NORTHEAST QUADRANT ADVANCED LIFE SUPPORT, INC., CHILI VOLUNTEER AMBULANCE SERVICE, INC., AND VILLAGE OF MACEDON, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ROCHESTER AREA HEALTH MAINTENANCE ORGANIZATION, INC., DOING BUSINESS AS PREFERRED CARE, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

PINSKY LAW GROUP, PLLC, SYRACUSE (BRADLEY M. PINSKY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered December 26, 2013. The order, among other things, granted defendant's motion to strike plaintiffs' demand for a jury trial.

It is hereby ORDERED that said appeal from that part of the second ordering paragraph denying that part of plaintiffs' cross motion seeking to preclude certain evidence, and from the third and fourth ordering paragraphs is unanimously dismissed (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985), and the order is modified on the law by denying the motion, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs are various entities that provided emergency ambulance services to persons enrolled in health insurance plans administered by defendant. Plaintiffs submitted bills to defendant, and defendant remitted payments to plaintiffs for those services. In 2008, defendant informed plaintiffs that it overpaid them for services provided in 2007 and 2008, and it thereafter reduced payments made to plaintiffs in order to recoup the alleged overpayments for that period. Plaintiffs commenced this action challenging defendant's right to recoup the alleged overpayments.

Defendant filed a note of issue requesting a nonjury trial and plaintiffs responded with a demand for a jury trial. Defendant moved

to strike the demand, and plaintiffs cross-moved to dismiss certain affirmative defenses and to preclude defendant from introducing evidence that its alleged overpayments were based upon mistakes attributable to the computer software program used by defendant to process payments to plaintiffs.

By the order in appeal No. 1, Supreme Court granted defendant's motion and that part of plaintiffs' cross motion seeking dismissal of the sixth affirmative defense. The court otherwise denied the cross motion. In addition, the court, sua sponte, struck the amended note of issue and certificate of readiness and granted defendant leave to amend its answer with counterclaims "for the sole purpose of pleading a defense based upon the software error."

Defendant moved to reargue that part of plaintiffs' cross motion seeking to preclude defendant from introducing evidence concerning the alleged software error, and to strike, as unnecessary, those parts of the order that the court granted sua sponte. By the order in appeal No. 2, the court granted defendant's motion in its entirety and, upon reargument, adhered to its decision denying that part of plaintiffs' cross motion seeking to preclude evidence.

In appeal No. 1, plaintiffs' "notice of cross appeal" expressly limited the scope of the appeal and did not include that part of the order denying their cross motion insofar as it sought dismissal of the first and fifth affirmative defenses. We decline to exercise our discretion to construe the notice of appeal to encompass plaintiffs' contention that the court erred in denying the cross motion to that extent (*see Haas v Haas*, 265 AD2d 887, 888-889; *see generally McSparron v McSparron*, 87 NY2d 275, 282, *rearg dismissed* 88 NY2d 916).

We agree with plaintiffs in appeal No. 1, however, that the court erred in granting defendant's motion to strike their demand for a jury trial, and we therefore modify the order accordingly. The question whether plaintiffs are entitled to a jury trial turns on whether "the underlying claims set forth in the complaint are legal rather than equitable in nature" (*Martell v North Riv. Ins. Co.*, 107 AD2d 948, 949). Here, we conclude that plaintiffs' request for "a declaration that [defendant] is not entitled to offset or recoup any funds from [p]laintiffs" is incidental to their request for monetary relief. "[V]iewed in its entirety, the primary character of the case is legal" (*Cadwalader Wickersham & Taft v Spinale*, 177 AD2d 315, 316), and "the complaint contains 'demands and sets forth facts which would permit a judgment for a sum of money only' " (*Harris v Trustco Bank N.Y.*, 224 AD2d 790, 791, quoting CPLR 4101 [1]).

In appeal No. 2, the court, upon reargument, properly adhered to its prior decision denying that part of the cross motion seeking to preclude defendant from introducing evidence concerning its mistaken overpayments arising from the alleged software error. Contrary to plaintiffs' contention, the record is replete with references to that alleged error, which is at the foundation of defendant's counterclaims for restitution and money had and received (*see Banque Worms v Bank America Intl.*, 77 NY2d 362, 366-367; *Manufacturers Hanover Trust Co. v*

Chemical Bank, 160 AD2d 113, 117-118, *lv denied* 77 NY2d 803).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

680

CA 14-01764

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

CANANDAIGUA EMERGENCY SQUAD, INC., PENFIELD VOLUNTEER EMERGENCY AMBULANCE SERVICE, INC., NORTHEAST QUADRANT ADVANCED LIFE SUPPORT, INC., CHILI VOLUNTEER AMBULANCE SERVICE, INC., AND VILLAGE OF MACEDON, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ROCHESTER AREA HEALTH MAINTENANCE ORGANIZATION, INC., DOING BUSINESS AS PREFERRED CARE, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

PINSKY LAW GROUP, PLLC, SYRACUSE (BRADLEY M. PINSKY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered May 27, 2014. The order, among other things, granted defendant's motion for leave to reargue and, upon reargument, adhered to its decision denying that part of plaintiffs' cross motion seeking to preclude certain evidence.

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

Same memorandum as in *Canandaigua Emergency Squad, Inc. v Rochester Area Health Maintenance Org., Inc*. ([appeal No. 1] ___ AD3d ___ [July 10, 2015]).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

688

KA 13-00748

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD J. ENGLERT, II, DEFENDANT-APPELLANT.

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 (Dennis M. Kehoe, A.J.), rendered April 9, 2013. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]). We reject defendant's contention that County Court erred in permitting the People to introduce evidence of his sexual practices and/or proclivities with his former girlfriend. Inasmuch as such evidence was not related to any prior crime or misconduct, we conclude that it did not constitute *Molineux* evidence (*see People v Cortez*, 22 NY3d 1061, 1076-1080 [Abdus-Salaam, J., concurring], *cert denied* ___ US ___, 135 S Ct 146).

Contrary to defendant's contention, the court did not abuse its discretion in permitting the People to elicit testimony from the investigating police officer concerning his training and background in child sexual abuse investigations as well as testimony that provided a general overview of such investigations (*see People v Kozlowski*, 11 NY3d 223, 238, *rearg denied* 11 NY3d 904, *cert denied* 556 US 1282). Moreover, inasmuch as the officer's testimony did not contain any statement of the victim, it could not be considered bolstering (*see People v Ludwig*, 24 NY3d 221, 230-232). Defendant failed to preserve for our review his contention that the court erred in permitting the testimony of an expert with respect to child sexual abuse accommodation syndrome (CSAAS) (*see generally People v Goupil*, 104 AD3d 1215, 1216, *lv denied* 21 NY3d 943), and, in any event, that contention is without merit (*see People v Williams*, 20 NY3d 579, 583-

584; *People v Spicola*, 16 NY3d 441, 465, *cert denied* ___ US ___, 132 S Ct 400; *People v Black*, 124 AD3d 1365, 1366-1367). We likewise reject defendant's contention that the testimony of the nurse-practitioner "improperly bolstered the perceived credibility" of the victim. The testimony was well within the type of expert testimony that is accepted by the courts in New York (*see Spicola*, 16 NY3d at 465), and did not constitute bolstering (*see Ludwig*, 24 NY3d at 230-232).

Contrary to the further contention of defendant, "[t]he failure of defense counsel to obtain the testimony of an expert does not constitute ineffective assistance of counsel because defendant has not shown that 'such testimony was available, that it would have assisted the jury in its determination or that [defendant] was prejudiced by its absence' " (*People v Brandi E.*, 38 AD3d 1218, 1219, *lv denied* 9 NY3d 863; *see People v Aikey*, 94 AD3d 1485, 1487, *lv denied* 19 NY3d 956). Insofar as defendant contends that defense counsel was ineffective in failing to object to the testimony of the People's CSAAS expert, we note that the law is well settled that such testimony is permitted (*see Spicola*, 16 NY3d at 465; *see also People v Karst*, 166 AD2d 920, 921, *lv denied* 76 NY2d 987), and defense counsel thus had no legitimate basis to object (*see People v Wallace*, 60 AD3d 1268, 1270-1271, *lv denied* 12 NY3d 922).

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).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

709

CA 14-01676

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

KOVALSKY-CARR ELECTRIC SUPPLY CO., INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HARTFORD CASUALTY INSURANCE COMPANY AND
EASTCOAST ELECTRIC, LLC, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

ADAMS BELL ADAMS, P.C., ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

RELIN, GOLDSTEIN & CRANE LLP, ROCHESTER, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered December 18, 2013. The judgment awarded plaintiff damages in the principal amount of $70,460.98.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, to recover sums allegedly remaining due pursuant to an agreement with defendant EastCoast Electric, LLC (EastCoast). The State University Construction Fund hired EastCoast as the prime contractor for a construction project (SUCF project), and EastCoast entered into an agreement with plaintiff pursuant to which plaintiff supplied materials for the SUCF project, and EastCoast obtained a labor and material bond from defendant Hartford Casualty Insurance Company.

In appeal No. 1, defendants appeal from an order that, inter alia, granted plaintiff's motion for partial summary judgment on its first cause of action and denied their cross motion for leave to amend the answer. We note at the outset that the order was subsumed in a judgment that was subsequently entered and, while the appeal properly lies from the judgment, we exercise our discretion to treat the notice of appeal as valid and deem the appeal to be from the judgment (*see* CPLR 5520 [c]; *Hendryx v Johnson Boys Ford-Mercury*, 309 AD2d 1260, 1260). In appeal No. 2, defendants appeal from an order that granted plaintiff's motion seeking, inter alia, to dismiss the answer with counterclaims and denied their cross motion to consolidate this action with another pending action commenced by plaintiff against EastCoast.

We conclude in appeal No. 1 that Supreme Court properly granted plaintiff's motion for partial summary judgment on its first cause of action. Plaintiff established its entitlement to judgment by submitting the documents comprising its agreement with EastCoast along with evidence establishing that EastCoast failed to make the payments required by the terms of that agreement (*see Deere & Co. v M.P. Jones Cos., Inc*. [appeal No. 1], 93 AD3d 1208, 1208). Defendants failed to raise a triable issue of fact in opposition to the motion (*see Resetarits Constr. Corp. v Elizabeth Pierce Olmsted, M.D. Ctr. for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1455). We further conclude in appeal No. 1 that the court properly denied defendants' cross motion for leave to amend their answer inasmuch as the proposed amendment is lacking in merit (*see Pink v Ricci*, 100 AD3d 1446, 1448-1449).

In appeal No. 2, we reject defendants' contention that the court erred in denying their cross motion to consolidate this action with another pending action commenced by plaintiff against EastCoast. It is not possible to determine from the submissions in support of the cross motion whether the actions raise "a common question of law or fact" warranting consolidation (CPLR 602 [a]). We also reject defendants' contention that the court erred in granting that part of plaintiff's motion to dismiss the second counterclaim, which seeks attorney's fees incurred in the instant action pursuant to State Finance Law § 137 (4) (c). Inasmuch as plaintiff prevailed on its first cause of action, it cannot be said that plaintiff's "claim is without substantial basis in fact or law" (*id.*). We agree with defendants, however, that the court erred in granting plaintiff's motion to the extent that it sought dismissal of the first counterclaim. That counterclaim alleges that plaintiff is liable for backcharges for incomplete or incorrect labor or materials provided by plaintiff to EastCoast on the SUCF project and on two additional projects. Plaintiff failed to establish its entitlement to judgment with respect to that counterclaim insofar as it relates to those two additional projects (*see New York Univ. v Cliff Tower, LLC*, 107 AD3d 649, 650). We therefore modify the order in appeal No. 2 accordingly.

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

710

CA 14-01858

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

KOVALSKY-CARR ELECTRIC SUPPLY CO., INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HARTFORD CASUALTY INSURANCE COMPANY AND
EASTCOAST ELECTRIC, LLC, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

ADAMS BELL ADAMS, P.C., ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

RELIN, GOLDSTEIN & CRANE LLP, ROCHESTER, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered September 23, 2014. The order, among other things, granted the motion of plaintiff to strike the answer and counterclaims of defendants and denied the cross motion of defendants to consolidate.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying in part plaintiff's motion and reinstating the first counterclaim, and as modified the order is affirmed without costs.

Same memorandum as in *Kovalsky-Carr Elec. Supply Co., Inc. v Hartford Cas. Ins. Co.* ([appeal No. 1] ___ AD3d ___ [July 10, 2015]).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

713

KA 10-00358

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OLE PETTERSEN, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (DANIEL J. JAWOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered May 27, 2009. The judgment convicted defendant, upon a jury verdict, of offering a false instrument for filing in the first degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the amount of restitution ordered and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of three counts of offering a false instrument for filing in the first degree (Penal Law § 175.35 [1]) and ordering him to pay restitution in the amount of $675,984. Defendant's conviction stems from allegations of fraudulent Medicaid billing relating to his operation of a substance abuse and methadone treatment facility. Specifically, defendant charged certain clients for counseling services in such a way that the services could be billed at a higher rate.

We reject defendant's contention that County Court's failure to charge the jury on mistake of law deprived him of a fair trial. The mistake of law defense set forth in Penal Law § 15.20 (2) (a) relieves a person of criminal liability if he or she engaged in such conduct in reliance upon an official statement of the law contained in a statute or other enactment. Defendant contends that evidence demonstrating his good faith misunderstanding of complex billing regulations warranted a mistake of law charge. In *People v Marrero* (69 NY2d 382, 387), the Court of Appeals noted that the mistake of law defense "was intended to be a very narrow escape valve," and that it applies only where "an individual demonstrates an effort to learn what the law is, relies on the validity of that law and, later, it is determined that there was *a mistake in the law itself*" (*id.* at 390). That is not the case here. In any event, we note that the court properly instructed

the jury on the issue of specific intent, thereby allowing the jury to consider whether defendant's good-faith belief that his billing practice was legal prevented him from forming a specific intent to defraud.

Defendant further failed to demonstrate that he relied on an official statement. Contrary to defendant's contention, we conclude that Penal Law § 15.20 (2) (d) does not apply in this case. Penal Law § 15.20 (2) (d) relieves a person of criminal liability if he or she engaged in such conduct in reliance upon "an interpretation of the statute or law relating to the offense, officially made or issued by a public servant, agency or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute or law." No government official issued a statement authorizing the conduct in question and, indeed, defendant was warned by governmental officials that his conduct was improper (*see id.*; *see also Marrero*, 69 NY2d at 385-386).

We further conclude that the court did not err in denying defendant's request for a circumstantial evidence charge inasmuch as the People presented both direct and circumstantial evidence (*see People v Smith*, 90 AD3d 1565, 1566, *lv denied* 18 NY3d 998; *People v Stanford*, 87 AD3d 1367, 1369, *lv denied* 18 NY3d 886). Contrary to defendant's contention, the fact that the element of intent was established solely through circumstantial evidence did not require the court to give a circumstantial evidence charge (*see People v Saxton*, 75 AD3d 755, 758, *lv denied* 15 NY3d 924).

We reject defendant's contention that the verdict is against the weight of the evidence with respect to his intent to defraud (*see* Penal Law § 175.35). 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).

As defendant correctly concedes, by failing to object to the prosecutor's remarks on summation, defendant failed to preserve for our review his contention that prosecutorial misconduct denied him a fair trial (*see People v Johnson*, 121 AD3d 1578, 1579; *People v King*, 53 AD3d 1105, 1105, *lv denied* 11 NY3d 790). 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 agree with defendant, however, that the People failed to meet their burden of establishing the amount of restitution to be paid by defendant. At the restitution hearing held pursuant to Penal Law § 60.27 (2), the People had the burden of proving "the amount of defendant's gain from the commission of the offense[s] . . . based upon a preponderance of the evidence" (CPL 400.30 [4]; *see People v Consalvo*, 89 NY2d 140, 145). An auditor for the Attorney General testified at the hearing that, based on her review of the records of 52 clients, defendant owed restitution in the amount of $675,984. Those client records, however, were not admitted in evidence at the restitution hearing. Moreover, the People did not seek to incorporate

any of the trial testimony to support the restitution claim, nor did they offer any evidence other than the auditor's testimony and two spreadsheets summarizing her findings based on the client records. Without the admission in evidence of the client records, the auditor's testimony regarding defendant's gain was conclusory and lacked a proper evidentiary basis (*see People v Wilson*, 59 AD3d 807, 808-809; *see also People v Pugliese*, 113 AD3d 1112, 1113, *lv denied* 23 NY3d 1066). We therefore modify the order by vacating the amount of restitution ordered. In view of our determination, we do not address defendant's remaining contentions regarding restitution.

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

715

KA 11-02526

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL CRUZ, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Terrence M. Parker, A.J.), rendered November 1, 2011. The judgment convicted defendant, upon a jury verdict, of grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the conviction to petit larceny and vacating the sentence, and as modified the judgment is affirmed, and the matter is remitted to Cattaraugus County Court for sentencing.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of grand larceny in the third degree (Penal Law § 155.35 [1]), which arose out of the theft of four puppies of a certain breed. Defendant contends that the conviction is not supported by legally sufficient evidence because the People failed to establish, among other things, that the value of the stolen property exceeded $3,000. Defendant concedes that he failed to preserve for our review his challenges to the legal sufficiency of the evidence. We nevertheless exercise our power to review his challenge with respect to the value of the stolen puppies as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we conclude that the conviction is not supported by legally sufficient evidence with respect thereto (*see generally People v Danielson*, 9 NY3d 342, 349).

The People were required to establish beyond a reasonable doubt that the market value of the stolen puppies at the time of the crime exceeded $3,000 (*see* Penal Law § 155.20 [1]), and they attempted to meet that burden with testimony from the victim of the crime. We note, however, that "[l]egally sufficient evidence of value is not supplied by the opinion testimony of a victim who is not qualified to testify as an expert" (*People v Stein*, 172 AD2d 1060, 1060, *lv denied*

78 NY2d 975) and, here, the victim testified that he was not a dog expert. In any event, the victim's substantive testimony concerning the value of the stolen puppies amounted to merely speculative statements of value, and not conclusive proof thereof (*see generally People v Harold*, 22 NY2d 443, 445; *People v Loomis*, 56 AD3d 1046, 1047). Notably, the victim testified that he had advertised the puppies and sold one of them under the representation that it was of a certain breed, but the puppies were, in fact, of another breed. Therefore, "[o]n this record, we cannot conclude that the jury ha[d] a reasonable basis for inferring, rather than speculating, that the value of the [stolen] property exceeded the statutory threshold of $3,000" (*People v Morgan*, 111 AD3d 1254, 1257 [internal quotation marks omitted]). Inasmuch as the proof of value in excess of $3,000 is insufficient, we reduce the conviction to petit larceny (Penal Law § 155.25; *see People v Vandenburg*, 254 AD2d 532, 534, *lv denied* 93 NY2d 858), and we remit the matter to County Court for sentencing on that reduced conviction.

We have reviewed defendant's remaining contentions and conclude that none warrants further modification or reversal of the judgment.

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

716

KA 14-00566

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRELL HALE, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (JEREMY V. MURRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered November 19, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: 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 refusing to suppress evidence on the basis that it was the fruit of an unnecessarily prolonged traffic stop. We reject that contention. The evidence at the suppression hearing established that the police lawfully stopped the rental vehicle being driven by defendant because it did not have a license plate lamp, and the license plate was rendered unreadable by a covering of dirt (*see* Vehicle and Traffic Law §§ 375 [2] [a] [4]; 402 [1]; *People v Brooks*, 23 AD3d 847, 848, *lv denied* 6 NY3d 810; *People v Potter*, 266 AD2d 920, 920-921, *lv denied* 94 NY2d 865). During their initial visit to the vehicle, the police asked to see defendant's license and registration, as well as the rental agreement for the vehicle. Upon examination of those documents away from the vehicle, they concluded that defendant was the sole occupant of the vehicle, but that he was not listed on the vehicle rental agreement as an authorized driver of the vehicle. That conclusion provided the police with at least "a founded suspicion that criminal activity [was] afoot" (*People v Hollman*, 79 NY2d 181, 184), i.e., that defendant was committing the unauthorized use of a motor vehicle in the third degree (*see* Penal Law § 165.05 [1]; *People v Bryant*, 77 AD3d 485, 485, *lv denied* 16 NY3d 829). The police were therefore justified in returning to the vehicle a second time to inquire into the identity of the person named on the rental agreement

and whether defendant had permission to use the vehicle (*see generally People v Jones*, 66 AD3d 1476, 1477, *lv denied* 13 NY3d 908; *People v Kelly*, 37 AD3d 866, 867, *lv denied* 8 NY3d 986). During their second visit to defendant's vehicle, one of the police officers saw a gun on the floor of the vehicle, which provided the police with probable cause to arrest defendant (*see People v Johnson*, 114 AD3d 1132, 1132, *lv denied* 24 NY3d 961). We therefore conclude that the police "did not inordinately prolong the detention beyond what was reasonable under the circumstances" (*People v Edwards*, 14 NY3d 741, 742, *rearg denied* 14 NY3d 794).

Contrary to defendant's further contention, the testimony from police officers at the suppression hearing was not " 'unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Bush*, 107 AD3d 1581, 1582, *lv denied* 22 NY3d 954). " '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 Twillie*, 28 AD3d 1236, 1237, *lv denied* 7 NY3d 795) and, here, there is no basis in the record to disturb the suppression court's determination to credit the testimony of the police officers (*see People v Williams*, 115 AD3d 1344, 1345; *Bush*, 107 AD3d at 1582).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

718

KA 12-01618

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE BAPTISTA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered April 11, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance 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 criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]), defendant contends that the search warrant in question was not issued upon probable cause and that Supreme Court therefore erred in refusing to suppress physical evidence seized during the execution of the search warrant. We reject that contention.

"It is well settled that probable cause may be supplied, in whole or in part, [by] hearsay information, provided [that] it satisfies the two-part *Aguilar-Spinelli* test requiring a showing that the informant is reliable and has a basis of knowledge for the information imparted" (*People v Flowers*, 59 AD3d 1141, 1142 [internal quotation marks omitted]). Here, defendant does not challenge the confidential informant's hearsay information other than to say that the informant's reliability or basis of knowledge was not established. We agree with the People that the confidential informant's reliability and the basis of his knowledge was established by evidence of the confidential informant's participation in the four controlled buys from defendant and the confidential informant's prior participation in over 20 other investigations (*see People v Myhand*, 120 AD3d 970, 973-975, *lv denied* 25 NY3d 952; *People v Monroe*, 82 AD3d 1674, 1675, *lv denied* 17 NY3d

808; *Flowers*, 59 AD3d at 1142-1143; *People v Lee*, 303 AD2d 839, 840, *lv denied* 100 NY2d 622). We therefore conclude that the People satisfied both prongs of the *Aguilar-Spinelli* test.

Defendant's contention that he was never identified in the warrant application is not preserved for our review (*see generally People v Fuentes*, 52 AD3d 1297, 1298, *lv denied* 11 NY3d 736), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Contrary to the contention of defendant, the confidential informant's single photo identification of defendant was not improper and did not taint the entire warrant application. The confidential informant's photo identification was not offered as "proof sufficient to warrant a conviction beyond a reasonable doubt," but it was instead used simply to determine whether there was "information sufficient to support a reasonable belief that an offense [had] been or [was] being committed or that evidence of a crime [could] be found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423). Moreover, "[t]he validity of the warrant is determined based on the information available at the time it was issued" (*People v O'Connor*, 242 AD2d 908, 910, *lv denied* 91 NY2d 895; *see People v Nieves*, 36 NY2d 396, 402), and we conclude that the single photo identification was acceptable within the context of the warrant application as a whole. The confidential informant was not shown the photograph of defendant until the confidential informant had already completed two controlled buys and had therefore seen the seller, i.e., defendant, twice. Moreover, the police did not apply for the warrant immediately following the single photo identification. Instead, two more controlled buys followed approximately six weeks after the confidential informant's positive identification of defendant, and the confidential informant identified the seller as defendant in both subsequent buys. Thus, the confidential informant "had sufficient opportunity to observe defendant . . . [and] to provide an independent identification" (*People v Kirby*, 280 AD2d 775, 778, *lv denied* 96 NY2d 920; *see People v Kairis*, 37 AD3d 1070, 1071, *lv denied* 9 NY3d 846), and "[a]ny taint . . . was sufficiently attenuated by the passage of time between the two identification[s]" (*People v Davis*, 294 AD2d 872, 873). Any impropriety regarding the use of the single photo identification was therefore vitiated.

Defendant's contention that the surveillance team did not observe the third controlled buy that took place after defendant was seen leaving the apartment in the first week of October 2011 is unpreserved for our review inasmuch as it was not raised in any of defendant's motions or in appearances before the court (*see generally People v Santos*, 122 AD3d 1394, 1395). In addition, defendant's further contention that the hearsay statement of an unidentified female failed the *Aguilar-Spinelli* test is also unpreserved for our review inasmuch as it is raised for the first time on appeal (*see People v Stevens*, 87 AD3d 754, 756, *lv denied* 18 NY3d 861). Finally, defendant's contention that the information upon which the warrant was based was stale is also unpreserved for our review (*see People v Long*, 100 AD3d

1343, 1346, *lv denied* 20 NY3d 1063). We decline to exercise our power to review any of those unpreserved contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

725

CA 14-02184

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

SIMPSON & SIMPSON, PLLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LIPPES MATHIAS WEXLER FRIEDMAN LLP, GERALD S. LIPPES, WILLIAM E. MATHIAS, II, AND SCOTT E. FRIEDMAN, DEFENDANTS-RESPONDENTS.

LAW OFFICES OF LARRY KERMAN, TONAWANDA (LARRY KERMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONNORS & VILARDO, LLP, BUFFALO (TERRENCE M. CONNORS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered June 24, 2014. The order granted defendants' motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the first and second causes of action are reinstated.

Memorandum: Defendants, a law firm and its three managing partners, formerly employed a lead bookkeeper and business manager (hereafter, employee) from May 2000 until February 2008, when the employee resigned. Thereafter, the employee began to work in a similar position for plaintiff. Approximately one year following her resignation from defendant law firm, defendants discovered that the employee had embezzled over $270,000 from defendant law firm's bank accounts. After that discovery, one of the defendant managing partners contacted the employee at plaintiff, and she admitted the theft and executed a promissory note requiring payment in the full amount of the embezzled funds. The employee thereafter embezzled money from plaintiff in order to pay defendants' promissory note. When plaintiff discovered that defendants were the recipients of funds embezzled from plaintiff, plaintiff demanded defendants return the funds, but defendants refused to return the full amount demanded. Plaintiff commenced this action asserting causes of action for conversion, unjust enrichment and intentional infliction of emotional distress, seeking judgment "of not less than $210,000." Prior to the motion at issue in this appeal, defendants moved separately to dismiss the complaint and for summary judgment dismissing the complaint. Supreme Court granted defendants' motion to dismiss in part and dismissed the third cause of action, for intentional infliction of

emotional distress, and denied the summary judgment motion. Following depositions, the court granted defendants' successive motion for summary judgment dismissing the remaining causes of action. Plaintiff appeals from the order granting the successive motion, and we reverse.

Contrary to plaintiff's contention, the court properly entertained defendants' successive motion for summary judgment. Although "multiple summary judgment motions should be discouraged in the absence of newly discovered evidence or sufficient cause[,]" we conclude that there was "sufficient cause" for defendants' present motion made after depositions were conducted (*Welch Foods v Wilson*, 277 AD2d 882, 883; *see Taillie v Rochester Gas & Elec. Corp.*, 68 AD3d 1808, 1809-1810).

We agree with plaintiff that the court erred in granting defendants' motion for summary judgment dismissing the complaint. With respect to the cause of action for conversion, we agree with plaintiff that the court erred in determining that the commingling of the embezzled funds in the employee's joint checking account precluded a cause of action for conversion. "Money, if specifically identifiable, may be the subject of a conversion action" (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 884). Upon our review of the record, we conclude that here the embezzled funds are sufficiently identifiable and traceable to sustain a cause of action for conversion (*see Lenczycki v Shearson Lehman Hutton*, 238 AD2d 248, 248, *lv dismissed in part and denied in part* 91 NY2d 918; *Republic of Haiti v Duvalier*, 211 AD2d 379, 384-385; *Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 124-125, *lv denied* 77 NY2d 803; *cf. Heckl v Walsh* [appeal No. 2], 122 AD3d 1252, 1254).

We further conclude that there are issues of fact precluding summary judgment on the conversion cause of action. "Conversion is an unauthorized assumption and exercise of the right of ownership over [personal property] belonging to another to the exclusion of the owner's rights" (*Peters Griffin Woodward, Inc.*, 88 AD2d at 883; *see* 2A NY PJI 3:10-3:11, at 111-132 [2015]). Defendants disavow any knowledge, however, of the illicit nature of the funds that the employee used to repay them and thus, they claim that they had no knowledge that the funds they received from the employee belonged to plaintiff. We nevertheless conclude that, given the unique facts of this case, there are issues of fact with respect to defendants' knowledge of the employee's embezzlement from plaintiff, despite defendants' disavowal. We conclude that the circumstances known to defendants were so "obviously suspicious that no honest person (not just a reasonably prudent person) could turn a blind eye thereto," thus requiring defendants to investigate (*MCC Proceeds v Advest, Inc.*, 293 AD2d 331, 334-335, *lv denied* 98 NY2d 613; *see Leve v Itoh & Co. (Am.)*, 136 AD2d 477, 478, *lv denied* 71 NY2d 806; *cf. Lenczycki*, 238 AD2d at 248; *see generally Hartford Ins. Co. v General Acc. Group Ins. Co.*, 177 AD2d 1046, 1046-1047).

We further conclude that there are triable issues of fact whether, even if defendants lacked knowledge that the funds they received were stolen by the employee, defendants converted plaintiff's

funds when they refused to return them upon plaintiff's demand. "Where the original possession is lawful, a conversion does not occur until the defendant refuses to return the property after demand" by the property's rightful owner (*Johnson v Gumer*, 94 AD2d 955, 955). On the record before us, we conclude that there are triable issues of fact whether defendants improperly refused to return the funds once plaintiff informed defendants that the funds had been stolen by the employee and demanded their return. Defendants asserted a claim of right defense by claiming that defendant law firm is a "holder in due course," i.e., that it accepted the personal checks from the employee " 'for value . . . in good faith . . . without notice . . . of any defense against or claim to [them] on the part of any other person' " (*Depew Dev. v AT & A Trucking Corp.*, 210 AD2d 974, 975; *see* UCC 3-302). We conclude that there are triable issues of fact whether defendant law firm parted with value in exchange for the checks and whether defendant law firm accepted the checks in good faith.

Finally, we also agree with plaintiffs that the court erred in dismissing the cause of action for unjust enrichment on the basis that it dismissed the cause of action for conversion. Unjust enrichment " 'is an obligation [that] the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one [party] money . . . under such circumstances that in equity and good conscience [the party] ought not to retain it' " (*Manufacturers Hanover Trust Co.*, 160 AD2d at 117, quoting *Miller v Schloss*, 218 NY 400, 407). "Unjust enrichment . . . does not require the performance of any wrongful act by the one[s] enriched . . . [, and even i]nnocent parties may frequently be unjustly enriched" (*Simonds v Simonds*, 45 NY2d 233, 242). Although the equitable cause of action for unjust enrichment is closely related to the cause of action for conversion based on wrongful detention of property after demand for its return by the rightful owner (*see Pokoik v Gittens*, 171 AD2d 470, 471), it is nevertheless a separate cause of action from the cause of action for conversion (*see e.g. Citipostal, Inc. v Unistar Leasing*, 283 AD2d 916, 918-919).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

726

CA 14-01658

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

JACQUELYN J. SASSO, INDIVIDUALLY AND AS PARENT/NATURAL GUARDIAN OF JOSHUA SASSO-KANE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WCA HOSPITAL, DEFENDANT-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (KARA M. ADDELMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered May 7, 2014 in a personal injury action. The order denied the motion of defendant for leave to amend its answer and 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 to recover for injuries sustained by her son when his bicycle struck a depressed area on defendant's property. At the time of the accident, plaintiff's son was riding his bicycle back from school through defendant's parking lot. Defendant moved for leave to amend its answer to assert an affirmative defense based on the recreational use statute, i.e., General Obligations Law § 9-103, and for summary judgment dismissing the complaint pursuant to that statute and on the ground of assumption of the risk. Supreme Court denied the motion. We affirm.

The court properly denied that part of defendant's motion seeking leave to amend the answer to assert the recreational use statute as an affirmative defense. "It is well established that [l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*Williams v New York Cent. Mut. Fire Ins. Co.* [appeal No. 2], 108 AD3d 1112, 1114 [internal quotation marks omitted]; *see Landers v CSX Transp., Inc.*, 70 AD3d 1326, 1327). We conclude that the court properly determined that defendant's proposed amendment patently lacks merit inasmuch as the recreational use statute does not apply to the facts of this case as a matter of law. It is undisputed that plaintiff's son was engaged in one of the recreational activities

enumerated in section 9-103, i.e., bicycle riding, when he was injured. To establish applicability of the statute, however, defendant was also required to show that its property "was suitable for the recreational activity in which plaintiff[']s son] was participating when the accident occurred" (*Moscato v Frontier Distrib.*, 254 AD2d 802, 803, *lv denied* 92 NY2d 817). "Whether a parcel of land is suitable and the immunity [of the recreational use statute] available is a question of statutory interpretation, and is, therefore, a question of law for the Court" (*Bragg v Genesee County Agric. Socy.*, 84 NY2d 544, 552; *see Hulett v Niagara Mohawk Power Corp.*, 1 AD3d 999, 1001). Suitability is established by showing that the subject property is " '(1) physically conducive to the activity at issue, and (2) of a type that is appropriate for public use in pursuing that activity as recreation' " (*Blair v Newstead Snowseekers*, 2 AD3d 1286, 1288, *lv denied* 2 NY3d 704). "A substantial indicator that the property is physically conducive to the particular activity is whether recreationists have used the property for that activity in the past; such past use by participants in the [activity] manifests the fact that the property is physically conducive to it" (*id.* [internal quotation marks omitted]). Here, defendant failed to submit any evidence that the property had been used in the past by "recreationists" for bicycle riding. Moreover, under the circumstances of this case, we conclude that the subject property is not appropriate for public use in pursuing bicycle riding as a recreational activity (*see Iannotti v Consolidated Rail Corp.*, 74 NY2d 39, 45). Indeed, the Court of Appeals has made clear that recreational use immunity should apply only to property that "the Legislature would have envisioned as being opened up to the public for recreational activities" (*id.*). Here, defendant failed to establish that its employee parking lot comes within the purview of that standard.

Contrary to defendant's final contention, the court properly denied that part of its motion seeking summary judgment dismissing the complaint on the ground of assumption of the risk. As stated by the Court of Appeals, the "application of assumption of the risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues" (*Custodi v Town of Amherst*, 20 NY3d 83, 89). Here, plaintiff's son was not engaging in an activity or event sponsored or supported by defendant, nor was he operating his bicycle at a designated venue (*see id.*). Rather, he was simply using his bicycle to return home from school, and thus the court properly concluded that assumption of the risk does not apply.

Defendant's remaining contention is not properly before us inasmuch as it is raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

731

CA 13-01672

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

CLARK BONO ROOFING & CONSTRUCTION COMPANY, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NORD BITUMI U.S., INC., DEFENDANT-RESPONDENT.

JOSEPH MAKOWSKI, LLC, BUFFALO (ALISA A. LUKASIEWICZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (DANIEL B. MOAR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered June 3, 2013. The order granted the motion of defendant for summary judgment seeking dismissal of the complaint.

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

Memorandum: Plaintiff is a roofing company that defendant had approved to install defendant's roofing systems. In 1983, plaintiff installed roofs on three certain commercial buildings, and defendant provided a 10-year warranty covering "materials and workmanship" on each roof to the owner of those buildings. Approximately 13 months after installation, the roofs leaked, and plaintiff was required to make various repairs to the roofs during subsequent years, allegedly because of defendant's defective materials. In 1991, plaintiff and the owner of the buildings commenced this action alleging, inter alia, a cause of action for breach of express warranty. The owner of the buildings subsequently discontinued its action against defendant, and defendant thereafter moved for summary judgment seeking dismissal of the complaint, which Supreme Court granted in its entirety. We affirm.

We reject plaintiff's contention that the court erred in granting that part of defendant's motion seeking dismissal of the cause of action for breach of express warranty. Defendant met its burden of establishing that the word "owner" as used in the warranties unambiguously referred to the owner of the commercial buildings where the roofs were installed, and that there was no other reasonable construction of that word (*see DiPizio Const. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 905, 906; *Jellinick v Naples & Assoc.*, 296 AD2d 75, 78-79; *see generally W.W.W. Assoc. v Giancontieri*, 77 NY2d

157, 162), and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to plaintiff's contention, the term "owner" cannot refer to plaintiff inasmuch as plaintiff is identified in the warranties as the "approved roofing contractor," and the warranty covers for the owner's benefit the materials used by plaintiff and plaintiff's workmanship in conjunction therewith. Thus, because plaintiff was not a party entitled to the benefit of the express warranty, it may not assert a cause of action against defendant for the breach thereof (*see generally Martin v Dierck Equip. Co.*, 43 NY2d 583, 589). Inasmuch as plaintiff relies exclusively upon that cause of action for its claim to damages, the court properly granted the motion in its entirety and dismissed the complaint (*see* CPLR 3212 [b]).

In light of our determination, we do not reach plaintiff's remaining contentions.

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

734

CA 14-01809

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

RALPH A. DELEO, INDIVIDUALLY AND AS LIMITED ADMINISTRATOR OF THE ESTATE OF THARAN J. DELEO, DECEASED, AND AS GUARDIAN OF JOSEPH A. DELEO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF MONROE, ET AL., DEFENDANTS, RG&E CORPORATION, DDS CONSTRUCTORS, LLC, AND DDS UTILITIES, INC., DEFENDANTS-APPELLANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (CLAIRE F. GALBRAITH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PATRICK J. BURKE, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered June 25, 2014. The order granted the motion of plaintiff for leave to amend the complaint to add a demand for punitive damages.

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

Memorandum: Plaintiff commenced this negligence action stemming from a motor vehicle accident that occurred when a vehicle operated by Tharan J. Deleo (decedent) collided with a vehicle operated by defendant Gregory Verhulst in the Town of Greece. Decedent made a left turn from Mill Road onto Mill Hollow Crossing as Verhulst was driving towards her on Mill Hollow Crossing. Plaintiff alleges that a mound of soil (hereafter, spoil pile) covered with snow obstructed decedent's view and that decedent could not see Verhulst's oncoming vehicle, thereby causing a collision between the two vehicles. Decedent was injured and ultimately died as a result of the collision. The spoil pile was allegedly created, in part, by defendants RG&E Corporation, DDS Constructors, LLC, and DDS Utilities, Inc. (defendants) as a result of work being done on the land adjacent to the roadway. Defendants appeal from an order that granted plaintiff's motion for leave to amend the complaint to add a demand for punitive damages based on plaintiff's allegations of defendants' "gross, wilful, wanton, and egregious conduct." We now reverse.

We conclude that a claim for punitive damages is unsupported by

the alleged facts of this case inasmuch as the alleged conduct of defendants did not "manifest spite or malice, or a fraudulent or evil motive on the part of the defendant[s], or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" (*Marinaccio v Town of Clarence*, 20 NY3d 506, 511, *rearg denied* 21 NY3d 976 [internal quotation marks omitted]; *see Anderson v Nottingham Vil. Homeowner's Assn., Inc.*, 37 AD3d 1195, 1198, *amended on rearg* 41 AD3d 1324; *Kolodziejczyk v Abscope Envtl.*, 280 AD2d 1001, 1002). Plaintiff contends that a claim for punitive damages is warranted because defendants did not have a safety plan or training regarding the placement of the spoil pile at the project and therefore violated safety and industry standards. We reject that contention. Evidence of a violation of a safety standard is an insufficient ground for granting a motion for leave to amend a complaint to add a claim for punitive damages inasmuch as such a violation does not constitute "negligence per se," but is "merely some evidence of negligence" (*Bauer v Female Academy of Sacred Heart*, 97 NY2d 445, 453; *see Cowsert v Macy's E., Inc.*, 74 AD3d 1444, 1445; *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25; *cf*. *Shaheen v Hueber-Breuer Constr. Co., Inc.*, 4 AD3d 761, 762-763). "If [such a] violation . . . does not constitute negligence per se, it surely is insufficient to sustain a claim for punitive damages, which requires a significantly higher level of culpability" (*Heller*, 303 AD2d at 26). Unlike *Randi A. J. v Long Is. Surgi-Center* (46 AD3d 74), a case relied on by plaintiff, this case does not involve a "callous, reckless, or grossly negligent disregard of . . . a right protected by the declared public policy of this State" (*id. at* 82).

Finally, we reject plaintiff's contention that defendants' subsequent conduct demonstrates a "pattern of conduct and conscious disregard" for motorist safety warranting a claim for punitive damages. The alleged subsequent conduct fails to support plaintiff's motion inasmuch as plaintiff does not allege any facts that, if proven, would demonstrate that defendants " 'wilful[ly] or wanton[ly]' " left the spoil pile before the accident with a " 'criminal indifference' " to the fact that it could cause an accident (*Marinaccio*, 20 NY3d at 511; *cf. Matter of Brandon*, 55 NY2d 206, 210-212). In addition, we note that the alleged "conduct occurring after the accident did not proximately cause plaintiff['s] injuries and is outside the conduct alleged in the proposed amended complaint" (*Taylor v Dyer*, 190 AD2d 902, 904; *see Hale v Saltamacchia*, 28 AD3d 715, 715; *Boykin v Mora*, 274 AD2d 441, 442).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

736

CA 14-02183

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

KELSEY D. COVELL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SAMANTHA M. SLOCUM, DEFENDANT-RESPONDENT.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order and judgment (one paper) of the Supreme Court, Niagara County (Frank Caruso, J.), entered March 11, 2014. The order and judgment granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries she allegedly sustained when she was struck by a vehicle operated by defendant on the street in front of plaintiff's house. Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint.

Even assuming, arguendo, that defendant met her initial burden on the motion, we conclude that plaintiff's opposing papers demonstrated the existence of a triable issue of fact requiring denial of defendant's motion. Specifically, plaintiff submitted the affidavit of a witness who averred that, immediately after the accident, defendant essentially stated that she had not seen plaintiff prior to the collision. We reject defendant's contention that we should decline to consider that witness's affidavit because plaintiff failed to disclose the witness's identity and/or defendant's alleged statements in responding to defendant's discovery demands. Although defendant's "admissions" should have been disclosed during discovery, "there is no indication that the failure to do so was willful or contumacious" and, therefore, the affidavit "may properly be considered in opposition to defendant[']s] motion" (*Schaaf v Pork Chop, Inc.*, 24 AD3d 1277, 1278). Nevertheless, in light of plaintiff's failure to disclose, we further conclude that, upon appropriate motion from defendant, the court should afford defendant additional rights of

discovery pursuant to 22 NYCRR 202.21 (d) (*see generally Gendusa v Yu Lin Chen*, 71 AD3d 1085, 1086; *Schaaf*, 24 AD3d at 1278).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

754

CA 14-01578

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

IN THE MATTER OF GEORGE EASTMAN HOUSE, INC., ALSO KNOWN AS INTERNATIONAL MUSEUM OF PHOTOGRAPHY AT GEORGE EASTMAN HOUSE, DOING BUSINESS AS GEORGE EASTMAN HOUSE INTERNATIONAL MUSEUM OF PHOTOGRAPHY, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MORGAN MANAGEMENT, LLC, MONROE VOITURE NO. 111 MEMORIAL HOME, INC., LA SOCIETE DES 40 HOMMES ET 8 CHEVAUX, CITY OF ROCHESTER DIRECTOR OF PLANNING AND ZONING, CITY OF ROCHESTER PLANNING COMMISSION AND CITY OF ROCHESTER PRESERVATION BOARD, RESPONDENTS-RESPONDENTS.

THOMAS H. JACKSON, VICTOR, FOR PETITIONER-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (REUBEN ORTENBERG OF COUNSEL), FOR RESPONDENT-RESPONDENT MORGAN MANAGEMENT, LLC.

T. ANDREW BROWN, CORPORATION COUNSEL, ROCHESTER (JOHANNA F. BRENNAN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS CITY OF ROCHESTER DIRECTOR OF PLANNING AND ZONING, CITY OF ROCHESTER PLANNING COMMISSION AND CITY OF ROCHESTER PRESERVATION BOARD.

CIMINELLI & CIMINELLI, PLLC, PENFIELD (PAUL VINCENT CIMINELLI OF COUNSEL), FOR RESPONDENT-RESPONDENT MONROE VOITURE NO. 111 MEMORIAL HOME, INC., LA SOCIETE DES 40 HOMMES ET 8 CHEVAUX.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered May 29, 2014 in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the amended petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging, inter alia, the determination of respondent City of Rochester Planning Commission (Planning Commission) approving the application of respondent Morgan Management, LLC (Morgan), for a special permit. The special permit allows Morgan to construct an apartment building on property owned by respondent Monroe Voiture No. 111 Memorial Home, Inc., La Societe Des 40 Hommes et 8 Chevaux (Monroe

Voiture), "in association with the overall redevelopment of the property." Petitioner is a not-for-profit corporation that owns the property adjacent to the Monroe Voiture property, which includes the George Eastman House.

We note at the outset that, although petitioner's notice of appeal states, inter alia, that it is appealing from "each and every part of" the judgment, petitioner contends on appeal only that Supreme Court erred in dismissing the second cause of action in the amended petition. Petitioner has thus abandoned any issues with respect to the remainder of the amended petition (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Contrary to petitioner's contention, we conclude that the court properly agreed with respondents that the second cause of action should be dismissed. Pursuant to Chapter 120, Article XVII of the Municipal Code of the City of Rochester (Code), the City of Rochester (City) established Planned Development District (PDD) No. 14, which includes the property of petitioner and Monroe Voiture. The City's intent in establishing PDD No. 14 was "to recognize and permit a defined area for the delivery of programs and community services offered by George Eastman House and the Monroe Voiture . . . and to provide for the orderly growth and development of the properties" (Code, Ch PDD, PDD No. 14, § [A]). A special permit is required in PDD No. 14 for "[m]ultifamily dwellings in newly constructed buildings" (*id*. at § [C] [1]). Morgan applied for a special permit for the construction of a three- and four-story, 99-unit multifamily apartment building. The application further stated that the proposed project would include, inter alia, the renovation and rehabilitation of the existing clubhouse on the Monroe Voiture property. Following a hearing, the Planning Commission found that the proposed project met the City's standards for approval of a special permit (*see* Code § 120-192 [B] [3] [a] [1]), including that the proposed project would be in harmony with the goals, standards and objectives of the City's Comprehensive Plan. Petitioner commenced this proceeding and the court, inter alia, dismissed petitioner's second cause of action seeking to annul the Planning Commission's determination. We affirm.

The Planning Commission's "determination 'should be sustained upon judicial review if it was not illegal, [had] a rational basis, and [was] not arbitrary and capricious' " (*Matter of Kearney v Kita*, 62 AD3d 1000, 1001, *lv denied* 13 NY3d 716; *see Matter of Kempisty v Town of Geddes*, 93 AD3d 1167, 1169, *lv denied* 19 NY3d 815, *rearg denied* 21 NY3d 930; *Matter of McLiesh v Town of Western*, 68 AD3d 1675, 1676). With respect to the determination granting the application for a special permit, we note at the outset that "[t]he inclusion of the permitted use in the ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood" (*Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243). Thus, "once it is shown that the contemplated use is in conformance with the conditions imposed, the special use permit must be granted unless there are reasonable grounds for its denial, supported by substantial evidence" (*Matter of Sunrise Plaza Assoc. v*

Town Bd. of Town of Babylon, 250 AD2d 690, 693, *lv denied* 92 NY2d 810).

We agree with petitioner that the purpose and intent of PDD No. 14 was relevant to the Planning Commission's evaluation of Morgan's application for the special permit. We reject petitioner's further contention, however, that the Planning Commission failed to consider whether Morgan's special permit application was in harmony with the purpose and intent of PDD No. 14 when it approved the application. The Planning Commission considered that, in addition to the construction of a multifamily apartment building, the proposed project included renovation of the clubhouse, allowing for the continuance and expansion of the programs and community services offered by Monroe Voiture. In addition, the Planning Commission found that the proposed project as a whole would fulfill the purpose and intent of PDD No. 14. Contrary to petitioner's contention, the Planning Commission was not required to consider the apartment building apart from the improvements to the existing property in determining whether the application was consistent with the purpose and intent of PDD No. 14. Although the new construction of a multifamily dwelling triggered the special permit process, the Planning Commission was entitled to consider the apartment building in the context of the overall redevelopment of the Monroe Voiture property. Moreover, the evidence before the Planning Commission established that the application for a special use permit for the construction of a multifamily dwelling on the property would directly affect the renovation of the deteriorating clubhouse and Monroe Voiture's ability to continue and enhance its operations. Thus, we agree with the court that the Planning Commission's approval of Morgan's application for a special permit was not illegal, irrational, or arbitrary and capricious.

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

780

CA 15-00009

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

GENESEE VALLEY TRUST COMPANY AND CANANDAIGUA NATIONAL CORPORATION,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

THE WATERFORD GROUP, LLC, BRIAN P. COSTELLO AND MICHAEL J. MERRIMAN,
DEFENDANTS-RESPONDENTS-APPELLANTS.

UNDERBERG & KESSLER LLP, ROCHESTER (PAUL F. KENEALLY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order and interlocutory judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered March 28, 2014. The order and judgment denied the cross motion of plaintiffs for, inter alia, summary judgment and granted the motion of defendants for summary judgment in part by issuing a declaration that § 7.1 of the employment agreements of defendants Brian P. Costello and Michael J. Merriman with plaintiff Genesee Valley Trust Company is invalid and unenforceable and dismissing the fifth and eighth causes of action.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by vacating the declaration with respect to defendant Brian P. Costello, denying that part of defendants' motion seeking summary judgment dismissing the fifth cause of action and reinstating that cause of action, and granting that part of defendants' motion seeking summary judgment dismissing the fourth cause of action, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff Canandaigua National Corporation (CNC) purchased plaintiff Genesee Valley Trust Company (GVT), an investment management firm, on or about January 2, 2008. Defendants Brian P. Costello and Michael J. Merriman were employees of GVT, and Costello had been a GVT shareholder and was paid for his shares in the sale to CNC. Costello and Merriman signed new employment agreements with GVT that became effective January 3, 2008. Section 7.1 of the agreements provided that the employee would pay GVT a fee in the event that the employee solicited and obtained business from GVT clients within a

year of leaving its employ, and that the amount of the fee would be based on two times the total amount of fees and payments made to GVT by the solicited client in the 12 months prior to the employee's departure. In addition, section 7.2 prohibited the employee from soliciting other GVT employees to leave their employment under certain circumstances. Costello, Merriman, and nonparty Mary O'Brian, another GVT employee, all left GVT between December 31, 2010 and January 7, 2011, and Costello signed a termination agreement with a clause that prohibited him from making disparaging statements about GVT. Later in January 2011, Costello, Merriman, and O'Brian became the sole members of defendant The Waterford Group, LLC (Waterford), another investment management firm.

Plaintiffs commenced this action alleging, inter alia, that defendants solicited GVT clients to move their business to Waterford, that Merriman solicited O'Brian to leave GVT and join Waterford in violation of section 7.2, and that Costello disparaged GVT in violation of his termination agreement. Plaintiffs sought damages and a judgment declaring that amounts were due to GVT from Costello and Merriman pursuant to section 7.1. After obtaining dismissal of several of plaintiffs' causes of action on a motion to dismiss, defendants moved for summary judgment seeking a declaration that section 7.1 is unenforceable and dismissal of the remaining causes of action. Plaintiffs cross-moved for, inter alia, summary judgment seeking a declaration that section 7.1 is enforceable against both Costello and Merriman. Supreme Court denied plaintiffs' cross motion and granted defendants' motion in part by issuing a declaration that section 7.1 is "invalid and unenforceable," and dismissing the fifth and eighth causes of action on the ground that section 7.2 is likewise unenforceable. The court denied defendants' motion with respect to the fourth cause of action, which alleges that Merriman breached his duty of fidelity and loyalty to GVT, and the twelfth cause of action, which alleges that Costello breached the nondisparagement clause of his termination agreement. Plaintiffs appeal and defendants cross-appeal.

We note at the outset that plaintiffs do not contend in their brief that the court erred in issuing a declaration that section 7.1 is unenforceable against Merriman or that the court erred in dismissing the eighth cause of action, and we thus deem any issues with respect to those matters abandoned (*see Burton v Matteliano*, 81 AD3d 1272, 1275, *lv denied* 17 NY3d 703).

We agree with plaintiffs that the court erred in granting that part of defendants' motion seeking a declaration that section 7.1 is unenforceable against Costello. We therefore modify the order and judgment by vacating the declaration with respect to Costello, thereby allowing the first cause of action to go forward. Because Costello sold his GVT shares to CNC, and CNC acquired GVT's goodwill in the transaction, the enforceability of section 7.1 against Costello should be evaluated pursuant to the standard applicable to the sale of a business rather than "the stricter standard of reasonableness" applicable to employment contracts (*Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307, *rearg denied* 40 NY2d 918; *see Weiser LLP v*

Coopersmith, 51 AD3d 583, 583-584; *Kraft Agency v Delmonico*, 110 AD2d 177, 182-183). A covenant restricting the right of a seller of a business to compete with the buyer is enforceable if its duration and scope are "reasonably necessary to protect the buyer's legitimate interest in the purchased asset" (*Hadari v Leshchinsky*, 242 AD2d 557, 558; *see Mohawk Maintenance Co. v Kessler*, 52 NY2d 276, 283-284; *Purchasing Assoc. v Weitz*, 13 NY2d 267, 271-272, *rearg denied* 14 NY2d 584), and we conclude that the scope and one-year duration of section 7.1 are reasonably necessary, as applied to Costello, to protect CNC's legitimate interest in GVT's goodwill (*see Weiser LLP*, 51 AD3d at 583-584; *see also Purchasing Assoc.*, 13 NY2d at 271-272; *Sarantopoulos v E-Z Cash ATM, Inc.*, 35 AD3d 708, 709), except relative to clients, if any, that Costello independently recruited to GVT after it was sold to CNC (*see Weiser LLP v Coopersmith*, 74 AD3d 465, 467-468). Absent anticompetitive misconduct by the employer not present here, a restrictive covenant that is overbroad in some respect is "partially enforceable 'to the extent necessary to protect [the employer's] legitimate interest' " (*Malcolm Pirnie, Inc. v Werthman*, 280 AD2d 934, 935; *see BDO Seidman v Hirshberg*, 93 NY2d 382, 394-395; *see also Brown & Brown, Inc. v Johnson*, ___ NY3d ___, ___ [June 11, 2015] and, with that limited exception, section 7.1 is prima facie enforceable against Costello.

In any event, we note that the result would be the same under the standard applicable to employment contracts, whereby a restrictive covenant "is reasonable only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public" (*BDO Seidman*, 93 NY2d at 388-389). GVT's interest in protecting its customer relationships and goodwill for the benefit of CNC is a legitimate interest under that standard as well (*see TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572; *Gundermann & Gundermann Ins. v Brassill*, 46 AD3d 615, 616), and partially enforcing section 7.1 against Costello will not impose undue hardship on him or harm the public (*see BDO Seidman*, 93 NY2d at 393-394).

We conclude, however, that plaintiffs are not entitled to a declaration in their favor at this juncture because they have not established that the damages clause of section 7.1 is enforceable (*see generally id.* at 396). As the parties acknowledge, the provision of section 7.1 governing the amount of the fee to be paid "essentially represents a liquidated damages clause" (*id.*), and is thus enforceable if, at the time the agreement was made, the amount of plaintiffs' actual loss was "incapable or difficult of precise estimation" and the amount liquidated was not "plainly or grossly disproportionate to the probable loss" (*Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 425; *see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380). Although the record establishes that plaintiffs' actual damages from the solicitation of any particular client "are sufficiently difficult to ascertain to satisfy the first requirement of a valid liquidated damages provision" (*BDO Seidman*, 93 NY2d at 396; *see Marcone APW, LLC v Servall Co.*, 85 AD3d 1693, 1696-1697), and we recognize that

defendants, as the parties seeking to avoid liquidated damages, bear the ultimate burden of establishing that the clause is unenforceable (*see 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.*, 24 NY3d 528, 536; *JMD Holding Corp.*, 4 NY3d at 379-380), we conclude that the sparse financial information submitted by plaintiffs on their cross motion "by no means conclusively demonstrates the absence of gross disproportionality" (*BDO Seidman*, 93 NY2d at 396-397). Accordingly, "further development of the record on the liquidated damages formula" at trial is necessary (*id.* at 397; *see Central Irrigation Supply v Putnam Country Club Assoc., LLC*, 27 AD3d 684, 685; *Tremco, Inc. v Turk*, 170 AD2d 987, 987-988).

We also agree with plaintiffs that the court erred in granting that part of defendants' motion seeking to dismiss the fifth cause of action on the basis that plaintiffs had no legitimate interest in enforcing section 7.2 against Merriman in connection with his alleged solicitation of O'Brian. We therefore further modify the order and judgment accordingly. A covenant not to solicit employees is " 'inherently more reasonable and less restrictive' " than a covenant not to compete (*OTG Mgt., LLC v Konstantinidis*, 40 Misc 3d 617, 621; *see also Natsource LLC v Paribello*, 151 F Supp 2d 465, 470-471), and an employer has a legitimate interest in preventing an employee from leaving to work for a competitor if the employee has cultivated personal relationships with clients through the use of the employer's resources (*see BDO Seidman*, 93 NY2d at 391-392; *1 Model Mgt., LLC v Kavoussi*, 82 AD3d 502, 503-504). There is conflicting evidence here regarding the importance of the personal relationships O'Brian had with GVT clients, and thus an issue of fact exists whether GVT had a legitimate interest in preventing Merriman from soliciting her to join Waterford (*see Fewer v GFI Group Inc.*, 124 AD3d 457, 458).

We agree with defendants on their cross appeal that the court erred in denying that part of their motion seeking to dismiss the fourth cause of action, and we therefore further modify the order and judgment accordingly. The majority of the allegations in that cause of action were determined in the prior dismissal order to be insufficiently particularized to satisfy CPLR 3016 (b). Defendants made a prima facie showing on their motion for summary judgment that Merriman did not engage in the remaining conduct alleged, and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Finally, we reject defendants' contention that the court erred in denying that part of their motion seeking to dismiss the twelfth cause of action on the basis that plaintiffs had not established any damages arising from Costello's alleged breach of his termination agreement. Defendants did not meet their burden on that issue "simply by pointing to gaps in plaintiff[s'] proof" (*Route 104 & Rte. 21 Dev., Inc. v Chevron U.S.A., Inc.*, 96 AD3d 1491, 1492; *see Benderson v Ulrich/34 Chestnut St., LLC*, 57 AD3d 1417, 1419).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

783

CA 14-02228

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

GREECE RIDGE, LLC AND TOWN OF GREECE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.

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

FORSYTH, HOWE, O'DWYER, KALB & MURPHY, P.C., ROCHESTER (ROBERT B. KOEGEL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered April 8, 2014. The order granted in part the motion of plaintiffs to dismiss certain affirmative defenses and granted in part the cross motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by granting that part of the cross motion with respect to the fourth cause of action, and dismissing that cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs allege that the Department of Transportation changed the elevation of a storm drainage system near a mall and other properties owned by plaintiffs, and that those changes caused plaintiffs' properties to flood during periods of heavy rain. Plaintiffs commenced this action in Supreme Court seeking, among other relief, an injunction requiring defendant to correct the drainage system, and damages for injuries caused by the resultant flooding. Plaintiffs also commenced an action in the Court of Claims seeking damages for the same injuries, but the parties stipulated to dismissal of that action without prejudice. As relevant here, plaintiffs moved to dismiss certain affirmative defenses pursuant to grounds set forth in CPLR 3211, and defendant cross-moved for summary judgment dismissing the complaint. Defendant appeals from an order that, inter alia, granted parts of the motion and the cross motion.

Contrary to defendant's contention, the court properly denied that part of its cross motion seeking summary judgment dismissing all claims for money damages. Although defendant is correct that " 'claims that are primarily against the State for damages must be brought in the Court of Claims, the Supreme Court may consider a claim

for injunctive relief as long as the claim is not primarily for damages' " (*Zutt v State of New York*, 50 AD3d 1131, 1132; *see* Court of Claims Act § 9 [2]). "Whether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim, is dependent upon the facts and issues presented in a particular case" (*Matter of Gross v Perales*, 72 NY2d 231, 236, *rearg denied* 72 NY2d 1042; *see generally Metropolitan Taxicab Bd. of Trade v New York City Taxi & Limousine Commn.*, 115 AD3d 521, 522-523, *lv denied* 24 NY3d 911). Here, defendant failed to establish in support of its cross motion that the essential nature of the causes of action for negligence, continuing nuisance, and continuing trespass is to recover money damages, and thus the court properly declined to grant summary judgment dismissing those causes of action.

We agree, however, with the further contention of defendant that the court erred in denying that part of its cross motion seeking summary judgment dismissing the cause of action for inverse condemnation, and we therefore modify the order accordingly. That cause of action alleged that the flooding intruded onto plaintiffs' properties and interfered with their property rights to such an extent that it constituted "a constitutional taking requiring [defendant] to purchase the properties from plaintiffs." It is well settled that such a "taking can consist of either a permanent ouster of the owner, or a permanent interference with the owner's physical use, possession, and enjoyment of the property, by one having condemnation powers" (*Weaver v Town of Rush*, 1 AD3d 920, 923). "In order to constitute a permanent ouster, 'defendant['s] conduct must constitute a permanent physical occupation of plaintiff's property amounting to exercise of dominion and control thereof' " (*id.* at 923-924; *see Reiss v Consolidated Edison Co. of N.Y.*, 228 AD2d 59, 61, *appeal dismissed* 89 NY2d 1085, *lv denied* 90 NY2d 807, *cert denied* 522 US 1113).

Here, defendant met its burden on its cross motion with respect to the cause of action for inverse condemnation by establishing as a matter of law that any interference with plaintiffs' property rights was not sufficiently permanent to constitute a de facto taking (*see Sarnelli v City of New York*, 256 AD2d 399, 400-401, *lv denied* 93 NY2d 804, *reconsideration denied* 93 NY2d 958; *cf. Sassone v Town of Queensbury*, 157 AD2d 891, 893), and plaintiffs failed to raise a triable issue of fact in opposition (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Insofar as the parties rely upon the cause of action for inverse condemnation as a basis to grant or deny the motion to dismiss the affirmative defenses, their contentions concerning those affirmative defenses are academic in light of our dismissal of that cause of action.

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

All concur except SCONIERS and DEJOSEPH, JJ., who dissent in part and vote to modify in accordance with the following memorandum: We respectfully dissent in part. We agree with the majority that Supreme Court erred in denying that part of defendant's cross motion seeking summary judgment dismissing the fourth cause of action, for inverse

condemnation. With respect to the remaining causes of action, however, we conclude that the court further erred in denying that part of the cross motion seeking summary judgment dismissing them to the extent that they assert claims for damages, and in granting that part of plaintiffs' motion seeking dismissal of the 10th affirmative defense, which alleges that the court lacks subject matter jurisdiction over plaintiffs' claims for damages. We would therefore further modify the order accordingly.

The remaining causes of action, sounding in negligence, continuing nuisance and continuing trespass, "are primarily claims against the State for money damages and as such could only be entertained in the Court of Claims" (*Schaffer v Evans*, 57 NY2d 992, 994; *see* Court of Claims Act § 9 [4]). Contrary to the majority, we conclude that the damages for losses allegedly incurred as the result of the flooding are "consequential damages and are not 'incidental to the primary relief sought by [plaintiffs]' " (*Matter of Bennefield v Annucci*, 122 AD3d 1329, 1330). To the extent that the first three causes of action support plaintiffs' claim for injunctive relief, they may remain in Supreme Court (*see Zutt v State of New York*, 50 AD3d 1131, 1132), but the claims for damages must be asserted in the Court of Claims (*see Bennefield*, 122 AD3d at 1330; *Matter of Taylor v Kennedy*, 159 AD2d 827, 827).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

806

CA 14-01792

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

JASON P. SADOWSKI, ET AL., PLAINTIFFS,

V ORDER

FORBES HOMES, INC., ET AL., DEFENDANTS.

FORBES HOMES, INC., AND FORBES HOMES, INC., DOING BUSINESS AS FORBES-CAPRETTO HOMES, THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

WETZEL DEVELOPMENT, LLC, THIRD-PARTY DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MAURICE L. SYKES OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MICHAEL T. GLASCOTT OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered February 18, 2014. The order and judgment granted contractual indemnification to third-party plaintiffs against third-party defendant and denied the motion of third-party defendant to set aside a directed verdict and to dismiss the third-party complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 30 and July 7, 2015,

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

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

813

CA 14-02093

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

ANDREW J. HAIN, INDIVIDUALLY, AND AS EXECUTOR
OF THE ESTATE OF HOLLY J. HAIN, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ANGELA J. JAMISON, LEAH A. JAMISON,
DEFENDANTS-RESPONDENTS,
AND DRUMM FAMILY FARM, INC., DEFENDANT-APPELLANT.

BRIAN P. FITZGERALD, P.C., BUFFALO (DEREK J. ROLLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

COUGHLIN & GERHART, LLP, BINGHAMTON (JAMES P. O'BRIEN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered August 15, 2014. The order denied the motion of defendant Drumm Family Farm, Inc. for summary judgment dismissing the complaint and cross claims against it.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is granted and the complaint and all cross claims against defendant Drumm Family Farm, Inc. are dismissed.

Memorandum: This personal injury and wrongful death action arises from a motor vehicle accident in which plaintiff's wife (decedent) was struck on Curtis Coopers Road, in Steuben County, by a vehicle driven by defendant Leah A. Jamison and owned by defendant Angela J. Jamison (collectively, Jamison defendants). The parties agree that decedent stopped her vehicle on the southbound side of that road, facing south, and exited her vehicle. Plaintiff alleges that decedent stopped her vehicle because a newly born calf that escaped from a farm owned by defendant Drumm Family Farm, Inc. (Drumm Farm) had wandered on or near the road, and decedent exited her vehicle to assist the calf. The parties further agree that both decedent and the calf were in the northbound lane when they were struck by the Jamison defendants' vehicle. Plaintiff contends that Drumm Farm was negligent in allowing the calf to escape from its farm, and that such negligence was a proximate cause of decedent's death. We agree with Drumm Farm

that Supreme Court erred in denying its motion for summary judgment dismissing the complaint and all cross claims against it.

Although "a landowner or the owner of an animal may be liable under ordinary tort-law principles when a farm animal . . . is negligently allowed to stray from the property on which the animal is kept" (*Hastings v Sauve*, 21 NY3d 122, 125-126; *see Sargent v Mammoser*, 117 AD3d 1533, 1534), "liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes" (*Ely v Pierce*, 302 AD2d 489, 489, *lv denied* 100 NY2d 505; *see Castillo v Amjack Leasing Corp.*, 84 AD3d 1298, 1298-1299, *lv denied* 17 NY3d 711; *see generally Sheehan v City of New York*, 40 NY2d 496, 503). Here, in support of its motion, Drumm Farm established that any negligence on its part in allowing the calf to escape merely "created the opportunity for plaintiff to be standing [in the roadway], [but] it did not *cause* [her] to stand" there (*Hurlburt v Noble Envtl. Power, LLC*, 128 AD3d 1518, 1519; *see Akinola v Palmer*, 98 AD3d 928, 929). "In short, the [alleged] negligence of [Drumm Farm] merely furnished the occasion for an unrelated act to cause injuries not ordinarily anticipated" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 316, *rearg denied* 52 NY2d 784; *see Papadakis v HM Kelly, Inc.*, 97 AD3d 731, 732; *see generally Barnes v Fix*, 63 AD3d 1515, 1516, *lv denied* 13 NY3d 716). Importantly, plaintiff does not contend, and did not submit any evidence that would establish, that the calf's presence in the road blocked decedent's ability to travel in the southbound lane or otherwise forced decedent to stop her vehicle. Thus, Drumm Farm established as a matter of law that its "alleged negligent act, at most, caused the [calf to wander] out of the field, which was not the immediate cause of the accident" (*Lee v New York City Hous. Auth.*, 25 AD3d 214, 219, *lv denied* 6 NY3d 708; *see Schiff v Possemato*, 25 AD3d 839, 839-840), and plaintiff failed to raise a triable issue of fact in opposition (*see Gerrity v Muthana*, 28 AD3d 1063, 1064, *affd* 7 NY3d 834; *Wechter v Kelner*, 40 AD3d 747, 748, *lv denied* 9 NY3d 806).

All concur except WHALEN, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent. Defendant Drumm Family Farm, Inc. (Drumm Farm), as landowner and owner of the calf that plaintiff's wife (decedent) encountered on the roadway, may be held liable for her injuries if it negligently allowed the calf to stray from its property (*see Hastings v Sauve*, 21 NY3d 122, 125-126), and its negligence was a substantial cause of the events that resulted in decedent's injuries (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784; *Pomeroy v Buccina*, 289 AD2d 944, 945). Contrary to the majority, I conclude that triable issues of fact remain whether Drumm Farm's alleged negligence was a proximate cause of the accident.

There is no question that Drumm Farm owed a duty to keep its livestock out of the roadway, and that a motor vehicle accident is "within the class of reasonably foreseeable hazards that the duty exists to prevent" (*Sanchez v State of New York*, 99 NY2d 247, 252; *see Hastings*, 21 NY3d at 124-126; *Sargent v Mammoser*, 117 AD3d 1533,

1534). In my view, Drumm Farm failed to establish as a matter of law that it should be relieved of liability for its alleged breach of that duty because decedent's conduct was "of such an extraordinary nature or so attenuate[d] [Drumm Farm's] negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to [Drumm Farm]" (*Kush v City of Buffalo*, 59 NY2d 26, 33).

Nor did Drumm Farm establish as a matter of law that its alleged negligence did not place decedent in an unsafe position on the roadway by creating a hazard for her and other motorists (*see Gardner v Perrine*, 101 AD3d 1587, 1588). It is impossible to determine from the evidence in the record whether the calf was on the shoulder of the road or in the travel lane, and thus it is equally impossible to determine whether the calf's presence placed decedent in a position of danger. If the calf was in a position that forced decedent to stop her vehicle on the curve of a dark country road, she would have been in a "position of peril" (*id*.), regardless of whether she remained in the vehicle. I cannot agree with the majority, moreover, that it was plaintiff's burden to submit evidence that the calf's presence in the roadway blocked decedent's lane of travel or otherwise forced her to stop her vehicle. Rather, it was Drumm Farm's burden to eliminate, as a matter of law, any causal link between its alleged negligence and decedent's death. Concluding that Drumm Farm met that burden "requires the resolution of factual inferences in favor of [Drumm Farm], which is improper on a motion for summary judgment" (*Morris v Lenox Hill Hosp*., 232 AD2d 184, 185, *affd* 90 NY2d 953).

In sum, "because the determination of legal causation turns upon questions of foreseeability, and 'what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the [factfinder] to resolve' " (*Kriz v Schum*, 75 NY2d 25, 34, quoting *Derdiarian*, 51 NY2d at 315). As Supreme Court properly determined, a jury should decide whether the accident was a foreseeable consequence of Drumm Farm's alleged negligence. I would therefore affirm the order denying Drumm Farm's motion for summary judgment dismissing the complaint and all cross claims against it.

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

821

KA 13-01919

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PETER GIACONA, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN LEEDS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered January 29, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of two counts of vehicular assault in the second degree (§ 120.03 [1]), and one count each of driving while intoxicated (Vehicle and Traffic Law § 1192 [3]), and reckless driving (§ 1212). In appeal Nos. 3 through 6, defendant appeals from four orders directing him to pay restitution to the two car accident victims and the hospital that treated them in connection with the judgment of conviction in appeal No. 2.

With respect to the judgments in appeal Nos. 1 and 2, our review of County Court's denial of defendant's request for youthful offender treatment is precluded by his waiver of the right to appeal, the validity of which he does not contest (*see People v Pacherille*, 25 NY3d 1021, ___). However, we agree with defendant in appeal No. 2, and the People correctly concede, that his challenge to the legality of the sentence is not foreclosed by the valid waiver of the right to appeal (*see People v Graves*, 96 AD3d 1466, 1466-1467, *lv denied* 19 NY3d 1026). Turning to the merits, defendant contends, and the People further correctly concede, that the imposition of a five-year term of probation with an ignition interlock device with respect to the vehicular assault counts is illegal pursuant to Penal Law § 60.21 (*see*

People v Flagg, 107 AD3d 1613, 1614, *lv denied* 22 NY3d 1138), and we therefore modify the judgment accordingly. Pursuant to section 60.21, the mandatory five-year term of probation with an ignition interlock device only applies to a defendant convicted of a violation of Vehicle and Traffic Law § 1192 (2), (2-a) or (3) (*see Flagg*, 107 AD3d at 1614). Here, the proper remedy is to vacate the term of probation imposed on the vehicular assault counts (*see id.*). We note, however, that the court properly imposed the ignition interlock condition as a component of the three-year term of probation on the conviction under Vehicle and Traffic Law § 1192 (3). In addition, we agree with the People that the order of commitment must be amended to reflect that defendant's term of postrelease probation is a period of three years to commence immediately upon defendant's release from imprisonment (*see* Penal Law § 60.21; *see generally People v Brooks*, 46 AD3d 1374, 1374).

With respect to appeal Nos. 3 through 6, we reject defendant's contention that the court erred in ordering him to pay restitution to the treating hospital for the costs of medical care of the victims injured as a result of defendant's crimes (*see generally People v McDaniel*, 219 AD2d 861, 861-862, *lv denied* 88 NY2d 850). We reject defendant's further contention that the court erred in ordering restitution in an amount over $15,000, and we conclude that the court properly exercised its discretion in ordering reimbursement for medical expenses actually incurred by the victims injured as a result of defendant's crimes (*see* Penal Law § 60.27 [5] [b]). Finally, defendant's contention that one of the injured victims was required to submit medical bills to a no-fault insurer in lieu of restitution is without merit (*see People v Wilson*, 108 AD3d 1011, 1013; *People v Whitmore*, 234 AD2d 1008, 1008; *McDaniel*, 219 AD2d at 861).

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

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

822

KA 13-01920

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PETER GIACONA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN LEEDS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered January 29, 2013. The judgment convicted defendant, upon his plea of guilty, of vehicular assault in the second degree (two counts), driving while intoxicated, and reckless driving.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the term of probation imposed on counts one and two of the superior court information, and as modified the judgment is affirmed.

Same memorandum as in *People v Giacona* ([appeal No. 1] ___ AD3d ___ [July 10, 2015]).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

823

KA 14-01779

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PETER GIACONA, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN LEEDS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Mark H. Fandrich, A.J.), dated September 8, 2014. The order directed defendant to pay restitution of $2,405.74 to Malori G.

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

Same memorandum as in *People v Giacona* ([appeal No. 1] ___ AD3d ___ [July 10, 2015]).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

824

KA 14-01780

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PETER GIACONA, DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN LEEDS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Mark H. Fandrich, A.J.), dated September 8, 2014. The order directed defendant to pay restitution of $5,516.63 to Andrew N.

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

Same memorandum as in *People v Giacona* ([appeal No. 1] ___ AD3d ___ [July 10, 2015]).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

825

KA 14-01781

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PETER GIACONA, DEFENDANT-APPELLANT.
(APPEAL NO. 5.)

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN LEEDS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Mark H. Fandrich, A.J.), dated September 8, 2014. The order directed defendant to pay restitution of $35,424.94 to the Office of the New York State Attorney General, on behalf of SUNY Upstate Medical University Hospital.

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

Same memorandum as in *People v Giacona* ([appeal No. 1] ___ AD3d ___ [July 10, 2015]).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

826

KA 14-01782

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PETER GIACONA, DEFENDANT-APPELLANT.
(APPEAL NO. 6.)

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN LEEDS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Mark H. Fandrich, A.J.), dated September 8, 2014. The order directed defendant to pay restitution of $59,528.12 to the Office of the New York State Attorney General, on behalf of SUNY Upstate Medical University Hospital.

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

Same memorandum as in *People v Giacona* ([appeal No. 1] ___ AD3d ___ [July 10, 2015]).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

828

KA 15-00008

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDY ASHKAR, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO 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 (Joseph E. Fahey, J.), rendered July 23, 2013. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of stolen property in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed to an indeterminate term of 5 to 15 years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of criminal possession of stolen property in the first degree (Penal Law § 165.54). Defendant failed to preserve for our review his contention that his waiver of the right to a jury trial is invalid on the ground that the record fails to establish either that he signed the written waiver in open court (*see People v Dixon*, 113 AD3d 1104, 1104, *lv denied* 23 NY3d 962), or that the waiver was knowing, intelligent, and voluntary (*see People v Magnano*, 158 AD2d 979, 979, *affd* 77 NY2d 941, *cert denied* 502 US 864; *People v Dallas*, 119 AD3d 1362, 1364, *lv denied* 24 NY3d 1083). 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]).

By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to establish that defendant "knowingly possesse[d] stolen property," i.e., a winning $5 million lottery ticket, and that "the value of the property exceed[ed] one million dollars" (Penal Law

§ 165.54; *see* § 155.20 [2] [c]). 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).

We reject defendant's contention that he was denied effective assistance of counsel. Defense counsel's representation was not ineffective based upon his failure to object to alleged instances of prosecutorial misconduct (*see People v Swan*, 126 AD3d 1527, 1527), to renew his motion for a trial order of dismissal at the close of the evidence (*see People v Woodard*, 96 AD3d 1619, 1621, *lv denied* 19 NY3d 1030), or to cross-examine the victim more vigorously (*see People v Adams*, 247 AD2d 819, 819, *lv denied* 91 NY2d 1008). Rather, the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defendant was afforded meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). To the extent that defendant's contention is based upon defense counsel's allegedly inadequate or erroneous advice concerning defendant's waiver of a jury trial, the contention is properly raised in a motion pursuant to CPL 440.10 (*see Magnano*, 158 AD2d at 979).

We agree with defendant, however, that the imposition of the maximum sentence is unduly harsh and severe, particularly in light of the fact that defendant has no prior criminal history and his crime did not involve the use of violence or threats thereof. We therefore modify the judgment as a matter of discretion in the interest of justice by reducing the sentence imposed to an indeterminate term of incarceration of 5 to 15 years, which is the sentence that the People requested after defendant was convicted.

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

836

CA 15-00089

PRESENT: CENTRA, J.P., CARNI, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF DESIREE DAWLEY, JAMES DAWLEY, LYNN BARBUTO, ROBERT BARBUTO, JAMES NEARPASS, ASTRID NEARPASS, TODD WORDEN, LAURA WORDEN, JONATHAN MORELLI AND JANE MORELLI, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

WHITETAIL 414, LLC, WILMORITE, INC., TOWN OF TYRE TOWN BOARD, JAMES LEONARD AND JEANNE LEONARD, RESPONDENTS-RESPONDENTS.

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

HARRIS BEACH PLLC, PITTSFORD (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS WHITETAIL 414, LLC, WILMORITE, INC., JAMES LEONARD AND JEANNE LEONARD.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (THOMAS R. SMITH OF COUNSEL), FOR RESPONDENT-RESPONDENT TOWN OF TYRE TOWN BOARD.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Seneca County (W. Patrick Falvey, A.J.), entered September 18, 2014 in a CPLR article 78 proceeding. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs, and the petition is granted.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul the negative declaration issued by respondent Town of Tyre Town Board (Town Board) on June 12, 2014 under the State Environmental Quality Review Act ([SEQRA] ECL art 8) with respect to the proposed construction of the Lago Resort and Casino. Respondents filed answers seeking dismissal of the petition. Following additional written submissions and oral argument, Supreme Court dismissed the petition. We conclude that the court erred in doing so, and we therefore reverse.

We agree with petitioners that the negative declaration issued on June 12, 2014 failed to contain a written “reasoned elaboration” as required by 6 NYCRR 617.7 (b) (4). Although the Town Board issued the negative declaration at the June 12, 2014 meeting, the record

establishes that special counsel for the Town of Tyre subsequently prepared an attachment entitled "Reasons Supporting the Determination of Significance in Part 3 of Full Environmental Assessment Form." According to submissions made by special counsel in support of respondents' answers seeking dismissal of the petition, the attachment was prepared to "explain[] the findings made by the Town Board at the meeting and the rationale for the Negative Declaration." Notably, the attachment was not provided to the members of the Town Board until July 11, 2014. Moreover, the record establishes that the Town Board has never passed a resolution approving and/or adopting the attachment as part of its negative declaration. Nonetheless, respondents contend, and the court agreed, that there was compliance with SEQRA's procedural mandates. We reject that contention.

It is well settled that SEQRA's procedural mechanisms mandate strict compliance, and anything less will result in annulment of the lead agency's determination of significance (*see Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 347). "[L]iteral rather than substantial compliance with SEQRA is required" (*Matter of Badura v Guelli*, 94 AD2d 972, 972; *see Matter of Tupper v City of Syracuse*, 46 AD3d 1343, 1344, *lv denied* 10 NY3d 709). Here, 6 NYCRR 617.7 (b) (4) requires that, in making the determination of significance, the lead agency—in this case the Town Board—must "set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation." We conclude that the intent of the regulation is to focus and facilitate judicial review and, of no lesser importance, to provide affected landowners and residents with a clear, written explanation of the lead agency's reasoning at the time the negative declaration is made. We reject respondents' contention that we should search the entire record to discern the Town Board's reasoning as of June 12, 2014 in making the determination to issue the negative declaration. "A record evincing an extensive legislative process . . . is neither a substitute for strict compliance with SEQRA's [written] reasoned elaboration requirement nor sufficient to prevent annulment" (*Matter of Troy Sand & Gravel Co., Inc. v Town of Nassau*, 82 AD3d 1377, 1379). We therefore reverse the judgment and grant the petition, thereby annulling the negative declaration and vacating the site plan approval and all related resolutions.

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

CARNI and DEJOSEPH, JJ., concur.

CENTRA, J.P., concurs in the following memorandum: I agree with the majority that Supreme Court erred in dismissing the petition, but I write separately because, in my view, a transcript of a hearing may in certain circumstances satisfy the requirement that a lead agency "set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation" (6 NYCRR 617.7 [b] [4]; *see Matter of Coursen v Planning Bd. of Town of Pompey*, 37 AD3d 1159, 1160). Under the circumstances of this case, however, the transcript from the June

12, 2014 meeting did not satisfy the requirements of 6 NYCRR 617.7 (b) (4). The transcript of the meeting shows that some of the responses of the members of respondent Town of Tyre Town Board were equivocal, and thus in my view the lead agency's determination of significance is not supported by the requisite reasoned elaboration.

VALENTINO, J., dissents and votes to affirm in the following memorandum: I respectfully dissent. I disagree with the majority's conclusion that respondent Town of Tyre Town Board (Town Board) failed to comply strictly with SEQRA's procedural mandates. To the contrary, I conclude that the Town Board's determination was made in accordance with lawful procedure (*see Akpan v Koch*, 75 NY2d 561, 570; *Matter of Forman v Trustees of State Univ. of N.Y.*, 303 AD2d 1019, 1020) and, thus, that Supreme Court properly dismissed the petition. I would therefore affirm the judgment.

The transcript from the June 12, 2014 meeting satisfied the requirement for "a written form containing a reasoned elaboration" for the Town Board's determination of no significant adverse environmental impacts (6 NYCRR 617.7 [b] [4]; *see Matter of Residents Against Wal-Mart v Planning Bd. of Town of Greece*, 60 AD3d 1343, 1344, *lv denied* 12 NY3d 715; *Matter of Coursen v Planning Bd. of Town of Pompey*, 37 AD3d 1159, 1160). Here, the information contained in the attachment referenced by the majority was addressed—in much the same language—at the June 12, 2014 meeting, as were other documents created prior to that meeting. The minutes from the June 12, 2014 meeting establish that each of the 10 areas that were identified as having at least one potentially moderate to large impact were discussed at length before the Town Board members found no significant adverse environmental impacts. In my view, those minutes demonstrate that the Town Board "identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (*Matter of New York City Coalition to End Lead Poisoning v Vallone*, 100 NY2d 337, 348 [internal quotation marks omitted]).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

837

CA 15-00083

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

IN THE MATTER OF CLAYTON A. POTTER,
PETITIONER-APPELLANT,

V ORDER

ROBERT F. HYLAND & SONS, LLC,
RESPONDENT-RESPONDENT.

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

LECLAIR KORONA GIORDANO COLE, LLP, ROCHESTER (STEVEN E. COLE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered October 10, 2014 in a CPLR article 76 proceeding. The order, insofar as appealed from, dismissed the petition.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on April 21, 2015, and filed in the Monroe County Clerk's Office on April 22, 2015,

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

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

839

CA 14-01791

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

AMY PETROCI, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL PETROCI, DEFENDANT-APPELLANT-RESPONDENT.

WILLIAM R. HITES, BUFFALO, FOR DEFENDANT-APPELLANT-RESPONDENT.

BOUVIER PARTNERSHIP LLP, BUFFALO (MELISSA H. THORE OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered December 17, 2013 in a divorce action. The order, among other things, awarded plaintiff a money judgment against defendant for maintenance arrears.

It is hereby ORDERED that said cross appeal is unanimously dismissed and the order is modified on the law by vacating the seventh ordering paragraph and directing that the modification of child support be retroactive to February 14, 2012, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Defendant former husband appeals, and plaintiff former wife cross-appeals, from an order that, inter alia, awarded plaintiff a money judgment against defendant for maintenance arrears, denied defendant's request for reimbursement from plaintiff for health insurance premiums paid by him, and granted defendant a downward modification of his child support obligation. We note at the outset that we dismiss plaintiff's cross appeal inasmuch as she seeks only an affirmance of the order (*see Loveless Family Trust v Koenig*, 77 AD3d 1447, 1448).

Defendant contends that Supreme Court erred in failing to order plaintiff to reimburse him for amounts he spent to provide health insurance coverage for the parties' children at times when the parties' Property Settlement and Separation Agreement (Agreement) required that plaintiff provide such coverage. We reject that contention. Although we agree with defendant that the Agreement required plaintiff to provide health insurance coverage under the circumstances, we nevertheless agree with the court that defendant failed to establish his entitlement to reimbursement inasmuch as he "failed to present sufficient proof as to how much he . . . actually paid for insurance premiums for the children as opposed to himself", i.e., he failed to establish the price differential between a family

plan and an individual plan. Contrary to defendant's further contention, the court properly defined the "duration of [the] marriage" as the period between the date of marriage and the date of divorce for purposes of calculating maintenance under the Agreement, and the court was not required to apply the contrary definition of "[l]ength of marriage" applicable to an award of temporary maintenance under Domestic Relations Law § 236-B (5-a) (b) (3).

We agree with defendant that the court erred in not directing that the child support modification be retroactive to the date of his application therefor (*see* Domestic Relations Law § 240 [1] [j]; *Hayek v Hayek*, 63 AD3d 1598, 1599). We therefore modify the order accordingly. We further agree with defendant that the court erred in failing to adjust the parties' respective pro-rata shares of health insurance expenses, uninsured health care expenses, and child care expenses when it granted defendant's request for a downward modification of child support (*see* § 240 [1-b] [c] [4], [5]; *see also* § 240 [1] [d]; *see generally Griggs v Griggs*, 44 AD3d 710, 713-714; *Matter of Lewis v Redhead*, 37 AD3d 469, 470; *Rzepecki v Rzepecki*, 6 AD3d 1134, 1135). Consequently, we remit the matter to Supreme Court to calculate any arrears owed by, or credits due to, defendant (*see Lazar v Lazar*, 124 AD3d 1242, 1244; *Hayek*, 63 AD3d at 1599; *Sherman v Sherman*, 304 AD2d 744, 745).

Finally, "giving due deference to the court's credibility determinations" (*Leo v Leo*, 125 AD3d 1319, 1319; *see Flash v Fudella*, 64 AD3d 1242, 1243), we perceive no error in the award of extracurricular and child care expenses.

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

857

KA 14-00695

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL S. TURLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL S. TURLEY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered May 10, 2013. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree, course of sexual conduct against a child in the second degree and sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]), course of sexual conduct against a child in the second degree (§ 130.80 [1] [a]), and sexual abuse in the first degree (§ 130.65 [1]).

Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury, we conclude that the verdict is not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349; *see generally People v Bleakley*, 69 NY2d 490, 495). The victims testified to specific details about defendant's multiple acts of sexual conduct with them between August 1996 and June 1998, when they were between the ages of five and seven years old. One of the victims also testified to an act of sexual abuse by defendant when she was 12 years old. During a recorded telephone conversation with one of the victims, defendant made inculpatory statements (*see People v Smith*, 126 AD3d 1528, 1529). When that victim asked defendant about why he sexually abused her, defendant responded, inter alia, that "I was misguided in thinking that it was something you wanted," and that "I know it was wrong, and

I was trying to show you love in a way that you shouldn't have been shown."

We reject defendant's contention that he was denied effective assistance of counsel inasmuch as defense counsel's conduct did not constitute " 'egregious and prejudicial' error such that defendant did not receive a fair trial" (*People v Benevento*, 91 NY2d 708, 713). Defendant contends that he was denied effective assistance of counsel because defense counsel arguably opened the door to allow the People to present evidence that the testimony of one of the victims had not been tailored to come within the statute of limitations. That contention is without merit inasmuch as the prosecutor did not present any inculpatory evidence as a result of defense counsel's questions. In any event, County Court provided the jury with a curative instruction that required the jury not to speculate with respect to matters that occurred outside of the time frame set forth in the indictment. Inasmuch as the jury is presumed to have followed the court's curative instruction, we conclude that the curative instruction sufficiently alleviated any prejudice to defendant (*see People v O'Neal*, 38 AD3d 1305, 1307, *lv denied* 9 NY3d 848; *People v Ware*, 28 AD3d 1124, 1125, *lv denied* 7 NY3d 852). Defendant further contends that he was prejudiced by defense counsel's statement on summation that one of the witnesses, who is not listed as a victim in the indictment, "didn't say she was abused." We reject that contention inasmuch as the court sustained the prosecutor's timely objection and, after argument at the bench outside of the presence of the jury, struck defense counsel's statement from the record. Furthermore, after summations, the court granted the prosecutor's request for a curative instruction ordering the jury not to speculate about what may have happened to people other than the two victims listed in the indictment. The jury is presumed to have followed that curative instruction as well, thereby alleviating any prejudice to defendant (*see O'Neal*, 38 AD3d at 1307; *Ware*, 28 AD3d at 1125).

Defendant further contends that defense counsel was ineffective for advising him to abscond on the ground that he would not receive a fair trial. The facts upon which that contention is based are outside of the record on appeal, and the contention "must therefore be raised by way of a motion pursuant to CPL article 440 or an application seeking other [postconviction] relief" (*People v Washington*, 122 AD3d 1406, 1406; *see People v Ocasio*, 81 AD3d 1469, 1470, *lv denied* 16 NY3d 898, *cert denied* ___ US ___, 132 S Ct 318). We reject defendant's further contention that defense counsel's failure to file a motion to set aside the verdict constitutes ineffective assistance of counsel inasmuch as defendant failed to "establish that the motion, if made, would have been successful" (*People v Peterson*, 19 AD3d 1015, 1016, *lv denied* 6 NY3d 851). We have reviewed the remaining instances of alleged ineffective assistance of counsel raised by defendant and conclude that he received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

We reject the contention raised in defendant's pro se supplemental brief that the indictment was unconstitutionally vague because the counts for course of sexual conduct in the first and

second degree failed to provide fair notice of when the offending conduct occurred. We conclude that the indictment was sufficiently specific inasmuch as "[t]he period of [less than] two years alleged in the indictment was sufficient to give defendant adequate notice of the charges to enable him to prepare a defense, to ensure that the crimes for which he was tried were in fact the crimes with which he was charged, and to protect [his] right not to be twice placed in jeopardy for the same conduct" (*People v McLoud*, 291 AD2d 867, 868, *lv denied* 98 NY2d 678 [internal quotation marks omitted]).

Contrary to defendant's further contention in his pro se supplemental brief, count one of the indictment for course of sexual conduct against a child (Penal Law § 130.75 [1] [a]) is not time-barred by the statute of limitations set forth in CPL 30.10 (3) (f). The charges in the indictment occurred between August 1996 and 1998, not 1994 as alleged by defendant. The trial testimony of the victims established that the crimes occurred during the period set forth in the indictment, and there is no evidence that the victims lied with respect thereto.

Defendant further contends in his pro se supplemental brief that he was denied a fair trial with an impartial jury. During the trial, the court observed that "there were just some jurors perhaps out in the rotunda" in the vicinity of lawyers who may have been talking to a camera operator working for the press. The court responded by issuing a "gag order," stating "no more contact between lawyers and the press . . ." Defendant's contention that the court should have conducted a voir dire in response to its observations is not properly raised on this appeal inasmuch as that contention raises matters outside the record concerning what a voir dire would have revealed (*see generally People v Piermont*, 180 AD2d 830, 830, *lv denied* 79 NY2d 1006; *People v Robinson*, 159 AD2d 598, 598). The issue is thus outside the record and "must therefore be raised by way of a motion pursuant to CPL article 440 or an application seeking other [postconviction] relief" (*Washington*, 122 AD3d at 1406).

Defendant also contends in his pro se supplemental brief that he was denied a fair trial because one of the jurors revealed that she often stayed overnight in Genesee County, but that she still slept at her legal address in Niagara County several nights per week. We conclude that such objection to the juror was waived inasmuch as defendant did not move to remove the juror on that ground (*see* CPL 470.05 [2]; *People v Clark*, 255 AD2d 241, 241, *lv denied* 93 NY2d 898; *see also People v Cosmo*, 205 NY 91, 100-101).

Finally, the sentence is not unduly harsh or severe.

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

862

KA 14-01518

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL S. TURLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL S. TURLEY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered July 18, 2014. The judgment convicted defendant, upon his plea of guilty, of bail jumping 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 bail jumping in the first degree (Penal Law § 215.57). 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).

Defendant contends in his pro se supplemental brief that the indictment is invalid because he was allegedly arrested prior to the expiration of the 30-day "grace period" provided in Penal Law § 215.57, and thus that reversal is required (*cf. People v Shurn*, 71 AD2d 610, 610, *affd* 50 NY2d 914). That contention is not properly before us. "Because the [indictment] is not jurisdictionally defective, defendant's challenge[] to the [indictment is] forfeited by defendant's plea of guilty . . . , and in any event the valid waiver of the right to appeal encompasses [that] nonjurisdictional challenge[]" (*People v Rossborough*, 101 AD3d 1775, 1775-1776).

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court

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

877.1

CA 15-00856

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

IN THE MATTER OF CONCRETE APPLIED TECHNOLOGIES CORPORATION, DOING BUSINESS AS CATCO, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, MARIA R. WHYTE, COMMISSIONER, ERIE COUNTY DEPARTMENT OF ENVIRONMENTAL PLANNING, AND KANDEY COMPANY, INC., RESPONDENTS-APPELLANTS.

MOSEY PERSICO, LLP, BUFFALO (JENNIFER C. PERSICO OF COUNSEL), FOR RESPONDENTS-APPELLANTS COUNTY OF ERIE AND MARIA R. WHYTE, COMMISSIONER, ERIE COUNTY DEPARTMENT OF ENVIRONMENTAL PLANNING.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOSEPH J. MANNA OF COUNSEL), FOR RESPONDENT-APPELLANT KANDEY COMPANY, INC.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (ELIZABETH A. KRAENGEL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Timothy J. Walker, J.), entered April 20, 2015 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, granted the petition in part.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs and the petition is dismissed in its entirety.

Memorandum: Petitioner commenced this CPLR article 78 proceeding to challenge the award by respondents County of Erie and the Commissioner of the Erie County Department of Environmental Planning (collectively, County) of a contract for a public work project to respondent Kandey Company, Inc. (Kandey). When the bids were opened on February 3, 2015, Kandey was the lowest bidder and the County awarded it the contract. On February 6, 2015, Kandey made a request to the County for permission to withdraw its bid because of "two unconscionable and substantial clerical errors" involving the omission of the costs for two subcontractors that it discovered during its post-bid review. The County granted Kandey's request, returned the bid bonds for the project and notified all of the bidding contractors of its determination "that it is in the best interest of Erie County to rebid the contract."

The County thereafter advertised for bids and, when the bids were opened on March 18, 2015, Kandey was again the lowest bidder. After the County awarded the contract to Kandey following the rebid, petitioner, the second lowest bidder, commenced this proceeding. Supreme Court granted those parts of its petition seeking judgment vacating the award of the contract to Kandey and directing the County to award the contract to the lowest responsible bidder, excluding Kandey, or, in the alternative, directing the County to rebid the contract pursuant to General Municipal Law § 103 (11) (b), and precluding Kandey from participation in that rebid. We reverse the judgment insofar as appealed from.

The court properly concluded that a rational basis supported the County's determination that Kandey made the showing required by General Municipal Law § 103 (11) (a) when it sought permission to withdraw its mistaken bid. The court erred, however, in concluding that the County failed to comply with General Municipal Law § 103 (11) (b) when it permitted Kandey to participate in the rebid. That section provides that the "sole remedy for a bid mistake in accordance with this section shall be withdrawal of that bid and the return of the bid bond or other security, if any, to the bidder." That is precisely what the County did here when it permitted Kandey to withdraw the mistaken bid. The statute further provides that, after the mistaken bid is withdrawn, the County "may, in its discretion, award the contract to the next lowest responsible bidder or rebid the contract," and the County acted within the discretion extended to it under the statute when it elected to rebid the contract.

The statute is silent on the question whether a contractor that was permitted to withdraw its bid may participate in the rebid. We agree with Kandey and the County that, had the Legislature intended to forbid a contractor in Kandey's position from participating in the rebid, it would have done so explicitly. Further, "[a] court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit" (*Gammons v City of New York*, 24 NY3d 562, 570 [internal quotation marks omitted]). Thus, we do not interpret the statute to include an implicit prohibition against Kandey's participation in the rebid following the withdrawal of its mistaken bid.

Contrary to the contention of petitioner, moreover, permitting Kandey to participate in the rebid did not violate the statute's explicit prohibition against "[a]ny amendment to or reformation of a bid or a contract to rectify such an error or mistake therein" (General Municipal Law § 103 [11] [b]). Kandey's bid was not amended or reformed; it was withdrawn. Permitting Kandey to withdraw its original bid was not equivalent to allowing a renegotiation of that bid (*see Matter of Picone/McCullagh v Miele*, 283 AD2d 501, 503; *cf. Le Cesse Bros. Contr. v Town Bd. of Town of Williamson*, 62 AD2d 28, *affd* 46 NY2d 960). Like the other contractors that participated in the rebid, Kandey submitted a new bid. Under these circumstances, permitting Kandey's participation in the rebid was entirely consistent with the statute's purpose of "protect[ing] the integrity of the competitive bidding process" (*Picone/McCullagh*, 283 AD2d at 502).

We therefore reverse the judgment insofar as appealed from and dismiss the petition in its entirety.

Entered: July 10, 2015

Frances E. Cafarell
Clerk of the Court