SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JANUARY 31, 2020

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED JANUARY 31, 2020

_____	652	KA 18 01272	PEOPLE V JOSEPH R. WATKINS, II
_____	830	CA 19 00394	KERMIT G. STRADTMAN, JR. V MARK CAVARETTA
_____	831	CA 19 00398	KERMIT G. STRADTMAN, JR. V MARK CAVARETTA
_____	864	KA 18 00147	PEOPLE V MELQUAN TUCKER
_____	873	CA 19 00006	PATRICK A. NICOL V TARA M. NICOL
_____	920	CA 19 00375	KYLE GEHRKE V MUSTANG SALLY'S SPIRITS AND GRILL,
_____	921	CA 19 00711	EUGENE L. PIERCE V TIMOTHY B. HOWARD
_____	964	CA 18 02306	JEANNETTE S. V SAUL P. GREENFIELD, M.D.
_____	1011	CA 18 02209	ANDREW S. IWASYKIW V CORY STARKS
_____	1061	KA 17 01099	PEOPLE V CHARLES STRAUSS
_____	1066	CAF 16 02075	CARLOS J. TORRES V DIANE M. RODRIGUEZ
_____	1067	CAF 16 02347	CARLOS J. TORRES V ERIE COUNTY CHILDREN'S SERVICES
_____	1089	CA 18 01985	LONNIE DOTSON V J.C. PENNY COMPANY, INC.
_____	1090	CA 18 01217	LONNIE DOTSON V J.C. PENNEY COMPANY, INC.
_____	1091	CA 18 02323	LONNIE DOTSON V GARY MIGUEL
_____	1095	CA 18 02372	RAZIM RAMULIC V STATE OF NEW YORK
_____	1109	CA 19 00292	SAVE MONROE AVE., INC. V TOWN OF BRIGHTON
_____	1113	CA 19 01100	CHARLES PHILLIPS V STATE OF NEW YORK
_____	1114	CA 19 00576	BRIGHTON GRASSROOTS, LLC V TOWN OF BRIGHTON
_____	1131	KA 17 01993	PEOPLE V JASHUA WILLIAMS
_____	1147	KA 16 00185	PEOPLE V JUSTIN WOODARD
_____	1175	KA 12 01739	PEOPLE V JOHN WAYNE COLE
_____	1177	KA 17 00905	PEOPLE V BOBBY L. DAVIS
_____	1181	CAF 18 01315	Mtr of GIOHNA R.

_____	1182	CA 19 00233	CLARK RIGGING & RENTAL CORPORATION, V LIBERTY MUTUAL INSURANCE COMPANY
_____	1193	KA 17 01357	PEOPLE V WIGBERTO OSORIO
_____	1206	CAF 18 01489	Mtr of HOPE B.
_____	1207	CAF 18 01490	Mtr of FAITH B.
_____	1211	CA 19 00604	TERESA VITKO V SCOTT S. SIMON
_____	1217	KA 16 01992	PEOPLE V ANGNEM G. GREEN
_____	1221	KA 04 02539	PEOPLE V KYLE MILLER
_____	1226	KA 17 01127	PEOPLE V RUBEN BAILEY,JR.
_____	1227	CA 19 00577	THOMAS CARCIONE V ESSEX HOMES OF WNY, INC.
_____	1231	CA 19 01051	RAYLAND L. HICKS V STATE OF NEW YORK
_____	1248	CAF 18 01206	HOLLI H. V JOSEPH R.
_____	1249	CAF 18 00764	Mtr of BRADY R.
_____	1250	CAF 18 01195	Mtr of BRADY R.
_____	1254	CA 18 01323	PEOPLE OF THE STATE OF NEW YORK V PETER J BATTAGLIA
_____	1259	KA 18 00755	PEOPLE V JAMELL CHAPMAN
_____	1264	KA 16 00368	PEOPLE V WINSTON A. WILSON, JR.
_____	1269	CAF 18 00624	JUAN LORENZO MURIEL V MEGHAN O'NEILL MURIEL
_____	1271	CAF 18 01723	RAY WILLIAMS V VIRGINIA DAVIS
_____	1280	KA 18 01034	PEOPLE V JOSHUA D. BIASELLI
_____	1281	KA 18 00170	PEOPLE V SHEVOCKIE BLOODWORTH
_____	1282	KA 19 00153	PEOPLE V JUSTIN C. POTTS
_____	1283	KA 17 00713	PEOPLE V BRANDON WARMLEY
_____	1284	KA 17 01150	PEOPLE V DEMETRIEN BELL-BRADLEY
_____	1286	KA 19 00114	PEOPLE V JOSEPH T. MOLSKI
_____	1287	KA 17 01542	PEOPLE V RICHARD LOVE
_____	1288	KA 13 01179	PEOPLE V JODICE Q. CRITTENDEN
_____	1289	CAF 18 02374	JOSEPH E. BERG V EMILY E. STOUFER-QUINN
_____	1290	CAF 18 01626	NICHOLAS B. HERMANN V LATESSA WILLIAMS
_____	1297	CA 19 00381	KEVIN MURRAY V KATERI MURRAY
_____	1298	CA 19 00125	SPINE SURGERY OF BUFFALO NIAGARA, V

			GEICO CASUALTY COMPANY
_____	1305	KA 15 01996	PEOPLE V RODNEY HAWKINS
_____	1310	KA 18 00618	PEOPLE V FREDERICK HAYDEN-LARSON
_____	1311	KA 15 01807	PEOPLE V SHAQUAN O. LATIMORE
_____	1315	CA 19 01273	MYRON O. BRADY V LINDA F. BRADY
_____	1316	CA 19 00239	BUFFALO TEACHERS FEDERATION, INC. V BOARD OF EDUCATION OF THE BUFFALO P
_____	1317	CA 19 00857	JANE GRIFFIN MEECH V ROBERT J. ANTHONY, JR.
_____	2	KA 19 00547	PEOPLE V WILLIAM BROCKINGTON
_____	4	KA 19 00593	PEOPLE V JOSEPH CENTOFANTI
_____	6	KA 18 00320	PEOPLE V RICHARD WHITE
_____	7	KA 17 01653	PEOPLE V WAYNE SHORTER
_____	9	KA 18 00157	PEOPLE V DARNELL DOZIER
_____	11	CAF 19 00241	DURIEL A. GREEN V BIANCA S. BOLTON
_____	14	CA 19 00100	425 WEST MAIN ASSOCIATES V SELECTIVE INSURANCE CO
_____	17	CA 19 01101	STATE OF NEW YORK V FOIT-ALBERT ASSOCIATES, ARCHI
_____	19	CA 19 00872	KAREN D. V HOON CHOI, M.D.
_____	24	KA 17 00096	PEOPLE V WILLIE STENSON
_____	42	KA 17 01532	PEOPLE V RESHEENA JENKINS
_____	43	KA 17 01573	PEOPLE V RESHEENA JENKINS
_____	44	KA 17 02060	PEOPLE V WALTER DENNIS
_____	45	KA 18 01367	PEOPLE V MICHAEL HENDRICKSON
_____	48	KA 15 00763	PEOPLE V GARY L. EADY
_____	59	CA 19 01227	NATIONAL FUEL GAS SUPPLY CORPORATIO V IVAN GUROV
_____	65	CA 19 01194	NATIONAL FUEL GAS SUPPLY CORPORATIO V EMILY R. OPREA
_____	67	KA 17 00729	PEOPLE V KEITH O. MORRISON
_____	68	KA 19 00805	PEOPLE V GUSTAVO ROMAN
_____	69	KA 19 00670	PEOPLE V RUFINO LOPEZ
_____	72	KAH 18 00672	SHAWN E. AKIN V JOHN COLVIN
_____	73	CAF 19 00022	Mtr of ERIC

_____	78	CA 18 02364	CONESUS LAKE NURSING HOME, LLC In the Matter of NEW YORK STATE DEPARTMENT OF HEALTH
_____	83	CA 19 00637	BHARAT AGGARWAL V EASTVIEW MALL, LLC
_____	88	CA 19 00941	MOHSIN NAGI V TONY PAYNE, JR.
_____	89	CA 19 01358	MOHSIN NAGI V TONY PAYNE, JR.
_____	90	CA 19 01359	MOHSIN NAGI V TONY PAYNE, JR.
_____	93	KA 18 01861	PEOPLE V CARLOS PEREZ-MEDINA
_____	95	KA 18 00283	PEOPLE V MICHAEL COIT
_____	101	KAH 17 01758	RICHARD F. MILLS V JOHN COLVIN
_____	102	KAH 18 02018	RICHARD MILLS V JOHN COLVIN
_____	103	KAH 18 02019	RICHARD MILLS V JOHN COLVIN
_____	118	TP 18 01637	DARREL OLDHAM V ANTHONY ANNUCCI
_____	119	KA 18 00869	PEOPLE V BRANDON DECAPUA
_____	121	KA 17 00944	PEOPLE V SHELBY M. HODGE
_____	127	CAF 18 00996	Mtr of LOGAN P.
_____	128	CAF 18 00997	Mtr of LOGAN P.
_____	129	CAF 19 00248	ROCHELLE RAGER V JOSHUA RAMSELL
_____	130	CAF 18 02172	PAMELA ROBINSON V ERIE COUNTY DEPARTMENT OF SOCIAL
_____	135	CA 19 01218	STEVEN M. CRAMER V RONALD J. SCHRUEFER
_____	139	CA 19 00229	TRAVELERS CASUALTY AND SURETY COMPA V DIPIZIO CONSTRUCTION COMPANY, INC.
_____	142	TP 19 01523	D. N. V ANTHONY ANNUCCI
_____	145	KA 19 00071	PEOPLE V ANDRES AYALA
_____	161.1	CA 19 00284	ANDREW FAGAN V STATE FARM MUTUAL AUTOMOBILE INSUR
_____	163	TP 19 01585	ROBERT CARDEW V ANTHONY ANNUCCI
_____	170	CAF 18 01586	KEREEM JOHNSON V MICHELLE L. BODIE
_____	176	CA 19 01347	AYANNA HEMPHILL V BUFFALO PUBLIC SCHOOLS

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

652

KA 18-01272

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH R. WATKINS, II, DEFENDANT-APPELLANT.

STEVEN A. FELDMAN, UNIONDALE, FOR DEFENDANT-APPELLANT.

JOSEPH R. WATKINS, II, DEFENDANT-APPELLANT PRO SE.

Appeal from a judgment of the Steuben County Court (William F. Kocher, A.J.), rendered December 15, 2017. The judgment convicted defendant upon a jury verdict of rape in the first degree, criminal sexual act in the first degree, and incest in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Steuben County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [1]), criminal sexual act in the first degree (§ 130.50 [1]), and incest in the third degree (§ 255.25). Defendant failed to preserve for our review the contention in his main brief that the conviction is not supported by legally sufficient evidence inasmuch as his motion for a trial order of dismissal was not specifically directed at the grounds advanced on appeal and, in any event, he failed to renew his motion after presenting evidence (*see People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention in the main brief that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant contends in his pro se supplemental brief that County Court erred in failing to grant that part of his omnibus motion seeking suppression of an intercepted telephone call pursuant to CPL 700.70. There is no indication in the record, however, that the court ruled on that part of the motion. The Court of Appeals "has construed CPL 470.15 (1) as a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, *or not ruled upon*, by the trial court" (*People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999] [emphasis added]; *see People v Concepcion*, 17 NY3d 192, 197-198 [2011]), and

thus the court's failure to rule on the motion insofar as it sought suppression of the intercepted telephone call cannot be deemed a denial thereof. We therefore hold the case, reserve decision and remit the matter to County Court for a ruling on that part of defendant's motion (*see generally People v Morris*, 176 AD3d 1635, 1636 [4th Dept 2019]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

830

CA 19-00394

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, TROUTMAN, AND WINSLOW, JJ.

KERMIT G. STRADTMAN, JR., INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF KELLY L. STRADTMAN, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARK CAVARETTA, JOSEPH A. CARUANA, SYNERGY BARIATRICS, P.C., AND JOSEPH A. CARUANA, M.D., P.C., DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOHN P. DANIEU OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered August 14, 2018. The order granted defendants' motion for summary judgment and dismissed the complaint.

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

Same memorandum as in *Stradtman v Cavaretta* ([appeal No. 2] — AD3d — [Jan. 31, 2020] [4th Dept 2020]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

831

CA 19-00398

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, TROUTMAN, AND WINSLOW, JJ.

KERMIT G. STRADTMAN, JR., INDIVIDUALLY,
AND AS ADMINISTRATOR OF THE ESTATE OF
KELLY L. STRADTMAN, DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARK CAVARETTA, JOSEPH A. CARUANA,
SYNERGY BARIATRICS, P.C., AND JOSEPH A.
CARUANA, M.D., P.C.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOHN P. DANIEU OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered November 16, 2018. The order denied plaintiff's motion for leave to renew and reargue his opposition to defendants' motion for summary judgment.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is dismissed, and the order is modified on the law by granting that part of plaintiff's motion seeking leave to renew, and upon renewal, denying defendants' motion for summary judgment and reinstating the complaint, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action alleging that the negligence of defendants during their treatment of plaintiff's decedent, which included abdominal surgeries performed on July 1 and July 6, 2013, caused decedent to suffer serious injuries and caused her eventual death. In appeal No. 1, plaintiff appeals from an order that granted defendants' motion for summary judgment dismissing the complaint. In appeal No. 2, plaintiff appeals from an order that denied his motion for leave to reargue and renew his opposition to defendants' motion. Insofar as the order in appeal No. 2 denied that part of plaintiff's motion seeking leave to reargue, it is not appealable and we therefore dismiss the appeal to that extent (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]).

With respect to the merits, we conclude that Supreme Court properly determined that defendants met their initial burden on their motion for summary judgment dismissing the complaint and that plaintiff failed to raise an issue of fact with his initial submissions in opposition. Nevertheless, we conclude in appeal No. 2 that the court erred in denying that part of plaintiff's motion seeking leave to renew his opposition to defendants' motion, and upon renewal, we further conclude that the new evidence submitted by plaintiff raised a triable issue of fact. We therefore modify the order in appeal No. 2 by granting that part of plaintiff's motion seeking leave to renew, and upon renewal, denying defendants' motion for summary judgment and reinstating the complaint. In light of that determination, we dismiss appeal No. 1 (*see generally Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

On their motion for summary judgment dismissing the complaint, defendants had "the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause [decedent's] injuries" (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017] [internal quotation marks omitted]; *see Isensee v Upstate Orthopedics, LLP*, 174 AD3d 1520, 1521 [4th Dept 2019]). We conclude that the affidavit of defendant Joseph A. Caruana was sufficient to meet that burden inasmuch as it was "detailed, specific, and factual in nature," and it "address[ed] each of the specific factual claims of negligence raised in . . . plaintiff's bill of particulars" (*Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015] [internal quotation marks omitted]; *see Shattuck v Anain*, 174 AD3d 1339, 1339 [4th Dept 2019]). Contrary to plaintiff's contention, Caruana's affidavit did not contradict his prior deposition testimony. Rather, Caruana's affidavit and deposition were consistent that the surgery performed on July 6, 2013 was intended to address decedent's pneumatosis, ischemia, and other conditions, because the surgery would relieve her underlying bowel obstruction.

Because "defendants met their burden on both compliance with the accepted standard of care and proximate cause, the burden shifted to plaintiff[] to raise triable issues of fact by submitting an expert's affidavit both attesting to a departure from the accepted standard of care and that defendants' departure from that standard of care was a proximate cause of the injur[ies]" (*Isensee*, 174 AD3d at 1522; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]). Here, plaintiff submitted an affirmation of an expert surgeon in opposition to defendants' motion, and the court properly determined that the affirmation of plaintiff's expert was not in admissible form inasmuch as it did not comply with CPLR 2106 (a) (*see Cleasby v Acharya*, 150 AD3d 605, 605 [1st Dept 2017]). Specifically, plaintiff's expert "failed to state that he or she [was] licensed to practice medicine in the State of New York" (*Cleasby*, 150 AD3d at 605). Thus, plaintiff failed to "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact" (*Alvarez*, 68 NY2d at 324).

Plaintiff, however, cured the technical defect in his expert's affirmation by submitting in support of his motion for leave to renew an affidavit from his expert, which included the statement that the expert was licensed to practice medicine in New York. Plaintiff also provided a reasonable justification for the failure to include that necessary information in the original affirmation (*see* CPLR 2221 [e] [3]; *Doe v North Tonawanda Cent. School Dist.*, 91 AD3d 1283, 1284 [4th Dept 2012]). We therefore conclude that the court erred in denying that part of plaintiff's motion seeking leave to renew his opposition to defendants' motion (*see Green v Canada Dry Bottling Co. of N.Y., L.P.*, 133 AD3d 566, 567 [2d Dept 2015]; *Koufalis v Logreira*, 102 AD3d 750, 750 [2d Dept 2013]; *Arkin v Resnick*, 68 AD3d 692, 693-694 [2d Dept 2009]).

We further conclude that, upon renewal, the opinions rendered by plaintiff's expert were sufficient to raise triable issues of fact. We agree with plaintiff that the court erred in determining that his expert lacked "the requisite skill, training, education, knowledge or experience from which it can be assumed that [the expert's] opinion rendered . . . is reliable" (*Payne v Buffalo Gen. Hosp.*, 96 AD3d 1628, 1629-1630 [4th Dept 2012] [internal quotation marks omitted]; *see Fay v Satterly*, 158 AD3d 1220, 1221 [4th Dept 2018]). It is well settled that "[a] physician need not be a specialist in a particular field to qualify as a medical expert and any alleged lack of knowledge in a particular area of expertise goes to the weight and not the admissibility of the testimony" (*Moon Ok Kwon v Martin*, 19 AD3d 664, 664 [2d Dept 2005]; *see Borawski v Huang*, 34 AD3d 409, 410-411 [2d Dept 2006]; *Corcino v Filstein*, 32 AD3d 201, 202 [1st Dept 2006]).

We also agree with plaintiff that the court erred in determining that the expert's opinions were " 'speculative or unsupported by any evidentiary foundation' " (*Occhino*, 151 AD3d at 1871, quoting *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). The expert's opinion was appropriately based in part on evidence in the record, i.e., decedent's medical records (*see generally Admiral Ins. Co. v Joy Contrs., Inc.*, 19 NY3d 448, 457 [2012]; *Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725 [1984]). Those records included a CT scan of decedent revealing pneumatosis, which, according to Caruana's testimony, suggested that decedent's bowel was dying. The records also included the autopsy report, confirming that the cause of decedent's death was the passing of gastrointestinal contents through the wall of the dying bowel. Based on that information, the expert opined: "once a CT reveals pneumatosis, standards of care require that a surgeon visually inspects all of the portions of the bowel in the operating room. This is because bowel ischemia may or may not be reversible, and in case ischemia cannot be reversed, a bowel resection is necessary to save a patient's life." According to the expert, defendants deviated from the appropriate standard of care by failing to perform an "exploratory laparotomy of the entire bowel and abdominal cavity . . . to address the source of [decedent's] sepsis," and defendants' deviation from the standard of care caused decedent's death.

We respectfully disagree with the dissent's conclusion that the expert opinion is conclusory. The opinion is not conclusory because it is supported by ample evidence that, if defendants had performed an exploratory laparotomy of the entire bowel, they would have discovered that resection of the dying bowel was medically necessary, and, furthermore, that resection of decedent's dying bowel would have saved her life (*see Reid v Soults*, 138 AD3d 1087, 1090 [2d Dept 2016]; *cf. Diaz*, 99 NY2d at 544-545).

All concur except PERADOTTO, J., who dissents in part and votes to modify in accordance with the following memorandum: I respectfully dissent in part in appeal No. 2. Although I agree with the majority that Supreme Court erred in denying plaintiff's motion for leave to renew his opposition to defendants' motion for summary judgment dismissing the complaint, upon renewal I would adhere to the court's determination to grant defendants' motion and dismiss the complaint. I agree with defendants that the affirmation of plaintiff's expert submitted upon renewal in opposition to defendants' motion is conclusory and therefore insufficient to raise a triable issue of material fact whether the alleged malpractice of defendants was a proximate cause of the death of plaintiff's decedent (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Plaintiff's expert "failed to articulate, in a nonconclusory fashion" that the alleged injuries to plaintiff's decedent would not have occurred absent the alleged malpractice of defendants (*Goldsmith v Taverni*, 90 AD3d 704, 705 [2d Dept 2011]; *see generally Diaz*, 99 NY2d at 544). Specifically, the expert failed to opine how a full abdominal exploration would have prevented the clinical deterioration of plaintiff's decedent or prevented her ultimate death in this case (*see Poblocki v Todoro*, 49 AD3d 1239, 1240 [4th Dept 2008]; *Sawczyn v Red Roof Inns, Inc.*, 15 AD3d 851, 852 [4th Dept 2005], *lv denied* 5 NY3d 710 [2005]; *Koeppel v Park*, 228 AD2d 288, 290 [1st Dept 1996]). I therefore would modify the order in appeal No. 2 by granting that part of plaintiff's motion seeking leave to renew his opposition to defendants' motion for summary judgment and, upon renewal, adhere to the court's determination to grant defendants' motion and dismiss the complaint.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

864

KA 18-00147

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

MELQUAN TUCKER, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DENNIS A. RAMBAUD OF COUNSEL), FOR INTERVENOR-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered January 8, 2018. The judgment convicted defendant, upon a jury verdict, of criminal possession of a firearm.

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

Opinion by PERADOTTO, J.:

We conclude that New York's criminal prohibition on the possession of a handgun in the home without a license, as applied to defendant, does not violate the Second Amendment of the Constitution of the United States.

I

Upon executing a no-knock search warrant, police officers entered a residence in which defendant and other people were present. While searching a bedroom, the police discovered a gun box in the closet containing a revolver, two cylinders, and ammunition. The police also discovered in that bedroom, among other things, defendant's driver's license and a bottle of medication prescribed to defendant. Later DNA testing also connected defendant to the revolver. It is undisputed that defendant did not have a license to possess a handgun, and defendant does not claim that he had applied for one. Additionally, when the police first entered the residence, another officer positioned outside had observed the codefendant jump from a first floor window of another bedroom and saw numerous baggies, later determined to contain heroin, fall from the codefendant's person. The

police also seized a small digital scale from the kitchen of the residence.

Defendant and the codefendant were charged by joint indictment with criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), and defendant was separately charged in the indictment with criminal possession of a firearm (§ 265.01-b [1]). Defendant moved to dismiss the criminal possession of a firearm charge on the ground that the charge is unconstitutional as applied to him because it violates his right under the Second Amendment to possess the revolver in his home for self-defense. Defendant notified the Attorney General of the State of New York pursuant to Executive Law § 71 that he was challenging the constitutionality of Penal Law § 265.01-b (1). The People opposed the motion, and defendant replied in further support of his constitutional challenge. Supreme Court denied the motion.

Following trial, the jury rendered a verdict finding defendant guilty of criminal possession of a firearm (Penal Law § 265.01-b [1]) but acquitting him of the drug-related charge. Defendant now appeals, raising as his primary contention that the court erred in denying his motion to dismiss the charge of criminal possession of a firearm because, as applied to him, criminal prosecution under the statute for possession of an unlicensed firearm violates his right under the Second Amendment to possess the revolver in his home for self-defense. We note at the outset that the issue before us does not involve a challenge to any particular provision of the licensing requirement; instead, the central question is whether New York may constitutionally impose any criminal sanction whatsoever on the unlicensed possession of a handgun in the home.

II

New York has a long history of regulating the possession of firearms by persons within the state, particularly by way of a licensing requirement. In the latter part of the nineteenth century, the legislature enacted a law prohibiting any person under 18 years old from "hav[ing], carry[ing] or hav[ing] in his possession in any public street, highway or place in any city" a pistol or firearm of any kind without a license from a police magistrate of such city and making the violation thereof a misdemeanor (L 1884, ch 46, § 8; *see also* L 1883, ch 375). In 1905, the legislature amended the law to prohibit any person over 16 years old from carrying a concealed firearm in any city or village without a license and to further prohibit any person from selling or otherwise providing any pistol, revolver or other firearm to a person under 16 years old (*see* L 1905, ch 92, §§ 1, 2).

As has been recounted in prior cases (*see e.g. Kachalsky v County of Westchester*, 701 F3d 81, 84-85 [2d Cir 2012], *cert denied* 569 US 918 [2013]), following an increase in shooting homicides and suicides committed with revolvers and other concealable firearms during the early twentieth century, as reported in a coroner's office study, the legislature enacted the Sullivan Law to address the rise of violent

crimes associated with such weapons (*see id.*; *People ex rel. Darling v Warden of City Prison*, 154 App Div 413, 422-423 [1st Dept 1913]; *Revolver Killings Fast Increasing*, NY Times, Jan. 30, 1911, at 4, col 4). The law made it a misdemeanor to possess without a license "any pistol, revolver or other firearm of a size which may be concealed upon the person" "in any city, village or town of th[e] state" (L 1911, ch 195, § 1). Although the First Department, in rejecting a challenge to the law shortly after its passage, relied in part on the now-repudiated basis that the Second Amendment does not apply to the states (*see Darling*, 154 App Div at 419), the court also reasoned that the right conferred by statute (*see* Civil Rights Law § 4; *People v Perkins*, 62 AD3d 1160, 1161 [3d Dept 2009], *lv denied* 13 NY3d 748 [2009]) was not violated by the law inasmuch as the legislature had "passed a regulative, not a prohibitory, act" in the proper exercise of its police powers to promote the safety of the public (*Darling*, 154 App Div at 423). The First Department noted that prior state laws regulating the carrying of concealed weapons had not "seem[ed] effective in preventing crimes of violence" and that the legislature had therefore determined to proceed "a step further with the regulatory legislation" concerning licensing in order to prevent criminals from possessing handguns (*id.*).

The law was subsequently amended and recodified, and today New York maintains its criminal prohibition on the possession of certain firearms, including pistols and revolvers, without a valid license, even if such firearms remain in one's home (*see* Penal Law §§ 265.00 [3]; 265.01 [1]; 265.01-b [1]; 265.20 [a] [3]).

III

The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The Supreme Court of the United States has held that the amendment confers an individual right to keep and bear arms for lawful purposes, such as self-defense in the home (*see District of Columbia v Heller*, 554 US 570 [2008]), and that the right is fully applicable to the states (*see McDonald v City of Chicago*, 561 US 742 [2010]). The Court held that self-defense is the central component of the Second Amendment right and stated that "the need for defense of self, family, and property is most acute" in the home and that handguns are "the most preferred firearm in the nation to keep and use for protection of one's home and family" (*Heller*, 554 US at 628-629 [internal quotation marks omitted]; *see id.* at 599; *see also McDonald*, 561 US at 767). The Court thus struck down laws that effectuated complete bans on in-home possession of handguns (*see McDonald*, 561 US at 791; *Heller*, 554 US at 635).

The Court also recognized, however, that "the right secured by the Second Amendment is not unlimited" and has never been understood as allowing one "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose" (*Heller*, 554 US at 626; *see generally Robertson v Baldwin*, 165 US 275, 281-282 [1897]). The Court made clear that its holdings "did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by

felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms' " (*McDonald*, 561 US at 786, quoting *Heller*, 554 US at 627-628). Such "presumptively lawful regulatory measures" were offered "only as examples" rather than as an exhaustive list (*Heller*, 554 US at 627 n 26).

In light of the lack of detailed guidance offered in *Heller* and *McDonald* regarding the manner in which Second Amendment challenges to firearms legislation should be evaluated, the courts began to develop an analytical framework for reviewing such challenges (*see generally New York State Rifle & Pistol Assn., Inc. v Cuomo*, 804 F3d 242, 252-254 [2d Cir 2015], *cert denied* — US —, 136 S Ct 2486 [2016]). Appellate courts, including the Court of Appeals, have generally applied or taken an approach consistent with a two-step analysis in which they first " 'determine whether the challenged legislation impinges upon conduct protected by the Second Amendment' " and, if so, they then "determine the appropriate level of scrutiny to apply and evaluate the constitutionality of the law using that level of scrutiny" (*United States v Jimenez*, 895 F3d 228, 232 [2d Cir 2018]; *see e.g. People v Hughes*, 22 NY3d 44, 51 [2013]; *New York State Rifle & Pistol Assn., Inc.*, 804 F3d at 254 and n 49 [citing cases using a two-step approach]).

IV

On this appeal, defendant contends that the court erred in denying his motion to dismiss the criminal possession of a firearm count (Penal Law § 265.01-b [1]) because New York's criminal prohibition on the possession of a handgun in the home without a license, as applied to him, violates his right under the Second Amendment. Although defendant mentions that Penal Law article 265 allows for prosecutorial discretion in these circumstances to determine whether to pursue a class E felony (*see* § 265.01-b) or a class A misdemeanor (*see* § 265.01; *see generally* William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 265.01 at 106 [2017 ed]), that is not the premise of his challenge (*cf. People v Eboli*, 34 NY2d 281, 284 [1974]); nor does this case involve a constitutional challenge to the licensing requirements or process upon a denial or revocation of such a license (*cf. Matter of Delgado v Kelly*, 127 AD3d 644, 644 [1st Dept 2015], *lv denied* 26 NY3d 905 [2015]). Rather, defendant contends that New York may not constitutionally impose any criminal sanction whatsoever on the unlicensed possession of a handgun in the home. According to defendant, that criminal prohibition should be subjected to strict scrutiny because it implicates conduct at the core of the Second Amendment and cannot withstand such scrutiny. The People respond that defendant's contention is without merit. The Attorney General, as intervenor, responds that defendant's challenge fails at step one of the analysis and that, even at step two, an intermediate level of scrutiny would apply and the criminal prohibition on unlicensed possession of a handgun in the home would survive such scrutiny.

The Attorney General presents arguments for rejecting defendant's challenge at the first step of the analysis based on the longstanding nature of New York's criminal prohibition relative to the presumptively lawful regulatory measures listed as examples in *Heller* and the historical and traditional justifications for regulating firearm possession (*see e.g. National Rifle Assn. of Am., Inc. v Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F3d 185, 196-197 [5th Cir 2012], *cert denied* 571 US 1196 [2014]; *Heller v District of Columbia*, 670 F3d 1244, 1253-1255 [DC Cir 2011] [*Heller II*]; *United States v Skoien*, 614 F3d 638, 640-641 [7th Cir 2010], *cert denied* 562 US 1303 [2011]; *see generally* 1 William Blackstone, Commentaries on the Laws of England at 139-140 [1765]). However, we need not address that issue here because, even assuming, arguendo, that defendant's challenge advances beyond the first step of the analysis, we conclude that New York's criminal prohibition passes constitutional muster under Second Amendment scrutiny at the second step (*see generally Jimenez*, 895 F3d at 234). Specifically, we conclude for the reasons that follow that, contrary to defendant's contention, the appropriate level of scrutiny is intermediate and the criminal prohibition on the possession of a handgun in the home without a license withstands such scrutiny.

With regard to the appropriate level of scrutiny, the Court of Appeals in *Hughes* considered the defendant's challenge to his conviction of criminal possession of a weapon in the second degree stemming from his unlicensed possession of a handgun in the home. The defendant's challenge was on the ground that the inapplicability of the home exception due to his prior misdemeanor conviction (*see* Penal Law §§ 265.02 [1]; 265.03 [3]), which effectively elevated his criminally culpable conduct from a class A misdemeanor to a class C felony, infringed upon his Second Amendment right (22 NY3d at 48-50). The Court—assuming, without deciding, that Second Amendment scrutiny was appropriate—applied intermediate scrutiny after concluding that several federal appellate courts had applied that level of scrutiny in Second Amendment cases and that the *Heller* opinion itself pointed in that direction (*id.* at 51).

Second Circuit precedent also holds that "[l]aws that place substantial burdens on core rights are examined using strict scrutiny" whereas "laws that place either insubstantial burdens on conduct at the core of the Second Amendment or substantial burdens on conduct outside the core of the Second Amendment (but nevertheless implicated by it) can be examined using intermediate scrutiny" (*Jimenez*, 895 F3d at 234). Here, the record does not establish that New York's licensing requirement as backed by a criminal penalty for noncompliance imposes anything more than an insubstantial burden on conduct at the core of the Second Amendment, i.e., the right of a law-abiding, responsible citizen to possess a handgun in the home for self-defense (*see generally id.* at 234-235). Contrary to defendant's contention that New York "prevent[s] citizens from protecting themselves in their home[s] and penaliz[es] them for doing so," state law does not effectuate a complete ban on the possession of handguns in the home (*cf. McDonald*, 561 US at 750; *Heller*, 554 US at 629; *see generally Perkins*, 62 AD3d at 1161). Instead, "New York's criminal

weapon possession laws prohibit only *unlicensed* possession of handguns. A person who has a valid, applicable license for his or her handgun commits no crime" (*Hughes*, 22 NY3d at 50; *see* Penal Law § 265.20 [a] [3]). Moreover, the Court of Appeals has noted that a license to possess a handgun in the home is not "difficult to come by" (*Hughes*, 22 NY3d at 50). There is no evidence on this record to support defendant's conclusory assertions that the expense and logistics of obtaining a license constitute substantial burdens on the right to possess a handgun in the home for self-defense (*see Kwong v Bloomberg*, 723 F3d 160, 164-165 [2d Cir 2013], *cert denied* 572 US 1149 [2014]; *see also United States v Marzzarella*, 614 F3d 85, 97 [3d Cir 2010], *cert denied* 562 US 1158 [2011]; *see generally Heller II*, 670 F3d at 1254-1255).

In light of the holding in *Hughes*, and as reinforced by persuasive federal case law, we conclude that intermediate scrutiny is the appropriate level by which to evaluate the constitutionality of the criminal prohibition on the possession of a handgun in the home without a license.

With regard to that evaluation, "[i]ntermediate scrutiny requires us to ask whether a challenged statute bears a substantial relationship to the achievement of an important governmental objective" (*Hughes*, 22 NY3d at 51). First, it is beyond dispute that "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention" (*Kachalsky*, 701 F3d at 97; *see Hughes*, 22 NY3d at 52; *New York State Rifle & Pistol Assn., Inc.*, 804 F3d at 261-262; *Schulz v State of N.Y. Exec.*, 134 AD3d 52, 56-57 [3d Dept 2015], *appeal dismissed* 26 NY3d 1139 [2016], *reconsideration denied* 27 NY3d 1047 [2016], *lv denied* 27 NY3d 907 [2016]). Those concerns include the state's "substantial and legitimate interest and[,] indeed, . . . grave responsibility, in insuring the safety of the general public from individuals who, by their conduct, have shown" that they should not be entrusted with a dangerous instrument (*Matter of Galletta v Crandall*, 107 AD3d 1632, 1632 [4th Dept 2013] [internal quotation marks omitted]). Further, we reject defendant's contention that the state's interest in this regard does not extend into the home and is limited to "prevent[ing] *public*, violent conduct from illegal gun use" (emphasis added). It is well established that the state's interest includes protecting persons within the home from violence and danger attributable to individuals who pose a safety risk if allowed to possess a handgun (*see Delgado*, 127 AD3d at 644; *Matter of Lipton v Ward*, 116 AD2d 474, 475-477 [1st Dept 1986]).

Second, the criminal prohibition on the unlicensed possession of a handgun, including in the home, bears a substantial relationship to the state's interests. "In the context of firearm regulation, the legislature is 'far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying [and possessing] firearms and the manner to combat those risks" (*Kachalsky*, 701 F3d at 97). We are satisfied that New York " 'has drawn reasonable inferences based on substantial evidence' " in formulating its judgment on the subject at

issue (*id.*; *see e.g. id.* at 97-98; Rep of the NY State Joint Legis Comm on Firearms and Ammunition, 1965 NY Legis Doc No. 6 at 7-18). Contrary to defendant's assertions, we conclude that the possibility of a criminal penalty is well-suited to promote compliance with the licensing requirement for handgun possession in furtherance of the state's interests (*see Hughes*, 22 NY3d at 52).

V

Defendant further contends that reversal is required because the court erred in denying his *Batson* application concerning the prosecutor's use of a peremptory challenge to exclude a black prospective juror. We reject that contention. Inasmuch as the prosecutor offered a race-neutral reason for the challenge and the court thereafter "ruled on the ultimate issue" by determining, albeit implicitly, that those reasons were not pretextual, the issue of the sufficiency of defendant's prima facie showing of discrimination at step one of the *Batson* test is moot (*People v Smocum*, 99 NY2d 418, 423 [2003]; *see People v Jiles*, 158 AD3d 75, 78 [4th Dept 2017], *lv denied* 31 NY3d 1149 [2018]; *cf. People v Bridgeforth*, 28 NY3d 567, 575-576 [2016]). Contrary to defendant's contention, we conclude that the court properly determined at step two that the People met their burden of offering a facially race-neutral explanation for the challenge (*see People v Lee*, 80 AD3d 877, 879 [3d Dept 2011], *lv denied* 16 NY3d 833 [2011]). Defendant failed to preserve for our review his contention that the prosecutor's explanation was pretextual because the prosecutor engaged in disparate treatment of similarly situated prospective jurors (*see People v Lucca*, 165 AD3d 414, 414 [1st Dept 2018], *lv denied* 32 NY3d 1126 [2018]; *Lee*, 80 AD3d at 879; *see generally Smocum*, 99 NY2d at 423), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

* * *

Accordingly, we conclude that the judgment convicting defendant of criminal possession of a firearm (Penal Law § 265.01-b [1]) should be affirmed.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

873

CA 19-00006

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

PATRICK A. NICOL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TARA M. NICOL, DEFENDANT-RESPONDENT.

WENDY S. SISSON, GENESEO, FOR PLAINTIFF-APPELLANT.

Appeal from an order (denominated decision) of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered April 26, 2018 in a divorce action. The order denied plaintiff's motion to, inter alia, enforce certain terms of the parties' separation and settlement agreement, and for attorney's fees.

It is hereby ORDERED that the order so appealed from is modified on the law by vacating those parts denying the motion insofar as it sought a downward modification of plaintiff's child support obligation with respect to the health insurance premiums and insofar as it sought attorney's fees, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Plaintiff appeals from a decision denying his motion seeking, in effect, a downward modification of his child support obligation, enforcement of certain terms of the parties' separation and settlement agreement (agreement), and attorney's fees. As a preliminary matter, although not raised by the parties and although "[n]o appeal lies from a mere decision" (*Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]; *see generally* CPLR 5501 [c]; 5512 [a]), we conclude that the paper appealed from meets the essential requirements of an order, and we therefore treat it as such (*see Matter of Louka v Shehatou*, 67 AD3d 1476, 1476 [4th Dept 2009]).

On appeal, plaintiff contends that defendant breached the agreement by failing to immediately make payment on a jointly held student loan and that Supreme Court erred in failing to award him damages for the alleged breach. Plaintiff's motion insofar as it sought enforcement of the agreement, which was incorporated but not merged in the parties' judgment of divorce, appears to have been made pursuant to Domestic Relations Law § 244, which is not the proper procedure for seeking such damages (*see generally Thompson v Lindblad*, 125 AD2d 460, 460-461 [2d Dept 1986]). Instead, the proper procedure "would be the commencement of a plenary action" (*Petritis v Petritis*, 131 AD2d 651, 653 [2d Dept 1987]). Thus, we do not address the merits of plaintiff's contention (*see generally Anonymous v Anonymous*, 27

AD3d 356, 360-361 [1st Dept 2006]; *Thompson*, 125 AD2d at 460-461; *Barratta v Barratta*, 122 AD2d 3, 5 [2d Dept 1986]).

Plaintiff also contends that the court erred in summarily denying the motion insofar as it sought a downward modification of his child support obligation with respect to the health insurance premiums. We agree. As an initial matter, the court erred in denying the motion to that extent on the ground that plaintiff had, in effect, implicitly waived his right to seek a downward modification by failing to take remedial action after defendant informed him of the cost increase for the children's health insurance premiums. It is well settled that a waiver " 'should not be lightly presumed' and must be based on 'a clear manifestation of intent' to relinquish" a known right (*Auburn Custom Millwork, Inc. v Schmidt & Schmidt, Inc.*, 148 AD3d 1527, 1531 [4th Dept 2017], quoting *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]; *see also Matter of McManus v Board of Educ. of Hempstead Union Free School Dist.*, 87 NY2d 183, 189 [1995]; *Ferraro v Janis*, 62 AD3d 1059, 1060 [3d Dept 2009]). We conclude that plaintiff's inaction here did not constitute a waiver inasmuch as "inaction or silence . . . cannot constitute a waiver" (*Coniber v Center Point Transfer Sta., Inc.*, 137 AD3d 1604, 1607 [4th Dept 2016]; *see Agati v Agati*, 92 AD2d 737, 737 [4th Dept 1983], *affd* 59 NY2d 830 [1983]; *Matter of Hinck v Hinck*, 113 AD3d 681, 683 [2d Dept 2014]).

We further conclude that plaintiff was entitled to a hearing on that part of his motion seeking a downward modification of child support inasmuch as he made a prima facie showing of a substantial change in circumstances (*see Isichenko v Isichenko*, 161 AD3d 833, 834-835 [2d Dept 2018]; *Bergman v Bergman*, 84 AD3d 537, 540 [1st Dept 2011]; *Schelter v Schelter*, 159 AD2d 995, 996 [4th Dept 1990]; *see generally* Domestic Relations Law § 236 [B] [9] [b] [1]). Indeed, plaintiff submitted evidence establishing that his 50% share of the health insurance premiums had increased from $50.15 per week to $113.00 per week, which amounted to nearly 18% of his gross income. We therefore modify the order by vacating that part denying plaintiff's motion insofar as it sought a downward modification of his child support obligation with respect to the health insurance premiums, and we remit the matter to Supreme Court for a hearing on that part of plaintiff's motion.

In light of that determination, we also agree with plaintiff that the court erred in summarily denying that part of his motion seeking attorney's fees. We therefore further modify the order by vacating that part denying the motion with respect to attorney's fees, and we remit the matter to Supreme Court to determine that part of plaintiff's motion (*see Cavallaro v Cavallaro* [appeal No. 2], 278 AD2d 812, 812 [4th Dept 2000], *lv dismissed* 96 NY2d 792 [2001]).

We have reviewed plaintiff's remaining contention and conclude that it lacks merit.

All concur except DeJoseph, J., who dissents and votes to dismiss

in accordance with the following memorandum: I disagree with the majority's decision to treat the decision appealed from as an order. I therefore dissent and would dismiss the appeal.

In 1987, this Court held that "[n]o appeal lies from a mere decision" (*Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]). In reaching that conclusion, we relied on, inter alia, CPLR 5512 (a), titled "appealable paper," which provides that "[a]n initial appeal shall be taken from the judgment or order of the court of original instance." Until today, we have routinely followed that settled principle (*see Matter of Town of Leray v Village of Evans Mills*, 161 AD3d 1593, 1593 [4th Dept 2018]; *Infarinato v Rochester Tel. Corp.*, 158 AD3d 1063, 1063 [4th Dept 2018]; *Boulter v Boulter* [appeal No. 1], 147 AD3d 1512, 1512 [4th Dept 2017]; *O'Reilly-Morshead v O'Reilly-Morshead*, 147 AD3d 1562, 1562 [4th Dept 2017]; *Eddy v Antanavige*, 126 AD3d 1403, 1403 [4th Dept 2015]; *Meenan v Meenan*, 103 AD3d 1277, 1277-1278 [4th Dept 2013]; *Partners Trust Bank v State of New York* [appeal No. 1], 90 AD3d 1514, 1514 [4th Dept 2011]; *Knope v Knope*, 77 AD3d 1320, 1321 [4th Dept 2010]; *Plastic Surgery Group of Rochester, LLC v Evangelisti*, 39 AD3d 1265, 1266 [4th Dept 2007]; *Pecora v Lawrence*, 28 AD3d 1136, 1137 [4th Dept 2006]; *Matter of Baker v Baker-Kelly*, 24 AD3d 1263, 1263 [4th Dept 2005]; *Matter of Viscomi v Village of Herkimer*, 23 AD3d 1048, 1048 [4th Dept 2005]; *Darien Lake Theme Park & Camping Resort, Inc. v Contour Erection & Siding Sys., Inc.*, 21 AD3d 1280, 1280 [4th Dept 2005]; *State of New York v Newell*, 15 AD3d 880, 880 [4th Dept 2005]; *Matter of Amanda G.*, 281 AD2d 954, 954 [4th Dept 2001]; *Cook v Komorowski*, 273 AD2d 924, 924 [4th Dept 2000]; *Kreutter v Goldthorpe*, 269 AD2d 870, 870 [4th Dept 2000]; *Kulp v Gannett Co.*, 259 AD2d 970, 970 [4th Dept 1999]). We have not been alone in applying the legal principle that no appeal lies from a decision. Indeed, all of the other Departments of the Appellate Division, as well as the Court of Appeals, have applied the same (*see Matter of Sims v Coughlin*, 86 NY2d 776, 776 [1995]; *Gunn v Palmieri*, 86 NY2d 830, 830 [1995]; *Aurora Loan Servs., LLC v Revivo*, 175 AD3d 622, 622 [2d Dept 2019]; *Ryals v New York City Tr. Auth.*, 104 AD3d 519, 519 [1st Dept 2013]; *DD & P Realty, Inc. v Robustiano*, 68 AD3d 1496, 1497 n [3d Dept 2009]).

Here, the record includes a decision that is denominated only as a decision and has no ordering paragraphs and, in his notice of appeal, plaintiff explicitly appeals "from the *Decision*" (emphasis added). My colleagues in the majority believe that the decision is an appealable paper because it meets "the essential requirements of an order." To support that proposition, the majority relies on *Matter of Louka v Shehatou* (67 AD3d 1476 [4th Dept 2009]), wherein this Court determined that a letter would be treated as an order inasmuch as "the Referee filed the letter with the Family Court Clerk and . . . the letter resolved the motion and advised the father that he had a right to appeal" (*id.* at 1476). Although the decision here was filed and resolved the motion, there was no directive in the decision that plaintiff had the right to appeal from it. Furthermore, I submit that almost all written decisions at least attempt to resolve the issues presented by the parties and many of those decisions are also filed.

Thus, it seems as though the law in the Fourth Department has now effectively changed. Indeed, under the majority's determination, an appeal may lie from a mere decision if it was filed and if it resolved the issues presented by the parties, the appealable paper no longer needs to be labeled as an order and it no longer needs any ordering paragraphs, and the appellant can still appeal even if he or she refers to the paper on appeal as a "decision" in the notice of appeal.

In conclusion, I cannot join my colleagues in adopting and applying this "essential requirements" standard inasmuch as CPLR 5512 (a) is clear in its directive that an appealable paper is defined either as an order or a judgment, not a decision that has some elements of an order.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

920

CA 19-00375

PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

KYLE GEHRKE, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

MUSTANG SALLY'S SPIRITS AND GRILL, INC., DOING BUSINESS AS TIFFANY'S CABARET, AND SEVENTEEN HUNDRED PROPERTIES, INC., DEFENDANTS-APPELLANTS-RESPONDENTS.

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

VANDETTE PENBERTHY LLP, BUFFALO (VINCENT PARLATO OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered December 21, 2018. The order denied the motion of defendants for summary judgment and denied in part the cross motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the cross motion with respect to defendants' duty of care, and granting the motion and dismissing the amended complaint, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained during an arm wrestling competition that he initiated with one of defendants' employees while the two were at a strip club owned by defendants. In the amended complaint, plaintiff asserted a cause of action for negligence based on the theories of respondeat superior and premises liability. Defendants thereafter moved for summary judgment dismissing the amended complaint on the grounds that, inter alia, the employee was acting outside the scope of his employment at the time of the incident and defendants did not owe plaintiff a duty of care under the theory of premises liability. Plaintiff cross-moved for, among other things, summary judgment on the issue of liability. Defendants appeal and plaintiff cross-appeals from an order that, inter alia, denied defendants' motion and granted that part of plaintiff's cross motion with respect to the issue of defendants' duty of care to plaintiff under the theory of premises liability. We modify the order by denying plaintiff's cross motion with respect to defendants' duty of care to plaintiff, granting defendants' motion, and dismissing the amended complaint.

Defendants contend on their appeal that Supreme Court erred in denying their motion with respect to plaintiff's respondeat superior claim. We agree, and therefore we also reject plaintiff's contention on his cross appeal that he was entitled to summary judgment with respect to liability under that theory.

Although it is generally a question for the jury whether an employee is acting within the scope of employment (*see Riviello v Waldron*, 47 NY2d 297, 303 [1979]; *Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1131-1132 [4th Dept 2008], *lv denied* 11 NY3d 708 [2008]), an employer is not liable as a matter of law under the theory of respondeat superior "if the employee was 'acting solely for personal motives unrelated to the furtherance of the employer's business' " (*Mazzarella v Syracuse Diocese* [appeal No. 2], 100 AD3d 1384, 1385 [4th Dept 2012]). Here, we conclude that defendants met their initial burden on the motion by establishing that the employee's act of arm wrestling plaintiff was not within the scope of his employment and that plaintiff failed to raise a triable issue of fact in response (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The uncontroverted evidence submitted by defendants demonstrated that, although the employee had various responsibilities at the club, he was not required to entertain the club's patrons, and he arm wrestled plaintiff out of personal motives unrelated to any of his job responsibilities (*see Mazzarella*, 100 AD3d at 1385; *Burlarley v Wal-Mart Stores, Inc.*, 75 AD3d 955, 956 [3d Dept 2010]). Indeed, that evidence demonstrated that the club did not sponsor or sanction arm wrestling competitions on the premises and that neither plaintiff nor the employee had heard of anyone arm wrestling at the club prior to the incident. Moreover, although "it is not necessary that the precise type of injury caused by the employee's act be foreseeable" (*Dykes v McRoberts Protective Agency*, 256 AD2d 2, 3 [1st Dept 1998]; *see Riviello*, 47 NY2d at 304), here the arm wrestling contest was not reasonably foreseeable because nothing about the impromptu contest was a natural incident of the employee's job duties (*see Riviello*, 47 NY2d at 304; *cf. Sims v Bergamo*, 3 NY2d 531, 534-535 [1957]; *Salem v MacDougal Rest., Inc.*, 148 AD3d 501, 502 [1st Dept 2017]; *Jones v Hiro Cocktail Lounge*, 139 AD3d 608, 609 [1st Dept 2016]).

We likewise agree with defendants on their appeal that the court erred in denying their motion and in granting plaintiff's cross motion with respect to his claim that defendants owed him a duty of care under a theory of premises liability (*see Stribing v Bill Gray's Inc.*, 166 AD3d 1503, 1505 [4th Dept 2018]).

In light of our determination, defendants' remaining contention is academic.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

921

CA 19-00711

PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF REVEREND EUGENE L. PIERCE, NAN L. HAYNES, KARIMA AMIN, AND CHARLES J. CULHANE, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

SHERIFF TIMOTHY B. HOWARD, RESPONDENT-APPELLANT.

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

ANNA MARIE RICHMOND, BUFFALO, FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Mark A. Montour, J.), entered November 21, 2018 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to compel respondent "to internally review and assess all incidents of a serious or potentially problematic nature, and report incidents to the New York State Commission of Corrections, pursuant to 9 NYCRR [ ] 7022.1-7022.4, as required by the Commission's Reportable Incident Guidelines." Respondent filed an answer and asserted objections in point of law, including that petitioners, who are former members of the Erie County Community Corrections Advisory Board, lacked standing to bring this proceeding, which objection Supreme Court treated as a motion to dismiss the petition. The court denied the motion to dismiss and granted the petition. Respondent appeals.

We agree with respondent that petitioners lack standing to bring this proceeding inasmuch as they cannot establish either the requisite " 'injury in fact' " or that the injury petitioners assert falls within the "zone of interests or concerns sought to be promoted or protected by the . . . provision" in question (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). Further, we have previously held that enforcement of the State Commission of Correction's Minimum Standards and Regulations, which include 9 NYCRR part 7022, "is a matter for the Commission of Correction or others in

the executive branch of government and not for the courts" (*Powlowski v Wullich*, 102 AD2d 575, 583 [4th Dept 1984]).

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

964

CA 18-02306

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

JEANNETTE S., AS PARENT AND NATURAL GUARDIAN OF BRANDON K.S., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PIERRE E. WILLIOT, M.D., SAUL P. GREENFIELD, M.D., PEDIATRIC UROLOGY OF WESTERN NEW YORK, P.C., AND KALEIDA HEALTH, DOING BUSINESS AS WOMEN & CHILDREN'S HOSPITAL OF BUFFALO, DEFENDANTS-RESPONDENTS.

BROWN CHIARI LLP, BUFFALO (MICHAEL R. DRUMM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS PIERRE E. WILLIOT, M.D., SAUL P. GREENFIELD, M.D. AND PEDIATRIC UROLOGY OF WESTERN NEW YORK, P.C.

CONNORS LLP, BUFFALO (MOLLIE C. MCGORRY OF COUNSEL), FOR DEFENDANT-RESPONDENT KALEIDA HEALTH, DOING BUSINESS AS WOMEN & CHILDREN'S HOSPITAL OF BUFFALO.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J., for Donna M. Siwek, J.), entered May 17, 2018. The order, inter alia, granted the motions of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by denying the motions for summary judgment of defendants Saul P. Greenfield, M.D., Pediatric Urology of Western New York, P.C., and Kaleida Health, doing business as Women & Children's Hospital of Buffalo, and reinstating the complaint against those defendants, and as modified the order is affirmed without costs.

Memorandum: In this medical malpractice action arising from allegations that defendants were negligent in providing medical care to plaintiff's son, plaintiff appeals from an order that, insofar as appealed from, granted the respective motions of defendants Saul P. Greenfield, M.D. and Pediatric Urology of Western New York, P.C. (collectively, Pediatric Urology defendants) and defendant Kaleida Health, doing business as Women & Children's Hospital of Buffalo (Kaleida Health) for summary judgment dismissing the complaint against them; granted the motions of defendant Pierre E. Williot, M.D. and the Pediatric Urology defendants and Kaleida Health to strike plaintiff's

supplemental bills of particulars; and denied plaintiff's cross motion for an order directing defendants to accept her supplemental bills of particulars or, alternatively, granting leave to amend the bills of particulars.

Contrary to plaintiff's contention, we conclude that Supreme Court properly granted the respective motions of Williot and the Pediatric Urology defendants and Kaleida Health to strike plaintiff's "supplemental" bills of particulars. A supplemental bill of particulars is appropriate "[w]here the plaintiff[] seek[s] to allege continuing consequences of the injuries suffered and described in previous bills of particulars, rather than new and unrelated injuries" (*Sisemore v Leffler*, 125 AD3d 1374, 1375 [4th Dept 2015] [internal quotation marks omitted]; *see Kellerson v Asis*, 81 AD3d 1437, 1438 [4th Dept 2011]). Where, however, the plaintiff alleges a new injury, it is not a supplemental bill of particulars but an amended bill of particulars (*see Jurkowski v Sheehan Mem. Hosp.*, 85 AD3d 1672, 1673-1674 [4th Dept 2011]; *see generally* CPLR 3043 [b]). Here, the documents that plaintiff labeled "supplemental" bills of particulars were actually amended bills of particulars because they listed a new injury, i.e., hypovolemic shock. Thus, we conclude that the court properly granted the motions to strike plaintiff's "supplemental" bills of particulars inasmuch as they were actually amended bills of particulars. We further conclude that the amended bills of particulars are "a nullity" inasmuch as the note of issue had been filed and plaintiff failed to seek leave to serve amended bills of particulars before serving them upon defendants (*Jurkowski*, 85 AD3d at 1674; *cf.* CPLR 3042 [b]; *see generally Stewart v Dunkleman*, 128 AD3d 1338, 1339-1340 [4th Dept 2015], *lv denied* 26 NY3d 902 [2015]).

Contrary to plaintiff's further contention, the court properly denied plaintiff's cross motion to the extent that she sought leave to serve the amended bills of particulars. " 'Leave to serve an amended bill of particulars should not be granted where a [note of issue] has been filed, except upon a showing of special and extraordinary circumstances' " (*Stewart*, 128 AD3d at 1339; *see Glionna v Kubota, Ltd.*, 154 AD2d 920, 920 [4th Dept 1989]). Here, plaintiff failed to allege any special and extraordinary circumstances that would permit her to amend her bills of particulars (*see Stewart*, 128 AD3d at 1339-1340).

We also reject plaintiff's contention that Kaleida Health's motion for summary judgment was untimely. Kaleida Health complied with the court-ordered deadline for the filing of summary judgment motions (*see* CPLR 3212 [a]; *see generally Brill v City of New York*, 2 NY3d 648, 652 [2004]).

We agree with plaintiff, however, that the court erred in granting Kaleida Health's and the Pediatric Urology defendants' motions for summary judgment dismissing the complaint against them, and we therefore modify the order accordingly. On a motion for summary judgment in a medical malpractice action, " 'a defendant has the burden of establishing, prima facie, that he or she did not deviate from good and accepted standards of . . . care, or that any

such deviation was not a proximate cause of the plaintiff's injuries' " (*Culver v Simko*, 170 AD3d 1599, 1600 [4th Dept 2019]). Even assuming, arguendo, that Kaleida Health addressed both deviation and causation in its motion for summary judgment and met its initial burden by submitting its expert's affidavit, we conclude that plaintiff raised triable issues of fact in opposition (*see generally id.*). Specifically, plaintiff submitted the affirmation of her expert, who opined that Kaleida Health breached the applicable standard of care by "mis-triaging" plaintiff's son, which led to a delay in medical treatment. Plaintiff's expert opined that the symptoms and vital signs exhibited by plaintiff's son required him to be seen by a physician and started on intravenous hydration immediately upon his arrival at the emergency room. The expert further opined that Kaleida Health's deviation from the standard of care was a proximate cause of the injuries to plaintiff's son (*see Kless v Paul T.S. Lee, M.D., P.C.*, 19 AD3d 1083, 1084 [4th Dept 2005]). Thus, the affidavits submitted by Kaleida Health and plaintiff presented a "classic battle of the experts" precluding summary judgment (*Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018] [internal quotation marks omitted]).

Contrary to the dissent's conclusion, plaintiff did not rely on "a new theor[y] of liability" (*Walker v Caruana*, 175 AD3d 1807, 1807 [4th Dept 2019]; *see DeMartino v Kronhaus*, 158 AD3d 1286, 1286-1287 [4th Dept 2018]) in opposing Kaleida's motion. Rather, plaintiff's theory of liability, as alleged in the bill of particulars to Kaleida Health, has consistently been that Kaleida Health was negligent in failing to properly and timely triage and treat her son (*see Contreras v Adeyemi*, 102 AD3d 720, 722 [2d Dept 2013]). The injury mentioned in Kaleida Health's records of the triage of plaintiff's son, i.e., "septic shock," was merely mimicked by plaintiff in her bill of particulars. Plaintiff's expert, and the experts of the Pediatric Urology defendants, however, opined that plaintiff's son was not experiencing septic shock, but was actually suffering from hypovolemic shock. Under these circumstances, the change in the precise nature of the harm actually suffered by plaintiff's son does not change the underlying theory of liability, i.e., Kaleida Health's negligence and malpractice in triaging plaintiff's son (*see id.*).

With respect to the Pediatric Urology defendants' motion for summary judgment, we conclude that they failed to meet their " 'initial burden of establishing the absence [on their part] of any departure from good and accepted medical practice or that . . . plaintiff[']s son] was not injured thereby' " (*Groff v Kaleida Health*, 161 AD3d 1518, 1521 [4th Dept 2018]). Here, the Pediatric Urology defendants submitted an affidavit from an expert in pediatric infectious diseases and an affirmation from an expert in urology. Both experts averred that Greenfield's role in the care of plaintiff's son was limited to a single phone call on Saturday, June 27, 2009. Both experts failed to address plaintiff's testimony that she called and spoke with Greenfield on two separate occasions over the course of the weekend of June 27-28, 2009, with the second phone call necessitated by the fact that the son's "symptoms were not resolving." Thus, the experts failed to "assume the truth of the plaintiff's

testimony" (*Ebbole v Nagy*, 169 AD3d 1461, 1462 [4th Dept 2019]), and therefore the experts' affidavit and affirmation do not meet the Pediatric Urology defendants' burden on their motion of eliminating all material issues of fact (*see id.*). The Pediatric Urology defendants' "[f]ailure to make such a [prima facie] showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

All concur except SMITH, J.P., and PERADOTTO, J., who dissent in part and vote to affirm in the following memorandum: We agree with the majority that Supreme Court properly granted the motions to strike plaintiff's "supplemental" bills of particulars. We also agree with the majority that the summary judgment motion of defendant Kaleida Health, doing business as Women & Children's Hospital of Buffalo (Kaleida Health), was not untimely. We respectfully disagree, however, with the majority's conclusions that the court erred in granting the motion of Saul P. Greenfield, M.D. and Pediatric Urology of Western New York, P.C. (collectively, Pediatric Urology defendants), and the motion of Kaleida Health, both of which sought summary judgment dismissing the complaint against the respective movants. We therefore dissent in part and vote to affirm the order in its entirety.

The majority concludes that, assuming, arguendo, that Kaleida Health met its initial burden on its motion, plaintiff raised triable issues of fact in opposition by submitting an expert's opinion that Kaleida Health deviated from the standard of care by misdiagnosing plaintiff's son, because his symptoms and vital signs required him to be seen by a physician and started on intravenous hydration immediately upon his arrival at the emergency room. Plaintiff's expert based that opinion on his conclusions that, when plaintiff's son arrived at the hospital, he had an "elevated heart rate, elevated respiratory rate, low blood pressure, altered mental status ('tipsy'), a history of fever, and a rash on his feet and legs."

"It is well settled that, where an expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, . . . [his or her] opinion should be given no probative force and is insufficient to withstand a motion for summary judgment" (*Golden v Pavlov-Shapiro*, 138 AD3d 1406, 1406 [4th Dept 2016], *lv denied* 28 NY3d 913 [2017] [internal quotation marks omitted]; *see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Here, there is no indication in the record that plaintiff's son had low blood pressure when he arrived at the emergency room, his respiration rate was normal at that time, the triage nurse did not indicate that she observed any rash, nor did she indicate that plaintiff's son was tipsy or otherwise exhibited an altered mental state. Finally, the central complaint upon the arrival of plaintiff's son at the hospital was a fever, but his temperature was normal at that time, and the expert provided no explanation why a history of fever would impact his diagnosis if the patient's temperature was normal at the time of triage. Thus, we conclude that " 'the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, . . . [and therefore his]

opinion should be given no probative force and is insufficient to withstand summary judgment' " (*Wilk v James*, 108 AD3d 1140, 1143 [4th Dept 2013], quoting *Diaz*, 99 NY2d at 544; *see Hope A.L. v Unity Hospital of Rochester*, 173 AD3d 1713, 1715 [4th Dept 2019]). Inasmuch as we agree with the majority's tacit conclusion that Kaleida Health met its initial burden on the motion (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), we conclude that the court properly granted the motion of Kaleida Health for summary judgment dismissing the complaint against it.

The majority also concludes that the court erred in granting the motion of the Pediatric Urology defendants for summary judgment dismissing the complaint against them. Plaintiff testified at her deposition and averred in an affidavit that she spoke on the telephone with Greenfield twice to seek advice because she was increasingly concerned about her son's condition. The majority concludes that the Pediatric Urology defendants failed to meet their initial burden on the motion because their experts failed to address plaintiff's second telephone call with Greenfield. We disagree.

We conclude that the Pediatric Urology defendants met their burden on their motion by submitting the opinions of two medical experts establishing that Greenfield acted in accordance with the standard of care based on the information that plaintiff provided in her telephone calls (*see generally Alvarez*, 68 NY2d at 324). Even assuming, arguendo, that plaintiff submitted sufficient information to raise a triable issue of fact whether she spoke with Greenfield twice on the weekend in question, we conclude that she failed to raise a triable issue of fact whether during the second call she provided any additional information concerning her son's condition, and thus she failed to raise a triable issue of fact whether the Pediatric Urology defendants deviated from the standard of care by failing to act on information received during the second call (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Furthermore, the Pediatric Urology defendants also met their initial burden with respect to the issue of causation by establishing that the care and treatment that Greenfield provided was not a cause of the injuries sustained by plaintiff's son (*see generally Nestorowich v Ricotta*, 97 NY2d 393, 398 [2002]). In response, plaintiff's expert opined only that, if plaintiff's son had been taken to an emergency room earlier, he "would have had an even greater opportunity for successful diagnosis and treatment." Inasmuch as the expert's "submissions provide no explanation to support the claim that the alleged delay in [referring plaintiff's son to an emergency room] contributed to the injuries sustained" (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1257 [4th Dept 2019]), we conclude that the "affirmation is conclusory in nature and lacks any details and thus is insufficient to raise the existence of a triable factual issue concerning medical malpractice" (*Hudson v Slough*, 55 AD3d 1358, 1358 [4th Dept 2008] [internal quotation marks omitted]; *see Lake v Kaleida Health*, 59 AD3d 966, 966-967 [4th Dept 2009]).

More fundamentally, plaintiff's expert's opinions on malpractice

and causation cannot create a question of fact because they are based on a new condition and new injury. Plaintiff's expert opined that: plaintiff's son developed Henoch-Schonlein Purpura (HSP) in the days before presenting to the emergency room and was suffering from HSP when he presented to the emergency room; plaintiff's son was misdiagnosed and the correct diagnosis was HSP; as a result of the mistriage, plaintiff's son went into hypovolemic shock; and, if properly triaged, plaintiff's son's condition, i.e., HSP, never would have progressed to hypovolemic shock.

Plaintiff's expert's opinion regarding failure to triage and diagnose relates to a new condition, HSP, and his opinion on proximate cause relates to a new injury, hypovolemic shock, neither of which were included in plaintiff's original bill of particulars and both of which were included in the "supplemental" bills of particulars, which this Court unanimously agrees were properly struck. Inasmuch as plaintiff's expert's opinions regarding the defendants' negligence and proximate cause involve a new condition and new injury not included in plaintiff's original bill of particulars, they constituted a new theory of recovery and thus could not be used to defeat the defendants' motions (*see Walker v Caruana*, 175 AD3d 1807, 1807-1808 [4th Dept 2019]; *DeMartino v Kronhaus*, 158 AD3d 1286, 1287 [4th Dept 2018]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1011

CA 18-02209

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

ANDREW S. IWASYKIW, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CORY STARKS AND HAYLEY COLE, AS COEXECUTORS OF THE ESTATE OF NANCY LEE STARKS, DECEASED, DEFENDANTS-RESPONDENTS.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE GLENNON LAW FIRM, P.C., ROCHESTER (PETER J. GLENNON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered March 30, 2018 in a divorce action. The judgment, inter alia, equitably distributed the marital property.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the 5th, 16th and 17th decretal paragraphs, and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Wayne County, for further proceedings in accordance with the following memorandum: In this matrimonial action, plaintiff husband appeals from a judgment of divorce that, inter alia, dissolved the marriage between plaintiff and his wife (decedent) and distributed the marital assets and debts. Decedent died while this appeal was pending and the coexecutors of her estate have been substituted as defendants.

We reject plaintiff's contention that Supreme Court abused its discretion in failing to award him a portion of decedent's retirement accounts. The party seeking an equitable share of the other spouse's retirement accounts has the burden of establishing the existence and value of the accounts (*see Weidman v Weidman*, 162 AD3d 720, 724 [2d Dept 2018]). Here, plaintiff failed to meet his burden because the only evidence in the record with respect to decedent's retirement accounts established, via plaintiff's concession, that decedent opened them prior to the marriage. Plaintiff submitted no evidence that decedent contributed to her retirement accounts during the marriage or that any alleged increase in the accounts' value during the marriage was attributable to plaintiff. Thus, decedent's retirement accounts are not subject to equitable distribution (*see* Domestic Relations Law § 236 [B] [1] [d] [1]; *Weidman*, 162 AD3d at 724).

We also conclude that the court did not abuse its discretion in declining to equitably distribute personal property from the marital residence in New York. Plaintiff presented no documentary evidence with respect to the value of the personal property that he contends must be equitably distributed. "In the absence of proof of the value of the . . . personal property, the court did not err in refusing to order its equitable distribution" (*LaBarre v LaBarre*, 251 AD2d 1008, 1008 [4th Dept 1998]). Furthermore, we note that "there is no requirement that each item of marital property be distributed equally and the trial court has discretion in fashioning a division of property" (*Mula v Mula*, 131 AD3d 1296, 1301 [3d Dept 2015]), and here the court permitted plaintiff to retain certain personal property he took from a Florida property that was owned by plaintiff and decedent and permitted decedent to retain certain personal property from the New York residence.

We agree with plaintiff, however, that the court erred in determining that decedent's interest in Four Points Land Development, LLC (Four Points) was her separate property not subject to equitable distribution. "There is a presumption that all property acquired during a marriage constitutes marital property, 'even if it is titled only in the name of one spouse' " (*Malachowski v Daly*, 87 AD3d 1321, 1322 [4th Dept 2011]; *see* Domestic Relations Law § 236 [B] [1] [c]). "[T]he party seeking to overcome such presumption has the burden of proving that the property in dispute was separate property" (*Swett v Swett*, 89 AD3d 1560, 1562 [4th Dept 2011] [internal quotation marks omitted]; *see Fields v Fields*, 15 NY3d 158, 163 [2010], *rearg denied* 15 NY3d 819 [2010]). It is well settled that "property [that is] acquired in exchange for [separate] property, even if the exchange occurs during [the] marriage, is separate property" (*Owens v Owens*, 107 AD3d 1171, 1172-1173 [3d Dept 2013]; *see Terasaka v Terasaka*, 130 AD3d 1474, 1475 [4th Dept 2015]). "A party asserting a separate property claim must trace the source of the funds . . . with sufficient particularity to rebut the presumption that they were marital property" (*Gately v Gately*, 113 AD3d 1093, 1093 [4th Dept 2014], *lv dismissed* 23 NY3d 1048 [2014] [internal quotation marks omitted]; *see Bailey v Bailey*, 48 AD3d 1123, 1124 [4th Dept 2008]).

Decedent's interest in Four Points, which includes an interest in certain real property owned by Four Points, was acquired during the marriage, presumptively rendering it marital property (*see Fields*, 15 NY3d at 165), but defendants contend that Four Points and the real property owned by Four Points are separate property because decedent used separate property to acquire those holdings. Specifically, defendants note that Four Points was formed using proceeds from the sale in 2007, and three years before the marriage, of a lodge property owned by decedent. Based on the record before us, however, we conclude that decedent failed to establish that she maintained the proceeds from the sale of the lodge property separate from the marital property (*see Galachiuk v Galachiuk*, 262 AD2d 1026, 1027 [4th Dept 1999]), and that decedent failed to present sufficient evidence tracing the source of the funds used to purchase the assets at issue to rebut the presumption that those funds were marital property (*see*

Maddaloni v Maddaloni, 142 AD3d 646, 652 [2d Dept 2016]; *Bailey*, 48 AD3d at 1124). We therefore modify the judgment by vacating the fifth decretal paragraph and we remit the matter to Supreme Court to equitably distribute decedent's interest in Four Points and its subject real property holdings.

We further agree with plaintiff that the court erred in admitting in evidence certain credit card statements and in relying on those statements when calculating the equitable distribution of the marital credit card debt. A business record is admissible if "it was made in the regular course of any business and . . . it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (CPLR 4518 [a]). Here, the uncertified credit card statements should not have been admitted in evidence because decedent failed to lay a proper foundation for the admission of those documents as business records pursuant to CPLR 4518 (a) (*see Velocity Invs., LLC v Cocina*, 77 AD3d 1306, 1306 [4th Dept 2010]). Thus, inasmuch as it was error to admit the credit card statements in evidence, we conclude that Supreme Court abused its discretion in relying on those credit card statements when calculating the equitable distribution of the marital credit card debt (*see generally West Val. Fire Dist. No. 1 v Village of Springville*, 294 AD2d 949, 950 [4th Dept 2002]; *Phillips v Phillips*, 249 AD2d 527, 528 [2d Dept 1998]). Thus, we further modify the judgment by vacating the 16th and 17th decretal paragraphs, and we direct the court on remittal to conduct a hearing with respect to the equitable distribution of the marital credit card debt.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1061

KA 17-01099

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES STRAUSS, DEFENDANT-APPELLANT.

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

CHARLES STRAUSS, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered April 4, 2017. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree (eight counts) and attempted burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentence imposed for burglary in the second degree under count two of the indictment shall run concurrently with the sentence imposed under count one of the indictment and consecutive to the sentence imposed in Madison County Court, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of eight counts of burglary in the second degree (Penal Law § 140.25 [2]) and one count of attempted burglary in the second degree (§§ 110.00, 140.25 [2]), defendant contends, in both his main and pro se supplemental briefs, that County Court erred in denying his motion to dismiss the indictment on speedy trial grounds (*see* CPL 30.30). We reject that contention. Where, as here, a defendant is charged with a felony offense, the People must announce readiness for trial within six months of the commencement of the action (*see* CPL 30.30 [1] [a]; *People v Cortes*, 80 NY2d 201, 207 n 3 [1992], *rearg denied* 81 NY2d 1068 [1993]), "exclusive of the days chargeable to the defense" (*People v Waldron*, 6 NY3d 463, 467 [2006]).

Here, defendant established that 404 days elapsed between the commencement of the criminal action against defendant on November 13, 2014, when the felony complaints were filed (*see* CPL 1.20 [17]; *People v Osgood*, 52 NY2d 37, 43 [1980]), and the People's announcement of

their readiness for trial on December 22, 2015. Thus, defendant met his initial burden on the motion of establishing that the People were not ready for trial within six months, and the burden shifted to the People to establish time periods that were chargeable to the defense (*see People v Berkowitz*, 50 NY2d 333, 349 [1980]; *People v Gushlaw* [appeal No. 2], 112 AD2d 792, 793 [4th Dept 1985], *lv denied* 66 NY2d 919 [1985]).

Defendant correctly concedes that the nine-day period from November 25 to December 4, 2015 is excludable and, contrary to his contention, the People established that an additional 222 days were excludable inasmuch as defendant's attorneys waived defendant's speedy trial rights pursuant to CPL 30.30 with respect to that period (*see People v Trepasso*, 197 AD2d 891, 891 [4th Dept 1993], *lv denied* 82 NY2d 854 [1993]). Thus, only 173 days were chargeable to the People, and therefore the court properly denied defendant's motion to dismiss the indictment on speedy trial grounds (*see* CPL 30.30).

Contrary to the further contentions of defendant in his pro se supplemental brief, "a waiver under CPL 30.30 'does not involve such a fundamental decision that it cannot be made by counsel' " (*People v Wheeler*, 159 AD3d 1138, 1141-1142 [3d Dept 2018], *lv denied* 31 NY3d 1123 [2018]), and CPL 30.30 (4) (b) does not require the court to approve the decision of defense counsel to waive speedy trial rights (*see generally People v Waldron*, 6 NY3d 463, 467 [2006]; *People v Lewins*, 151 AD3d 575, 576 [1st Dept 2017], *lv denied* 30 NY3d 981 [2017]).

Defendant contends in his main brief that the court erred in admitting evidence related to jewelry that was found inside a storage unit owned by defendant's mother, including recorded jail telephone conversations between defendant and his mother where defendant asked his mother and his sister to remove items from the storage unit. He asserts that the People failed to establish that the jewelry was connected to the charged crimes, and thus that the evidence constituted inadmissible *Molineux* evidence. We reject defendant's contention. Defendant's accomplice testified that he noticed some of the jewelry that was stolen during the charged crimes was missing when he and defendant went to sell the stolen items at the pawn shops, and the accomplice further testified that defendant later told the accomplice that he had hidden some of the jewelry stolen during the charged crimes in the storage unit. Thus, contrary to defendant's contention, we conclude that the evidence constituted direct evidence of defendant's participation in the charged crimes and was "not *Molineux* evidence at all" (*People v Arafet*, 13 NY3d 460, 465 [2009]; *see generally People v Hillard*, 79 AD3d 1757, 1758 [4th Dept 2010], *lv denied* 17 NY3d 796 [2011]). Furthermore, in the recorded jail telephone calls, defendant told his mother that her failure to remove certain items from the storage unit could result in defendant spending 30 years in jail. "Certain postcrime conduct is 'indicative of a consciousness of guilt, and hence of guilt itself' " (*People v Bennett*, 79 NY2d 464, 469 [1992], quoting *People v Reddy*, 261 NY 479, 486 [1933]), and we conclude that the evidence of the jail telephone calls was "properly admitted as evidence of defendant's consciousness

of guilt" (*People v Wallace*, 59 AD3d 1069, 1070 [4th Dept 2009], *lv denied* 12 NY3d 861 [2009]).

Defendant further contends in his main brief that the court erred in refusing to suppress cell site location information (CSLI) records on the ground that they were improperly obtained by the People without a warrant. Even assuming, arguendo, that the court erred in admitting the CSLI records, we conclude that the error was harmless inasmuch as the evidence of defendant's identity as a participant in the crimes was overwhelming, and there is no reasonable possibility that, but for the admission in evidence of those records, the verdict would have been different (*see People v Crimmins*, 36 NY2d 230, 237 [1975]; *People v Jiles*, 158 AD3d 75, 81 [4th Dept 2017], *lv denied* 31 NY3d 1149 [2018]). Defendant's accomplice testified about defendant's participation in the burglaries, and items stolen during the burglaries were recovered from defendant's apartment, including from his bedroom, and were identified by the victims as property that was stolen from their homes during the burglaries.

We agree with the contention of defendant in his main brief, however, that the aggregate sentence of 50 years to life in prison imposed by the court is unduly harsh and severe under the circumstances of this case. We therefore modify the judgment as a matter of discretion in the interest of justice by directing that the sentence imposed for burglary in the second degree under count two of the indictment shall run concurrently with the sentence imposed under count one of the indictment, and consecutive to the sentence imposed in Madison County Court.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1066

CAF 16-02075

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF ESTELLE MINER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CARLOS J. TORRES, RESPONDENT-APPELLANT.

IN THE MATTER OF CARLOS J. TORRES,
PETITIONER-APPELLANT,

V

DIANE M. RODRIGUEZ, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-RESPONDENT.

CENTER FOR ELDER LAW & JUSTICE, BUFFALO (DAVID A. SHAPIRO OF COUNSEL), FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE YOON OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret A. Logan, R.), entered October 25, 2016 in proceedings pursuant to Family Court Act article 6. The order, among other things, awarded sole custody of the subject child to petitioner Estelle Miner.

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

Memorandum: In appeal No. 1, respondent-petitioner father appeals from an order that, inter alia, awarded custody of the subject child to the child's maternal grandmother (petitioner). In appeal No. 2, the father appeals from an order dismissing his custody petition against respondent Erie County Children's Services (ECCS).

With respect to appeal No. 1, the father contends that the Referee lacked the authority to render the custody determination because ECCS did not sign the stipulation for Family Court to refer the matter to a referee to hear and determine the issues raised

therein. We reject that contention inasmuch as ECCS is not a party to either of the two petitions that were the subject of the stipulation of reference (*see* CPLR 2104, 4317 [a]). We further conclude that the father, who along with the other parties to those petitions stipulated to the reference in the manner prescribed by CPLR 2104, consented to the scope of the stipulation.

The father's challenge in appeal No. 1 to the temporary custody order is raised for the first time on appeal and thus is not preserved for our review (*see generally Matter of Annabella C. [Sandra C.]*, 169 AD3d 1432, 1433 [4th Dept 2019]; *Matter of Jaydalee P. [Codilee R.]*, 156 AD3d 1477, 1477 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]). In any event, that challenge has been rendered moot by the issuance of the final custody order (*see Matter of Shonyo v Shonyo*, 151 AD3d 1595, 1597 [4th Dept 2017], *lv denied* 30 NY3d 901 [2017]).

We reject the further contention of the father in appeal No. 1 that the finding of extraordinary circumstances is not supported by the record. Affording great deference to the determination of the hearing court with its superior ability to evaluate the credibility of the testifying witnesses (*see Matter of Cross v Caswell*, 113 AD3d 1107, 1107 [4th Dept 2014]), we conclude that the finding of extraordinary circumstances is supported by evidence of the father's abandonment of his parental rights and responsibilities with respect to the child and his history of domestic violence (*see Matter of McNeil v Deering*, 120 AD3d 1581, 1582 [4th Dept 2014], *lv denied* 24 NY3d 911 [2014]; *Matter of Barnes v Evans*, 79 AD3d 1723, 1723-1724 [4th Dept 2010], *lv denied* 16 NY3d 711 [2011]).

Here, the evidence at the hearing established that the father was voluntarily absent from the child's life starting when she was eight months old and that he made minimal efforts thereafter to maintain a relationship with the child (*see Matter of Greeley v Tucker*, 150 AD3d 1646, 1647 [4th Dept 2017]; *see also Matter of Rodriguez v Delacruz-Swan*, 100 AD3d 1286, 1289 [3d Dept 2012]; *cf. Matter of Tyrrell v Tyrrell*, 67 AD2d 247, 249-251 [4th Dept 1979], *affd* 47 NY2d 937 [1979]). At most, the father spoke to the child by telephone twice during the five months that elapsed between his departure from the home he shared with respondent mother and the child and the subsequent removal of the child from the home. When he learned of the removal, the father refused the mother's request that he take the child, and the child was instead briefly placed with a relative of her half-sisters.

After the child was placed with petitioner, the father took no steps to engage in the child's life and even avoided the efforts of his own family members to facilitate his visitation with the child. The father's own testimony at the hearing established that, at the time he sought custody, he was not a caregiver for the child, had not been visiting the child, and had not been a part of the child's life for half of her 16 months.

The finding of extraordinary circumstances was further supported

by evidence of the father's history of domestic violence, including violence toward the mother, which took place in the presence of another child and while the mother was pregnant with the subject child, violence toward the mother of one of the father's other children, and also violence toward children (*see McNeil*, 120 AD3d at 1582). Notably, the father acknowledged during his testimony that he had failed to comply with the terms of an order of protection in favor of one of his other children.

To the extent that the father challenges the best interests determination, we conclude that the record also supports the determination that the award of custody to petitioner was in the child's best interests (*see Matter of Jackson v Euson*, 153 AD3d 1655, 1656 [4th Dept 2017]).

Finally, we dismiss the appeal from the order in appeal No. 2 inasmuch as the father has not raised any contentions with respect to that order (*see Matter of Dawley v Dawley* [appeal No. 2], 144 AD3d 1501, 1502 [4th Dept 2016]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1067

CAF 16-02347

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF CARLOS J. TORRES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ERIE COUNTY CHILDREN'S SERVICES,
RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR PETITIONER-APPELLANT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE YOON OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret A. Logan, R.), entered October 25, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Same memorandum as in *Matter of Miner v Torres* ([appeal No. 1] — AD3d — [Jan. 31, 2020] [4th Dept 2020]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1089

CA 18-01985

PRESENT: SMITH, J.P., LINDLEY, CURRAN, AND TROUTMAN, JJ.

LONNIE DOTSON AND SONIA DOTSON,
PLAINTIFFS-RESPONDENTS,

V ORDER

J.C. PENNEY COMPANY, INC., ET AL., DEFENDANTS,
GARY MIGUEL, CHIEF OF POLICE FOR CITY OF
SYRACUSE AND CITY OF SYRACUSE,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOSMAN LAW FIRM, LLC, BLOSSVALE (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered April 30, 2018. The order, among other things, awarded plaintiff Sonia Dotson attorney fees.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 3 and 21, 2020,

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1090

CA 18-01217

PRESENT: SMITH, J.P., LINDLEY, CURRAN, AND TROUTMAN, JJ.

SONIA DOTSON, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

GARY MIGUEL, CHIEF OF POLICE FOR CITY OF SYRACUSE AND CITY OF SYRACUSE, DEFENDANTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 2.)

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

BOSMAN LAW FIRM, LLC, BLOSSVALE (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered June 7, 2018. The judgment, among other things, ordered that plaintiff recover from defendants the sum of $38,318.44 together with interest.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 3 and 21, 2020,

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1091

CA 18-02323

PRESENT: SMITH, J.P., LINDLEY, CURRAN, AND TROUTMAN, JJ.

SONIA DOTSON, PLAINTIFF-RESPONDENT,

V ORDER

GARY MIGUEL, CHIEF OF POLICE FOR CITY OF SYRACUSE AND CITY OF SYRACUSE, DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOSMAN LAW FIRM, LLC, BLOSSVALE (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered September 12, 2018. The order, among other things, denied defendants' motion seeking to vacate the court's order entered April 30, 2018 awarding plaintiff attorney fees.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 3 and 21, 2020,

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1095

CA 18-02372

PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

RAZIM RAMULIC AND RAJKA RAMULIC,
CLAIMANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 119842.)

STILLWELL MIDGLEY PLLC, BUFFALO (DAVID M. STILLWELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ROBERT J. MARANTO, JR., OF COUNSEL), FOR CLAIMANTS-RESPONDENTS.

Appeal from an interlocutory judgment of the Court of Claims (J. David Sampson, J.), entered June 12, 2018. The interlocutory judgment, among other things, apportioned liability 75% to defendant.

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

Memorandum: In this action to recover for injuries sustained by Razim Ramulic (claimant) when he slipped and fell on defendant's property, defendant appeals from an interlocutory judgment of the Court of Claims that, after a trial on the issue of liability, apportioned liability 75% to defendant and 25% to claimant. We affirm.

We reject defendant's contention that the court erred in denying its motion for summary judgment dismissing the claim. Defendant failed to meet its initial burden on the motion by establishing that it had relinquished control of the property (*see generally Gronski v County of Monroe*, 18 NY3d 374, 381-382 [2011], *rearg denied* 19 NY3d 856 [2012]).

We also reject defendant's contention that the court erred in precluding it from offering in evidence at trial an Amended and Restated Project Management Agreement (Agreement) pertaining to the property. Where a party fails to disclose information that the court finds ought to have been disclosed, "[i]t is within the trial court's discretion to determine the nature and degree of the penalty, and the sanction will remain undisturbed unless there has been a clear abuse of discretion" (*Calabrese Bakeries, Inc. v Rockland Bakery, Inc.*, 139 AD3d 1192, 1194 [3d Dept 2016] [internal quotation marks omitted]).

Further, "[a]lthough a party may not be compelled to produce or sanctioned for failing to produce information which [it] does not possess . . . , the failure to provide information in its possession will . . . preclude it from later offering proof regarding that information at trial" (*Vaz v New York City Tr. Auth.*, 85 AD3d 902, 903 [2d Dept 2011]; *see Kontos v Koakos Syllogos "Ippocrates," Inc.*, 11 AD3d 661, 661 [2d Dept 2004]; *see generally Hogan v Vandewater*, 104 AD3d 1164, 1165 [4th Dept 2013]). Here, although defendant previously produced an unsigned copy of the Agreement in response to claimants' discovery demands, it did not produce a signed Agreement until the pretrial conference three days before trial and failed to establish that it was not previously in possession of the signed Agreement. We thus conclude that the court did not abuse its discretion in precluding the signed Agreement at trial (*see generally Calabrese Bakeries, Inc.*, 139 AD3d at 1194).

We likewise reject defendant's contention that the court erred in finding that defendant had not relinquished control of the property where claimant fell. "On appeal from a judgment entered after a nonjury trial, this Court has the power to set aside the trial court's findings if they are contrary to the weight of the evidence and to render the judgment we deem warranted by the facts," although "[w]e must give due deference . . . to the court's evaluation of the credibility of the witnesses and quality of the proof . . . and review the record in the light most favorable to sustain the judgment" (*Mosley v State of New York*, 150 AD3d 1659, 1660 [4th Dept 2017] [internal quotation marks omitted]; *see Black v State of New York* [appeal No. 2], 125 AD3d 1523, 1524-1525 [4th Dept 2015]). "Moreover, [o]n a bench trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Mosley*, 150 AD3d at 1660 [internal quotation marks omitted]).

Like other landowners, the State "must act as a reasonable [person] in maintaining [its] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*id.*; *see Johnston v State of New York*, 127 AD2d 980, 980-981 [4th Dept 1987], *lv denied* 69 NY2d 611 [1987]). That duty, however, "is premised on the landowner's exercise of control over the property," and thus "a landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property" (*Gronski*, 18 NY3d at 379). Based on the testimony and documentary evidence admitted at trial, we conclude that the court's determination that defendant retained control of the property, and specifically that it remained responsible for snow and ice removal, is not against the weight of the evidence. Defendant's further contention that it ceded control of the property by virtue of the Facilities Development Corporation Act (McKinney's Uncons Laws of NY § 4401 *et seq.*) 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 [4th Dept 1994]). In any event, defendant failed to establish how the cited provisions, which apply to health facilities improvement

programs, pertain to the historic rehabilitation project that was taking place at defendant's property at the time of the accident (*see* Uncons Laws §§ 4403 [7]; 4405 [6]; 4408).

We reject defendant's contentions that the court erred in failing to allocate liability to any other entity for its relative culpable conduct and that it erred in allocating only 25% liability to claimant. As noted above, the evidence at trial did not establish that defendant relinquished its control of the property, and specifically its responsibility for snow and ice removal, to another entity, and thus the court properly allocated liability between defendant and claimant as the only possible culpable parties (*see generally* CPLR 1601). Further, we conclude that a fair interpretation of the evidence supports the court's determination that defendant was 75% at fault for the accident (*see generally Mosley*, 150 AD3d at 1661).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1109

CA 19-00292

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF SAVE MONROE AVE., INC., 2900 MONROE AVE., LLC, CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND SERVICES, INC., JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN AND STEVEN M. DEPERRIOR, PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF BRIGHTON, TOWN BOARD OF TOWN OF BRIGHTON, TOWN OF BRIGHTON PLANNING BOARD, DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., M&F, LLC, THE DANIELE FAMILY COMPANIES, RESPONDENTS-DEFENDANTS-RESPONDENTS, ET AL., RESPONDENTS-DEFENDANTS.

HODGSON RUSS LLP, BUFFALO (CHARLES W. MALCOMB OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

WEAVER MANCUSO FRAME PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS TOWN OF BRIGHTON, TOWN BOARD OF TOWN OF BRIGHTON AND TOWN OF BRIGHTON PLANNING BOARD.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., M&F, LLC AND THE DANIELE FAMILY COMPANIES.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered February 7, 2019 in a CPLR article 78 proceeding and declaratory judgment action. The order and judgment, among other things, granted the motions of respondents-defendants Town of Brighton, Town Board of Town of Brighton, Town of Brighton Planning Board, Daniele Management, LLC, Daniele SPC, LLC, Mucca Mucca, LLC, Mardanth Enterprises, Inc., M&F, LLC, and the Daniele Family Companies for partial dismissal of the petition-complaint.

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

Memorandum: Petitioners-plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action to, inter alia, annul the determination of respondent-defendant Town Board

of Town of Brighton (Town Board) approving an incentive zoning application submitted by respondents-defendants Daniele Management, LLC, Daniele SPC, LLC, Mucca Mucca, LLC, Mardanth Enterprises, Inc., M&F, LLC, and the Daniele Family Companies (collectively, developers) in connection with a proposed Whole Foods store in respondent-defendant Town of Brighton (Town). Petitioners appeal from an order and judgment that, inter alia, granted the motions of the developers and the Town, Town Board, and respondent-defendant Town of Brighton Planning Board (Planning Board) to dismiss certain causes of action in the petition-complaint.

Contrary to petitioners' contention regarding the seventh cause of action, the Town Board's determination to authorize certain deviations from the applicable zoning regulations in exchange for incentive contributions from the developers (*see generally Asian Ams. for Equality v Koch*, 72 NY2d 121, 129 [1988]) did not effectively amend the zoning regulations without the requisite referral to the Planning Board (*see* Brighton Town Code ch 225). Indeed, the incentive zoning mechanism utilized in this case was already part of the Town's preexisting zoning regulations developed in consultation with the Planning Board, and the application of that mechanism to a particular property did not thereby amend those regulations.

For the reasons stated in our decision in *Matter of Brighton Grassroots, LLC v Town of Brighton* (— AD3d — [Jan. 31, 2020] [4th Dept 2020]), petitioners' remaining contentions do not require modification or reversal of the order and judgment.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1113

CA 19-01100

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND WINSLOW, JJ.

CHARLES PHILLIPS, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.

DOLCE PANEPINTO, P.C., BUFFALO (SEAN E. COONEY OF COUNSEL), FOR CLAIMANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (KENNETH L. BOSTICK, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered November 16, 2018. The order denied the application of claimant for permission to file a late claim.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting claimant's application insofar as it seeks permission to file a late claim asserting a Labor Law § 240 (1) cause of action upon condition that claimant shall file that proposed claim within 30 days of the date of entry of the order of this Court and as modified the order is affirmed without costs.

Memorandum: Claimant was allegedly injured on April 19, 2017, while working for a subcontractor on a demolition and abatement project at Attica Correctional Facility. Two days later, he filed an incident report with the former New York State Department of Correctional Services and, 92 days after the incident, he attempted to file a notice of intention to file a claim (notice of intent). Although the notice of intent was indisputably untimely (*see* Court of Claims Act § 10 [3]), defendant nevertheless proceeded to conduct an examination under oath (EUO) of claimant (*see* § 17-a). On January 2, 2018, following the EUO, claimant filed an application seeking permission to file a late claim against defendant (*see* § 10 [6]). The Court of Claims denied the application, leading to this appeal.

It is well settled that "[a] determination by the Court of Claims to grant or deny a motion for permission to file a late . . . claim lies within the broad discretion of that court and should not be disturbed absent a clear abuse of that discretion" (*Malkan v State of New York*, 145 AD3d 1601, 1601-1602 [4th Dept 2016], *lv denied* 29 NY3d 907 [2017] [internal quotation marks omitted]; *see Collins v State of New York*, 69 AD3d 46, 48 [4th Dept 2009]; *but see Matter of Smith v State of New York*, 63 AD3d 1524, 1524 [4th Dept 2009]). Upon our

consideration of the six factors outlined in Court of Claims Act § 10 (6), we conclude that the court abused its discretion in denying claimant's application insofar as claimant sought to assert a cause of action under Labor Law § 240 (1).

Several factors militate against granting claimant's application. For instance, his excuse for failing to file a timely notice of intent was law office failure, which, as the court determined, is not an acceptable excuse (*see Casey v State of New York*, 161 AD3d 720, 721 [2d Dept 2018], *lv denied* 32 NY3d 903 [2018]; *Langner v State of New York*, 65 AD3d 780, 783 [3d Dept 2009]). Also, as the court noted, claimant has at least "a partial alternate remedy through workers' compensation" (*Matter of Garguiolo v New York State Thruway Auth.*, 145 AD2d 915, 916 [4th Dept 1988]; *see Matter of Lockwood v State of New York*, 267 AD2d 832, 833 [3d Dept 1999]). With respect to three of the remaining four statutory factors, we agree with the court's determination that defendant had notice of the essential facts constituting the claim, had an opportunity to investigate the claim and was not prejudiced by the delay (*see generally Smith*, 63 AD3d at 1524).

The most significant factor, however, is "whether the claim appears to be meritorious" (Court of Claims Act § 10 [6]) inasmuch as "it would be futile to permit the filing of a legally deficient claim which would be subject to immediate dismissal, even if the other factors tend to favor the granting of the request" (*Prusack v State of New York*, 117 AD2d 729, 730 [2d Dept 1986]; *see Collins*, 69 AD3d at 49).

Contrary to claimant's contention, we agree with the court that claimant's proposed Labor Law § 200 cause of action lacks merit inasmuch as there is no dispute that claimant's accident did not arise from any condition of the property and the record establishes that defendant "exercise[d] no supervisory control over the operation" (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *see Mayer v Conrad*, 122 AD3d 1366, 1367 [4th Dept 2014]). Furthermore, in his proposed claim, claimant sought to assert a section 241 (6) cause of action, but he has failed to address that cause of action on appeal. We therefore deem abandoned any challenge to the court's determination that the cause of action lacked merit (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We agree with claimant, however, that the court erred in concluding that the proposed cause of action under section 240 (1) lacks any appearance of merit. In our view, there is evidence to support claimant's contention that his "injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Specifically, in support of his application, claimant submitted, inter alia, the transcript from his EUO, wherein he stated that, at the time he was injured, he was attempting to remove a large, heavy industrial window from a window sill that was several feet off of the ground. He was unable to use the manlift that he had used with other such windows

because the platform of the manlift, at its lowest point, was higher than the bottom of the window he was removing. Other documentation submitted by claimant indicates that, as he struggled to remove the window and lower it to the ground, the window allegedly "fell" on him, causing him to sustain injuries to his back.

Claimant's submissions raise issues of fact whether he was injured by the application of the force of gravity to the window as he was moving it between "a physically significant elevation differential" (*id.*; *see generally Zarnoch v Luckina*, 112 AD3d 1336, 1337 [4th Dept 2013]) and whether he was provided adequate protection from the preventable, gravity-related accident. We conclude that claimant has "sufficiently 'establish[ed] the appearance of merit of the claim' " under Labor Law § 240 (1) (*Smith*, 63 AD3d at 1525).

"Even if the excuse for failing to file a timely claim is 'not compelling,' " we conclude that the denial of the application with respect to the proposed section 240 (1) cause of action was an abuse of discretion because defendant was able to investigate the claims and thus suffered no prejudice and, as noted, the proposed section 240 (1) cause of action appears to have merit (*Jomarron v State of New York*, 23 AD3d 527, 528 [2d Dept 2005]; *see Smith*, 63 AD3d at 1524-1525). We therefore modify the order by granting the application insofar as it seeks permission to file a late claim asserting a Labor Law § 240 (1) cause of action upon condition that claimant shall file that proposed claim within 20 days of the date of entry of the order of this Court (*see Smith*, 63 AD3d at 1524).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1114

CA 19-00576

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF BRIGHTON GRASSROOTS, LLC,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF BRIGHTON, TOWN OF BRIGHTON TOWN BOARD,
TOWN OF BRIGHTON PLANNING BOARD, M&F, LLC,
DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH
ENTERPRISES, INC., DANIELE MANAGEMENT, LLC,
COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY
COMPANIES, RESPONDENTS-DEFENDANTS-RESPONDENTS,
ET AL., RESPONDENTS-DEFENDANTS.

THE ZOGHLIN GROUP, PLLC, ROCHESTER (MINDY L. ZOGHLIN OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

WEAVER MANCUSO FRAME PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS TOWN OF BRIGHTON, TOWN OF BRIGHTON TOWN BOARD AND TOWN OF BRIGHTON PLANNING BOARD.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC. AND DANIELE MANAGEMENT, LLC, COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered February 7, 2019 in a CPLR article 78 proceeding and declaratory judgment action. The order and judgment, among other things, granted the motions of respondents-defendants Town of Brighton, Town of Brighton Town Board, Town of Brighton Planning Board, M&F, LLC, Daniele SPC, LLC, Mucca Mucca, LLC, Mardanth Enterprises, Inc., and Daniele Management, LLC, collectively doing business as Daniele Family Companies, for partial dismissal of the amended petition-complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motions in part with respect to the 9th, 10th and 14th causes of action, vacating the last two decretal paragraphs, and reinstating the 14th cause of action, and as modified the order and judgment is affirmed without costs.

Memorandum: Petitioner-plaintiff (petitioner) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action to, inter alia, annul the determination of respondent-defendant Town of

Brighton Town Board (Town Board) approving an incentive zoning application by respondents-defendants M&F, LLC, Daniele SPC, LLC, Mucca Mucca, LLC, Mardanth Enterprises, Inc., and Daniele Management, LLC, collectively doing business as Daniele Family Companies, in connection with a proposed Whole Foods store in respondent-defendant Town of Brighton (Town). Petitioner appeals from an order and judgment that, inter alia, granted the motions of respondents-defendants (respondents) to dismiss certain causes of action and claims in the amended petition-complaint.

Contrary to petitioner's contention, Supreme Court properly dismissed its 11th cause of action, which alleged a violation of Brighton Town Code chapter 113, because there is no private right of action to enforce that provision (*see generally Rubman v Osuchowski*, 163 AD3d 1471, 1474 [4th Dept 2018]).

Even assuming, arguendo, that petitioner's 12th and 13th causes of action challenging the validity of the Town's incentive zoning law (Brighton Town Code ch 209) were timely commenced (*see generally Matter of Association for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation*, 23 NY3d 1, 9 [2014]), we nevertheless conclude that those causes of action were properly dismissed on the merits because the provisions of the challenged incentive zoning law are consistent with its authorizing legislation (*see* Town Law § 261-b). Contrary to petitioner's contention, section 261-b does not require an incentive zoning law to specifically adopt a prospective formula for weighing the costs and benefits of awarding any particular incentive under the law.

Contrary to petitioner's further contentions, we conclude that its claims under the Open Meetings Law (Public Officers Law art 7) were properly dismissed. Specifically, petitioner's claim alleging that one or more secret meetings took place as evidenced by a specific press conference is speculative and conclusory (*see Matter of Feinberg-Smith Assoc., Inc. v Town of Vestal Zoning Bd. of Appeals*, 167 AD3d 1350, 1353 [3d Dept 2018]; *Residents for More Beautiful Port Washington v Town of N. Hempstead*, 153 AD2d 727, 729 [2d Dept 1989], *lv denied* 75 NY2d 703 [1990]), petitioner's claim regarding the online posting of voluminous information prior to the March 28, 2018 public meeting is without merit (*see Matter of Clover/Allen's Cr. Neighborhood Assn. LLC v M&F, LLC*, 173 AD3d 1828, 1831-1832 [4th Dept 2019]), and petitioner's claim regarding the facility used for the February 28, 2018 public hearing is likewise without merit (*see generally Matter of Frigault v Town of Richfield Planning Bd.*, 107 AD3d 1347, 1351-1352 [3d Dept 2013]). In light of our determinations on those claims, petitioner's contention that the court erred in denying its cross motion for discovery in connection therewith is academic (*see Niagara Falls Water Bd. v City of Niagara Falls*, 85 AD3d 1664, 1665 [4th Dept 2011], *lv denied* 17 NY3d 714 [2011]). We note that there is no indication in the record that the court considered the various affidavits to which petitioner now objects.

We agree with petitioner, however, that the court erred by granting a declaration in favor of respondents on petitioner's 9th and

10th causes of action, which allege violations of the public trust doctrine, because there are unresolved factual issues concerning the impact of the Whole Foods development on a recreational trail known as the Auburn Trail, including whether the development would require the constructive abandonment of the existing public use easements for that trail (*see Clover/Allen's Cr. Neighborhood Assn. LLC*, 173 AD3d at 1829-1831; *Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150-1152 [2d Dept 2011]). We therefore modify the order and judgment by vacating the last two decretal paragraphs.

We further agree with petitioner that the court erred in granting those parts of the motions seeking to dismiss its 14th cause of action concerning a permissive referendum under Town Law § 64 (2) (*cf. Matter of Conners v Town of Colonie*, 108 AD3d 837, 838-842 [3d Dept 2013]), and we therefore further modify the order and judgment accordingly. Contrary to the court's determination, that cause of action is ripe for adjudication (*see generally Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 518-521 [1986], *cert denied* 479 US 985 [1986]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1131

KA 17-01993

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASHUA WILLIAMS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered October 13, 2016. The judgment convicted defendant upon a nonjury verdict of murder in the second degree, criminal possession of a weapon in the second degree (two counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of murder in the second degree (Penal Law § 125.25 [1]), endangering the welfare of a child (§ 260.10 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). We reject defendant's contention that the evidence is legally insufficient to establish his liability as an accessory with respect to those charges. "Accessorial liability requires only that defendant, acting with the mental culpability required for the commission of the crime[s], intentionally aid another in the conduct constituting the offense[s]" (*People v Pizarro*, 151 AD3d 1678, 1681 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017] [internal quotation marks omitted]; *see* § 20.00). Here, viewing the evidence in the light most favorable to the People (*see People v Fox*, 124 AD3d 1252, 1253 [4th Dept 2015]), the factfinder could have reasonably concluded that defendant and the man alleged by defendant to have shot the victim shared "a common purpose and a collective objective" (*see People v Cabey*, 85 NY2d 417, 422 [1995]), and that defendant "shared in the intention of" the shooter (*People v Morris*, 229 AD2d 451, 451 [2d Dept 1996], *lv denied* 88 NY2d 990 [1996]).

Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the

weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although an acquittal would not have been unreasonable, upon "weigh[ing] conflicting testimony, review[ing] any rational inferences that may be drawn from the evidence and evaluat[ing] the strength of such conclusions" (*People v Courteau*, 154 AD3d 1317, 1318 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]), we conclude that County Court did not fail to give the evidence the weight it should be accorded (*see People v O'Neill*, 169 AD3d 1515, 1515 [4th Dept 2019]; *see generally Bleakley*, 69 NY2d at 495). Contrary to defendant's contention, the trial testimony tending to establish his guilt was not incredible as a matter of law (*see generally People v Washington*, 160 AD3d 1451, 1452 [4th Dept 2018]; *People v Moore* [appeal No. 2], 78 AD3d 1658, 1659-1660 [4th Dept 2010]), and any inconsistencies in that testimony merely presented issues of credibility for the factfinder to resolve (*see generally People v Withrow*, 170 AD3d 1578, 1579 [4th Dept 2019], *lv denied* 34 NY3d 940 [2019], *reconsideration denied* 34 NY3d 1020 [2019]; *People v Graves*, 163 AD3d 16, 23 [4th Dept 2018]).

We also reject defendant's contention that he received ineffective assistance of counsel due to counsel's failure to adduce evidence at trial that one of the People's witnesses had received a specific promise of consideration in exchange for that witness' truthful testimony. At trial, however, that witness testified that he hoped his cooperation would be considered at his upcoming sentencing on an unrelated charge, and that no specific promise had been made to him. The record on appeal contains no evidence of any agreement beyond the general hope for leniency described by the witness at trial, and thus defendant has failed to "demonstrate the absence of strategic or other legitimate explanations for" defense counsel's failure to adduce additional proof of a specific agreement (*People v Kurkowski*, 117 AD3d 1442, 1443 [4th Dept 2014] [internal quotation marks omitted]).

Finally, the sentence is not unduly harsh or severe.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1147

KA 16-00185

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN WOODARD, DEFENDANT-APPELLANT.

EDELSTEIN & GROSSMAN, NEW YORK CITY (JONATHAN I. EDELSTEIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Francis A. Affronti, J.), entered December 26, 2015. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Memorandum: Defendant appeals by permission of this Court from an order denying without a hearing his motion pursuant to CPL article 440 seeking to vacate on, inter alia, the ground of ineffective assistance of counsel the judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3]) and attempted robbery in the first degree (§§ 110.00, 160.15 [2]). We previously affirmed that judgment of conviction (*People v Woodard*, 96 AD3d 1619, 1619 [4th Dept 2012], *lv denied* 19 NY3d 1030 [2012]).

Defendant contends that he was denied effective assistance of counsel because defense counsel failed to investigate the circumstances under which defendant provided a written statement to police. Preliminarily, we agree with defendant that his ineffective assistance of counsel claim is not procedurally barred by CPL 440.10 (2) (c).

With respect to the merits, "[a] defendant's right to effective assistance of counsel includes defense counsel's reasonable investigation" (*People v Rossborough*, 122 AD3d 1244, 1245 [4th Dept 2014]; *see People v Howard*, 175 AD3d 1023, 1025 [4th Dept 2019]; *People v Jenkins*, 84 AD3d 1403, 1408 [2d Dept 2011], *lv denied* 19 NY3d 1026 [2012]). Although "the failure to investigate may amount to ineffective assistance of counsel" (*Rossborough*, 122 AD3d at 1245; *see*

People v Kurkowski, 117 AD3d 1442, 1443 [4th Dept 2014]), the governing standard is " 'reasonable competence,' not perfect representation" (*People v Modica*, 64 NY2d 828, 829 [1985]; *see People v Young*, 167 AD3d 1448, 1449 [4th Dept 2018], *lv denied* 33 NY3d 1036 [2019]).

Here, defendant alleges that he invoked his right to counsel while in police custody prior to giving a written statement to police. Defendant contends that defense counsel's failure to discover that fact during his investigation of defendant's case amounts to ineffective assistance. We disagree. Defense counsel properly requested and received discovery materials and filed an omnibus motion on defendant's behalf seeking, inter alia, suppression of defendant's written statement. The discovery materials produced gave no indication that defendant requested a lawyer at any time, and the testimony adduced at the ensuing *Huntley* hearing established that defendant freely and voluntarily waived his right to counsel prior to giving his written statement to police. Defendant admittedly failed to inform defense counsel that he invoked his right to counsel prior to giving the written statement until after the *Huntley* hearing, at which point defense counsel moved to reopen the hearing. Thus, the record establishes that defense counsel sufficiently investigated the facts, and defense counsel's failure to argue or elicit information at the *Huntley* hearing tending to show that defendant had invoked his right to counsel while in police custody is attributable to defendant's failure to inform him of that alleged fact (*see Young*, 167 AD3d at 1450; *People v Bradford*, 202 AD2d 441, 442 [2d Dept 1994], *lv denied* 84 NY2d 823 [1994]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1175

KA 12-01739

PRESENT: PERADOTTO, J.P., DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN W. COLE, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered July 31, 2012. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts), robbery in the second degree (two counts), kidnapping in the second degree, assault in the second degree (two counts) and criminal possession of a weapon in the second degree (four counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts of robbery in the first degree (Penal Law § 160.15 [2], [4]), two counts of robbery in the second degree (§ 160.10 [1], [2] [a]), one count of kidnapping in the second degree (§ 135.20), two counts of assault in the second degree (§ 120.05 [2], [6]), and four counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), defendant contends that the prosecutor committed a *Batson* violation by peremptorily striking an African-American prospective juror. We reject that contention.

In determining whether a party has used peremptory challenges to exclude prospective jurors based on race, a trial court must follow the three-step process set forth in *Batson v Kentucky* (476 US 79, 96-98 [1986]). "At step one, the movant must make a prima facie showing that the peremptory strike was used to discriminate; at step two, if that showing is made, the burden shifts to the opposing party to articulate a non-discriminatory reason for striking the juror; and finally, at step three, the trial court must determine, based on the arguments presented by the parties, whether the proffered reason for the peremptory strike was pretextual and whether the movant has shown purposeful discrimination" (*People v Bridgeforth*, 28 NY3d 567, 571 [2016]; *see People v Pescara*, 162 AD3d 1772, 1772-1773 [4th Dept

2018]).

Initially, we note that "the issue of whether defendant established a prima facie case became moot when the prosecutor stated his race-neutral reasons for the subject challenge" (*People v Malloy*, 166 AD3d 1302, 1308 [3d Dept 2018], *affd* 33 NY3d 1078 [2019]). With respect to the merits of defendant's contention, we conclude that the prosecutor's proffered reason for striking the prospective juror, specifically that the prospective juror "indicated she'd have no hesitation in voicing her disagreement with the other jurors," whereas the prosecutor was "looking for jurors who can harmonize their verdict and come to an unanimous verdict," was race-neutral (*see id.*; *see generally People v Payne*, 88 NY2d 172, 183 [1996]). Contrary to defendant's contention, we further conclude that Supreme Court did not abuse its discretion in determining that the prosecutor's explanation for his peremptory challenge with respect to the prospective juror was not pretextual (*see People v Farrare*, 118 AD3d 1477, 1477-1478 [4th Dept 2014], *lv denied* 23 NY3d 1061 [2014]; *see generally People v Linder*, 170 AD3d 1555, 1558 [4th Dept 2019], *lv denied* 33 NY3d 1071 [2019]; *People v English*, 119 AD3d 706, 706 [2d Dept 2014], *lv denied* 24 NY3d 1043 [2014]). Defendant failed to preserve for our review his claim of disparate treatment by the prosecutor of other similarly situated panelists (*see People v Dunham*, 170 AD3d 569, 570 [1st Dept 2019], *lv denied* 33 NY3d 1068 [2019], *reconsideration denied* 34 NY3d 950 [2019]; *see generally People v Holloway*, 71 AD3d 1486, 1486-1487 [4th Dept 2010], *lv denied* 15 NY3d 774 [2010]).

We reject defendant's further contention that the court erred in failing to adequately ascertain whether he knowingly and voluntarily relinquished his right to conflict-free assistance of counsel after defense counsel suffered a medical episode resulting in a one-day adjournment of trial. Such an error "requires reversal only if defendant first establishes that defense counsel had a potential conflict of interest" (*People v McGillicuddy*, 103 AD3d 1200, 1201 [4th Dept 2013]), and defendant failed to establish that a conflict of interest existed. "Where no conflict of interest is involved, the standard for assessing the effectiveness of trial counsel is whether the attorney provided meaningful representation" (*People v Ennis*, 11 NY3d 403, 411 [2008], *cert denied* 556 US 1240 [2009]). Here, there is no indication in the record that defense counsel's condition affected his performance at trial (*see People v Morehouse*, 5 AD3d 925, 927 [3d Dept 2004], *lv denied* 3 NY3d 644 [2004]; *People v Badia*, 159 AD2d 577, 578 [2d Dept 1990], *lv denied* 76 NY2d 784 [1990]). Moreover, with respect to defendant's specific allegations of ineffective assistance, "[d]efendant failed to demonstrate that those alleged errors were not strategic in nature . . . , and mere disagreement with trial strategy is insufficient to establish that defense counsel was ineffective" (*People v Henry*, 74 AD3d 1860, 1862 [4th Dept 2010], *lv denied* 15 NY3d 852 [2010]).

Finally, we reject defendant's contention that the court failed to comply with the procedure for disclosure of jury notes to counsel set forth in *People v O'Rama* (78 NY2d 270 [1991]). "[T]he *O'Rama*

procedure is not implicated when the jury's request is ministerial in nature and therefore requires only a ministerial response" (*People v Williams*, 142 AD3d 1360, 1362 [4th Dept 2016], *lv denied* 28 NY3d 1128 [2016] [internal quotation marks omitted]), and defendant has not established that the note at issue contained a substantive inquiry (*see id.*; *People v Ziegler*, 78 AD3d 545, 546 [1st Dept 2010], *lv denied* 16 NY3d 838 [2011]; *People v Robinson*, 51 AD3d 575, 576 [1st Dept 2008], *lv denied* 11 NY3d 793 [2008]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1177

KA 17-00905

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BOBBY L. DAVIS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered March 24, 2017. The judgment convicted defendant upon a jury verdict of burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that Supreme Court erred in denying his motion to reopen the *Wade* hearing after the victim testified at trial that she believed that a police officer presented her stolen cell phone to her prior to administering the show-up identification. Contrary to defendant's contention, the totality of the victim's testimony reveals some confusion, whereas the police officer's testimony was clear and consistent that, after the victim identified defendant, a police officer showed her the cell phone and asked if she recognized it. Consequently, we conclude that the court did not abuse its discretion in denying defendant's motion to reopen the *Wade* hearing (*see People v Gilley*, 163 AD3d 1156, 1159 [3d Dept 2018], *lv denied* 33 NY3d 948 [2019]). In any event, inasmuch as there is overwhelming evidence of defendant's guilt and no reasonable possibility that defendant otherwise would have been acquitted, any error in the court's denial of defendant's motion is harmless (*see People v Fuentes*, 52 AD3d 1297, 1298 [4th Dept 2008], *lv denied* 11 NY3d 736 [2008]; *see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1181

CAF 18-01315

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF GIOHNA R. AND JOHNA R.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JOHN R., AND TRACY R., RESPONDENTS-APPELLANTS.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR RESPONDENT-APPELLANT JOHN R.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT TRACY R.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (YVETTE VELASCO OF COUNSEL), FOR PETITIONER-RESPONDENT.

LISA S. CUOMO, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeals from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered July 6, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order terminated respondents' parental rights with respect to the subject children.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father and respondent mother appeal from an order that, inter alia, terminated their parental rights with respect to the subject children on the ground of permanent neglect and freed the children for adoption.

Initially, contrary to the mother's contention on her appeal, we conclude on this record that Family Court's prehearing ruling precluding certain evidence does not constitute reversible error (*cf. Matter of Star Leslie W.*, 63 NY2d 136, 147 [1984]).

We also reject the mother's contention that the court erred in finding that she permanently neglected the subject children. Upon our review of the record, we conclude that "[p]etitioner met its burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and [the children] by providing services and other assistance aimed at ameliorating or resolving the problems preventing [the

children's] return to [the mother's] care . . . , and that the [mother] failed substantially and continuously to plan for the future of the child[ren] although physically and financially able to do so . . . Although the [mother] participated in [some of] the services offered by petitioner, [she] did not successfully address or gain insight into the problems that led to the removal of the child[ren] and continued to prevent the child[ren's] safe return" (*Matter of Michael S. [Kathryne T.]*, 162 AD3d 1651, 1652 [4th Dept 2018], *lv denied* 32 NY3d 906 [2018] [internal quotation marks omitted]; *see* Social Services Law § 384-b [7] [a]; *Matter of Alexander S. [David S.]*, 130 AD3d 1463, 1463 [4th Dept 2015], *lv denied* 26 NY3d 910 [2015], *appeal dismissed and lv denied* 26 NY3d 1030 [2015], *rearg denied* 26 NY3d 1132 [2016]).

Contrary to the mother's further contention, we conclude that "the record supports the court's determination that termination of her parental rights is in the best interests of the child[ren], and that a suspended judgment was not warranted under the circumstances inasmuch as any progress made by the mother prior to the dispositional determination was insufficient to warrant any further prolongation of the child[ren's] unsettled familial status" (*Matter of Kendalle K. [Corin K.]*, 144 AD3d 1670, 1672 [4th Dept 2016]).

The mother's contention that the Attorney for the Children (AFC) was ineffective because she substituted her judgment for that of the children is "based on matters outside the record and is not properly before us" (*Matter of Daniel K. [Roger K.]*, 166 AD3d 1560, 1561 [4th Dept 2018], *lv denied* 32 NY3d 919 [2019] [internal quotation marks omitted]). We also conclude that the record does not support the mother's additional contention that the AFC represented conflicting interests requiring her disqualification (*see Matter of Smith v Smith*, 241 AD2d 980, 980 [4th Dept 1997]; *cf. Matter of Brian S. [Tanya S.]*, 141 AD3d 1145, 1148 [4th Dept 2016]).

We reject the father's contention on his appeal that the court erred in finding that he permanently neglected the subject children. Contrary to the father's contention, we conclude that "there is no evidence that [the father] had a realistic plan to provide an adequate and stable home for the child[ren]" (*Matter of Jarrett P. [Jeremy P.]*, 173 AD3d 1692, 1695 [4th Dept 2019], *lv denied* 34 NY3d 902 [2019] [internal quotation marks omitted]). Contrary to the father's further contention, the record supports the court's determination that termination of the father's parental rights was in the best interests of the children (*see Kendalle K.*, 144 AD3d at 1672).

Finally, we reject the father's contention that reversal is required because petitioner failed to properly notify the children's uncle and his fiancée of the instant proceeding. Even assuming, arguendo, that petitioner violated its statutory duty (*see* Family Ct Act § 1017 [1] [a]), the record establishes that the uncle and his fiancée were aware for years that the children had been placed in foster care, yet they did not express any interest in obtaining custody until several months into the fact-finding hearing. We thus

conclude that no prejudice arose from any failure by petitioner to notify the uncle and his fiancée of this proceeding (*see Matter of Mirabella H. [Angela I.]*, 162 AD3d 1733, 1734 [4th Dept 2018], *lv denied* 32 NY3d 909 [2018]; *Matter of Elizabeth YY. v Albany County Dept. of Social Servs.*, 229 AD2d 618, 620-621 [3d Dept 1996]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1182

CA 19-00233

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

CLARK RIGGING & RENTAL CORP.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LIBERTY MUTUAL INSURANCE COMPANY,
KC PRECAST, LLC, DEFENDANTS,
AND TRI-KRETE LIMITED, DEFENDANT-RESPONDENT.

COLLIGAN LAW LLP, BUFFALO (KEVIN T. O'BRIEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SHEATS & BAILEY, PLLC, LIVERPOOL (ANTHONY C. GALLI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Henry J. Nowak, Jr., J.), entered December 13, 2018. The order, insofar as appealed from, granted in part the motion of defendant Tri-Krete Limited to dismiss the complaint against it.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in its entirety and the first and second causes of action against defendant Tri-Krete Limited are reinstated.

Memorandum: Plaintiff commenced this action against defendants Tri-Krete Limited (Tri-Krete) and KC Precast, LLC (KC Precast) for breach of contract, account stated, unjust enrichment, and fraudulent inducement, and against defendant Liberty Mutual Insurance Company to recover on a payment bond, arising out of work KC Precast hired plaintiff to perform in connection with a construction project. Tri-Krete moved to dismiss the complaint against it pursuant to CPLR 3211 (a) (7), contending that plaintiff failed to sufficiently allege that Tri-Krete is an alter ego of KC Precast. Plaintiff appeals from an order insofar as it granted Tri-Krete's motion with respect to the first and second causes of action, for breach of contract and account stated. We agree with plaintiff that Supreme Court erred in granting that part of the motion, and we therefore reverse the order insofar as appealed from.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction . . . We accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the

facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Affording the allegations in the complaint every possible favorable inference (*see Palladino v CNY Centro, Inc.*, 70 AD3d 1450, 1451 [4th Dept 2010]), we conclude that plaintiff sufficiently alleged that Tri-Krete is an alter ego of KC Precast (*see Grigsby v Francabandiero*, 152 AD3d 1195, 1196-1197 [4th Dept 2017]). It is well settled that, "[w]hen a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego, the corporate form may be disregarded to achieve an equitable result" (*Austin Powder Co. v McCullough*, 216 AD2d 825, 827 [3d Dept 1995]). "A party seeking to pierce the corporate veil must establish that '(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury' " (*Millennium Constr., LLC v Loupolover*, 44 AD3d 1016, 1016 [2d Dept 2007], quoting *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). However, "[b]ecause a decision to pierce the corporate veil in any given instance will necessarily depend on the attendant facts and equities, there are no definitive rules governing the varying circumstances when this power may be exercised" (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014]).

With respect to the first element, plaintiff alleged, inter alia, that nonparties Marc Bombini, Adam Bombini, and Tony Bombini "were and/or are in exclusive control" of KC Precast and are also the officers or directors of Tri-Krete; that the Bombinis intermingled the assets of Tri-Krete and KC Precast with each other and with the Bombinis' personal assets; that KC Precast utilized its alter ego, Tri-Krete, as the subcontractor on certain paperwork connected with the construction project because KC Precast was unable to obtain workers' compensation insurance; and that the Bombinis made clear in certain conversations with plaintiff that Tri-Krete and KC Precast are one and the same (*cf. Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407, 407 [1st Dept 2007]).

With respect to the second element, it is well established that "[w]rongdoing in this context does not necessarily require allegations of actual fraud. While fraud certainly satisfies the wrongdoing requirement, other claims of inequity or malfeasance will also suffice" (*Baby Phat Holding Co., LLC*, 123 AD3d at 407). Plaintiff's complaint includes a fraudulent inducement cause of action against both Tri-Krete and KC Precast in which plaintiff alleges, inter alia, that at the request of KC Precast and its alter ego, Tri-Krete, and in actual reliance upon their promise of payment, plaintiff performed work; that the promises were clear and were made in order to induce

plaintiff to perform the work and to delay the filing of an action against them or the assertion of a claim under the payment bond; and that both KC Precast and Tri-Krete knew that their representations were false and never intended to pay plaintiff. We therefore conclude that, at this stage of the litigation, plaintiff sufficiently alleged that the asserted domination of KC Precast by Tri-Krete was used to commit a fraud or wrong against plaintiff which resulted in plaintiff's injury (*see Grigsby,* 152 AD3d at 1197).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1193

KA 17-01357

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WIGBERTO OSORIO, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (J. SCOTT PORTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered June 22, 2017. The judgment convicted defendant upon a jury verdict of murder in the second degree, attempted kidnapping in the second degree, gang assault in the first degree, assault in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [3]), attempted kidnapping in the second degree (§§ 110.00, 135.20), gang assault in the first degree (§ 120.07), and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant's conviction stems from an incident in which a group of men brutally beat the victim with baseball bats and attempted to kidnap him before defendant's codefendant shot the victim multiple times, killing him.

We reject defendant's contention that the testimony of the accomplice who testified at trial was insufficiently corroborated (*see People v Smith*, 150 AD3d 1664, 1665 [4th Dept 2017], *lv denied* 30 NY3d 953 [2017]; *People v Highsmith*, 124 AD3d 1363, 1364 [4th Dept 2015], *lv denied* 25 NY3d 1202 [2015]). Here, other testimony at trial established that defendant made statements to the police demonstrating a motive to harm the victim, and that defendant, the codefendant, and another participant in the crime were close friends (*see People v Garcia*, 170 AD3d 462, 463 [1st Dept 2019], *lv denied* 33 NY3d 1069 [2019]). There was also testimony that defendant, the codefendant, and two other participants were seen together just hours before the murder, and that defendant was holding a baseball bat and asking where

the victim was at that time (*see People v Strauss*, 155 AD3d 1317, 1319 [3d Dept 2017], *lv denied* 31 NY3d 1122 [2018]). Additionally, forensic evidence substantiated much of the accomplice's testimony, and testimony of eyewitnesses at and near the scene of the crime harmonized with the accomplice's testimony. We conclude that the corroborative evidence " 'tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth' " (*People v Reome*, 15 NY3d 188, 192 [2010]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant next contends that the integrity of the grand jury proceeding was impaired by the testimony of two witnesses who admitted that they lied during part of their testimony. We reject that contention, as we did in the codefendant's appeal, because, "inasmuch as the prosecutor did not knowingly offer perjured testimony and there was sufficient evidence before the grand jury to support the charges without considering the perjured testimony, dismissal of the indictment was not required" (*People v Cruz-Rivera*, 174 AD3d 1512, 1513 [4th Dept 2019]). We also reject defendant's further contention that County Court erred in denying his request for a missing witness charge because, as we concluded in the codefendant's appeal, "[t]he People demonstrated that the witness was uncooperative with them and thus not under their control" (*id.* at 1514).

Contrary to defendant's final contention, the sentence is not unduly harsh or severe. We note, however, that the certificate of conviction contains errors that must be corrected (*see id.*). First, the certificate of conviction incorrectly reflects that defendant was convicted of murder in the second degree pursuant to Penal Law § 125.25 (1), and it must therefore be amended to reflect that he was convicted of murder in the second degree pursuant to section 125.25 (3). Second, the certificate of conviction incorrectly reflects that defendant was convicted of criminal possession of a weapon in the third degree pursuant to Penal Law § 265.03 (3), and it must therefore be amended to reflect that he was convicted of criminal possession of a weapon in the third degree pursuant to section 265.02 (1). Third, the certificate of conviction incorrectly reflects that defendant was sentenced to 3⅓ to 7 years for criminal possession of a weapon in the third degree, and it must therefore be amended to reflect that he was sentenced to 3½ to 7 years for that conviction. Lastly, the certificate of conviction incorrectly reflects that defendant was sentenced on July 15, 2016, and it must therefore be amended to reflect the correct sentencing date of June 22, 2017.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1206

CAF 18-01489

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF HOPE B.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

ORDER

ROCHELLE B., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (JOSEPH MARZOCCHI OF COUNSEL), FOR PETITIONER-RESPONDENT.

ARLENE BRADSHAW, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered June 21, 2018, and corrected on August 24, 2018, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, continued the placement of the subject child with petitioner.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1207

CAF 18-01490

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF FAITH B.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND
FAMILY SERVICES, PETITIONER-RESPONDENT;

ORDER

ROCHELLE B., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (JOSEPH MARZOCCHI OF COUNSEL), FOR PETITIONER-RESPONDENT.

ARLENE BRADSHAW, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered June 21, 2018, and corrected on August 24, 2018, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, vacated the placement of the subject child with petitioner and released the child to the custody of her father.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1211

CA 19-00604

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

TERESA VITKO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT S. SIMON, DEFENDANT,
AND TOWN OF ORCHARD PARK, DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM LLP, BUFFALO (MARINA A. MURRAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRIEDMAN & RANZENHOFER, P.C., AKRON (SAMUEL A. ALBA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered October 9, 2018. The order granted the application of plaintiff for leave to serve a late notice of claim.

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

Memorandum: Supreme Court abused its discretion in granting plaintiff's application for leave to serve a late notice of claim against defendant Town of Orchard Park (Town) nearly 11 months after the incident in question occurred (*see generally Tate v State Univ. Constr. Fund*, 151 AD3d 1865, 1865 [4th Dept 2017]). "In determining whether to grant such leave, the court must consider, inter alia, whether the [plaintiff] has shown a reasonable excuse for the delay, whether the municipality had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the municipality" (*Matter of Friend v Town of W. Seneca*, 71 AD3d 1406, 1407 [4th Dept 2010]; *see King v Niagara Falls Water Auth.*, 147 AD3d 1398, 1399 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]; *see generally* General Municipal Law § 50-e [5]). Here, plaintiff failed to meet her burden of demonstrating that the Town had actual knowledge of the incident within 90 days of its occurrence (*see Powell v Central N.Y. Regional Transp. Auth.*, 169 AD3d 1412, 1413-1414 [4th Dept 2019], *lv denied* 34 NY3d 904 [2019]; *Friend*, 71 AD3d at 1407). Indeed, plaintiff does not dispute that the Town lacked actual knowledge of any injury at the subject property until the Town was served with plaintiff's application. Plaintiff likewise failed to establish a reasonable excuse for her failure to timely serve the notice of claim, and to establish that a late notice of claim would not substantially prejudice the Town's interests (*see*

generally Tate, 151 AD3d at 1865-1866; *Andrews v Long Is. R.R.*, 110 AD3d 653, 654 [2d Dept 2013]; *Matter of Portnov v City of Glen Cove*, 50 AD3d 1041, 1043 [2d Dept 2008]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1217

KA 16-01992

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANGNEM G. GREEN, DEFENDANT-APPELLANT.

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (JEFFERY FRIESEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered May 26, 2016. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (three counts).

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 on each count to a determinate term of imprisonment of seven years and three years of postrelease supervision, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of three counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that he was deprived of a fair trial because the prosecutor stated during voir dire that crack cocaine, unlike marihuana, was "hardcore stuff." Inasmuch as defendant did not object to the prosecutor's comment, his contention is unpreserved for our review (*see* CPL 470.05 [2]). In any event, even assuming, arguendo, that the comment was improper, we conclude that it was not so egregious or prejudicial as to deprive defendant of a fair trial (*see generally People v Jackson*, 108 AD3d 1079, 1080 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013]; *People v Miller*, 104 AD3d 1223, 1223-1224 [4th Dept 2013], *lv denied* 21 NY3d 1017 [2013]; *People v South*, 233 AD2d 910, 910 [4th Dept 1996], *lv denied* 89 NY2d 989 [1997]).

We reject defendant's further contention that he was deprived of a fair trial because County Court failed to excuse a juror who said during voir dire that she knew "a gentleman who was high up in the state troopers. He's retired now." When asked by defense counsel how she would feel about serving on the jury, the juror answered "I don't think it would affect me. I just wanted to let you know that I did

know him." Neither side challenged the juror for cause. Even assuming, arguendo, that the court erred in failing, sua sponte, to excuse the prospective juror for cause, we conclude that "the error does not require reversal because defendant had not exhausted his peremptory challenges and did not peremptorily challenge that prospective juror" (*People v Arguinzoni*, 48 AD3d 1239, 1241 [4th Dept 2008], *lv denied* 10 NY3d 859 [2008]; *see People v Simmons*, 119 AD3d 1343, 1344 [4th Dept 2014], *lv denied* 24 NY3d 964 [2014], *reconsideration denied* 24 NY3d 1088 [2014]).

We agree with defendant, however, that the 10-year determinate sentence is unduly harsh and severe considering that defendant has no violent crimes on his record and was offered the opportunity to plead guilty to the charges in the indictment in exchange for a prison sentence of five years. It does not appear that any facts were revealed at trial that were unknown to the People or the court at the time the sentence promise was made. Under the circumstances, we modify the judgment as a matter of discretion in the interest of justice by reducing the sentence on each count to a determinate term of imprisonment of seven years plus three years of postrelease supervision (*see* CPL 470.15 [6] [b]).

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1221

KA 04-02539

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE E. MILLER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Cattaraugus County Court (Larry M. Himelein, J.), entered February 28, 2005. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and defendant's risk level determination made by Cattaraugus County Court pursuant to the Sex Offender Registration Act is vacated.

Memorandum: In 2001, defendant was convicted in Cattaraugus County Court upon his plea of guilty of attempted sodomy in the second degree and, that same year, he was convicted in Allegany County Court upon his plea of guilty of sexual abuse in the first degree. The convictions stemmed from a course of conduct against one victim that occurred in both jurisdictions. Defendant was sentenced in both cases and, prior to his release from prison, Allegany County Court held a proceeding to determine his risk level designation under the Sex Offender Registration Act (SORA) (Correction Law § 168 *et seq.*) and designated him a level two risk. Cattaraugus County Court subsequently held a SORA proceeding utilizing a risk assessment instrument (RAI) and case summary that were substantively identical to those used in the Allegany County SORA proceeding, but designated defendant a level three risk. On a prior appeal (*People v Miller*, 37 AD3d 1071 [4th Dept 2007]), we affirmed the order of Cattaraugus County Court designating him a level three risk. We subsequently granted defendant's motion for a writ of error coram nobis (*People v Miller*, 169 AD3d 1460 [4th Dept 2019]), and we vacated our prior order. We now consider the appeal de novo.

"Where, as here, a single RAI addressing all relevant conduct is prepared, the goal of assessing the risk posed by the offender is fulfilled by a single SORA adjudication. To hold otherwise—that is,

to permit multiple risk level determinations based on conduct included in a single RAI—would result in redundant proceedings and constitute a waste of judicial resources" (*People v Cook*, 29 NY3d 114, 119 [2017]). In order to prevent multiple courts from reaching conflicting conclusions based on the same RAI, "one—and only one—sentencing court should render a risk level determination based on all conduct contained in the RAI" (*id.* at 119-120; *see People v Katz*, 150 AD3d 1160, 1160 [2d Dept 2017]). Inasmuch as the Cattaraugus County SORA proceeding was duplicative, we reverse the order and vacate defendant's risk level determination made by Cattaraugus County Court (*see Cook*, 29 NY3d at 119-120; *Katz*, 150 AD3d at 1160).

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1226

KA 17-01127

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RUBEN L. BAILEY, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered May 10, 2017. The judgment convicted defendant, upon a nonjury verdict, of criminal sexual act in the third degree and endangering the welfare of a child (five counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of criminal sexual act in the third degree (Penal Law § 130.40 [2]), and five counts of endangering the welfare of a child (§ 260.10 [1]). Contrary to defendant's contention, County Court properly prohibited defense counsel from questioning the victim's mother about the victim's past specific instances of lying (*see generally People v Pavao*, 59 NY2d 282, 288-289 [1983]; *People v Jimmeson*, 101 AD3d 1678, 1679 [4th Dept 2012], *lv denied* 21 NY3d 944 [2013]). Defendant was free to call qualified witnesses to testify to the victim's general reputation in the community for being untruthful (*see generally Jimmeson*, 101 AD3d at 1679) but failed to do so.

We also reject defendant's contention that defense counsel was ineffective for failing to introduce during the cross-examination of the victim a letter and a recording of the victim, each of which purportedly contained statements regarding the victim's credibility that would have been helpful to the defense. It is well settled that "the party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness' answers concerning collateral matters solely for the purposes of impeaching that witness' credibility" (*Pavao*, 59 NY2d at 288-289). Inasmuch as the letter and recording constituted extrinsic evidence concerning collateral matters, any attempt by defense counsel to introduce those items to impeach the victim's credibility would have

had " 'little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]), and thus defense counsel's failure to do so did not render him ineffective (*see id.*).

Defendant's further contention, raised for the first time in his appellate brief, that his right to a speedy trial was violated is unpreserved for our review (*see People v Tirado*, 109 AD3d 688, 690 [4th Dept 2013], *lv denied* 22 NY3d 959 [2013], *reconsideration denied* 22 NY3d 1091 [2014], *cert denied* 574 US 877 [2014]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). "A defendant who desires to raise the issue whether there has been compliance with the speedy trial statute must do so formally rather than as an added argument in an appellate brief, so that the People will have sufficient opportunity to put their side of the question before the court" (*People v Hardy*, 47 NY2d 500, 506 [1979]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1227

CA 19-00577

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

THOMAS CARCIONE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ESSEX HOMES OF WNY, INC., ESSEX HOMES, INC.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

ESSEX HOMES OF WNY, INC., AND ESSEX HOMES, INC.,
THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

R.M. WICK, INC., THIRD-PARTY DEFENDANT-RESPONDENT.

THE HARTFORD INSURANCE COMPANY, NONPARTY APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ANTHONY R. BRIGHTON OF COUNSEL), FOR NONPARTY APPELLANT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (KAITLIN E. HASTINGS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

NASH CONNORS, P.C., BUFFALO (ANDREW KOWALEWSKI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS-RESPONDENTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RICHARD T. SARAF OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered January 25, 2019. The order granted plaintiff's motion to reduce the worker's compensation lien of nonparty The Hartford Insurance Company.

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 action seeking damages for an injury he sustained in a work-related accident on November 4, 2008. As a result of that injury, nonparty The Hartford Insurance Company (Hartford), the workers' compensation insurer for plaintiff's employer, paid benefits to plaintiff and claimed a lien in the amount of those payments (*see* Workers' Compensation Law § 29). Plaintiff

moved for an order reducing the lien, and Supreme Court, in effect, granted the motion. Although it was undisputed that plaintiff had filed only one workers' compensation claim, which stemmed from the November 4, 2008 injury, and thus that Hartford had provided workers' compensation benefits solely pursuant to that claim, the court nevertheless determined that a majority of those benefits payments related to injuries plaintiff purportedly sustained after November 4, 2008, for which plaintiff had not submitted workers' compensation claims. The court therefore reduced Hartford's lien to the amount of benefits that the court determined were paid by Hartford with respect to plaintiff's November 4, 2008 injury. Hartford appeals, and we reverse.

Workers' Compensation Law § 29 (1) provides as relevant here that, if an employee has received workers' compensation benefits, the insurance carrier liable for the payment of those benefits "shall have a lien on the proceeds of any recovery from [another], whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated . . . for such case and the expenses for medical treatment paid or to be paid by it and to such extent such recovery shall be deemed for the benefit of" the insurance carrier. " '[S]ection 29, read in its entirety and in context, clearly reveals a legislative design to provide for reimbursement of the compensation carrier *whenever a recovery is obtained in tort for the same injury that was a predicate for the payment of compensation benefits' "* (*Matter of Beth V. v New York State Off. of Children & Family Servs.*, 22 NY3d 80, 91 [2013]; *see Ronkese v Tilcon N.Y., Inc.*, 129 AD3d 1273, 1275 [3d Dept 2015], *lv dismissed* 28 NY3d 1045 [2016], *lv dismissed* 30 NY3d 1049 [2018]; *see generally Spadaro v Meza*, 100 AD3d 736, 738 [2d Dept 2012]). Here, as noted, it is undisputed that Hartford made payments to plaintiff solely with respect to his workers' compensation claim for the November 4, 2008 injury, and indeed that plaintiff filed no other workers' compensation claim for which benefits were paid. Once Hartford provided payments to plaintiff predicated on his claim for the November 4, 2008 injury, Hartford obtained a lien in the amount of those payments against any recovery by plaintiff in his tort action arising from that same injury (*see Beth V.*, 22 NY3d at 91). After Hartford obtained such lien by virtue of its payments to plaintiff, "[t]he court was without authority to . . . strike, waive or reduce any portion of . . . Hartford's lien, beyond its share of the litigation expenses, including attorney's fees, so that plaintiff could recover more" (*Fernandez v Toyota Lease Trust*, 156 AD3d 435, 435 [1st Dept 2017]; *see also Hammer v Turner Constr. Corp.*, 39 AD3d 705, 705 [2d Dept 2007]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1231

CA 19-01051

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

RAYLAND L. HICKS, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 130452.)

BURKWIT LAW FIRM, PLLC, ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered December 7, 2018. The order granted the motion of defendant to dismiss the amended claim and for a sealing order.

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

Memorandum: In this action for wrongful conviction and imprisonment pursuant to Court of Claims Act § 8-b, claimant appeals from an order granting the motion of defendant, State of New York (State), seeking to dismiss the amended claim and for a sealing order. We affirm.

Claimant was convicted of, inter alia, burglary in the first degree (Penal Law § 140.30 [2]) arising out of the alleged assault of his former girlfriend in her home. He was sentenced to 12½ years in prison. On appeal from the judgment of conviction, this Court held that County Court erred in precluding testimony from a defense witness, reversed the judgment of conviction, and granted a new trial (*People v Hicks*, 94 AD3d 1483, 1484 [4th Dept 2012]). A second trial was held, and claimant was convicted again of the same counts. On appeal, this Court reversed that judgment of conviction on the ground that claimant's Sixth Amendment right to confrontation was violated and granted a new trial (*People v Hicks*, 142 AD3d 1333, 1335 [4th Dept 2016]). Prior to the start of the third trial, the court granted claimant's motion to dismiss the indictment with prejudice because the People failed to present proof due to the former girlfriend's failure to appear in court.

A defendant unjustly convicted may recover damages under section 8-b of the Court of Claims Act where the "judgment of conviction was

reversed or vacated, and the accusatory instrument dismissed or, if a new trial was ordered, either he was found not guilty at the new trial or he was not retried and the accusatory instrument dismissed; provided that the [judgment] of conviction was reversed or vacated, and the accusatory instrument was dismissed, on any of [certain enumerated grounds, including, as relevant here,] paragraph . . . (g) of subdivision one of section 440.10 of the criminal procedure law" (§ 8-b [3] [b] [ii]). CPL 440.10 (1) (g) permits vacatur of a judgment of conviction on the ground that "new evidence has been discovered since the entry of a judgment, which could not have been produced at trial with due diligence 'and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant' " (*People v McFarland*, 108 AD3d 1121, 1121 [4th Dept 2013], *lv denied* 24 NY3d 1220 [2015]).

In order " '[t]o defeat a motion to dismiss, the statute places the burden on the claimant to provide the requisite documentary evidence' establishing that the judgment of conviction was reversed and the indictment was dismissed pursuant to one of the grounds listed in section 8-b (3) (b) of the Court of Claims Act" (*Scheidelman v State of New York*, 151 AD3d 1691, 1693 [4th Dept 2017]). Contrary to claimant's contention that his judgment of conviction was reversed on CPL 440.10 (1) (g) newly discovered evidence grounds, the judgment of conviction was reversed by this Court on the ground that claimant's Sixth Amendment right to confrontation was violated (*see* CPL 440.10 [1] [h]). Thus, because paragraph (h) of CPL 440.10 (1) is " 'not enumerated in Court of Claims Act § 8-b (3) (b) (ii), the [court] properly dismissed the claim' " (*Jeanty v State of New York*, 175 AD3d 1073, 1075 [4th Dept 2019]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1248

CAF 18-01206

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF HOLLI H., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH R., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

DAN SKINNER, BATAVIA, FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered April 4, 2018 in a proceeding pursuant to Family Court Act article 8. The amended order directed respondent to stay away from petitioner.

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

Memorandum: In appeal No. 1, respondent father appeals from an amended order of protection issued upon a finding that he committed the family offense of assault in the third degree under Penal Law § 120.00 (1) against petitioner mother. In appeal No. 2, the father appeals from an order entered after a fact-finding hearing determining that he neglected the subject child. In appeal No. 3, the father appeals from an order of disposition continuing the placement of the child in the custody of the maternal grandmother and placing the father under the supervision of petitioner, Wyoming County Department of Social Services.

Contrary to the father's contention in appeal No. 1, a fair preponderance of the evidence supports Family Court's determination that the father committed acts constituting the family offense of assault in the third degree (*see Matter of Riggins v Downing*, 177 AD3d 1337, 1337 [4th Dept 2019]; *Matter of Chilbert v Soler*, 77 AD3d 1405, 1406-1407 [4th Dept 2010], *lv denied* 16 NY3d 701 [2011]). The mother's testimony that, during an argument, the father attacked her and caused her to sustain a broken tooth and a broken wrist, which required the mother to undergo physical therapy and may require future surgery, is sufficient to establish that the father committed the family offense of assault in the third degree, including the element of physical injury (*see generally* Penal Law § 10.00 [9]; *People v Kraatz*, 147 AD3d 1556, 1556-1557 [4th Dept 2017]; *Matter of Shawn L.*, 233 AD2d 953, 953 [4th Dept 1996]). Contrary to the father's further

contention in appeal No. 1, " 'the court was entitled to credit the testimony of the [mother] over that of the [father]' " (*Matter of Helles v Helles*, 87 AD3d 1273, 1274 [4th Dept 2011]).

The father's appeal from the order in appeal No. 2 must be dismissed inasmuch as the appeal from the dispositional order in appeal No. 3 brings up for review the propriety of the fact-finding order (*see Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]).

Contrary to the father's contention in appeal No. 3, the court's finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]). The evidence at the fact-finding hearing that the child witnessed and intervened in an incident of domestic violence in October 2017, together with evidence of a pattern of ongoing domestic violence between the father and the mother fueled by their drug and alcohol abuse, established that the child had been " 'placed . . . in imminent risk of emotional harm' " (*Matter of Amodea D. [Jason D.]*, 112 AD3d 1367, 1368 [4th Dept 2013]; *see Matter of Jayden B. [Erica R.]*, 91 AD3d 1344, 1344-1345 [4th Dept 2012]).

The father's contention in appeal No. 3 that the court erred in continuing placement of the child with the maternal grandmother is moot inasmuch as a superseding custody order has been entered upon the consent of the father and the mother (*see Matter of Nyjeem D. [John D.]*, 174 AD3d 1424, 1425 [4th Dept 2019]).

We have examined the father's remaining contentions in appeal No. 3 and conclude that none requires modification or reversal of the order in that appeal.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1249

CAF 18-00764

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF BRADY R.

WYOMING COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JOSEPH R., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

JAMES WUJICK, COUNTY ATTORNEY, ATTICA (JENNIFER M. WILKINSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered April 18, 2018 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had neglected the subject child.

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

Same memorandum as in *Matter of Holli H. v Joseph R.* ([appeal No. 1] — AD3d — [Jan. 31, 2020] [4th Dept 2020]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1250

CAF 18-01195

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF BRADY R.

WYOMING COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JOSEPH R., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

JAMES WUJICK, COUNTY ATTORNEY, ATTICA (JENNIFER M. WILKINSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered June 12, 2018 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, continued the placement of the child with the maternal grandmother and placed respondent under the supervision of petitioner.

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

Same memorandum as in *Matter of Holli H. v Joseph R.* ([appeal No. 1] — AD3d — [Jan. 31, 2020] [4th Dept 2020]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1254

CA 18-01323

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF PEOPLE OF THE STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND BASIL SEGGOS, AS ACTING COMMISSIONER OF NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

PETER J. BATTAGLIA, JR., AS AN INDIVIDUAL AND CORPORATE OFFICER OF BATTAGLIA DEMOLITION INC., BUFFALO RECYCLED AGGREGATE LLC, AND BATTAGLIA TRUCKING INC., RESPONDENTS-APPELLANTS.

COHEN & LOMBARDO, P.C., BUFFALO (KATE SULLIVAN NOWADLY OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered June 15, 2018. The order and judgment, inter alia, enjoined operation of respondents' solid waste management facility.

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

Memorandum: Petitioners, the People of the State of New York, the New York State Department of Environmental Conservation (DEC), and Basil Seggos, as acting commissioner of the DEC, commenced this proceeding pursuant to Executive Law § 63 (12) seeking, inter alia, to enjoin respondents from illegally operating a solid waste management facility and concrete crusher until required DEC permits and approvals were obtained and the facility was brought into compliance with the relevant regulations. Respondents contend that Supreme Court erred in granting the petition in part and enjoining operations at the facility until the "DEC has approved any and all required permits," and in finding respondent Peter J. Battaglia, Jr. personally liable for any and all penalties assessed against respondents. We reject those contentions and affirm the order and judgment for reasons stated in the decision at Supreme Court.

We write only to note that, contrary to respondents' contention,

the court had subject matter jurisdiction over this proceeding inasmuch as the matter is ripe for judicial review. Although "[w]here the harm sought to be enjoined is contingent upon events which may not come to pass, the claim to enjoin the purported hazard is nonjusticiable as wholly speculative and abstract" (*Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo*, 64 NY2d 233, 240 [1984]), that is not the case here. The matter is ripe for judicial review inasmuch as petitioners seek to enjoin respondents from conduct causing a materialized harm, i.e., respondents' operation of a solid waste management facility in violation of the relevant regulations (*see generally Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 518 [1986], *cert denied* 479 US 985 [1986]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1259

KA 18-00755

PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMELL CHAPMAN, DEFENDANT-APPELLANT.

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

JAMELL CHAPMAN, DEFENDANT-APPELLANT PRO SE.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered April 18, 2018. The judgment convicted defendant upon a plea of guilty of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends in his main brief that his waiver of the right to appeal is not valid. We reject that contention. The record establishes that, prior to the plea, Supreme Court advised defendant of the maximum sentence that could be imposed (*see People v Lococo*, 92 NY2d 825, 827 [1998]); that the court "did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea" (*People v Tilford*, 162 AD3d 1569, 1569 [4th Dept 2018], *lv denied* 32 NY3d 942 [2018] [internal quotation marks omitted]); and that defendant understood that he was waiving his right to appeal both the conviction and the sentence. Thus, we conclude that defendant's waiver of the right to appeal was knowing, voluntary and intelligent (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses his challenge in his main brief to the severity of the sentence (*see id.* at 255; *see generally Lococo*, 92 NY2d at 827; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Defendant contends in his pro se supplemental brief that the guilty plea was not entered knowingly, voluntarily and intelligently due to the prosecution's failure to comply with its *Brady* obligations (*see generally Brady v Maryland*, 373 US 83, 87 [1963]). "Even

assuming, arguendo, that defendant's contention survives his valid waiver of the right to appeal" (*People v Kyler*, 96 AD3d 1431, 1431 [4th Dept 2012]), defendant failed to preserve that contention for our review (*see People v Johnson*, 60 AD3d 1496, 1497 [4th Dept 2009], *lv denied* 12 NY3d 926 [2009]). In any event, we conclude that "there is no support in the record for defendant's contention that the People committed a *Brady* violation that induced him to plead guilty" (*People v Williams*, 170 AD3d 1666, 1666 [4th Dept 2019]).

Defendant further contends in his pro se supplemental brief that the court erred in failing to order a competency hearing sua sponte. That contention survives the plea and the valid waiver of the right to appeal to the extent that it implicates the voluntariness of the plea (*see People v Stoddard*, 67 AD3d 1055, 1055 [3d Dept 2009], *lv denied* 14 NY3d 806 [2010]; *People v Jermain*, 56 AD3d 1165, 1165 [4th Dept 2008], *lv denied* 11 NY3d 926 [2009]), and it need not be preserved for our review (*see People v Henderson*, 162 AD3d 1507, 1508 [4th Dept 2018], *lv denied* 32 NY3d 1004 [2018]). Nevertheless, we reject defendant's contention. It is well settled that a defendant's " 'history of psychiatric illness does not in itself call into question defendant's competence' to proceed" (*People v Carpenter*, 13 AD3d 1193, 1194 [4th Dept 2004], *lv denied* 4 NY3d 797 [2005], quoting *People v Tortorici*, 92 NY2d 757, 765 [1999], *cert denied* 528 US 834 [1999]), and evidence that a defendant is " 'emotionally distraught' when pleading guilty affords no basis to withdraw the plea" (*People v Alexander*, 97 NY2d 482, 486 [2002]). Here, we conclude that nothing in the plea proceeding established that defendant's mental illness or his attempt at suicide "so stripped him of orientation or cognition that he lacked the capacity to plead guilty" (*id.*). He "responded appropriately to questioning by the court . . . and was 'unequivocal in assuring the court that he understood the meaning of the plea proceeding, and the implications of his decision to accept the plea agreement' " (*People v Yoho*, 24 AD3d 1247, 1248 [4th Dept 2005]; *see People v Terry*, 90 AD3d 1571, 1571 [4th Dept 2011]). Moreover, "defense counsel, who was in the best position to assess defendant's capacity, did not raise the issue of defendant's fitness to proceed or request an examination pursuant to CPL 730.30 (2)" (*People v Brown*, 9 AD3d 884, 885 [4th Dept 2004], *lv denied* 3 NY3d 671 [2004] [internal quotation marks omitted]; *see People v Winebrenner*, 96 AD3d 1615, 1617 [4th Dept 2012], *lv denied* 19 NY3d 1029 [2012]) and, indeed, we note that defense counsel specifically stated at sentencing that there was no basis upon which to challenge defendant's competence to proceed at the time of the plea.

We have considered the remaining contention in defendant's pro se supplemental brief and conclude that it does not warrant reversal or modification of the judgment.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1264

KA 16-00368

PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WINSTON A. WILSON, JR., DEFENDANT-APPELLANT.

KIMBERLY J. CZAPRANSKI, SCOTTSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered December 18, 2015. The judgment convicted defendant upon a plea of guilty of burglary 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 burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that his waiver of the right to appeal is invalid. We reject that contention. Defendant waived that right "both orally and in writing before pleading guilty, and [County Court] conducted an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v McGrew*, 118 AD3d 1490, 1490-1491 [4th Dept 2014], *lv denied* 23 NY3d 1065 [2014] [internal quotation marks omitted]; *see People v Weatherbee*, 147 AD3d 1526, 1526 [4th Dept 2017], *lv denied* 29 NY3d 1038 [2017]; *People v Nicometo*, 137 AD3d 1619, 1619-1620 [4th Dept 2016]). Additionally, the court "did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea" (*People v Tilford*, 162 AD3d 1569, 1569 [4th Dept 2018], *lv denied* 32 NY3d 942 [2018] [internal quotation marks omitted]; *see People v Tabb*, 81 AD3d 1322, 1322 [4th Dept 2011], *lv denied* 16 NY3d 900 [2011]).

Although defendant's contention that his guilty plea was not voluntarily, knowingly and intelligently entered survives the waiver of the right to appeal (*see People v McKay*, 5 AD3d 1040, 1041 [4th Dept 2004], *lv denied* 2 NY3d 803 [2004]), that contention is unpreserved for our review because defendant failed to move to withdraw his guilty plea or to vacate the judgment of conviction (*see People v Rojas*, 147 AD3d 1535, 1536 [4th Dept 2017], *lv denied* 29 NY3d 1036 [2017]; *People v Brown*, 115 AD3d 1204, 1205 [4th Dept 2014], *lv denied* 23 NY3d 1060 [2014]), and "nothing on the face of the record

calls into question the voluntariness of the plea or casts significant doubt upon defendant's guilt" (*People v Karlsen*, 147 AD3d 1466, 1468 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]; *see People v Rodriguez*, 156 AD3d 1433, 1434 [4th Dept 2017], *lv denied* 30 NY3d 1119 [2018]). In any event, defendant's contention lacks merit inasmuch as it is based solely on an unsupported claim of innocence (*see People v Haffiz*, 19 NY3d 883, 884-885 [2012]; *see generally People v Dixon*, 29 NY2d 55, 57 [1971]), which is belied by his statements during the plea colloquy (*see People v Dale*, 142 AD3d 1287, 1289 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]; *see generally Dixon*, 29 NY2d at 57).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1269

CAF 18-00624

PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

IN THE MATTER OF JUAN LORENZO MURIEL,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

MEGHAN O'NEILL MURIEL,
RESPONDENT-PETITIONER-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-PETITIONER-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PETITIONER-RESPONDENT-RESPONDENT.

MICHAEL J. KERWIN, MANLIUS, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered March 26, 2018 in a proceeding pursuant to Family Court Act article 6. The order granted petitioner-respondent sole legal and primary physical custody of the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent-petitioner mother appeals from an order that modified a prior custody and visitation order by, inter alia, awarding sole legal and primary physical custody of the subject children to petitioner-respondent father, with supervised visitation to the mother. We conclude that the mother waived her contention that the father failed to establish the requisite change in circumstances warranting an inquiry into the best interests of the children inasmuch as she alleged in her cross petition that there had been such a change in circumstances (*see Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]). In any event, we reject that contention because the record establishes that the mother engaged in conduct designed to alienate the children from the father (*see Matter of Williams v Rolf*, 144 AD3d 1409, 1411 [3d Dept 2016]; *Matter of Fox v Fox*, 93 AD3d 1224, 1225 [4th Dept 2012]).

Contrary to the mother's further contention, Family Court did not abuse its discretion in awarding the father sole legal and primary physical custody of the children. "Generally, a court's determination

regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Krug v Krug*, 55 AD3d 1373, 1374 [4th Dept 2008] [internal quotation marks omitted]; *see Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744 [4th Dept 2010]). Here, we see "no basis to disturb the court's determination inasmuch as it was based on the court's credibility assessments of the witnesses and 'is supported by a sound and substantial basis in the record' " (*Krug*, 55 AD3d at 1374; *see Dubuque*, 79 AD3d at 1744).

The mother's contention that the Attorney for the Children (AFC) was ineffective for advocating a position that was contrary to the children's wishes is not preserved for our review because the mother failed to make a motion seeking the AFC's removal (*see Matter of Mason v Mason*, 103 AD3d 1207, 1208 [4th Dept 2013]). In any event, the mother's contention lacks merit. In general, an attorney for the child "must zealously advocate the child's position . . . and, if the child is capable of knowing, voluntary and considered judgment, must follow the child's wishes even if the attorney for the child believes that what the child wants is not in the child's best interests" (*Matter of Swinson v Dobson*, 101 AD3d 1686, 1687 [4th Dept 2012], *lv denied* 20 NY3d 862 [2013] [internal quotation marks omitted]). Nevertheless, an attorney for the child is authorized to substitute his or her own judgment for that of the child where the attorney "is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child" (22 NYCRR 7.2 [d] [3]; *see Swinson*, 101 AD3d at 1687; *see generally Matter of Brian S. [Tanya S.]*, 141 AD3d 1145, 1147-1148 [4th Dept 2016]). Here, the AFC fulfilled his obligation to inform the court that the subject children had expressed their wishes to live with their mother, notwithstanding his position that they should be placed in the father's custody (*see* 22 NYCRR 7.2 [d] [3]). Additionally, the record supports a finding that the children "lack[ed] the capacity for knowing, voluntary and considered judgment" (*id.*; *see Matter of Rosso v Gerouw-Rosso*, 79 AD3d 1726, 1728 [4th Dept 2010]) and that following the children's wishes would have placed them at a substantial risk of imminent and serious harm (*see Matter of Isobella A. [Anna W.]*, 136 AD3d 1317, 1320 [4th Dept 2016]).

The mother further contends that the court erred in declining to conduct a *Lincoln* hearing. Inasmuch as the AFC expressed the children's wishes to the court (*see Matter of Montalbano v Babcock*, 155 AD3d 1636, 1637 [4th Dept 2017], *lv denied* 31 NY3d 912 [2018]), the children were both of young age (*see Matter of Olufsen v Plummer*, 105 AD3d 1418, 1419 [4th Dept 2013]), and there are indications in the record that they were being coached on what to say to the court (*see Matter of Sloma v Sloma*, 148 AD3d 1679, 1680 [4th Dept 2017]), we perceive no abuse of discretion in the court's denial of the mother's request for a *Lincoln* hearing (*see Matter of Charles M.O. v Heather S.O.*, 52 AD3d 1279, 1280 [4th Dept 2008]; *cf. Matter of Noble v Brown*, 137 AD3d 1714, 1714-1715 [4th Dept 2016]; *see generally Matter of*

Yeager v Yeager, 110 AD3d 1207, 1209 [3d Dept 2013]).

Finally, we reject the mother's contention that the court erred in directing that her visitation with the children be supervised. "Courts have broad discretion in determining whether visits should be supervised" (*Matter of Campbell v January*, 114 AD3d 1176, 1177 [4th Dept 2014], *lv denied* 23 NY3d 902 [2014]; *see Matter of Vieira v Huff*, 83 AD3d 1520, 1521 [4th Dept 2011]), and that determination will not be disturbed where, as here, there is a sound and substantial basis in the record to support it (*see Matter of Chilbert v Soler*, 77 AD3d 1405, 1406 [4th Dept 2010], *lv denied* 16 NY3d 701 [2011]).

All concur except BANNISTER, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully disagree with the majority's conclusion that the Family Court Referee did not abuse his discretion in denying the request of respondent-petitioner mother for a *Lincoln* hearing. I therefore dissent and would reverse the order and remit the matter to Family Court for further proceedings and a new determination on petitioner-respondent father's amended petition and the mother's cross petition (*see Matter of Noble v Brown*, 137 AD3d 1714, 1715 [4th Dept 2016]).

While the decision whether to conduct a *Lincoln* hearing is discretionary, it is " 'often the preferable course' " to conduct one (*id.*; *see Matter of Jessica B. v Robert B.*, 104 AD3d 1077, 1078 [3d Dept 2013]). Indeed, a child's preference, although not determinative, is an "important" factor that provides the court, while considering the potential for influence and the child's age and maturity, "some indication of what is in the child's best interests" (*Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]). In addition, the in camera testimony of a child may " 'on the whole benefit the child by obtaining for the [court] significant pieces of information [it] needs to make the soundest possible decision' " (*Matter of Walters v Francisco*, 63 AD3d 1610, 1611 [4th Dept 2009], quoting *Matter of Lincoln v Lincoln*, 24 NY2d 270, 272 [1969]).

In this case, the children were 10 and 7 years old, respectively, at the time of the proceeding, ages at which a child's "wishes [are] not necessarily entitled to the 'great weight' we accord to the preferences of older adolescents . . . [but are], at minimum, 'entitled to consideration' " (*Matter of Rivera v LaSalle*, 84 AD3d 1436, 1439 [3d Dept 2011]). Most importantly, the Attorney for the Children (AFC) substituted his judgment for that of the children and advocated that custody be transferred from the mother to the father, despite the fact that the children had been in the mother's custody since birth and the fact that the father admitted to having committed an act of domestic violence against the mother. While the AFC did inform the court of the children's expressed wishes to live with the mother, in my view, the court should have conducted a *Lincoln* hearing to consider those wishes and the reasons for them. Inasmuch as the position of the children differed from that of the AFC, it is quite possible that in camera interviews of the children would provide the court with significant information relevant to the court's determination of the best interests of the children.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1271

CAF 18-01723

PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

IN THE MATTER OF RAY WILLIAMS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

VIRGINIA DAVIS, RESPONDENT-RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR PETITIONER-APPELLANT.

LAURA ESTELA CARDONA, EAST SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered August 22, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent sole legal and physical custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: Petitioner father appeals from an order that, inter alia, awarded respondent mother sole legal and physical custody of the subject child, with supervised visitation with the father as mutually agreed by the parties.

During an appearance at which Family Court specifically stated that it was not "making any findings" and that it would make findings only after a future hearing, the father apparently grew frustrated with the proceedings and walked out of court. As the father was leaving, the court warned him that it would issue a permanent order in his absence. Thereafter, the court proceeded to hold a hearing, take testimony from the mother, and issue its determination on custody and visitation.

"It is axiomatic that custody determinations should [g]enerally be made only after a full and plenary hearing and inquiry . . . This general rule furthers the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interest[s] of the child[ren]" (*Matter of King v King*, 145 AD3d 1613, 1614 [4th Dept 2016] [internal quotation marks omitted]). Indeed, custody determinations "require a careful and comprehensive evaluation of the material facts and circumstances in order to permit

the court to ascertain the optimal result for the child. The value of a plenary hearing is particularly pronounced in custody cases in light of the subjective factors—such as the credibility and sincerity of the witnesses, and the character and temperament of the parents—that are often critical to the court's determination" (*S.L. v J.R.*, 27 NY3d 558, 563 [2016]).

While we do not condone his behavior, we agree with the father that, under the circumstances of this case, the court erred in granting the mother custody of the subject child in the absence of adequate notice to the father of a hearing to determine the best interests of the child (*cf. Matter of Amy Lynn T.*, 217 AD2d 974, 975 [4th Dept 1995]). We therefore reverse the order and remit the matter to Family Court for a new hearing on custody and visitation.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1280

KA 18-01034

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA D. BIASELLI, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (Sara Sheldon, A.J.), rendered February 26, 2018. The judgment convicted defendant upon a plea of guilty of driving while intoxicated, as a class E felony.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of driving while intoxicated, as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]). Although we agree with defendant "that the written waiver of the right to appeal does not establish a valid waiver because [County] Court 'did not inquire of defendant whether he understood the written waiver or whether he had even read the waiver before signing it' " (*People v Brackett*, 174 AD3d 1542, 1542 [4th Dept 2019], *lv denied* 34 NY3d 949 [2019], quoting *People v Bradshaw*, 18 NY3d 257, 262 [2011]; *see People v Saeli*, 136 AD3d 1290, 1291 [4th Dept 2016]), we conclude that defendant's oral waiver of the right to appeal was knowingly, intelligently, and voluntarily entered (*see Brackett*, 174 AD3d at 1542; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]). The court engaged defendant in " 'an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*Brackett*, 174 AD3d at 1542; *see Lopez*, 6 NY3d at 256). Defendant's contention that the waiver was invalid because he simply answered "yes" to the court's explanation is without merit inasmuch as "a waiver of the right to appeal [is] not rendered invalid based on [a] court's failure to require [the] defendant to articulate the waiver in his [or her] own words" (*People v Watson*, 169 AD3d 1526, 1527 [4th Dept 2019], *lv denied* 33 NY3d 982 [2019] [internal quotation marks omitted]).

Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256; *People v Hidalgo*, 91 NY2d 733, 737 [1998]). Defendant's further contention that the court did not adhere to its promise not to impose the maximum sentence survives defendant's waiver of the right to appeal but is not preserved for our review (*see People v Feher*, 165 AD3d 1610, 1610-1611 [4th Dept 2018], *lv denied* 32 NY3d 1171 [2019]). In any event, defendant's contention is without merit. The court's statements regarding sentencing were made at the conclusion of the plea proceeding, after defendant had pleaded guilty and the court had accepted that plea, and they did not change the terms of the plea agreement, which included no sentencing promise. Defendant's remaining contentions, to the extent they are not encompassed by the waiver of the right to appeal, are not preserved for our review (*see* CPL 470.05 [2]; *see generally People v Howland*, 130 AD3d 1105, 1106 [4th Dept 2015], *lv denied* 26 NY3d 1089 [2015]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1281

KA 18-00170

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHEVOCKIE BLOODWORTH, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered May 26, 2017. The judgment convicted defendant upon a jury verdict of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]), we reject defendant's contention that County Court erred in admitting in evidence a black knit hat and a blue latex glove. Insofar as defendant contends that the items should have been excluded as irrelevant because the People failed to establish their connection to the robbery, we conclude that the court did not err in admitting the evidence inasmuch as the connection between the items and the robbery was "not so tenuous as to be improbable" (*People v Flowers*, 166 AD3d 1492, 1495 [4th Dept 2018], *lv denied* 32 NY3d 1125 [2018]; *see People v Mirenda*, 23 NY2d 439, 453-454 [1969]; *People v Dasch*, 79 AD2d 877, 878 [4th Dept 1980]). Security camera footage of the robbery depicted one of the robbers wearing a dark colored hat and a blue glove, on the night of the crime police recovered a black knit hat and a blue latex glove a short distance from the scene of the robbery, and defendant's DNA was found on both items. Defendant's further contention that the People failed to lay an adequate foundation for admission of the hat and the glove is not preserved for our review (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Davidson*, 111 AD3d 848, 848 [2d Dept 2013], *lv denied* 22 NY3d 1087 [2014]) and, in any event, lacks merit (*see generally People v Moyer*, 186 AD2d 997, 997-998 [4th Dept 1992], *lv denied* 81 NY2d 844 [1993]).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]),

we likewise reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Pandajis*, 147 AD3d 1469, 1470-1471 [4th Dept 2017], *lv denied* 29 NY3d 1084 [2017]). Security camera footage depicted the individual alleged to be defendant taking money from a cash register with his left hand while wearing a navy blue winter jacket, a dark winter hat, a blue glove, and a mask. A navy blue jacket, a black knit hat, and a blue latex glove were thereafter recovered near the crime scene, and each was connected to defendant through DNA evidence. Further, defendant's ex-wife testified that the mask depicted in the security footage looked similar to one that she and defendant purchased together, that defendant had access to blue latex gloves at the time of the robbery, and that defendant had limited use of his right hand.

Defendant failed to preserve for our review his contention that he was penalized for exercising his right to a trial (*see People v Hurley*, 75 NY2d 887, 888 [1990]; *People v Williams*, 125 AD3d 1300, 1302 [4th Dept 2015], *lv denied* 26 NY3d 937 [2015]). We reject defendant's contention that his sentence is unduly harsh and severe.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1282

KA 19-00153

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN C. POTTS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered October 22, 2018. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk under the Sex Offender Registration Act ([SORA]; Correction Law § 168 *et seq.*). Contrary to defendant's contention, we conclude that County Court properly determined that defendant is a level two risk. It is well settled that a SORA "court may make an upward departure from a presumptive risk level when, after consideration of the indicated factors[,] . . . [the court determines that] there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines" (*People v Abraham*, 39 AD3d 1208, 1209 [4th Dept 2007] [internal quotation marks omitted]; *see generally People v Gillotti*, 23 NY3d 841, 861-862 [2014]). We conclude that the People established the existence of such an aggravating factor by clear and convincing evidence and that the upward departure was warranted under the totality of the circumstances (*see People v Castaneda*, 173 AD3d 1791, 1793 [4th Dept 2019], *lv denied* 34 NY3d 929 [2019]).

The case summary alleged the existence of a pending federal fraud charge that was based on allegations that defendant had hacked into the private internet accounts of numerous women to obtain nude or semi-nude photographs of the women. The case summary further alleged that he stored images of multiple women in his computer organized in folders using female names. According to the case summary, "[t]here were over 350 individual folders containing well over 1,000 images."

It is well settled that a case summary constitutes reliable hearsay and may be used in SORA hearings (*see* Correction Law § 168-n [3]; *People v Mingo*, 12 NY3d 563, 573 [2009]). Defendant contends that the court should not have credited the information contained in the case summary, yet he did not present any "compelling evidence" to cause the court to reject the allegations (*Mingo*, 12 NY3d at 573). Moreover, neither defendant's attorney nor defendant's uncle, who spoke at the hearing, denied the underlying allegations of the pending federal charge. Rather, in contending that the charge amounted to "hacking" and showed nothing more than "a college kid looking around on the internet for sexy pictures," they challenged the import of the allegations, not their veracity. Where, as here, "the defendant does not dispute the facts contained in the case summary, the case summary alone is sufficient to support the court's determination" (*People v Guzman*, 96 AD3d 1441, 1442 [4th Dept 2012], *lv denied* 19 NY3d 812 [2012]; *see People v Vaillancourt*, 112 AD3d 1375, 1375-1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]).

We further conclude that the upward departure was warranted inasmuch as the aggravating factor establishes an increased risk of sexual recidivism that was not adequately taken into account by the risk assessment instrument (*see Abraham*, 39 AD3d at 1209; *People v Shattuck*, 37 AD3d 1041, 1042 [4th Dept 2007], *lv denied* 8 NY3d 811 [2007]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1283

KA 17-00713

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON WARMLEY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (AMBER L. KERLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered February 21, 2017. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal sale of a controlled substance in the third degree (§ 220.39 [1]), arising from his sale of cocaine to a confidential informant (CI) during a controlled buy. We affirm.

Defendant failed to preserve for our review his contention that he was deprived of a fair trial because the two police investigators who identified him at trial lacked personal knowledge to support that testimony (*see* CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also failed to preserve his contention that he was deprived of a fair trial based on prosecutorial misconduct during summation (*see* CPL 470.05 [2]; *People v Simmons*, 133 AD3d 1275, 1277-1278 [4th Dept 2015], *lv denied* 27 NY3d 1006 [2016]). In any event, defendant's contention is without merit. The comments in which the prosecutor allegedly vouched for the credibility of a witness were fair responses to defense counsel's summation (*see People v Santana*, 55 AD3d 1338, 1339 [4th Dept 2008], *lv denied* 12 NY3d 762 [2009]). Additionally, even assuming, arguendo, that the prosecutor's comment

identifying defendant's voice on an audio recording that was admitted in evidence exceeded the bounds of permissible commentary, we conclude that the comment was not so egregious as to deny defendant a fair trial in light of County Court's instruction to the jury that an attorney's summation is not evidence (*see generally People v Ashwal*, 39 NY2d 105, 109-110 [1976]; *People v Escamilla*, 168 AD3d 758, 759-760 [2d Dept 2019], *lv denied* 33 NY3d 947 [2019]; *People v Plant*, 138 AD2d 968, 968 [4th Dept 1988], *lv denied* 71 NY2d 1031 [1988]).

The court properly admitted in evidence the audio recording of the controlled buy. Although some portions of the recording were not entirely clear, they were not "so inaudible and indistinct that the jury would have to speculate concerning [their] contents and would not learn anything relevant from them" (*People v Jackson*, 94 AD3d 1559, 1561 [4th Dept 2012], *lv denied* 19 NY3d 1026 [2012] [internal quotation marks omitted]; *see People v Johnson*, 151 AD3d 1462, 1463 [3d Dept 2017], *lv denied* 30 NY3d 1106 [2018]). We further conclude that the recording was properly authenticated inasmuch as one of the police investigators who had listened to the controlled buy testified that he listened to the recording, that it was a fair and accurate copy of what he heard during the buy, and that there were no alterations, additions, or deletions of any kind (*see People v Ely*, 68 NY2d 520, 527 [1986]). The recording was further authenticated by the CI's testimony that it was an accurate and fair reflection of his conversation with defendant during the controlled buy (*see generally People v McGee*, 49 NY2d 48, 60 [1979], *cert denied* 446 US 942 [1980]; *People v Carter*, 131 AD3d 717, 721 [3d Dept 2015], *lv denied* 26 NY3d 1007 [2015]).

We conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Nicholas*, 130 AD3d 1314, 1315 [3d Dept 2015]). The People's case hinged on the credibility of the CI, who had an extensive criminal history as well as motive to testify against defendant. The CI had also made a false sworn statement to the police, and his testimony conflicted with that of one of the police investigators. However, those issues were presented to the jury and thoroughly explored by defense counsel on cross-examination, and we afford great deference to the jury's credibility determinations (*see generally People v Reid*, 173 AD3d 1663, 1664 [4th Dept 2019]; *People v Hodge* [appeal No. 1], 147 AD3d 1502, 1503 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]). We note that the People also presented circumstantial evidence in the form of testimony and an audio recording that corroborated the CI's account of the controlled buy.

Defendant failed to preserve his contention that the court penalized him for asserting his right to a trial because he did not "set forth this issue on the record at the time of sentencing" (*People v Hodge*, 154 AD3d 963, 965 [2d Dept 2017], *lv denied* 30 NY3d 1105 [2018]). In any event, we note that "[t]he mere fact that a sentence imposed after trial is greater than that offered in connection with

plea negotiations is not proof that defendant was punished for asserting [his] right to trial . . . , and there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to trial" (*People v Pope*, 141 AD3d 1111, 1112 [4th Dept 2016], *lv denied* 29 NY3d 951 [2017] [internal quotation marks omitted]).

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1284

KA 17-01150

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMETRIEN BELL-BRADLEY, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered May 11, 2017. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of grand larceny in the third degree (Penal Law § 155.35 [1]), defendant contends that he was improperly sentenced as a second felony offender because the predicate conviction, i.e., a federal conviction of bank robbery, is not equivalent to any New York felony. Although that contention survives defendant's waiver of the right to appeal (*see People v Lopez*, 164 AD3d 1625, 1625 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]; *People v Murdie*, 134 AD3d 1353, 1354 [3d Dept 2015]), defendant failed to preserve it for our review (*see People v Jurgins*, 26 NY3d 607, 612 [2015]; *People v Hall*, 149 AD3d 1610, 1610 [4th Dept 2017]). Furthermore, although there is a "narrow exception to [the] preservation rule permitting appellate review when a sentence's illegality is readily discernable from the . . . record" (*People v Santiago*, 22 NY3d 900, 903 [2013]), this case does not fall within that narrow exception because resolution of the question whether defendant's federal conviction is the equivalent of a New York felony requires us to "resort to outside facts, documentation or foreign statutes" (*People v Samms*, 95 NY2d 52, 57 [2000]; *see People v Diaz*, 115 AD3d 483, 484 [1st Dept 2014], *lv denied* 23 NY3d 1036 [2014]). Inasmuch as "[a] CPL 440.20 motion is the proper vehicle for raising a challenge to a sentence as 'unauthorized, illegally imposed or otherwise invalid as a matter of law' (CPL 440.20 [1]), and a determination of second felony offender status is an aspect of the sentence" (*Jurgins*, 26 NY3d at 612), we decline to

exercise our power to review defendant's unpreserved contention in the interest of justice.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1286

KA 19-00114

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH T. MOLSKI, DEFENDANT-APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered December 20, 2018. The judgment convicted defendant upon his plea of guilty of possessing a sexual performance by a child.

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 possessing a sexual performance by a child (Penal Law § 263.16). Defendant's contention that he was denied effective assistance of counsel by counsel's performance during the investigatory phase prior to formal charges being brought against him survives his plea and valid waiver of the right to appeal insofar as defendant contends that "the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney[']s allegedly poor performance" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]; *see People v Nichols*, 21 AD3d 1273, 1274 [4th Dept 2005], *lv denied* 6 NY3d 757 [2005]). Nevertheless, defendant's contention lacks merit. The allegedly poor performance by counsel occurred during the preaccusatory stage, and therefore the right to effective assistance of counsel, which does not attach until after the commencement of formal adversarial judicial proceedings, did not apply (*see People v Claudio*, 83 NY2d 76, 78 [1993], *rearg dismissed* 88 NY2d 1007 [1996]; *People v Farrell*, 42 AD3d 954, 955-956 [4th Dept 2007]; *People v Anonymous*, 299 AD2d 296, 297 [1st Dept 2002]).

We likewise reject defendant's contention that County Court abused its discretion when it denied defendant's motion to withdraw his guilty plea on the ground of ineffective assistance of counsel.

As discussed above, the right to effective assistance of counsel had not attached at the preaccusatory stage and, insofar as defendant contends that he was deprived of effective assistance of counsel after formal charges had been brought against him, "defendant's allegations in support of the motion are belied by [his] statements during the plea proceeding" (*People v Barrett*, 153 AD3d 1600, 1601 [4th Dept 2017], *lv denied* 30 NY3d 1058 [2017]). Although defendant's remaining contention regarding the denial of his motion to withdraw his plea survives his waiver of the right to appeal (*see generally People v Steinbrecher*, 169 AD3d 1462, 1463 [4th Dept 2019], *lv denied* 33 NY3d 1108 [2019]), that contention is not properly before us inasmuch as defendant did not move to withdraw the plea on that ground (*see People v Carlisle*, 50 AD3d 1451, 1451 [4th Dept 2008], *lv denied* 10 NY3d 957 [2008]).

Lastly, defendant's valid waiver of the right to appeal encompasses his challenge to the severity of his sentence (*see People v Niccloy*, 151 AD3d 1740, 1740 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1287

KA 17-01542

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD LOVE, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Robert L. Bauer, A.J.), rendered April 19, 2017. The judgment convicted defendant upon his plea of guilty of criminal possession of a forged instrument in the second degree (two counts), criminal possession of stolen property in the fifth degree (two counts), attempted petit larceny and petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of, inter alia, two counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). Contrary to defendant's contention, his waiver of the right to appeal is valid inasmuch as County Court informed defendant, before he entered his plea, that the waiver would be a condition of the plea (*cf. People v Blackwell*, 129 AD3d 1690, 1690 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]), and the court assured itself "prior to the completion of the plea proceeding . . . that defendant adequately understood the right that [defendant] was forgoing" (*People v Bradshaw*, 18 NY3d 257, 265 [2011]).

Although defendant's contention that his plea "was coerced by statements made by the court . . . 'survives even a valid waiver of the right to appeal' " (*People v Bellamy*, 170 AD3d 1652, 1653 [4th Dept 2019]; *see People v Boyde*, 122 AD3d 1302, 1302 [4th Dept 2014]; *People v Gast*, 114 AD3d 1270, 1270 [4th Dept 2014], *lv denied* 22 NY3d 1198 [2014]), that contention is not preserved for our review "because [defendant] failed to move to withdraw his plea or vacate the judgment of conviction" (*Bellamy*, 170 AD3d at 1653; *see Gast*, 114 AD3d at 1270). We decline to exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3]

[c]).

Defendant further contends that his decision to enter the plea near the end of the jury trial "was largely impacted by the court's refusal to allow him to get a new attorney" in the middle of his trial. We thus conclude that defendant's contention that the court erred in refusing his request to grant a mistrial in order for him to retain a new attorney is not foreclosed by the valid waiver of the right to appeal or forfeited by his plea (*see People v Jones*, 173 AD3d 1628, 1630 [4th Dept 2019]; *People v Booker*, 133 AD3d 1326, 1327 [4th Dept 2015], *lv denied* 27 NY3d 1149 [2016]; *cf. People v Barr*, 169 AD3d 1427, 1427 [4th Dept 2019], *lv denied* 33 NY3d 1028 [2019]). Although defendant's contention was not properly preserved for our review (*see People v Hobart*, 286 AD2d 916, 916 [4th Dept 2001], *lv denied* 97 NY2d 683 [2001]), we nevertheless exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). In our view, defendant's contention lacks merit. We conclude that, " '[a]t most, defendant's allegations evinced disagreements with counsel over strategy . . . , which were not sufficient grounds for substitution' " (*People v Larkins*, 128 AD3d 1436, 1440 [4th Dept 2015], *lv denied* 27 NY3d 1001 [2016]; *see People v Chess*, 162 AD3d 1577, 1579 [4th Dept 2018]; *see generally People v Linares*, 2 NY3d 507, 511-512 [2004]).

Defendant further contends that he was penalized for asserting his right to a trial. Although that contention is not precluded by the valid waiver of the right to appeal (*see People v Povoski*, 55 AD3d 1221, 1222 [4th Dept 2008], *lv denied* 11 NY3d 929 [2009]), defendant failed to preserve that contention for our review (*see People v Hurley*, 75 NY2d 887, 888 [1990]; *People v Green*, 35 AD3d 1211, 1211 [4th Dept 2006], *lv denied* 8 NY3d 985 [2007]), 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]). Defendant's final contention is that the bargained-for sentence is unduly harsh and severe. We do not address that contention inasmuch as defendant, by "waiving the right to appeal in connection with a negotiated plea and sentence," has "relinquish[ed] the right to invoke" this Court's interest of justice jurisdiction to modify that sentence (*People v Lopez*, 6 NY3d 248, 255 [2006]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1288

KA 13-01179

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JODICE Q. CRITTENDEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 22, 2013. The judgment convicted defendant upon his plea of guilty of attempted robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]). We affirm.

We reject defendant's contention that Supreme Court erred in refusing to suppress the showup identification of him by the victim. "Showup identifications are disfavored, since they are suggestive by their very nature" (*People v Ortiz*, 90 NY2d 533, 537 [1997]). "Nevertheless, prompt showup identifications which are conducted in close geographic and temporal proximity to the crime are not presumptively infirm, and in fact have generally been allowed" (*id.* [internal quotation marks omitted]). Here, the People met their burden of demonstrating that the showup was reasonable under the circumstances (*see id.*) inasmuch as the showup occurred at the scene of the incident and less than two hours after the incident. Contrary to defendant's contention, "a two-hour interval between the crime and the showup is [not] per se unacceptable" (*People v Howard*, 22 NY3d 388, 402 [2013]; *see People v Johnson*, 167 AD3d 1512, 1513 [4th Dept 2018], *lv denied* 33 NY3d 949 [2019]). Moreover, the showup was not rendered unduly suggestive by the fact that, at the time of the identification, defendant's hands were cuffed behind his back and he was standing next to a plainclothes officer or by the fact that the witness may have heard a radio transmission stating that the police had a suspect in custody (*see People v Nance*, 132 AD3d 1389, 1390 [4th Dept 2015], *lv denied* 26 NY3d 1091 [2015]; *People v Sanchez*, 66 AD3d

420, 421 [1st Dept 2009], *lv denied* 13 NY3d 862 [2009]; *People v Ross*, 305 AD2d 1073, 1074 [4th Dept 2003], *lv denied* 1 NY3d 579 [2003]). Thus, the court properly refused to suppress the showup identification (*see generally People v Bartlett*, 137 AD3d 806, 806-807 [2d Dept 2016], *lv denied* 27 NY3d 1066 [2016]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1289

CAF 18-02374

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF JOSEPH E. BERG,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

EMILY E. STOUFER-QUINN, RESPONDENT-RESPONDENT.

DUKE LAW FIRM, P.C., LAKEVILLE (SUSAN K. DUKE OF COUNSEL), FOR PETITIONER-APPELLANT.

FORST LAW FIRM, ROCHESTER (KELLY M. FORST OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered September 27, 2018 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: Petitioner father commenced this proceeding pursuant to Family Court Act article 6 seeking to modify a prior custody and visitation order entered on stipulation. The father appeals from an order that granted respondent mother's motion to dismiss the petition, which was made during a hearing on the petition following the close of the father's proof.

It is well established that "[w]here an order of custody and visitation is entered on stipulation, a court cannot modify that order unless a sufficient change in circumstances—since the time of the stipulation—has been established, and then only where a modification would be in the best interests of the child[ren]" (*Matter of McKenzie v Polk*, 166 AD3d 1529, 1529 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of Hight v Hight*, 19 AD3d 1159, 1160 [4th Dept 2005]; *see also Matter of McCarthy v Kriegar*, 162 AD3d 1563, 1564 [4th Dept 2018]). "[O]ne who seeks to modify an existing order of [custody and] visitation is not automatically entitled to a hearing[and] must make some evidentiary showing sufficient to warrant it" (*Matter of Moreno v Elliott*, 170 AD3d 1610, 1612 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Chichra v Chichra*, 148 AD3d 883, 884 [2d Dept 2017]).

Here, we conclude that Family Court erred in interpreting the

existing order and underlying stipulation to permit the father to seek modification of the visitation arrangement without first satisfying the threshold burden of establishing a change in circumstances (*cf. Matter of Rosenkrans v Rosenkrans*, 154 AD3d 1123, 1124 [3d Dept 2017]; *Matter of Mayo v Mayo*, 63 AD3d 1207, 1208 [3d Dept 2009]; *Matter of Studenroth v Phillips*, 230 AD2d 247, 249-250 [3d Dept 1997]). Nevertheless, upon our independent review of the record (*see Matter of Curry v Reese*, 145 AD3d 1475, 1475 [4th Dept 2016]), we further conclude that the father failed to establish the requisite change in circumstances, and the court therefore did not err in dismissing the petition.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1290

CAF 18-01626

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF NICHOLAS B. HERMANN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LATESSA WILLIAMS, RESPONDENT-APPELLANT.

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

BRIAN P. DEGNAN, BATAVIA, FOR PETITIONER-RESPONDENT.

DEBORAH J. SCINTA, ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered August 7, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, granted petitioner father's petition to modify a prior order of custody by granting him sole custody of the subject child. Contrary to the mother's contention, Family Court's determination that the father established a change in circumstances has a sound and substantial basis in the record (*see Matter of Hill v Trojnor*, 137 AD3d 1671, 1672 [4th Dept 2016]). The testimony at the hearing established that there were incidents of domestic violence in the mother's household (*see Matter of Schieble v Swantek*, 129 AD3d 1656, 1657 [4th Dept 2015]; *Matter of Pecore v Blodgett*, 111 AD3d 1405, 1405-1406 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]) and that the mother had several changes of residence (*see Matter of Greene v Kranock*, 160 AD3d 1476, 1476 [4th Dept 2018]). Contrary to the mother's further contention, the court's determination that it was in the child's best interests for the father to have sole custody is supported by a sound and substantial basis in the record (*see Matter of Mauro v Costello*, 162 AD3d 1475, 1475 [4th Dept 2018]; *Matter of Chyreck v Swift*, 144 AD3d 1517, 1518 [4th Dept 2016]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]).

We reject the mother's contention that the court erred in relying on prior litigation between the parties in concluding that the mother

was unable or unwilling to foster a relationship between the child and the father. At the outset of the hearing, upon the father's request and without objection from the mother, the court took judicial notice of the prior orders and proceedings involving the parties, which was proper in any event (*see Matter of Gugino v Tsvasman*, 118 AD3d 1341, 1342 [4th Dept 2014]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1297

CA 19-00381

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND WINSLOW, JJ.

KEVIN MURRAY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KATERI MURRAY, DEFENDANT-APPELLANT.

TINA M. HAWTHORNE, BUFFALO, FOR DEFENDANT-APPELLANT.

FERON POLEON, LLP, AMHERST (KELLY A. FERON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

KRISTIN L. ARCURI, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered August 29, 2018. The order, inter alia, granted sole custody of the subject children to plaintiff.

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

Memorandum: Defendant mother appeals from an order modifying a prior custody and visitation order by, inter alia, awarding plaintiff father sole custody of the parties' children.

We reject the mother's contention that Supreme Court erred in finding that the father established a change in circumstances from the prior order of custody and visitation. "A party seeking a change in an established custody arrangement must show a change in circumstances [that] reflects a real need for change to ensure the best interests of the child[ren]" (*Matter of Foster v Foster*, 128 AD3d 1381, 1381 [4th Dept 2015], *lv denied* 26 NY3d 901 [2015] [internal quotation marks omitted]). Here, the father established the requisite change in circumstances based on the parties' heightened inability "to communicate in a manner conducive to sharing joint custody" (*Matter of Unczur v Welch*, 159 AD3d 1405, 1406 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018]; *see Matter of Ladd v Krupp*, 136 AD3d 1391, 1392 [4th Dept 2016]) and the mother's violation of a prior order of the court (*see generally Matter of Moreno v Elliott*, 170 AD3d 1610, 1611 [4th Dept 2019]). Contrary to the mother's further contention, we conclude that a sound and substantial basis exists in the record to support the court's determination that an award of sole custody to the father is in the best interests of the children (*see generally id.*).

We have reviewed the mother's remaining contention and conclude

that it does not warrant modification or reversal of the order.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1298

CA 19-00125

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND WINSLOW, JJ.

SPINE SURGERY OF BUFFALO NIAGARA,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GEICO CASUALTY COMPANY, DEFENDANT-RESPONDENT.

THE MORRIS LAW FIRM, P.C., BUFFALO (DANIEL K. MORRIS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RIVKIN RADLER LLP, UNIONDALE (J'NAIA L. BOYD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered January 8, 2019. The order granted the motion of defendant to dismiss the complaint and dismissed the complaint with prejudice.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by providing that the complaint is dismissed without prejudice and as modified the order is affirmed without costs.

Memorandum: Plaintiff, as the assignee of certain claims for no-fault benefits, commenced this action asserting a single cause of action for prima facie tort and seeking, inter alia, punitive damages. Defendant moved to dismiss the complaint pursuant to CPLR 3211 (a) (7), and Supreme Court granted the motion. Plaintiff appeals. For the reasons set forth in our decision in *Greater Buffalo Acc. & Injury Chiropractic, P.C. v Geico Cas. Co.* (175 AD3d 1100, 1101-1102 [4th Dept 2019]), which involved an identical complaint against defendant, we conclude that the court properly granted defendant's motion, and we do not consider documents submitted by plaintiff that were not considered by the court in determining the motion (*see id.*; *Tuchrello v Tuchrello*, 233 AD2d 917, 918 [4th Dept 1996]). Nevertheless, we agree with plaintiff that the dismissal of the complaint should have been without prejudice (*see* CPLR 205 [a]; *Herrmann v Bank of Am., N.A.*, 170 AD3d 1438, 1442 [3d Dept 2019]; *Clark v New York State Off. of Parks, Recreation & Historic Preserv.*, 288 AD2d 934, 935 [4th Dept 2001]), and we therefore modify the order accordingly.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1305

KA 15-01996

PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RODNEY HAWKINS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (CAITLIN M. CONNELLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered September 23, 2015. The judgment convicted defendant following a jury trial of driving while intoxicated, as a class E felony, aggravated unlicensed operation of a motor vehicle in the first degree and operating a motor vehicle not equipped with a court ordered ignition interlock device.

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 driving while intoxicated (DWI) (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]), aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]), and operating a motor vehicle not equipped with a court ordered ignition interlock device (§ 1198 [9] [d]).

Defendant contends that County Court violated CPL 320.10 by accepting the stipulation to the convictions of aggravated unlicensed operation of a motor vehicle in the first degree and operating a motor vehicle not equipped with a court ordered ignition interlock device without obtaining the waiver of a jury trial in writing in open court. The record, however, establishes that "defendant freely and voluntarily entered into the stipulation as part of a strategy to keep the jury from learning of his prior DWI conviction and that his license was suspended or revoked at the time of his arrest" (*People v Tatro*, 245 AD2d 1040, 1040 [4th Dept 1997]), and thus defendant waived that contention (*see People v Gibson*, 173 AD3d 1785, 1786-1787 [4th Dept 2019], *lv denied* 34 NY3d 931 [2019]).

Defendant failed to preserve his contention pursuant to CPL 200.60 (3) that the court erred by arraigning him on the special

information before jury selection began (*see People v Reid*, 232 AD2d 173, 174 [1st Dept 1996], *lv denied* 90 NY2d 862 [1997]; *People v Strange*, 194 AD2d 474, 474 [1st Dept 1993], *lv denied* 82 NY2d 727 [1993]; *cf. People v Alston*, 169 AD3d 1, 4 [1st Dept 2019], *lv granted* 33 NY3d 983 [2019]). Defendant's further contention that he was denied a fair trial by prosecutorial misconduct during jury selection and summation is also unpreserved for our review inasmuch as defendant did not object to any of the alleged improprieties (*see People v Carrasquillo*, 142 AD3d 1359, 1359 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's contention, the $2,000 fine imposed pursuant to his DWI conviction is not unduly harsh or severe.

We have reviewed defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1310

KA 18-00618

PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FREDERICK HAYDEN-LARSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIELLE E. PHILLIPS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered January 11, 2018. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree, driving while ability impaired by drugs and improper turning or stopping.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [7]), criminal possession of a controlled substance in the fourth degree (§ 220.09 [2]), and driving while ability impaired by drugs (Vehicle and Traffic Law § 1192 [4]). On the day of his arrest, a police officer pulled defendant's vehicle over for failing to signal. Defendant had a passenger with him. After approaching the vehicle, the officer observed that defendant appeared to be under the influence of drugs and placed him under arrest. The passenger was also arrested. At a suppression hearing, the officer testified that, after she arrested defendant and seated him in her patrol vehicle, defendant indicated that he had diabetes medication in his vehicle. Defendant did not give the officer permission to retrieve the bag of medication from his vehicle or say that he needed it at that time, nor did he give her permission to open the bag. The officer testified that she retrieved the bag for defendant because defendant would be allowed access to certain medication in lockup; she did not intend to give the bag to defendant while he was in the patrol vehicle. The officer looked in the bag and found needles, "narcotics," and "some residue"—not diabetes medication. Defendant's vehicle was subsequently impounded pursuant to Buffalo Police Department (BPD)

written policy. During the inventory search of the vehicle, the officers recovered, inter alia, methamphetamine.

We reject defendant's contention that Supreme Court erred in refusing to suppress the physical evidence recovered during the inventory search of his vehicle. "Following a lawful arrest of the driver of an automobile that must then be impounded, the police may conduct an inventory search of the vehicle" (*People v Johnson*, 1 NY3d 252, 255 [2003]). "[T]he inventory search itself must be conducted pursuant to 'an established procedure' that is related 'to the governmental interests it is intended to promote' and that provides 'appropriate safeguards against police abuse' " (*People v Walker*, 20 NY3d 122, 126 [2012], quoting *People v Galak*, 80 NY2d 715, 716 [1993]). In following that procedure, which must be standardized in order to limit officer discretion, the police must produce a "meaningful inventory list" (*Johnson*, 1 NY3d at 256). Here, the vehicle was legally impounded and inventoried inasmuch as both occupants, i.e., defendant and his passenger, had been arrested and could not drive the vehicle, a BPD policy existed governing impounding and conducting inventory searches of vehicles, officer testimony demonstrated compliance with that policy, and a meaningful inventory list resulted (*see People v Morman*, 145 AD3d 1435, 1436 [4th Dept 2016], *lv denied* 29 NY3d 999 [2017]; *People v Wilburn*, 50 AD3d 1617, 1618 [4th Dept 2008], *lv denied* 11 NY3d 742 [2008]; *People v Owens*, 39 AD3d 1260, 1261 [4th Dept 2007], *lv denied* 9 NY3d 849 [2007]). "The inventory search was not rendered invalid because the officers failed to secure and catalogue every item found in the vehicle" (*Owens*, 39 AD3d at 1261). We also reject defendant's contention that the People's reliance on one "unidentified page" as proof of BPD policy and procedure for inventory searches should be given no weight because it was presented to the court with no proof of origin. Even assuming, arguendo, that his contention was not effectively waived by trial counsel, we conclude that the one-page policy was clearly identified by the police officers as being part of the BPD's procedures manual.

We agree with defendant, however, that the court erred in refusing to suppress the evidence obtained from the diabetes bag pursuant to the inevitable discovery doctrine. The contents of the diabetes bag that defendant sought to suppress was the "very evidence" that was obtained as the "immediate consequence of the challenged police conduct" (*People v Stith*, 69 NY2d 313, 318 [1987]; *see People v Garcia*, 101 AD3d 1604, 1606 [4th Dept 2012], *lv denied* 20 NY3d 1098 [2013]), and thus the inevitable discovery doctrine is not applicable here (*see Garcia*, 101 AD3d at 1606). Nevertheless, the court's error in refusing to suppress the contents of the diabetes bag is harmless inasmuch as the evidence of defendant's guilt is overwhelming, and there is no reasonable possibility that the erroneously admitted evidence contributed to defendant's conviction (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]; *Garcia*, 101 AD3d at 1606). Notably, there is no dispute that the methamphetamine that formed the basis for the criminal possession counts was not found in the diabetes bag and, instead, was found during the valid inventory search.

Defendant failed to preserve for our review his challenge to the

legal sufficiency of the evidence with respect to the counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [7]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [2]) because defendant made only a general motion for a trial order of dismissal related to those counts (*see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, we conclude that the evidence is legally sufficient with respect to those counts (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, viewing the evidence in light of the elements of those counts as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally id.* at 348-349*; Bleakley*, 69 NY2d at 495).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1311

KA 15-01807

PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAQUAN O. LATIMORE, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered August 11, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a weapon on school grounds.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, his valid waiver of the right to appeal forecloses review of County Court's discretionary decision to deny defendant youthful offender status (*see People v Pacherille*, 25 NY3d 1021, 1024 [2015]) and also "forecloses review of [his] request that we exercise our interest of justice jurisdiction to adjudicate him a youthful offender" (*People v Allen*, 174 AD3d 1456, 1458 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1315

CA 19-01273

PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND BANNISTER, JJ.

MYRON O. BRADY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LINDA F. BRADY, DEFENDANT-APPELLANT.

INCLIMA LAW FIRM, PLLC, ROCHESTER (CHARLES P. INCLIMA OF COUNSEL), FOR DEFENDANT-APPELLANT.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (James J. Piampiano, J.), entered December 31, 2018. The order denied the motion of defendant seeking, inter alia, a declaration that a prenuptial agreement is unenforceable.

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

Memorandum: Plaintiff husband commenced this action seeking a divorce and, inter alia, a declaration regarding the parties' rights to their separate property in accordance with their prenuptial agreement (agreement). Defendant wife filed an amended answer with counterclaims, asserting, inter alia, that the agreement was unenforceable because it lacked consideration, was unconscionable and manifestly unfair, and was the product of duress, bad faith, and coercion. Subsequently, defendant, in essence, moved for summary judgment on her first and second counterclaims, seeking a declaration that the agreement was unenforceable on many of the grounds raised in those counterclaims, and also requested an order directing plaintiff to reacquire certain shares in Brady Farms, Inc. Defendant now appeals from an order denying her motion, and we affirm.

Contrary to defendant's contention, Supreme Court properly denied that part of her motion seeking a declaration inasmuch as she failed to sustain her initial burden of establishing that the agreement was unenforceable as a matter of law. Specifically, defendant failed to establish that the agreement was unenforceable due to lack of consideration inasmuch as the marriage itself was the consideration for the agreement (*see De Cicco v Schweizer*, 221 NY 431, 433 [1917]; *Rupert v Rupert*, 245 AD2d 1139, 1141 [4th Dept 1997], *appeal dismissed* 97 NY2d 661 [2001], *rearg denied* 97 NY2d 726 [2002]). Further, "[a] duly executed [prenuptial] agreement is provided the same presumption

of legality as any other contract" (*Goldfarb v Goldfarb*, 231 AD2d 491, 491 [2d Dept 1996]). Thus, where, as here, a prenuptial agreement has been signed by both parties and formally acknowledged, the agreement is presumed valid (*see id.* at 491-492; *see generally* Domestic Relations Law § 236 [B] [3]), and defendant had the burden to establish otherwise (*see Carter v Fairchild-Carter*, 159 AD3d 1315, 1315-1316 [3d Dept 2018]; *Gottlieb v Gottlieb*, 138 AD3d 30, 36 [1st Dept 2016], *lv dismissed* 27 NY3d 1125 [2016]; *Goldfarb*, 231 AD2d at 492). "Such agreements will be enforced absent proof of fraud, duress, overreaching or unconscionability" (*Carter*, 159 AD3d at 1316). Here, defendant failed to establish as a matter of law that the agreement was the product thereof (*cf. Rabinovich v Shevchenko*, 93 AD3d 774, 775 [2d Dept 2012]; *see generally Bibeau v Sudick*, 122 AD3d 652, 655 [2d Dept 2014]; *McKenna v McKenna*, 121 AD3d 864, 866 [2d Dept 2014]).

We reject defendant's further contention that the court erred in denying that part of her motion seeking an order directing plaintiff to reacquire his shares in Brady Farms, Inc. inasmuch as defendant failed to establish that plaintiff transferred those shares in violation of Domestic Relations Law § 236 (B) (2) (b).

Finally, we have reviewed defendant's remaining contention and conclude that it lacks merit.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1316

CA 19-00239

PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF ARBITRATION BETWEEN BUFFALO TEACHERS FEDERATION, INC., PETITIONER-RESPONDENT-RESPONDENT,

AND MEMORANDUM AND ORDER

BOARD OF EDUCATION OF THE BUFFALO PUBLIC SCHOOLS, RESPONDENT-PETITIONER-APPELLANT.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (BETHANY A. CENTRONE OF COUNSEL), FOR RESPONDENT-PETITIONER-APPELLANT.

ROBERT T. REILLY, BUFFALO (TIMOTHY CONNICK OF COUNSEL), FOR PETITIONER-RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered January 4, 2019 in a proceeding pursuant to CPLR article 75. The order and judgment granted the petition to confirm an arbitration award and denied the cross petition to vacate the arbitration award.

It is hereby ORDERED that said appeal from the order and judgment insofar as it confirmed the second paragraph of the arbitration award is unanimously dismissed, and the order and judgment is modified on the law by denying the petition in part, granting the cross petition in part, and vacating the fourth paragraph of the award except to the extent that it prohibits respondent-petitioner from discriminating on the basis of union membership status, and as modified the order and judgment is affirmed without costs.

Memorandum: After hiring 16 teachers' aides in compliance with a prior arbitration award, respondent-petitioner (respondent) announced its intention to eliminate 5½ teaching positions for the 2017-2018 school year in order to offset the cost of hiring the teachers' aides. Petitioner-respondent (petitioner) filed a grievance seeking, inter alia, to prevent the elimination of the teaching positions on the ground that respondent's intended conduct was retaliatory. A temporary restraining order was issued preventing the elimination of the positions while the dispute was pending. After the 2017-2018 school year ended, the arbitrator issued an opinion and award that set forth the arbitration award in the last five paragraphs thereof, only two of which are at issue here. Petitioner then commenced this proceeding seeking to confirm the award, and respondent filed a cross petition seeking to vacate the award. Supreme Court granted the

petition, denied the cross petition, and confirmed the award. Respondent appeals.

We dismiss as moot the appeal from the order and judgment insofar as it confirmed the second paragraph of the award, which directed respondent to "rescind its decision to eliminate . . . teaching positions . . . for the 2017-2018 school year." It is well established that "an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]; *see Matter of State of New York [Office of Mental Health, Rochester Psychiatric Ctr.]*, 145 AD2d 788, 789 [3d Dept 1988]). Because the 2017-2018 school year has concluded, a determination in this appeal would have no effect on the parties' rights (*see generally Office of Mental Health, Rochester Psychiatric Ctr.*, 145 AD2d at 790).

With respect to the fourth paragraph of the award, we agree with respondent that the arbitrator exceeded his authority by requiring respondent to make the elimination of teaching positions in accordance with the "School Based Development Guide" (Guide). An award may be vacated where an arbitrator, "in effect, made a new contract for the parties in contravention of [an] explicit provision of [the] arbitration agreement which denied [the] arbitrator power to alter, add to or detract from" the collective bargaining agreement (CBA) (*Schiferle v Capital Fence Co., Inc.*, 155 AD3d 122, 126 [4th Dept 2017] [internal quotation marks omitted]; *see Matter of Professional, Clerical, Tech., Empls. Assn. [Board of Educ. for Buffalo City Sch. Dist.]*, 103 AD3d 1120, 1122-1123 [4th Dept 2013], *lv denied* 21 NY3d 863 [2013]). Because the CBA does not require respondent to make its staffing or budgetary decisions in accordance with the Guide, the arbitrator contravened an express provision in the CBA that denied him the "authority to modify or amend it." Thus, we conclude that the court erred in confirming that part of the award requiring respondent to make the elimination of teaching positions in accordance with the Guide, and we therefore modify the order and judgment accordingly (*see Matter of Buffalo Teachers Fedn., Inc. v Board of Educ. of City School Dist. of City of Buffalo*, 50 AD3d 1503, 1505 [4th Dept 2008], *lv denied* 11 NY3d 708 [2008]).

Furthermore, respondent contends that the fourth paragraph of the award is nonfinal and indefinite insofar as it directs that "[a]ny future elimination of teaching positions at [the affected school] as a result of hiring teacher aides must be narrowly tailored to meet the economic needs of [respondent] and be applied in a [union] membership neutral manner." We agree in part. An award is nonfinal and indefinite if, inter alia, "it leaves the parties unable to determine their rights and obligations" (*Matter of Meisels v Uhr*, 79 NY2d 526, 536 [1992]; *see Matter of Professional, Clerical, Tech. Empls. Assn. [Board of Educ. for Buffalo City Sch. Dist.]*, 162 AD3d 1479, 1480 [4th Dept 2018]). In our view, the foregoing language in the award is nonfinal and indefinite except to the extent that it prohibits respondent from discriminating on the basis of union membership status. Thus, we conclude that the court further erred in confirming

that part of the award, and we therefore further modify the order and judgment accordingly (*see Buffalo Teachers Fedn., Inc.*, 50 AD3d at 1505).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

1317

CA 19-00857

PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND BANNISTER, JJ.

JANE GRIFFIN MEECH,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT J. ANTHONY, JR., AND SARAH YERKOVICH,
DEFENDANTS-APPELLANTS-RESPONDENTS.

LAW OFFICES OF JOHN WALLACE, BUFFALO (JAMES J. NAVAGH OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

GELBER & O'CONNELL, LLC, AMHERST (TIMOTHY G. O'CONNELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 2, 2019. The order denied the motion of plaintiff for partial summary judgment and denied the cross motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the cross motion in part and dismissing the complaint insofar as it alleges that defendants had actual notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: After slipping and falling on the front porch of defendants' home, plaintiff commenced this action to recover damages for injuries that she allegedly sustained as a result of the fall. Later in the same month when plaintiff fell, defendants took photographs of the porch. Subsequently, approximately five weeks after the fall, plaintiff took photographs of the porch. Unlike defendants' photographs, plaintiff's photographs appear to depict a green substance on the porch. In addition, the photographs depict planters on the porch. Defendant Sarah Yerkovich testified at her deposition that she watered plants that grew in the planters and that water could leak out of the planters onto the porch. In his affidavit, plaintiff's expert opined that water had saturated the wooden porch over a period of "many months," leading to the development of a "microbial growth" that would have become slippery in wet weather, such as occurred on the day of the fall. Plaintiff, at her deposition, viewed a photograph of the porch and identified a skid mark in the alleged growth as the location of the fall. Plaintiff moved for partial summary judgment on, inter alia, the issue of negligence, and defendants cross-moved for summary judgment dismissing

the complaint. Defendants appeal and plaintiff cross-appeals from an order denying the motion and cross motion.

We agree with defendants on their appeal that Supreme Court erred in denying the cross motion with respect to the claim that defendants had actual notice of the allegedly dangerous condition, and we therefore modify the order accordingly. "To establish that they did not have actual notice of the allegedly dangerous condition, defendants were required to show that they did not receive any complaints concerning the area where plaintiff fell and were unaware of any . . . [slippery] substance in that location prior to plaintiff's accident" (*Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469 [4th Dept 2013]; *see Cosgrove v River Oaks Rests., LLC*, 161 AD3d 1575, 1576 [4th Dept 2018]). In support of their cross motion, defendants submitted the affidavit of defendant Robert J. Anthony, Jr., wherein he stated that he never observed a slippery organic growth on the porch prior to the fall and that no one had ever complained to him about the condition of the porch. In opposition, plaintiff failed to raise an issue of fact with respect to defendants' actual notice (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Contrary to their further contentions, defendants failed to meet their initial burden of establishing that the green substance on the porch did not constitute a dangerous condition (*see Smith v Szpilewski*, 139 AD3d 1342, 1342 [4th Dept 2016]; *cf. Wiedenbeck v Lawrence*, 170 AD3d 1669, 1669 [4th Dept 2019]), that they lacked constructive notice of the condition (*see Clarke v Wegmans Food Mkts., Inc.*, 147 AD3d 1401, 1402 [4th Dept 2017]; *see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]), that they did not create the condition (*see Chamberlain v Church of the Holy Family*, 160 AD3d 1399, 1400-1401 [4th Dept 2018]), or that plaintiff could not identify what caused her to fall without engaging in speculation (*see Doner v Camp*, 163 AD3d 1457, 1457 [4th Dept 2018]). Even assuming, arguendo, that defendants met their initial burden on those claims, we conclude that plaintiff raised an issue of fact by submitting the affidavit of her expert. Although plaintiff's expert relied upon photographs that were taken approximately five weeks after the fall, that fact does not render his opinion inadmissible, but rather goes to its weight (*see generally Sample v Yokel*, 94 AD3d 1413, 1414 [4th Dept 2012]; *Jackson v Nutmeg Tech., Inc.*, 43 AD3d 599, 602 [3d Dept 2007]).

Inasmuch as there are issues of fact with respect to defendants' negligence, we reject plaintiff's contention on her cross appeal that she is entitled to partial summary judgment on that issue (*cf. Rodriguez v City of New York*, 31 NY3d 312, 315, 323 [2018]; *see generally Zuckerman*, 49 NY2d at 562). Contrary to her further contention, res ipsa loquitur is inapplicable because the fall may have been caused by her own misstep (*see Anderson v Skidmore Coll.*, 94 AD3d 1203, 1205 [3d Dept 2012]; *see generally Dermatossian v New York*

City Tr. Auth., 67 NY2d 219, 226 [1986]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

2

KA 19-00547

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILLIAM BROCKINGTON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered January 29, 2019. The order denied the petition of defendant for a modification of his risk level pursuant to the Sex Offender Registration Act.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

4

KA 19-00593

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH CENTOFANTI, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH CENTOFANTI, DEFENDANT-APPELLANT PRO SE.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Niagara County Court (Matthew J. Murphy, III, J.), entered February 22, 2019. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court erred in using a risk assessment instrument (RAI) prepared by the District Attorney (DA) because it did not comply with the SORA Risk Assessment Guidelines and Commentary (2006). We reject that contention. "If the [DA] seeks a determination that differs from the recommendation submitted by the [B]oard [of Examiners of Sex Offenders], . . . the [DA] shall provide to the court and the sex offender a statement setting forth the determinations sought by the [DA] together with the reasons for seeking such determinations" (§ 168-k [2]). The RAI prepared by the DA, by which she requested the assessment of 30 points under risk factor 3, was such a statement. To the extent that defendant contends that the court erred in assessing him those points, he failed to preserve his contention for our review (*see People v Gillotti*, 23 NY3d 841, 854 [2014]).

Finally, we have reviewed the contentions in defendant's pro se supplemental brief and conclude that none warrants reversal or

modification of the order.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

6

KA 18-00320

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD WHITE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (EDWARD P. DUNN OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered September 8, 2017. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of robbery in the second degree (Penal Law § 160.10 [1]). Defendant failed to preserve his contention that the evidence is legally insufficient to establish that he was "aided by another person actually present" because his motion for a trial order of dismissal was not specifically directed at that alleged insufficiency (*id.*; *see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Goodrum*, 72 AD3d 1639, 1639 [4th Dept 2010], *lv denied* 15 NY3d 773 [2010]). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's further contention, defense counsel was not ineffective for failing to make a specific motion for a trial order of dismissal on the ground that there is legally insufficient evidence that he was aided by another. It is well settled that "[a] defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]; *see People v Bakerx*, 114 AD3d 1244, 1245 [4th Dept 2014], *lv denied* 22 NY3d 1196 [2014]), and here "there was no chance that such a motion would have succeeded" (*People v Heary*, 104 AD3d 1208, 1209 [4th Dept 2013], *lv denied* 21 NY3d 943 [2013],

reconsideration denied 21 NY3d 1016 [2013]; *see Bakerx*, 114 AD3d at 1245). The evidence at trial established that defendant " 'committed the robbery in the full view of his companion, who . . . was in a position to render immediate assistance to defendant' " (*People v McIntosh*, 158 AD3d 1289, 1290 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *cf. People v Hedgeman*, 70 NY2d 533, 535 [1987]). With respect to defendant's remaining allegations of ineffective assistance of counsel, we conclude that defendant "failed to sustain his burden to establish that his attorney 'failed to provide meaningful representation' that compromised his 'right to a fair trial' " (*People v Pavone*, 26 NY3d 629, 647 [2015], quoting *People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Huddleston*, 160 AD3d 1359, 1361 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]). Finally, the sentence is not unduly harsh or severe.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

7

KA 17-01653

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE SHORTER, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered June 27, 2017. The judgment convicted defendant upon his plea of guilty of driving while intoxicated, a class D felony and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2]; 1193 [1] [c] [ii]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]). We reject defendant's contention that County Court abused its discretion in denying his pro se motion to withdraw his guilty plea without conducting an evidentiary hearing or making a further inquiry into his allegations. " 'When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances . . . [O]ften[,] a limited interrogation by the court will suffice' " (*People v Manor*, 27 NY3d 1012, 1013-1014 [2016]; *see People v Walker*, 114 AD3d 1257, 1258 [4th Dept 2014], *lv denied* 23 NY3d 1044 [2014]). " 'The defendant should be afforded reasonable opportunity to present his contentions' " (*Walker*, 114 AD3d at 1258). Where "a motion to withdraw a plea is patently insufficient on its face, a court may simply deny the motion without making any inquiry" (*People v Mitchell*, 21 NY3d 964, 967 [2013]).

Here, the court allowed defendant to argue his motion to withdraw his plea, thus giving him a reasonable opportunity to advance his claims, and the court did not abuse its discretion in denying the

motion without further inquiry or a hearing (*see People v Alfred*, 142 AD3d 1373, 1373 [4th Dept 2016], *lv denied* 28 NY3d 1142 [2017]; *People v Bucci*, 137 AD3d 1744, 1744 [4th Dept 2016]; *People v Sparcino*, 78 AD3d 1508, 1509 [4th Dept 2010], *lv denied* 16 NY3d 746 [2011]). Defendant argued that he felt forced to take the plea based on his attorney's comments regarding the upcoming suppression hearing, which suggested that his attorney would not adequately represent him. Contrary to defendant's contention, defense counsel's advice that defendant was not likely to win at the suppression hearing did not constitute coercion (*see People v Griffin*, 120 AD3d 1569, 1570 [4th Dept 2014], *lv denied* 24 NY3d 1084 [2014]). Additionally, defendant's contention that he was forced to take the plea by his attorney is belied by the record inasmuch as defendant stated during the plea colloquy that he was pleading guilty of his own free will and was satisfied with his attorney's services (*see Bucci*, 137 AD3d at 1744; *People v Strasser*, 83 AD3d 1411, 1411 [4th Dept 2011]).

Contrary to defendant's further contention, his motion to withdraw the guilty plea did not include a request for new counsel (*see People v Ortiz*, 173 AD3d 433, 433 [1st Dept 2019]; *People v Singletary*, 63 AD3d 1654, 1654 [4th Dept 2009], *lv denied* 13 NY3d 839 [2009]; *People v Moore*, 39 AD3d 1199, 1199-1200 [4th Dept 2007], *lv denied* 9 NY3d 867 [2007]). Moreover, even assuming, arguendo, that defendant implicitly made such a request in the motion, we conclude that he failed to make specific factual allegations of serious complaints that would trigger the court's obligation to conduct a further inquiry (*see Ortiz*, 173 AD3d at 433; *see generally People v Sides*, 75 NY2d 822, 824-825 [1990]).

Finally, the sentence is not unduly harsh or severe.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

9

KA 18-00157

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARNELL DOZIER, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered April 5, 2017. The judgment convicted defendant upon his plea of guilty of attempted murder 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 attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that his waiver of the right to appeal is invalid. We agree. The best practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*People v Thomas*, — NY3d —, —, 2019 NY Slip Op 08545, *7 [Nov. 26, 2019], citing NY Model Colloquies, Waiver of Right to Appeal). Here, in describing the nature of defendant's right to appeal and the breadth of the waiver of that right, Supreme Court said only: "[T]his case will be over and . . . will go no further." Although no "particular litany" is required for a waiver of the right to appeal to be valid (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Johnson* [appeal No. 1], 169 AD3d 1366, 1366 [4th Dept 2019], *lv denied* 33 NY3d 949 [2019]), defendant's waiver of the right to appeal was invalid because the court mischaracterized it as an "absolute bar" to the taking of an appeal (*Thomas*, — NY3d at —).

Nevertheless, we have reviewed defendant's remaining contentions and conclude that none warrant reversal or modification of the judgment.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

11

CAF 19-00241

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF DURIEL A. GREEN,
PETITIONER-APPELLANT,

V ORDER

BIANCA S. BOLTON, RESPONDENT-RESPONDENT.

DEBORAH J. SCINTA, ORCHARD PARK, FOR PETITIONER-APPELLANT.

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT.

ALVIN M. GREENE, GRAND ISLAND, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered December 4, 2018 in a proceeding pursuant to Family Court Act article 6. The order confirmed a Referee's Report.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

14

CA 19-00100

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF 425 WEST MAIN ASSOCIATES LP,
PETITIONER-APPELLANT,

V ORDER

SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA,
RESPONDENT-RESPONDENT.

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

HURWITZ & FINE, P.C., BUFFALO (STEVEN E. PEIPER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

WILOFSKY FRIEDMAN KAREL & CUMMINS, NEW YORK CITY (ROMAN RABINOVICH OF COUNSEL), FOR UNITED POLICYHOLDERS AND NEW YORK ADJUSTERS ASSOCIATION, AMICI CURIAE.

Appeal from an order of the Supreme Court, Genesee County (Henry J. Nowak, Jr., J.), entered January 4, 2019. The order denied the petition to compel an appraisal.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

17

CA 19-01101

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

STATE OF NEW YORK, PLAINTIFF,
AND NEW YORK STATE THRUWAY AUTHORITY,
PLAINTIFF-APPELLANT,

V ORDER

FOIT-ALBERT ASSOCIATES, ARCHITECTURE,
ENGINEERING AND LAND SURVEYING, P.C.,
DEFENDANT-RESPONDENT.

THE LAW FIRM OF JANICE M. IATI, P.C., PITTSFORD (JANICE M. IATI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, BUFFALO (BRIAN SUTTER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered May 21, 2019. The order, among other things, denied the motion of plaintiffs seeking, inter alia, summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 30, 2019,

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

19

CA 19-00872

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

KAREN D., AS GUARDIAN OF THE PERSON AND
PROPERTY OF JOLIESE H., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HOON CHOI, M.D., DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 29, 2019. The order granted the motion of defendant Hoon Choi, M.D. for summary judgment dismissing the complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated against defendant Hoon Choi, M.D.

Memorandum: Plaintiff commenced this medical malpractice action seeking to recover damages for injuries sustained by her daughter (patient) as a result of defendants' alleged failure to address postsurgery complications in an appropriate and timely manner. We agree with plaintiff that Supreme Court erred in granting the motion of Hoon Choi, M.D. (defendant) for summary judgment dismissing the complaint against him. Defendant's own submissions, particularly his own deposition testimony and that of the attending neurosurgeon, raise an issue of fact whether defendant exercised independent medical judgment (*see Burnett-Joseph v McGrath*, 158 AD3d 526, 527 [1st Dept 2018]; *Reading v Fabiano*, 137 AD3d 1686, 1687 [4th Dept 2016]). Indeed, the attending neurosurgeon testified that, in developing a treatment plan for the patient, he relied upon defendant's interpretation of the first, postsurgical CT scan. Defendant testified that he formed his own interpretation of the CT scan in consultation with a team of physicians. There is no basis for the court's conclusion that defendant relied upon a report prepared by a radiologist, particularly inasmuch as defendant testified that he did

not believe that the report was available to him.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

24

KA 17-00096

PRESENT: PERADOTTO, J.P., CARNI, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE STENSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered March 24, 2016. The judgment convicted defendant, upon a plea of guilty, of failure to register or verify his status as a sex offender, as a class D felony.

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 failure to register or verify his status as a sex offender, as a second or subsequent offense (Correction Law §§ 168-f [4]; 168-t). We agree with defendant that his waiver of the right to appeal is invalid. County Court mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal and the attendant rights to counsel and poor person relief, as well as a bar to all postconviction relief, and there is no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues. We therefore cannot conclude that the waiver of appeal was knowing or voluntary (*see People v Thomas*, — NY3d —, 2019 NY Slip Op 08545, *6-7 [2019]). We nevertheless conclude that the negotiated sentence is not unduly harsh or severe.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

42

KA 17-01532

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RESHEENA JENKINS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered September 28, 2016. The judgment convicted defendant upon her plea of guilty of riot in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting her upon her plea of guilty of riot in the first degree (Penal Law § 240.06 [1]) and, in appeal No. 2, she appeals from a judgment convicting her upon her plea of guilty of assault in the second degree (§ 120.05 [3]). Both pleas were taken during one plea proceeding. We reject defendant's contention in both appeals that County Court erred in denying her motion to withdraw her guilty pleas. Initially, we agree with defendant that her contention that she did not enter the pleas knowingly, intelligently, and voluntarily survives the waiver of the right to appeal (*see People v Jackson*, 163 AD3d 1273, 1274 [3d Dept 2018], *lv denied* 32 NY3d 1065 [2018]; *People v Bibbs*, 147 AD3d 1301, 1301-1302 [4th Dept 2017]; *People v Fuller*, 124 AD3d 1394, 1394-1395 [4th Dept 2015], *lv denied* 25 NY3d 989 [2015]). We conclude, however, that the court did not abuse its discretion in denying the motion (*see Bibbs*, 147 AD3d at 1301-1302; *People v Dale*, 142 AD3d 1287, 1289 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]). Defendant's contention that she did not understand the plea proceeding and did not understand that she had other options aside from pleading guilty are belied by her statements during the plea proceeding (*see People v Gast*, 114 AD3d 1270, 1271 [4th Dept 2014], *lv denied* 22 NY3d 1198 [2014]; *People v Thomas*, 72 AD3d 1483, 1484 [4th Dept 2010]).

Contrary to defendant's further contention, the court did not abuse its discretion in denying the motion without a hearing. "When a defendant moves to withdraw a guilty plea, the nature and extent of

the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances . . . [O]ften[,] a limited interrogation by the court will suffice" (*People v Manor*, 27 NY3d 1012, 1013-1014 [2016] [internal quotation marks omitted]; *see People v Walker*, 114 AD3d 1257, 1258 [4th Dept 2014], *lv denied* 23 NY3d 1044 [2014]). Here, the court allowed defendant an opportunity to present her contentions, and the court was able to make an informed determination without holding a hearing (*see People v Zimmerman*, 100 AD3d 1360, 1362 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]; *People v Buske*, 87 AD3d 1354, 1355 [4th Dept 2011], *lv denied* 18 NY3d 882 [2012]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

43

KA 17-01573

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RESHEENA JENKINS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered September 28, 2016. The judgment convicted defendant upon her plea of guilty of assault in the second degree.

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

Same memorandum as in *People v Jenkins* ([appeal No. 1] — AD3d — [Jan. 31, 2020] [4th Dept 2020]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

44

KA 17-02060

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WALTER DENNIS, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 8, 2017. The judgment convicted defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree and driving while intoxicated, a misdemeanor.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [ii]) and driving while intoxicated (§ 1192 [3]). Defendant's sole contention, a challenge to the legality of the sentence, was rendered moot inasmuch as defendant has served the sentence in its entirety (*see People v Dale*, 142 AD3d 1287, 1290 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]; *People v Balkum*, 288 AD2d 910, 911 [4th Dept 2001]). We therefore dismiss the appeal.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

45

KA 18-01367

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL HENDRICKSON, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wayne County Court (Daniel G. Barrett, J.), dated March 19, 2018. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in refusing to grant him a downward departure from his presumptive risk level. We reject that contention.

It is well settled that "a defendant's response to treatment, 'if exceptional' . . . , may constitute a mitigating factor to serve as the basis for a downward departure" (*People v Bernecky*, 161 AD3d 1540, 1541 [4th Dept 2018], *lv denied* 32 NY3d 901 [2018], quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]; *see People v Davis*, 170 AD3d 1519, 1520 [4th Dept 2019], *lv denied* 33 NY3d 907 [2019]). The defendant has the burden of establishing by a preponderance of the evidence that his or her response to treatment was exceptional (*see Davis*, 170 AD3d at 1520; *Bernecky*, 161 AD3d at 1541). Nevertheless, a court errs when it concludes "that an offender's participation in treatment is adequately taken into account by the risk assessment instrument" without also considering whether the defendant established that he or she made an exceptional response to treatment and, if so, whether the court should exercise its discretion to grant a downward departure (*People v Migliaccio*, 90 AD3d 879, 880 [2d Dept 2011]; *see People v Lewis*, 140 AD3d 1697, 1697 [4th Dept 2016]). Here, the court properly considered defendant's individual response to treatment and determined that

defendant had failed to meet his burden of establishing that it warranted a downward departure (*see People v June*, 150 AD3d 1701, 1702 [4th Dept 2017]; *cf. Lewis*, 140 AD3d at 1697; *People v Washington*, 84 AD3d 910, 911 [2d Dept 2011], *lv dismissed* 17 NY3d 849 [2011]). We see no basis to disturb that determination (*see June*, 150 AD3d at 1702).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

48

KA 15-00763

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY L. EADY, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered March 26, 2015. The judgment convicted defendant upon a jury verdict of criminal possession of a forged instrument in the second degree (four counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of four counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). We reject defendant's contention that Supreme Court's *Molineux* ruling constituted an abuse of discretion. The evidence was particularly relevant on the issues of defendant's intent to defraud or knowledge that the instruments were forged (*see People v Bastian*, 294 AD2d 882, 883 [4th Dept 2002], *lv denied* 98 NY2d 694 [2002]; *People v Aiken*, 293 AD2d 623, 623 [2d Dept 2002], *lv denied* 98 NY2d 672 [2002]; *People v Brand*, 135 AD2d 1125, 1125 [4th Dept 1987], *lv denied* 70 NY2d 1004 [1988]). The probative value of that evidence outweighed its prejudicial effect (*see generally People v Williams*, 101 AD3d 1730, 1731 [4th Dept 2012], *lv denied* 21 NY3d 1021 [2013]). We reject defendant's further contention that the court abused its discretion in not allowing him to plead guilty prior to trial. Defendant requested to plead guilty with a promised sentence of 3½ to 7 years, but the court refused to agree to any promised sentence. A court has the power to determine the appropriate sentence (*see People v Williams*, 158 AD2d 930, 930-931 [4th Dept 1990], *lv denied* 75 NY2d 971 [1990]), and we perceive no abuse of the court's discretion here.

Finally, defendant contends that County Court (Dinolfo, J.) abused its discretion by denying defendant's request to participate in the judicial diversion program. We reject that contention. The court

did not abuse its discretion in determining that defendant was not an appropriate candidate for the program because of the lack of any connection between his criminal behavior and his substance abuse issues, his extensive criminal history, and the threat defendant posed to other program participants and the general public (*see People v Clarke*, 155 AD3d 1242, 1243-1244 [3d Dept 2017], *lv denied* 30 NY3d 1114 [2018]; *People v Chavis*, 151 AD3d 1757, 1758 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]; *People v Pittman*, 140 AD3d 989, 989 [2d Dept 2016]; *see generally* CPL 216.05 [3] [b]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

59

CA 19-01227

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND BANNISTER, JJ.

IN THE MATTER OF NATIONAL FUEL GAS SUPPLY CORPORATION, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

IVAN GUROV, RESPONDENT-APPELLANT, ET AL., RESPONDENTS.
(APPEAL NO. 1.)

LAW OFFICE OF TIMOTHY M. O'MARA, WILLIAMSVILLE (TIMOTHY M. O'MARA OF COUNSEL), FOR RESPONDENT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG A. LESLIE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered December 5, 2018. The order, among other things, granted the petition to acquire an easement.

It is hereby ORDERED that the case is held, the decision is reserved and the order is stayed in accordance with the following memorandum: In appeal No. 1, respondent Ivan Gurov appeals from an order that, inter alia, granted the petition and authorized petitioner to acquire an easement over his property. In appeal No. 2, respondents Emily R. Oprea and Grace R. Page, as trustees for the Roderick Family Trust, appeal from an order of the same court that, inter alia, granted the petition and authorized petitioner to acquire an easement over their property. The outcome of these appeals hinges on, inter alia, the validity of the State of New York's denial of petitioner's application for a water quality certification (WQC) (*see Matter of National Fuel Gas Supply Corp. v Schueckler*, 167 AD3d 128, 129-139 [4th Dept 2018]). The validity of that denial, however, is currently unclear and is being actively litigated in multiple proceedings before the Federal Energy Regulatory Commission and the United States Court of Appeals for the Second Circuit. Under these circumstances, and in the interest of judicial economy, we hold these cases and reserve decision pending determination of the validity of the denial of petitioner's application for a WQC (*see Buffalo United Charter Sch. v New York State Pub. Empl. Relations Bd.*, 107 AD3d 1437, 1438 [4th Dept 2013], *lv dismissed* 22 NY3d 1082 [2014]). Furthermore, in the exercise of our discretion, we stay the orders appealed from pending our ultimate disposition of these appeals (*see* CPLR 5519 [c]; *Sternberg v New York*

Water Serv. Corp., 94 AD2d 723, 723 [2d Dept 1983]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

65

CA 19-01194

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND BANNISTER, JJ.

IN THE MATTER OF NATIONAL FUEL GAS SUPPLY
CORPORATION, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

EMILY R. OPREA AND GRACE R. PAGE, AS TRUSTEES FOR
THE RODERICK FAMILY TRUST, RESPONDENTS-APPELLANTS,
ET AL., RESPONDENTS.
(APPEAL NO. 2.)

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG A. LESLIE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered December 5, 2018. The order, among other things, granted the petition to acquire an easement.

It is hereby ORDERED that the case is held, the decision is reserved and the order is stayed in accordance with the same memorandum as in *Matter of National Fuel Gas Supply Corp. v Gurov* (— AD3d — [Jan. 31, 2020] [4th Dept 2020]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

67

KA 17-00729

PRESENT: WHALEN, P.J., CARNI, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH O. MORRISON, DEFENDANT-APPELLANT.

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered January 18, 2017. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of one count of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Contrary to his contention and the People's incorrect concession (*see People v Berrios*, 28 NY2d 361, 366-367 [1971]; *People v Adair*, 177 AD3d 1357, 1357 [4th Dept 2019]), the record establishes that defendant knowingly, voluntarily and intelligently waived his right to appeal (*see People v Hoke*, 167 AD3d 1549, 1549-1550 [4th Dept 2018], *lv denied* 33 NY3d 949 [2019]; *People v Robinson*, 112 AD3d 1349, 1349 [4th Dept 2013], *lv denied* 23 NY3d 1042 [2014]). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

68

KA 19-00805

PRESENT: WHALEN, P.J., CARNI, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GUSTAVO ROMAN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Christopher S. Ciaccio, J.), entered January 26, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court erred in assessing points under risk factors four and five of the risk assessment instrument. As defendant correctly concedes, his contentions are not preserved for our review (*see People v Gillotti*, 23 NY3d 841, 854 [2014]; *People v Saraceni*, 153 AD3d 1561, 1561 [4th Dept 2017], *lv denied* 30 NY3d 1119 [2018]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see People v Charache*, 32 AD3d 1345, 1345 [4th Dept 2006], *affd* 9 NY3d 829 [2007]; *People v Jones*, 15 AD3d 929, 930 [4th Dept 2005]; *see also Saraceni*, 153 AD3d at 1561).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

69

KA 19-00670

PRESENT: WHALEN, P.J., CARNI, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RUFINO LOPEZ, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Alex R. Renzi, J.), dated February 8, 2019. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, Supreme Court properly assessed 15 points under risk factor 11 for a history of drug or alcohol abuse inasmuch as " '[t]he statements in the case summary and presentence report with respect to defendant's substance abuse constitute reliable hearsay supporting the court's assessment of points under th[at] risk factor' " (*People v Kunz*, 150 AD3d 1696, 1696 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]). Here, the case summary and presentence report establish that defendant began using marihuana, alcohol, and cocaine as a teenager; that he has a history of drug-related offenses; that he received multiple sanctions for drug use while incarcerated for the underlying sex offense; and that, although he was recommended for the Alcohol and Substance Abuse Treatment program while incarcerated, he was unable to complete that program due to his disciplinary sanctions (*see generally id.* at 1697; *People v Mundo*, 98 AD3d 1292, 1293 [4th Dept 2012], *lv denied* 20 NY3d 855 [2013]; *People v Carswell*, 8 AD3d 1073, 1073-1074 [4th Dept 2004], *lv denied* 3 NY3d 607 [2004]). We have considered defendant's remaining contention and conclude that it does not require reversal or modification of the order.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

72

KAH 18-00672

PRESENT: WHALEN, P.J., CARNI, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
SHAWN E. AKIN, PETITIONER-APPELLANT,

V ORDER

JOHN COLVIN, SUPERINTENDENT, FIVE POINTS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), dated February 1, 2018 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

73

CAF 19-00022

PRESENT: WHALEN, P.J., CARNI, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF THE ADOPTION OF CHILDREN
WHOSE FIRST NAMES ARE ERIC AND CAREN
---------- ORDER
JOY M. AND ROBERT M., PETITIONERS-RESPONDENTS;

ERIC S.M., RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR RESPONDENT-APPELLANT.

CHRISTOPHER A. BARTON, ELMIRA, FOR PETITIONERS-RESPONDENTS.

PAUL B. WATKINS, FAIRPORT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered November 14, 2018. The order, among other things, adjudged that respondent's consent to the adoption of the subject children was not required.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

78

CA 18-02364

PRESENT: WHALEN, P.J., CARNI, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF CONESUS LAKE NURSING HOME, LLC,
PETITIONER-APPELLANT,

V ORDER

NEW YORK STATE DEPARTMENT OF HEALTH AND HOWARD A. ZUCKER, AS NEW YORK STATE COMMISSIONER OF HEALTH,
RESPONDENTS-RESPONDENTS.

PULLANO & FARROW, ROCHESTER (MICHAEL P. SCOTT-KRISTANSEN OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered November 16, 2018 in a CPLR article 78 proceeding. The judgment dismissed the petition.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 12 and 13, 2019,

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

83

CA 19-00637

PRESENT: WHALEN, P.J., CARNI, BANNISTER, AND DEJOSEPH, JJ.

BHARAT AGGARWAL AND RENU AGGARWAL,
PLAINTIFFS-APPELLANTS,

V ORDER

EASTVIEW MALL, LLC, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PLAINTIFFS-APPELLANTS.

WEAVER MANCUSO FRAME PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered March 15, 2019. The order and judgment denied the motion of plaintiffs for summary judgment and granted the cross motion of defendant Eastview Mall, LLC, for summary judgment.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

88

CA 19-00941

PRESENT: WHALEN, P.J., CARNI, WINSLOW, AND DEJOSEPH, JJ.

MOHSIN NAGI AND CARE OF RAMSEY NAGI, POWER OF ATTORNEY, PLAINTIFF,

V ORDER

TONY PAYNE, JR., ET AL., DEFENDANTS.

LIPSITZ GREEN SCIME CAMBRIA, LLP, NONPARTY APPELLANT;

THE DIETRICH LAW FIRM P.C., NONPARTY RESPONDENT.
(APPEAL NO. 1.)

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

JOSEPH (JED) E. DIETRICH, III, ESQ., WILLIAMSVILLE, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR NONPARTY RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered October 26, 2018. The order directed nonparty appellant to distribute $30,506.17 in attorneys' fees to nonparty respondent.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

89

CA 19-01358

PRESENT: WHALEN, P.J., CARNI, WINSLOW, AND DEJOSEPH, JJ.

MOHSIN NAGI AND CARE OF RAMSEY NAGI, POWER OF ATTORNEY, PLAINTIFF,

V ORDER

TONY PAYNE, JR., ET AL., DEFENDANTS.

LIPSITZ GREEN SCIME CAMBRIA, LLP, NONPARTY APPELLANT;

THE DIETRICH LAW FIRM P.C., NONPARTY RESPONDENT.
(APPEAL NO. 2.)

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

JOSEPH (JED) E. DIETRICH, III, ESQ., WILLIAMSVILLE, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR NONPARTY RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered January 9, 2019. The amended order authorized nonparty appellant to release any unpaid portion of its disbursements held in escrow to itself.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

90

CA 19-01359

PRESENT: WHALEN, P.J., CARNI, WINSLOW, AND DEJOSEPH, JJ.

MOHSIN NAGI AND CARE OF RAMSEY NAGI, POWER OF ATTORNEY, PLAINTIFF,

V ORDER

TONY PAYNE, JR., ET AL., DEFENDANTS.

LIPSITZ GREEN SCIME CAMBRIA, LLP, NONPARTY APPELLANT;

THE DIETRICH LAW FIRM P.C., NONPARTY RESPONDENT.
(APPEAL NO. 3.)

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

JOSEPH (JED) E. DIETRICH, III, ESQ., WILLIAMSVILLE, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR NONPARTY RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered January 10, 2019. The judgment granted a money judgment to nonparty respondent The Dietrich Law Firm P.C.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

93

KA 18-01861

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARLOS M. PEREZ-MEDINA, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered October 23, 2017. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). We affirm. Contrary to defendant's contention, he validly waived his right to appeal (*see People v Dix*, 170 AD3d 1575, 1575-1576 [4th Dept 2019], *lv denied* 33 NY3d 1030 [2019]), and that valid waiver forecloses his challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

95

KA 18-00283

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL COIT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered August 9, 2017. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that Supreme Court abused its discretion in denying his request for a downward departure from his presumptive risk level. We reject that contention and conclude that defendant "failed to establish by a preponderance of the evidence the existence of mitigating factors not adequately taken into account by the guidelines" (*People v Lewis*, 156 AD3d 1431, 1432 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]; *see People v Gillotti*, 23 NY3d 841, 861 [2014]). We have reviewed defendant's remaining contention and conclude that it does not warrant modification or reversal of the order.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

101

KAH 17-01758

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

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

V ORDER

JOHN COLVIN, SUPERINTENDENT, FIVE POINTS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT.

RICHARD MILLS, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered August 28, 2017 in a habeas corpus proceeding. The judgment denied and dismissed the petition.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

102

KAH 18-02018

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

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

V ORDER

SUPERINTENDENT COLVIN, ANDREW CUOMO, GOVERNOR,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT.

RICHARD MILLS, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment of the Supreme Court, Seneca County (Daniel J. Doyle, J.), dated August 7, 2018 in a habeas corpus proceeding. The judgment denied and dismissed the petition.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

103

KAH 18-02019

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

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

V ORDER

JOHN COLVIN, SUPERINTENDENT, FIVE POINTS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT.

RICHARD MILLS, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment of the Supreme Court, Seneca County (Daniel J. Doyle, J.), dated August 28, 2018 in a habeas corpus proceeding. The judgment, inter alia, denied the motion of petitioner for relief pursuant to CPLR 5015.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

118

TP 18-01637

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND BANNISTER, JJ.

IN THE MATTER OF DARREL OLDHAM, PETITIONER,

V ORDER

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

DARREL OLDHAM, PETITIONER PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by judgment of the Supreme Court, Jefferson County [James P. McClusky, J.], dated September 7, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

119

KA 18-00869

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON DECAPUA, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Vincent M. Dinolfo, A.J.), entered January 31, 2018. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Contrary to defendant's contention, Supreme Court did not abuse its discretion in granting the People's request for an upward departure from his presumptive classification as a level two risk. " 'It is well settled that a court may grant an upward departure from a sex offender's presumptive risk level when the People establish, by clear and convincing evidence . . . , the existence of an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [risk assessment] guidelines' " (*People v Hackrott*, 170 AD3d 1646, 1647 [4th Dept 2019], *lv denied* 33 NY3d 908 [2019]). Here, the court made its determination based on "[s]tatements in a presentence report and case summary[, which] constitute 'reliable hearsay' upon which a court may properly rely in making an upward departure" (*People v Tidd*, 128 AD3d 1537, 1537 [4th Dept 2015], *lv denied* 25 NY3d 913 [2015]). We conclude that the court's determination to grant an upward departure was based on clear and convincing evidence of aggravating factors not adequately accounted for by the risk assessment guidelines, including evidence of defendant's history of sexually aggressive behavior and his diagnosis of, inter alia, impulse control disorder, which together increased his risk of recidivism (*see generally People v Tatner*, 149 AD3d 1595, 1595-1596 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]; *People v Kettles*, 39 AD3d 1270, 1271

[4th Dept 2007], *lv denied* 9 NY3d 803 [2007]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

121

KA 17-00944

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHELBY M. HODGE, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered January 24, 2017. The judgment convicted defendant, upon a plea of guilty, of kidnapping in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of kidnapping in the second degree (Penal Law § 135.20). Defendant's contention that the written waiver of indictment failed to comply with CPL 195.20 is forfeited by her guilty plea (*see People v Thomas*, — NY3d —, —, 2019 NY Slip Op 08545, *8 [Nov. 26, 2019]). Contrary to defendant's further contention, she validly waived her right to appeal (*see People v Bradley*, 177 AD3d 1325, 1325 [4th Dept 2019]; *People v Allen*, 174 AD3d 1456, 1457 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019]; *People v Rodriguez*, 93 AD3d 1334, 1335 [4th Dept 2012], *lv denied* 19 NY3d 966 [2012]). Defendant's challenge to the severity of her sentence is foreclosed by her valid waiver of the right to appeal (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Although they survive her valid waiver of the right to appeal, defendant's challenges to the voluntariness of her guilty plea are unpreserved for appellate review because she never moved to withdraw her plea or to vacate the judgment of conviction on those grounds (*see People v Ware*, 115 AD3d 1235, 1235 [4th Dept 2014]). Contrary to defendant's contention, her reluctance during the plea colloquy to name the accomplice that threatened to kill the victim did not negate an element of the crime to which she pleaded guilty for purposes of the exception to the preservation requirement (*see generally People v Lopez*, 71 NY2d 662, 666 [1988]). In any event, defendant's challenges to the voluntariness of her guilty plea lack merit (*see People v*

Rathburn, 178 AD3d 1421, 1421-1422 [4th Dept 2019]; *People v Eagle*, 105 AD3d 1453, 1454 [4th Dept 2013], *lv denied* 21 NY3d 1073 [2013]; *see also People v Moore*, 97 AD3d 850, 851 [3d Dept 2012]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

127

CAF 18-00996

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND BANNISTER, JJ.

IN THE MATTER OF LOGAN P.

SENECA COUNTY DIVISION OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

ORDER

STEPHEN P., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT.

CHRISTOPHER D. LUCCHESI, WATERLOO, FOR PETITIONER-RESPONDENT.

PAUL BLEAKLEY, GENEVA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Seneca County (Dennis F. Bender, J.), dated April 11, 2018 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Markeith G. [Deon W.]*, 152 AD3d 424, 424 [1st Dept 2017]; *Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

128

CAF 18-00997

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND BANNISTER, JJ.

IN THE MATTER OF LOGAN P.

SENECA COUNTY DIVISION OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

ORDER

STEPHEN P., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT.

CHRISTOPHER D. LUCCHESI, WATERLOO, FOR PETITIONER-RESPONDENT.

PAUL BLEAKLEY, GENEVA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Seneca County (Dennis F. Bender, J.), entered April 30, 2018 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject child and directed respondent to have no communication with the subject child, except during supervised visitation.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

129

CAF 19-00248

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND BANNISTER, JJ.

IN THE MATTER OF ROCHELLE RAGER,
PETITIONER-RESPONDENT,

V ORDER

JOSHUA RAMSELL, RESPONDENT-APPELLANT.

IN THE MATTER OF JOSHUA RAMSELL,
PETITIONER-APPELLANT,

V

ROCHELLE RAGER, RESPONDENT-RESPONDENT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

KATHLEEN KUGLER, CONFLICT DEFENDER, LOCKPORT (JESSICA J. BURGASSER OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

MELISSA A. CAVAGNARO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Niagara County (Kathleen Wojtaszek-Gariano, J.), entered December 19, 2018 in proceedings pursuant to Family Court Act article 6. The order, inter alia, granted the petition of Rochelle Rager for permission to relocate with the subject child to South Carolina.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

130

CAF 18-02172

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND BANNISTER, JJ.

IN THE MATTER OF PAMELA ROBINSON,
PETITIONER-APPELLANT,

V ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENT-RESPONDENT.

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT.

NICHOLAS G. LOCICERO, BUFFALO, FOR RESPONDENT-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), ATTORNEY FOR THE CHILDREN.

DOMINIC PAUL CANDINO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered May 9, 2018 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition with prejudice.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

135

CA 19-01218

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND BANNISTER, JJ.

STEVEN M. CRAMER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RONALD J. SCHRUEFER, DEFENDANT-RESPONDENT.

CHIACCHIA & FLEMING, LLP, HAMBURG (DANIEL J. CHIACCHIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended judgment of the Supreme Court, Erie County (John F. O'Donnell, J.), entered January 15, 2019. The amended judgment, entered upon a jury verdict of no cause of action, awarded defendant costs and disbursements.

It is hereby ORDERED that the amended judgment so appealed from is unanimously reversed on the law without costs, the posttrial motion is granted, the verdict is set aside, the complaint is reinstated, and a new trial is granted.

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries he sustained while riding his motorcycle when defendant's vehicle turned left in front of him. Following a trial on liability, the jury returned a verdict finding that defendant was not negligent, and Supreme Court denied plaintiff's CPLR 4404 (a) motion to set aside the verdict as contrary to the weight of the evidence. A verdict should not be set aside as against the weight of the evidence unless "the preponderance of the evidence in favor of the moving party is so great that the verdict could not have been reached upon any fair interpretation of the evidence" (*Siemucha v Garrison*, 111 AD3d 1398, 1401 [4th Dept 2013] [internal quotation marks omitted]; *see Wilson v Mary Imogene Bassett Hosp.*, 307 AD2d 748, 748 [4th Dept 2003]; *see also Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). A court should be guided by the rule that, "if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury" (*McMillian v Burden*, 136 AD3d 1342, 1343 [4th Dept 2016] [internal quotation marks omitted]; *see Siemucha*, 111 AD3d at 1401-1402). Here, as the court charged the jury, "defendant had a common-law duty to see that which [he] should have seen through the proper use of [his] senses" (*Larsen v Spano*, 35 AD3d 820, 822 [2d Dept 2006]; *see Rebay v Tormey*, 2 AD3d 826, 827 [2d Dept 2003]). The evidence

undisputedly established that the area of the accident did not have any obstructions and that defendant had a clear line of sight of oncoming traffic. Inasmuch as defendant admitted at trial that he never saw plaintiff or his motorcycle prior to the accident, we conclude that the finding that defendant was not negligent could not have been reached on any fair interpretation of the evidence (*see Casaregola v Farkouh*, 1 AD3d 306, 306-307 [2d Dept 2003]; *Hernandez v Joseph*, 143 AD2d 632, 632 [2d Dept 1988]; *Thompson v Korn*, 48 AD2d 1007, 1008 [4th Dept 1975]). We therefore reverse the amended judgment, grant plaintiff's posttrial motion, set aside the verdict, reinstate the complaint, and grant a new trial. In light of our determination, we do not address plaintiff's remaining contentions.

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

139

CA 19-00229

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

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, ASSERTING CLAIMS IN ITS OWN RIGHT, AND AS THE ASSIGNEE AND REAL PROPERTY IN INTEREST OF THE CLAIMS OF DIPIZIO CONSTRUCTION COMPANY, INC., PLAINTIFF-PETITIONER,

V ORDER

ERIE CANAL HARBOR DEVELOPMENT CORPORATION, DEFENDANT-RESPONDENT-RESPONDENT.

DIPIZIO CONSTRUCTION COMPANY, INC., NONPARTY APPELLANT.

LAW OFFICES OF DANIEL W. ISAACS, PLLC, EAST ROCKAWAY (DANIEL W. ISAACS OF COUNSEL), FOR NONPARTY APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (ANDREW P. DEVINE OF COUNSEL), FOR DEFENDANT-RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered January 29, 2019. The order denied the motion of nonparty DiPizio Construction Company, Inc. seeking to intervene.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

142

TP 19-01523

PRESENT: WHALEN, P.J., CURRAN, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF D.N., PETITIONER,

V ORDER

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

KAREN MURTAGH, EXECUTIVE DIRECTOR, PRISONERS' LEGAL SERVICES OF NEW YORK, BUFFALO (ANDREW STECKER OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [E. Jeannette Ogden, J.], entered July 29, 2019) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 6 and 10, 2019,

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

145

KA 19-00071

PRESENT: WHALEN, P.J., CURRAN, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRES AYALA, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Erie County Court (Michael F. Pietruszka, J.), entered July 3, 2018. The order denied the petition to vacate the designation of defendant as a level one risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order denying his petition to vacate his designation as a level one risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). County Court properly denied the petition, which defendant ostensibly made pursuant to Correction Law § 168-o. Contrary to defendant's contention, Correction Law § 168-o (2) does not permit a petition to "vacate" a level one risk designation. That subdivision provides only for "modification" of a risk level (§ 168-o [2]), and downward modification from risk level one is impossible because "SORA does not include a no risk category" (*People v Ayala*, 72 AD3d 1577, 1578 [4th Dept 2010], *lv denied* 15 NY3d 816 [2010] [internal quotation marks omitted]). Furthermore, we reject defendant's challenge to the procedures employed by the court in denying the petition. Because the petition submitted by defendant does not constitute "a petition . . . pursuant to subdivision one, two or three [of Correction Law § 168-o]," we conclude that the court was not required to follow the procedures set forth in subdivision four (§ 168-o [4]).

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

161.1

CA 19-00284

PRESENT: WHALEN, P.J., CURRAN, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

ANDREW FAGAN, PLAINTIFF-RESPONDENT,

V ORDER

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
ET AL., DEFENDANTS,
AND DANIEL M. HAWRYLCZAK, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (PATRICK J. MACKEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

RAMOS & RAMOS, BUFFALO (JOSHUA I. RAMOS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered January 11, 2019. The order, among other things, denied that part of the motion of defendant Daniel M. Hawrylczak seeking to dismiss the first and third causes of action in the amended complaint.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

163

TP 19-01585

PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF ROBERT CARDEW, PETITIONER,

V ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered August 26, 2019) to review a determination of respondent. The determination found that petitioner had violated various inmate rules.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

170

CAF 18-01586

PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF KEREEM JOHNSON,
PETITIONER-RESPONDENT,

V ORDER

MICHELLE L. BODIE, RESPONDENT-APPELLANT.

IN THE MATTER OF MICHELLE L. BODIE,
PETITIONER-APPELLANT.

V

KEREEM JOHNSON, RESPONDENT-RESPONDENT.

IN THE MATTER OF MICHELLE L. BODIE,
PETITIONER-APPELLANT,

V

KEREEM JOHNSON, RESPONDENT-RESPONDENT.

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

ANTHONY L. PENDERGRASS, BUFFALO, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered August 1, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, designated petitioner-respondent Kereem Johnson primary residential parent of the subject child.

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

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

176

CA 19-01347

PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

AYANNA HEMPHILL, PLAINTIFF-RESPONDENT,

V ORDER

BUFFALO PUBLIC SCHOOLS AND CITY OF BUFFALO,
DEFENDANTS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (CHRISTOPHER R. POOLE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOHN ELMORE, P.C., WILLIAMSVILLE (JOHN V. ELMORE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered July 9, 2019. The order denied the motion of defendants for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 25, 2019,

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

Entered: January 31, 2020

Mark W. Bennett
Clerk of the Court

MOTION NO. (379/04) KA 01-02455. -- THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V CHARLES COLEMAN, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: CARNI, J.P., NEMOYER, WINSLOW, BANNISTER, AND DEJOSEPH, JJ. (Filed Jan. 31, 2020.)

MOTION NO. (586/05) KA 03-00322. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WALLACE DRAKE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND BANNISTER, JJ. (Filed Jan. 31, 2020.)

MOTION NO. (1088/11) KA 08-01131. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JONATHAN J. MEEK, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ. (Filed Jan. 31, 2020.)

MOTION NO. (246/17) KA 14-00479. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TERRENCE D. BEARD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Jan. 31, 2020.)

MOTION NO. (1172/18) KA 16-01761. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DESHAWN HARRIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied and the memorandum and order entered November 16, 2018 is amended by deleting the phrase "witness's disability" from the

first sentence of the second paragraph of the memorandum and substituting in place thereof "codefendant's disability," and by deleting the phrases "witness had a disability" and "witness was the shooter" from the second sentence of the second paragraph of the memorandum and substituting in place thereof "codefendant had a disability" and "codefendant was the shooter," respectively. PRESENT: WHALEN, P.J., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ. (Filed Jan. 31, 2020.)

MOTION NO. (500/19) KA 15-00259. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANDRE T. MCCANTS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CARNI, NEMOYER, WINSLOW AND DEJOSEPH, JJ. (Filed Jan. 31, 2020.)

MOTION NO. (804/19) CA 19-00030. -- JAYME A. MAST, PLAINTIFF-APPELLANT, V GERARD A. DESIMONE, DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Jan. 31, 2020.)

MOTION NO. (829/19) CA 19-00573. -- WILMINGTON SAVINGS FUND SOCIETY, FSB, DOING BUSINESS AS CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR HILLDALE TRUST, PLAINTIFF-RESPONDENT, V JULIAN M. FERNANDEZ, ALSO KNOWN AS JULIAN MARTIN FERNANDEZ, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, TROUTMAN, AND WINSLOW, JJ. (Filed Jan. 31, 2020.)

MOTION NO. (881/19) CA 18-01785. -- DONNA M. BUBAR, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF RAYMOND BUBAR, DECEASED, PLAINTIFF-RESPONDENT, V RICHARD BRODMAN, M.D., ET AL., DEFENDANTS, AND DOROTHY URSCHEL, ANCP-C, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ. (Filed Jan. 31, 2020.)

MOTION NO. (882/19) CA 18-01786. -- DONNA M. BUBAR, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF RAYMOND BUBAR, DECEASED, PLAINTIFF-RESPONDENT, V RICHARD BRODMAN, M.D., ET AL., DEFENDANTS, MICHAEL CELLINO, M.D., AND BUFFALO MEDICAL GROUP, P.C., DEFENDANTS-APPELLANTS. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ. (Filed Jan. 31, 2020.)

MOTION NO. (883/19) CA 18-01787. -- DONNA M. BUBAR, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF RAYMOND BUBAR, DECEASED, PLAINTIFF-RESPONDENT, V RICHARD BRODMAN, M.D., BUFFALO CARDIOTHORACIC SURGICAL, PLLC, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 3.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ. (Filed Jan. 31, 2020.)

MOTION NO. (899/19) CA 19-00269. -- PETER L. HAINES AND MINNIE H. BRENNAN,

AS CO-EXECUTORS OF THE ESTATE OF PATRICIA S. HAINES, DECEASED, PLAINTIFFS-RESPONDENTS, V HOLLY WEST, ALSO KNOWN AS HOLLY W. WEST, AND WILLIAM J. HURLBURT, INDIVIDUALLY, AND DOING BUSINESS AS MILTON R. HURLBURT, DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND TROUTMAN, JJ. (Filed Jan. 31, 2020.)

MOTION NO. (994/19) CA 19-00268. -- ALLISON JACOBSON, PLAINTIFF-APPELLANT, V EDWARD C. PURDUE, NEW SOUTH INSURANCE COMPANY AND NATIONAL GENERAL INSURANCE, DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ. (Filed Jan. 31, 2020.)

MOTION NO. (1000/19) KA 15-01860. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARLES E. COLEMAN, II, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND DEJOSEPH, JJ. (Filed Jan. 31, 2020.)

MOTION NO. (1045/19) CA 19-00120. -- NANCY J. BRADY AND PATRICK J. BRADY, PLAINTIFFS-APPELLANTS, V TIMOTHY J. CONTANGELO, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ. (Filed Jan. 31, 2020.)