SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 28, 2014

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1341

CA 13-00298

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

BRYAN PARSLOW AND BETH PARSLOW, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V OPINION AND ORDER

STEVEN B. LEAKE, JONATHAN M. HENTY, COREY R. SCHLOBOHM, JOSEF M. WOLCOTT, ANDREW LEONELLO, NICHOLAS E. HOOKS, ANDREW M. MORGAN, KARL SMITH, COREY WILSON, KENNETH M. KOPERDA, JASON P. BARRY, JR., THEODORE L. BILOHLAVEK, NATHAN P. ZILAK, DEFENDANTS-RESPONDENTS-APPELLANTS, SIGMA ALPHA MU FRATERNITY, INC., PHILIP J. SCHNEIDER, JR., WILLIAM K. GENEWICK, DANIEL C. DIAZ, DEFENDANTS-RESPONDENTS, NORMAN C. GIANCURSIO, ET AL., DEFENDANTS.

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LAW OFFICE OF DESTIN C. SANTACROSE, BUFFALO (CHERYL A. KRZYWICKI OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT JOSEF M. WOLCOTT.

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JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (HEATH J. SZYMCZAK OF COUNSEL), FOR DEFENDANT-RESPONDENT SIGMA ALPHA MU FRATERNITY, INC.

GOLDBERG SEGALLA LLP, BUFFALO (DENNIS P. GLASCOTT OF COUNSEL), FOR DEFENDANT-RESPONDENT WILLIAM K. GENEWICK.

Appeal and cross appeals from an order of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered October 12, 2012. The order, among other things, granted in part the motions and cross motions of defendants-respondents-appellants for summary judgment dismissing the complaint against them.

Now, upon reading and filing the stipulation discontinuing the appeal insofar as it concerns defendant Philip J. Schneider, Jr. signed by the attorneys for plaintiffs and Schneider on May 31, 2013, and upon the partial stipulation of discontinuance of plaintiffs' action against defendant Jonathan M. Henty signed by the attorneys for plaintiffs and Henty on December 10 and 12, 2013 and filed in the Monroe County Clerk's Office on December 18, 2013,

It is hereby ORDERED that said cross appeal taken by defendant Jonathan M. Henty is dismissed upon stipulation, and the appeal taken by plaintiffs insofar as it concerns Henty and defendant Philip J. Schneider, Jr., is dismissed upon stipulation, and the order is modified on the law by denying those parts of the motions and cross motions of defendants Steven B. Leake, Karl Smith, Corey Wilson, Kenneth M. Koperda, Theodore L. Bilohlavek, and Nathan P. Zilak for summary judgment dismissing the third cause of action against them, granting those parts of the motions and cross motions of defendants Leake, Corey R. Schlobohm, Josef M. Wolcott, Andrew Leonello, Nicholas E. Hooks, Andrew M. Morgan, Smith, Wilson, Koperda, Jason P. Barry, Jr., Bilohlavek and Zilak, seeking summary judgment dismissing the fourth and fifth causes of action against them, and denying those parts of the motions and cross motions of defendants Leake, Schlobohm, Wolcott, Leonello, Hooks, Morgan, Smith, Wilson, Koperda, Barry, Bilohlavek, Zilak, William K. Genewick and Daniel C. Diaz for summary judgment dismissing the eighth cause of action against them, and as modified the order is affirmed without costs.

Opinion by SCUDDER, P.J.:

I

Plaintiffs commenced this action seeking damages for injuries that Bryan Parslow (plaintiff) sustained when he fell out of a second-story bathroom window while attending a party at "the Roxbury," a residence owned and managed by defendant Mr. G. Rentals, LLC, which in turn is owned solely by defendant Norman C. Giancursio. All of the defendants-respondents-appellants except Jonathan M. Henty (resident defendants), rented individual rooms inside the Roxbury and, pursuant to their leases, were authorized to use and were required to clean the common areas, kitchens and bathrooms inside the residence. The resident defendants, Henty and others held themselves out as the Delta Iota chapter of a fraternity known as Sigma Alpha Mu, but it is undisputed that defendant Sigma Alpha Mu Fraternity, Inc. (National), terminated its relationship with the Delta Iota chapter in 2005.

As relevant on the appeal and cross appeals, the resident defendants, and defendants Daniel C. Diaz and William K. Genewick, individually moved or cross-moved for summary judgment dismissing the complaint against them, and the National cross-moved for summary judgment dismissing the complaint against it. Supreme Court granted the motion of the National in its entirety and dismissed the complaint against it. The court also dismissed the 8th, 11th, and 12th causes of action. The court dismissed the third cause of action, for premises liability, insofar as it was asserted against resident defendants Steven B. Leake, Karl Smith, Corey Wilson, Kenneth M. Koperda, Theodore L. Bilohlavek and Nathan P. Zilak. The court denied the motions and cross motions of the remaining resident defendants, as well as the motion of Diaz, insofar as each sought dismissal of the third cause of action against them. The court dismissed the fourth cause of action, for negligent supervision, insofar as it was asserted against defendants Philip J. Schneider, Jr. and Genewick, but denied those parts of the motions and cross motions of the resident defendants and Diaz insofar as they sought summary judgment dismissing that cause of action against them. The court dismissed the fifth cause of action, alleging violations of General Obligations Law § 11-100 and Alcoholic Beverage Control Law § 65, insofar as it was asserted against Schneider. With respect to Genewick, Diaz and the resident defendants, the court granted their motions and cross motions seeking dismissal of that cause of action but only insofar as it was asserted by plaintiff. The court denied the motions and cross motions on the fifth cause of action insofar as they related "to the claims of Beth Parslow."

On this appeal and these cross appeals, we address the court's determinations with respect to the third, fourth, fifth and eighth causes of action as well as the court's dismissal of the entire complaint against the National. We note that, following submission of their appellate brief, plaintiffs withdrew their appeal insofar as it concerns Schneider and Henty, and Henty withdrew his cross appeal against plaintiffs.

II

We agree with plaintiffs that the court erred in dismissing the third cause of action against Leake, Smith, Wilson, Koperda, Bilohlavek and Zilak, and we reject the contentions of Schlobohm, Wolcott, Leonello, Hooks, Morgan, and Barry that the court erred in refusing to dismiss that cause of action against them. The third cause of action alleges that the resident defendants were responsible for the maintenance and upkeep of the Roxbury and that they failed in their duty to keep the property in a safe and proper condition. It is well settled that " '[l]iability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of [the] premises' " (*Clifford v Woodlawn Volunteer Fire Co., Inc.*, 31 AD3d 1102, 1103; *see Knight v Realty USA.COM, Inc*., 96 AD3d 1443, 1444). Thus, a tenant, i.e., one who both occupies and controls the property, "has a common-law duty to keep the premises it occupies in a reasonably safe condition, even when the landlord has explicitly agreed in the lease to maintain the premises" (*Reimold v Walden Terrace, Inc.*, 85 AD3d 1144, 1145; *see Milewski v Washington Mut., Inc.*, 88 AD3d 853, 854-855).

With respect to the resident defendants, we agree with plaintiffs that they are not entitled to summary judgment dismissing the third cause of action against them. Preliminarily, we reject the contentions of some of the resident defendants that they are entitled to dismissal of the third cause of action against them because plaintiff is unable to identify what may have caused him to fall from the window "without engaging in speculation" (*Lane v Texas Roadhouse Holdings, LLC*, 96 AD3d 1364, 1364 [internal quotation marks omitted]).

> "It is well established . . . that [a] moving party must affirmatively [demonstrate] the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof . . . Although [m]ere conclusions based upon surmise, conjecture, speculation or assertions are without probative value . . . , a case of negligence based wholly on circumstantial evidence may be established if the plaintiffs show[ ] facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" (*id.* at 1364-1365 [internal quotation marks omitted]; *see Rothbard v Colgate Univ.*, 235 AD2d 675, 678).

Here, although plaintiff was unable to recall the circumstances of his fall from the second-story window, the resident defendants submitted evidence from which negligence and causation may be reasonably inferred (*see Lane,* 96 AD3d at 1364-1365; *Rothbard*, 235 AD2d at 678; *cf. Smart v Zambito*, 85 AD3d 1721, 1721-1722). We thus conclude that the burden never shifted to plaintiffs to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

As tenants of the Roxbury, the resident defendants both occupied and controlled the premises and thus "owe[d] a duty of reasonable care to maintain [the] property in a safe condition and to give warning of unsafe conditions that are not open and obvious" (*Barry v Gorecki*, 38 AD3d 1213, 1216; *see Duclos v County of Monroe*, 258 AD3d 925, 926; *see also Milewski*, 88 AD3d at 854-855*; Reimold*, 85 AD3d at 1145; *see generally Basso v Miller*, 40 NY2d 233, 240-241). Although the resident defendants rented individual rooms inside the residence, they each exercised control over the bathrooms inside the Roxbury and were required, pursuant to the terms of their leases, to clean those bathrooms (*cf. Rothstein v 400 E. 54th St. Co.*, 51 AD3d 431, 431-432).

Having concluded that the resident defendants had a duty to maintain the bathrooms of the Roxbury in a reasonably safe condition, we now address whether those defendants breached that duty. As the Court of Appeals has recognized, a determination "whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [internal quotation marks omitted]; *see Bielicki v Excel Indus., Inc.*, 104 AD3d 1318, 1318). In our view, the resident defendants failed to establish as a matter of law that the window from which plaintiff fell did not constitute a dangerous condition on the night of the incident. The window was 78 inches high and 35 inches wide, and the window sill was "extremely low," measuring only 13¾ inches above the floor. When fully opened, the opening measured 39 inches in height. The window had no screen or fall protection device and, on the night of the incident, it was fully open and was covered by blinds.

While the resident defendants established that the Roxbury had been recently inspected by a code enforcement officer and that a new certificate of occupancy had been issued, the "alleged compliance with the applicable statutes and regulations is not dispositive of the question whether [the resident defendants] satisfied [their] duties under the common law" (*Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 872; *cf. Hyman v Queens County Bancorp, Inc*., 3 NY3d 743, 744-745). In our view, despite the property's apparent compliance with the local statutes and regulations, a jury could nevertheless determine that the absence of a screen or fall protection device in the window constituted a dangerous condition (*see Radcliffe v Hofstra Univ.*, 200 AD2d 562, 563; *Yahudah v Metro N. Riverview House*, 129 AD2d 429, 431; *see also Rothbard*, 235 AD2d at 677-678). Inasmuch as the resident defendants failed to establish as a matter of law that they did not breach their duty to maintain the premises in a reasonably safe condition, the burden never shifted to plaintiffs to raise a triable issue of fact (*see generally Alvarez*, 68 NY2d at 324).

We further conclude that the resident defendants failed to establish as a matter of law that the hazard posed by the window was open and obvious and thus that they had no duty to warn plaintiff of the hazard it presented. "Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances . . . A condition that is ordinarily apparent to a person making reasonable use of his or her

senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (*Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 1533 [internal quotation marks omitted]). As a side matter, we note that, even if the resident defendants had no duty to warn, their duty to keep the premises in a reasonably safe condition would not thereby be impacted (*see Pelow v Tri-Main Dev.*, 303 AD2d 940, 941).

The resident defendants further contend that they are entitled to summary judgment dismissing the third cause of action against them because they did not have actual or constructive notice of the allegedly dangerous condition. We reject that contention. "In seeking summary judgment dismissing the [third cause of action], [the resident] defendant[s] had the initial burden of establishing that [they] did not create the alleged[ly] dangerous condition and did not have actual or constructive notice of it" (*King v Sam's E., Inc.*, 81 AD3d 1414, 1414-1415 [internal quotation marks omitted]*; see Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1468-1469). Inasmuch as plaintiffs did not assert that the resident defendants created the allegedly dangerous condition, "the only issue before the court was whether [they] had actual or constructive notice thereof" (*Navetta*, 106 AD3d at 1469).

While some of the resident defendants established that they lacked actual notice of the condition, none of them established as a matter of law that they lacked constructive notice of it. "To constitute constructive notice, a defect [or dangerous condition] must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant[s] . . . to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837; *see Navetta*, 106 AD3d at 1469). Moreover, in order to establish the notice element in such a negligence claim, a plaintiff is required to demonstrate only that the defendant had notice of the condition that the plaintiff alleges was dangerous; the plaintiff is "not required to demonstrate that [the] defendant[] knew that th[e] condition[] [was] dangerous" (*Harris v Seager*, 93 AD3d 1308, 1309).

Contrary to the resident defendants' contentions, we conclude that they failed to meet their initial burden on the issue of constructive notice. Based on the evidence submitted by the resident defendants, it appears that virtually all of the windows on the second floor are the same size and that most, if not all, of them lacked screens and fall protection devices. Indeed, the evidence submitted by some of the resident defendants established that they were well aware that the condition that plaintiffs allege was dangerous "existed prior to the accident elsewhere in the building" (*Radnay v 1036 Park Corp.*, 17 AD3d 106, 108). Moreover, the evidence in the record establishes that the conditions of the windows on the second floor are visible and apparent to anyone looking at the residence from the outside and to anyone who had been anywhere on the second floor. Although some of the resident defendants may not have entered the subject bathroom in the short time in which they had resided at the Roxbury, we nevertheless conclude that the submissions of the resident defendants "raise issues of fact whether the [dangerous condition]

'was visible and apparent and existed for a sufficient length of time prior to plaintiff's fall to permit [them] to discover and remedy it' " (*Navetta*, 106 AD3d at 1469; *see generally Gordon*, 67 NY2d at 837). The burden thus never shifted to plaintiffs to raise a triable issue of fact (*see generally Alvarez*, 68 NY2d at 324).

III

With respect to the fourth cause of action, however, we agree with the resident defendants that the court erred in denying their motions and cross motions seeking summary judgment dismissing that cause of action against them. Plaintiffs alleged, inter alia, that the resident defendants served alcohol, permitted alcohol to be served or permitted individuals to bring alcohol to the party. As a result of the consumption of alcohol on the premises, attendees and guests, such as plaintiff, became intoxicated. Plaintiffs further alleged that the resident defendants had control over the attendees and guests and should have known of their intoxication. According to plaintiffs, the resident defendants "had the opportunity and duty to supervise the attendees and guests" and "had a duty to act in a reasonable manner to prevent harm to the attendees and guests." Plaintiffs thus alleged that the resident defendants were negligent in failing to supervise the 18-year-old plaintiff and that, as a result of that negligence, plaintiff "was caused to fall out of" the second-story bathroom window.

Hosts of parties where alcohol is consumed in a home that they either own or occupy risk exposure to liability under two separate and distinct theories of negligence. One theory is based on their duties as owners or occupiers of the premises "to control the conduct of third persons for the protection of others on the premises" (*Dynas v Nagowski*, 307 AD2d 144, 147), and the other theory is based on the duty of adults to "provide[] adequate supervision for minor guests who bec[ome] intoxicated at their home" (*Aquino v Higgins*, 15 NY3d 903, 905). We address first the duties of owners or occupiers of property.

> "Landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property . . . In particular, they have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control . . . Applying this rationale, lower courts have recognized that a landowner may have responsibility for injuries *caused by* an intoxicated guest . . . Significantly, however, these decisions have uniformly acknowledged that liability may be imposed only for injuries that occurred on [a] defendant's property, or in an area under [a] defendant's control, where [the] defendant had the opportunity to supervise the intoxicated guest . . . That duty emanated not from the provision of alcohol but from the obligation of a landowner to

> keep its premises free of known dangerous conditions, which may include intoxicated guests" (*D'Amico v Christie*, 71 NY2d 76, 85 [emphasis added]).

The duty established in *D'Amico* is "the duty to control the conduct of third persons *for the protection of others* on the premises," and that duty applies to landowners as well as those who are in control or possession of the property (*Dynas*, 307 AD2d at 147 [emphasis added]). In essence, the intoxicated guest becomes a dangerous condition, and the "common-law doctrine relating to landowners' liability for dangerous conditions on their land [is meant to] protect third persons injured *by* intoxicated guests" (*D'Amico,* 71 NY2d at 87 [emphasis added]; *see Sheehy v Big Flats Community Day*, 73 NY2d 629, 636-637; *see e.g. Demarest v Bailey*, 246 AD2d 772, 773; *Comeau v Lucas*, 90 AD2d 674, 675; *cf. Pettit v Green*, 104 AD3d 1149, 1150; *Ahlers v Wildermuth*, 70 AD3d 1154, 1154-1155; *McGlynn v St. Andrew Apostle Church*, 304 AD2d 372, 373, *lv denied* 100 NY2d 508). As the Court of Appeals noted in *Sheehy*, "the courts of this State have consistently refused to recognize a common-law cause of action against providers of alcoholic beverages in favor of persons injured as a result of their own voluntary intoxication" (73 NY2d at 636). The only recognized exception is "where a property owner has failed to protect *others* on the premises, or in other areas within the property owner's control, from the misconduct of an intoxicated person, at least when the opportunity to supervise was present" (*id.* at 637 [emphasis added]). "[T]hat exception has *no application* in a case such as this, which involves an attempt to recover by the person who voluntarily became intoxicated" (*id.* [emphasis added]).

With respect to the second theory of negligence, i.e., negligent supervision, that theory imposes liability on *adults* who fail to supervise intoxicated *minors* (*see generally Aquino*, 15 NY3d at 905). The duty to supervise in such instances arises from the fact that

> "[a] person, other than a parent, who undertakes to control, care for, or supervise an infant, is required to use reasonable care to protect the infant over whom he or she has assumed temporary custody or control. Such a person may be liable for any injury sustained by the infant which was proximately caused by his or her negligence. While a person caring for entrusted children is not cast in the role of an insurer, such an individual is obliged to provide adequate supervision and may be held liable for foreseeable injuries proximately resulting from the negligent failure to do so" (*Appell v Mandel*, 296 AD2d 514, 514).

In *Aquino*, the Court was addressing the theories of liability against the adult homeowners (parent-defendants) related to injuries sustained by an intoxicated minor. In that case, numerous 13- and 14-

year-old children were at a party hosted by one of the parent-defendants' children with the permission of the parent-defendants. No alcohol was to be permitted but, unbeknownst to the parent-defendants, the children consumed alcohol in the basement, and several became intoxicated. The parent-defendants learned of the consumption of alcohol and intoxication when they went into the basement at the end of the party and observed beer cans (*id.*, 68 AD3d 1650, 1650-1652, *revd* 15 NY3d 903). The parent-defendants observed all of the guests, and there were conflicting reports on the issue whether the minor plaintiff appeared to be intoxicated. The parent-defendants attempted to ensure that all of the minor guests had a safe ride home. The minor plaintiff was injured in a car accident after leaving the parent-defendants' home. The Court of Appeals concluded that there was a triable issue of fact whether the parent-defendants "properly supervised [the minor guests'] departure from the premises" (*id.*, 15 NY3d at 905; *see Appell*, 296 AD2d at 514).

In our view, the use of the word "supervise" in many of the *D'Amico*, i.e., landowner liability, cases has caused courts to conflate the idea of landowner liability with liability for negligent supervision of minors. An example of that conflation is found in *Struebel v Fladd* (75 AD3d 1164), a recent decision of this Court. While not all of the relevant facts are contained in the reported decision, we may take judicial notice of the record in that appeal (*see Edgewater Constr. Co., Inc. v 81 & 3 of Watertown, Inc*. [appeal No. 2], 24 AD3d 1229, 1231). In *Struebel*, the decedent was a 17-year-old minor who became intoxicated at a party hosted by another minor. The decedent fell from a second-story porch and died as a result of his injuries. Decedent's mother, individually and as the administrator of his estate, commenced an action against, inter alia, the minor host's mother and her fiancé, who were the two adults residing at the property with the minor host. While we dismissed the action against the fiancé on the ground that "the record establishe[d] that [he] was not present at the house at any time that evening" (*id.*, 75 AD3d at 1164), we refused to dismiss the claim for negligent supervision against the minor host's mother, finding that there was evidence in the record that she "was at the house at various times during the evening in question" (*id.*). We concluded that there were issues of fact whether the minor host's mother "had the opportunity to control the conduct of third persons on [the] premises and [was] reasonably aware of the need for such control . . . , and thus [could] be held liable for negligent supervision" (*id.* at 1165 [internal quotation marks omitted]). Although we cited to *Dynas* (307 AD2d at 147), *Place v Cooper* (35 AD3d 1260, 1261) and *D'Amico* (71 NY2d at 85) in support of our holding, those cases involved plaintiffs who had been injured *by* an intoxicated adult guest. In *Struebel*, however, the intoxicated minor injured himself. As noted above, the Court of Appeals has stated that liability under common-law negligence "has *no application* in a case . . . [that] involves an attempt to recover by the person who voluntarily became intoxicated" (*Sheehy*, 73 NY2d at 637 [emphasis added]). The duty of the minor host's mother to supervise the intoxicated decedent emanated not from her duty as a landowner but, rather, from the duty to protect minors over whom she had assumed temporary custody or control, regardless of how they became

intoxicated (*see Aquino*, 15 NY3d at 905; *cf. Rudden v Bernstein*, 61 AD3d 736, 738, *lv dismissed* 14 NY3d 768, *lv denied* 17 NY3d 712; *Moreno v Weiner*, 39 AD3d 830, 831, *lv denied* 9 NY3d 807). We thus conclude that *Struebel* should not be cited for the proposition that adult hosts of a party may be liable to an adult guest who is injured as a result of that guest's own voluntary intoxication.

In our view, this case is indistinguishable from *O'Neill v Ithaca Coll.* (56 AD3d 869, 871-872), in which a college student voluntarily consumed alcohol before falling from a second-floor balcony. Inasmuch as there was no proof that a third person was involved in the injured plaintiff's fall, the Third Department concluded that there was no basis to hold the party hosts liable, i.e., no duty to the injured plaintiff that was breached (*see id.*). While the dissent correctly notes that the Third Department in *O'Neill* wrote that the injured plaintiff had not been stumbling or slurring her words, and was not otherwise unable to control her physical abilities, the Court did not actually hold that liability would have attached if she had demonstrated those telltale signs of intoxication. Because the injured plaintiff in *O'Neill* had not displayed such signs, the Court did not decide the issue whether liability could have attached under different circumstances. Unlike the dissent, we do not attach any significance to the dicta of the Third Department in *O'Neill*.

It is the position of our dissenting colleague that *Sheehy* applies only to the negligent provision of alcohol and not to the negligent supervision of intoxicated adults. We cannot agree with that position. The issue in this case, insofar as it relates to the negligent supervision claim, is whether the resident defendants had a duty *to the adult plaintiff* to supervise him and to protect him from injuring himself as a result of his voluntary intoxication. Any duty of the resident defendants to protect the intoxicated plaintiff from himself would come from the fact that they hosted the party, i.e., they provided the alcohol. Otherwise, plaintiff could sue anyone attending the party for failing to supervise him. In addressing the injured plaintiff's "common-law claim," the Court of Appeals in *Sheehy* noted that the courts of New York had rejected "any argument that a duty exists to protect a consumer of alcohol from the results of his or her own voluntary conduct" (73 NY2d at 636). We thus conclude that, because plaintiff was not a minor entrusted to the care of the resident defendants, the resident defendants did not have a duty to protect plaintiff from the results of his own voluntary intoxication.

IV

The resident defendants further contend that the court erred in failing to dismiss the fifth cause of action against them in its entirety. We agree with the resident defendants in that respect, but we also agree with plaintiffs that the court erred in dismissing the eighth cause of action against the resident defendants, and Genewick and Diaz. The fifth cause of action alleged violations of General Obligations Law § 11-100 and Alcoholic Beverage Control Law § 65, but was asserted solely by plaintiff and not by plaintiff Beth Parslow, his mother. The eighth cause of action also alleged a violation of

General Obligations Law § 11-100, but was asserted solely by plaintiff's mother. She alleged that the resident defendants, and Genewick and Diaz, among others, provided or procured the alcohol consumed by plaintiff, who was under the age of 21. She further alleged that, as plaintiff's mother, she was caused and compelled to incur medical and other expenses after plaintiff fell out of a second-story window while in an intoxicated condition. In its decision, the court dismissed the fifth cause of action "as to the claims of plaintiff," but refused to dismiss the fifth cause of action "as to the claims of Beth Parslow." Finding that the eighth cause of action "seem[ed] in the main to assert a common law theory of liability for furnishing alcohol to [someone under the age of 21]," the court dismissed that cause of action.

The resident defendants contend on their cross appeals that the court should have dismissed the fifth cause of action against them in its entirety. "Alcoholic Beverage Control Law § 65 does not create an independent statutory cause of action" (*Sullivan v Mulinos of Westchester, Inc.*, 73 AD3d 1018, 1020), and it is well established that General Obligations Law § 11-100 does not provide a right of recovery for persons under the age of 21 (underage persons) who seek to recover for injuries suffered "as a result of their own intoxication" (*Rudden*, 61 AD3d at 738*; see Sheehy*, 73 NY2d at 635). Inasmuch as the fifth cause of action was asserted solely by plaintiff, i.e., an underage person who was injured as a result of his own intoxication, we conclude that there was no basis upon which to hold the resident defendants liable under that cause of action.

Plaintiffs contend on their appeal that the court erred in dismissing the eighth cause of action against the resident defendants, and Genewick and Diaz. We again agree. Contrary to the court's interpretation, the eighth cause of action alleged a violation of General Obligations Law § 11-100, and was asserted by plaintiff's mother only. It is well established that "she can recover for medical [and other] expenses she incurred on behalf of [plaintiff]" (*Rudden*, 61 AD3d at 738; *see McArdle v 123 Jackpot, Inc.*, 51 AD3d 743, 746).

Although the resident defendants contend that they cannot be liable under General Obligations Law § 11-100 because they were merely "passive participant[s]" who did not play "an indispensable role" in procuring the alcohol consumed by plaintiff the night of the incident (*Rust v Reyer*, 91 NY2d 355, 361), we reject that contention. General Obligations Law § 11-100 (1) provides that

> "[a]ny person . . . injured in person, property, means of support or otherwise, by reason of the intoxication or impairment of ability of any person under the age of twenty-one years . . . shall have a right of action to recover actual damages against any person who knowingly causes such intoxication or impairment of ability by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that

> such person was under the age of twenty-one years."

With respect to the resident defendants and Diaz, we conclude that they failed to establish as a matter of law that they did not unlawfully furnish or unlawfully assist in procuring alcoholic beverages for plaintiff. The evidence submitted by the resident defendants and Diaz in support of their motions and cross motions raises issues of fact whether they, as members of the defunct local fraternity or as residents of the Roxbury, participated in "a deliberate plan to provide, supply or give alcohol to . . . underage person[s]" (*Rust*, 91 NY2d at 360). Indeed, the evidence submitted by the resident defendants and Diaz raises issues of fact whether each of them was involved in the plan to host a party at which alcohol would be served to underage persons, and whether they each helped to procure the alcohol for that party through dues, and/or fees charged to those attending the party (*see id*. at 357; *cf. Cannon v Giordano*, 93 AD3d 1329, 1330, *lv denied* 19 NY3d 805; *Lombart v Chambery*, 19 AD3d 1110, 1111; *McGlynn*, 304 AD2d at 373).

With respect to Genewick, we agree with plaintiffs that the eighth cause of action should be reinstated with respect to him inasmuch as it is undisputed that he furnished or assisted in procuring some of the alcohol consumed by plaintiff on the night of the incident (*see* General Obligations Law § 11-100).

We thus conclude that the eighth cause of action should be reinstated against the resident defendants, and Genewick and Diaz.

V

Finally, we reject plaintiffs' contention that the court erred in dismissing the complaint against the National. That defendant submitted evidence in support of its motion establishing that it had disbanded the local chapter in 2005 and did not reinstate it thereafter. We thus conclude that the National demonstrated as a matter of law that it had no agency relationship with or control over the local chapter at the time of the incident (*see Parlato v Equitable Life Assur. Socy. of U.S.*, 299 AD2d 108, 116-117, *lv denied* 99 NY2d 508; *cf. Oja v Grand Ch. of Theta Chi Fraternity*, 255 AD2d 781, 781-782). Although the resident defendants and others continued to represent themselves as being affiliated with the National, a claim of apparent agency requires that the principal engage in misleading conduct that induces reliance by a third party (*see Hallock v State of New York*, 64 NY2d 224, 231; *King v Mitchell*, 31 AD3d 958, 959). Agents cannot "imbue [themselves] with apparent authority" through their own acts (*Hallock*, 64 NY2d at 231; *see Children's Day Treatment Ctr. & School, Inc. v Dorn*, 83 AD3d 425, 425).

VI

Accordingly, we conclude that the order should be modified by denying those parts of the motions and cross motions of Leake, Smith, Wilson, Koperda, Bilohlavek and Zilak seeking summary judgment

dismissing the third cause of action against them. We also conclude that the order should be further modified by granting those parts of the motions and cross motions of the resident defendants seeking summary judgment dismissing the fourth and fifth causes of action against them, and denying those parts of the motions and cross motions of the resident defendants, and Genewick and Diaz, seeking summary judgment dismissing the eighth cause of action against them and reinstating that cause of action against them.

All concur except FAHEY, J., who dissents in part and votes to modify in accordance with the following Opinion:

I

I agree with the majority that Supreme Court erred in dismissing the third cause of action, for premises liability, against defendants-respondents-appellants Steven B. Leake, Karl Smith, Corey Wilson, Kenneth M. Koperda, Theodore L. Bilohlavek and Nathan P. Zilak. I also agree with the majority that the court erred in failing to dismiss the fifth cause of action in its entirety against those whom my colleagues in the majority characterize as the resident defendants, i.e., all of the defendants-respondents-appellants except Jonathan M. Henty. The fifth cause of action was asserted solely by Bryan Parslow (plaintiff) and alleged violations of General Obligations Law § 11-100 and Alcoholic Beverage Control Law § 65. Likewise, I agree with the majority that the court erred in dismissing the eighth cause of action, which was asserted solely by plaintiff Beth Parslow and which alleged a violation of General Obligations Law § 11-100, against the resident defendants, and defendants William K. Genewick and Daniel C. Diaz.

I cannot agree with the majority, however, that the court erred in denying the motions and cross motions of the resident defendants seeking summary judgment dismissing the fourth cause of action, for negligent supervision, against them. In my view, the resident defendants had a duty to supervise and control their guests, including plaintiff, at the party at issue, and I conclude that the order should be affirmed to that extent. I therefore respectfully dissent in part.

II

As the majority notes, this action arises from an incident in which plaintiff fell out of a second-story window while attending a party at a house owned and managed by defendant Mr. G. Rentals, LLC. The house was occupied by 20 tenants and all of the resident defendants rented individual rooms in the house. The resident defendants and others held themselves out as members of the Sigma Alpha Mu fraternity.

The determination to hold the party was made during a weekly meeting of the fraternity attended by nearly everyone who lived in the house. The party involved 50 to 80 people, was concentrated in a second-floor common area of the house, and was open to anyone who had heard of it. The record establishes that each resident defendant was

aware of the party by virtue of being present at the house for some time during the party.

Guests at the party were not asked for proof of age and plaintiff, who was an 18-year-old college freshman, paid to attend the party with a group of three other friends. Plaintiff's group brought a backpack containing approximately 15 cans of beer to the party, which entitled them to a discount on their payment for admission to the party, and additional beer was also available for guests. Plaintiff initially drank beer that his group brought to the party, and he participated in a fraternity rush interview and eventually played a game of "beer pong" fueled by beer provided at the party.

Approximately one hour after participating in that "beer pong" game, plaintiff vomited, "slurred his words" and was "swaying." One of the members of plaintiff's group advised plaintiff that plaintiff "probably should get to the bathroom," which was on the second floor of the house. Plaintiff, who was obviously drunk, staggered in the direction of that room. The casing of the bathroom's window was seven feet high and four feet wide, and its sill was approximately 14 inches from the floor. The window, which was double-hung, had an opening that was three feet high and four feet wide, and it did not have a screen or fall protection device.

Shortly after entering the bathroom alone, plaintiff was discovered on the ground outside, below the bathroom window. The bathroom window was "wide open," but the window opening was concealed by horizontal blinds that covered the opening at the time plaintiff fell. The fall left plaintiff paralyzed from the waist down.

III

"Landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property" (*D'Amico v Christie*, 71 NY2d 76, 85; *see Martino v Stolzman*, 18 NY3d 905, 908). "The existence and scope of [that] duty is, in the first instance, a legal question for determination by the courts" (*Sanchez v State of New York*, 99 NY2d 247, 252; *see Di Ponzio v Riordan*, 89 NY2d 578, 583; *Kolodziejczak v Kolodziejczak*, 83 AD3d 1377, 1379; *see generally Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 236). The duty to supervise and control the conduct of third persons on premises extends to those in control or possession of the premises (*see Struebel v Fladd*, 75 AD3d 1164, 1165; *Dynas v Nagowski*, 307 AD2d 144, 147). Here, that duty extended to all resident defendants (*see O'Neill v Ithaca Coll.*, 56 AD3d 869, 871).

Courts of this State "have consistently refused to recognize a common-law cause of action against providers of alcoholic beverages in favor of persons injured as a result of their own voluntary intoxication" (*Sheehy v Big Flats Community Day*, 73 NY2d 629, 636; *see e.g. Kudisch v Grumpy Jack's, Inc.*, 112 AD3d 788, 789; *Van Neil v Hopper*, 167 AD2d 954, 954, *lv denied* 77 NY2d 804), and there is no dispute "that the mere infancy of [an] injured person does not

constitute an exception to that voluntary intoxication rule" (*Searley v Wegmans Food Mkts., Inc.*, 24 AD3d 1202, 1202). The question now before us, however, involves not the *provision* of alcohol, but the *supervision* of a voluntarily intoxicated person at a large party involving a dangerous combination of large quantities of alcohol and underage drinking.

O'Neill v Ithaca Coll. (56 AD3d 869) is instructive here. That case arose from the fall of the underage plaintiff from the balcony of an apartment during a small party. The plaintiffs commenced an action alleging that the defendant (college) was "liable for [the underage plaintiff's] injuries because, among other things, the balcony and its railings were unsafe and negligently designed" (*id.* at 869). The college subsequently commenced a third-party action seeking contribution against, inter alia, the five students who shared the subject apartment. Two of those students moved for summary judgment dismissing the third-party complaint against them, and the Third Department rejected the college's contention that the moving students were "potentially liable because they breached a duty owed to both [the] defendant and [the underage] plaintiff to control or supervise the activities of the guests at their party" (*id.* at 871). In doing so, however, the Third Department acknowledged that circumstances such as those at issue in the instant case could give rise to such a duty; to wit, that Court wrote in relevant part that,

> "[here], there was no fight nor was there proof of any uncontrolled party guests that may have led to a dangerous situation. In fact, there is no proof that a third person was involved in any way with plaintiff's fall from the balcony. Furthermore, despite proof that plaintiff drank alcohol at the party, there is no proof in this record that her consumption was anything other than voluntary (*compare Oja v Grand Ch. of Theta Chi Fraternity*, 257 AD2d 924, 925) or that her actions needed to be controlled because she was stumbling, slurring her speech or unable to control her physical abilities (*see e.g. Dollar v O'Hearn*, 248 AD2d 886, 887)."

In this case, plaintiff, who had reached the age of majority, but who was still a minor in the eyes of the law for the purpose of purchasing alcohol (*see* Alcoholic Beverage Control Law § 65 [1]), exhibited telltale signs of intoxication at a large party to which he and others were permitted to bring their own alcohol, at which no effort was made to exclude underage drinkers, and during which the hosts exhibited neither care nor concern for any intoxicated partygoer. Consequently, in my view, the resident defendants assumed a duty to supervise guests at the party, including plaintiff, through their control and possession of the house, as well as their presence at the house during at least part of that large, untamed affair.

IV

Accordingly, for the foregoing reasons, I respectfully disagree with the majority that the court erred in denying the motions and cross motions of the resident defendants seeking summary judgment dismissing the fourth cause of action, for negligent supervision, against them.

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

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CAF 13-00371

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

IN THE MATTER OF RAVEN B.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

MELISSA K.N., RESPONDENT-RESPONDENT.

NELSON LAW FIRM, MEXICO (ANNALISE DYKAS OF COUNSEL), FOR PETITIONER-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered February 11, 2013 in a proceeding pursuant to Family Court Act article 10. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is granted, respondent is adjudicated to have neglected the subject child and the matter is remitted to Family Court, Oswego County, for a dispositional hearing.

Memorandum: Since December 2010, petitioner, Oswego County Department of Social Services (DSS), had been visiting the apartment in which respondent mother had been living, and had been providing the mother with various services, including substance abuse treatment, parenting and preventative services, food vouchers, and housing support. At the time of the incident precipitating the instant neglect petition, i.e., May 28, 2012, the mother had been responsible for the care of the child for only a short time inasmuch as the child had been discharged from foster care on a trial basis in December 2011 and fully discharged on March 29, 2012. On the morning of the incident, while the mother was taking a nap, the child—then 3½ years old—left the apartment on her own, wandered approximately 1½ blocks away, and was eventually found by a neighbor, who took the child into her home and then assisted the police in attempting to locate the child's caretaker. After an unsuccessful search for the child's home, the responding police officer received the mother's address from his supervisor. Upon arriving at that address, he proceeded through an open door at the back of the residence onto a porch, loudly announced the presence of the police several times, went through a second open door leading to a stairway, again announced his presence, and then entered a third open door at the top of the stairs leading into the mother's apartment. After the police officer again announced his

presence, the mother awoke and exited her bedroom, at which point the officer informed her that her child had been located down the street.

On May 29, 2012, the child was temporarily removed from the mother's care with the mother's consent pursuant to Family Court Act § 1021 and, following a hearing pursuant to section 1027, Family Court ordered that the child be released to the mother's custody. On June 1, 2012, DSS filed the instant petition alleging that the child was neglected because she was placed at imminent risk of physical, emotional or mental harm by the mother's failure to exercise a minimum degree of care in providing the child with proper supervision, and the mother's failure to maintain a safe and sanitary residence. Following a fact-finding hearing, the court held that DSS had failed to prove by a preponderance of the evidence that the child was neglected, and DSS appeals from the order dismissing the petition. Inasmuch as we conclude that the court's determination lacks a sound and substantial basis in the record, we reverse the order, grant the petition, and remit the matter to Family Court for a dispositional hearing (*see generally Matter of Gada B. [Vianez V.]*, 112 AD3d 1368, 1369).

As an initial matter, we note that the mother was present at the fact-finding hearing, but failed to testify or present any proof. We "thus . . . draw the 'strongest inference [against her] that the opposing evidence permits' " (*Matter of Jayden B. [Erica R.]*, 91 AD3d 1344, 1345, quoting *Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79).

As relevant to the first basis for neglect alleged in the petition, a neglected child is defined as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof" (Family Ct Act § 1012 [f] [i] [B]). As the Court of Appeals has explained, "[t]he statute . . . imposes two requirements for a finding of neglect, which must be established by a preponderance of the evidence . . . First, there must be proof of actual (or imminent danger of) physical, emotional or mental impairment to the child . . . Second, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care . . . This is an objective test that asks whether a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances" (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [internal quotation marks omitted]). Moreover, it is well established that "the statutory requirement of imminent danger . . . does not require proof of actual injury" (*Matter of Ruthanne F.*, 265 AD2d 829, 830), and that "[a] single incident where the parent's judgment was strongly impaired and the child exposed to a risk of substantial harm can sustain a finding of neglect" (*Matter of Serenity P. [Shameka P.]*, 74 AD3d 1855, 1856 [internal quotation marks omitted]; *see Matter of Antonio NN.*, 28 AD3d 826, 827).

With regard to the first requirement for a finding of neglect

based on lack of proper supervision, there is no dispute that the 3½-year-old child was in imminent danger of physical, emotional, or mental impairment when she left the apartment and wandered the streets unsupervised until she was discovered by a neighbor (*see Antonio NN.*, 28 AD3d at 826-828; *Matter of Jonathan B.*, 270 AD2d 42, 42, *lv denied* 95 NY2d 765, *rearg denied* 96 NY2d 755; *see also Serenity P.*, 74 AD3d at 1855-1856), and that there was a "causal connection between the basis for the neglect petition and the circumstances that allegedly produce[d] the . . . imminent danger of impairment" (*Nicholson v Scoppetta*, 3 NY3d 357, 369).

With regard to the second requirement for a finding of neglect based on lack of proper supervision, we conclude that DSS established by a preponderance of the evidence that the imminent danger of impairment was the consequence of the mother's failure to exercise a minimum degree of parental care. "A child may be found to be neglected when the parent knew or should have known of circumstances requiring action to avoid harm or the risk of harm to the child and failed to act accordingly" (*Matter of Brian P. [April C.]*, 89 AD3d 1530, 1530; *see Antonio NN.*, 28 AD3d at 827). Here, the evidence was sufficient to meet that standard (*see Antonio NN.*, 28 AD3d at 826-828). Specifically, the evidence established that the outer door leading onto the porch was generally not locked, that the second door leading to the stairway was not always locked or that the lock was broken, and that the door leading into the apartment at the top of the stairs was never locked or that the lock was broken. The evidence also established that the mother was aware that the child was able to traverse the stairway and access the porch; thus, the mother knew, or should have known, that the child was able to open and go through unlocked doors. Following a visit from a DSS caseworker who observed the child going through the doors and traversing the stairs multiple times unsupervised and without the mother noticing, the mother was warned by the caseworker that it would be inappropriate and unsafe to allow the child to continue to do so. That knowledge, coupled with the evidence that the outer door was often unlocked or that the lock was broken, would lead a reasonably prudent parent to lock the door or otherwise act to ensure that his or her child could not get outside unsupervised before the parent fell asleep (*see Afton C.*, 17 NY3d at 9). The mother's contention that there was no evidence that the child had a propensity to go through the outer door and leave the building entirely is therefore of little consequence. Drawing the strongest inference against the mother that the opposing evidence permits (*see Jayden B.*, 91 AD3d at 1345), the mother should have known, at least, that the child had the ability to open an unlocked door, which could afford her the means of exiting the apartment on her own if left unsupervised.

Thus, although the hearing court's determinations are entitled to great deference (*see generally id.*), we conclude that the court erred in holding that DSS failed to establish, by a preponderance of the evidence, that the single incident at issue was sufficient to constitute neglect. To the contrary, we conclude that the mother was aware, or should have been aware, of the intrinsic danger of going to sleep without ensuring that the child would remain securely in the

apartment (*see Antonio NN.*, 28 AD3d at 827-828). There is no evidence that the mother suffered from any physical ailment that prevented her from properly supervising the child, nor is there any evidence that the mother took proactive steps, such as locking the door, using a child lock, or obtaining a caregiver, to prevent the child from leaving the apartment while the mother slept during the day (*cf. Matter of Janique Y.*, 256 AD2d 1053, 1054). We therefore conclude that petitioner met its burden of establishing that the imminent impairment of the child's physical, emotional, or mental condition was a consequence of the mother's failure to exercise a minimum degree of parental care (*see generally* Family Ct Act § 1012 [f] [i]; *Nicholson*, 3 NY3d at 368).

As relevant to the second basis for neglect alleged in the petition, a neglected child is defined as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care . . . in supplying the child with adequate food, clothing, [or] shelter . . . though financially able to do so or offered financial or other reasonable means to do so" (Family Ct Act § 1012 [f] [i] [A]). We conclude that the court's determination that the child was not neglected based on the condition of the mother's apartment lacks a sound and substantial basis in the record.

The evidence at the fact-finding hearing established that, in March 2012, there were several garbage bags on the porch, and in the kitchen and living room; there was a mound of toys covering the living room floor; and there were dirty dishes both overflowing the kitchen sink and stacked next to the toilet in the bathroom. In addition, the freezer was full of ice; the bottom drawer of the refrigerator contained moldy fruit floating in several inches of dirty water; and the bathroom sink was filled with a grayish-brown substance which appeared moldy and gel-like. Moreover, the evidence established that in the living room, where the child slept, cat litter and feces were in and around a large trash can lid, which was accessible to the child because the child gate in front of it was not properly secured. There was also a litter box containing cat feces in the living room, and the only barrier preventing the child's access thereto was a lawn chair. Importantly, there was evidence that the mother had previously admitted that the child had been exposed to cat feces in the past and that the mother had been warned about the safety hazards of failing to prevent the child's access to the litter and feces. There was also evidence that the child had access to the large quantities of garbage within the apartment and, during one visit by a DSS caseworker, the child was observed wearing no pants or underwear, with a disposable razor cover stuck between her buttocks. Under the above circumstances, we conclude that the unsanitary and unsafe condition of the mother's apartment posed an imminent danger of impairment to the child's physical, mental, or emotional condition (*see Matter of Sean K.*, 50 AD3d 1220, 1221; *Matter of Aiden L.*, 47 AD3d 1089, 1090; *Matter of Brian TT.*, 29 AD3d 1228, 1229; *Matter of Mary S.*, 279 AD2d 896, 898).

The court's conclusion that "the conditions in [the mother's] apartment lasted no longer than March 19th through March 26th" is unsupported by the evidence. Indeed, the evidence established that the apartment had been in deplorable condition on more than one occasion in May 2012 (*cf. Matter of Iyanah D.*, 65 AD3d 927, 927-928), including when a DSS caseworker conducted a visit and noted that the foul odor of the apartment nauseated her, and when the police officer entered the apartment on May 28, 2012 and observed garbage and clothes scattered throughout the apartment, as well as flies in the kitchen, and smelled a strong, foul odor (*see Sean K.*, 50 AD3d at 1221; *Aiden L.*, 47 AD3d at 1090; *Mary S.*, 279 AD2d at 898). The court's conclusion that the child had not been exposed to those conditions is unsupported by the evidence, and the mother's further contention that the unsafe and unsanitary condition of the apartment was transient "is not only at odds with the state of the apartment as described by [DSS's] caseworker, but also strongly suggests that she [did] not appreciate or recognize the imminent threat the[ ] conditions posed to her [3½-year-old daughter]" (*Aiden L.*, 47 AD3d at 1090). We therefore conclude that the court's determination—that the unsafe and unsanitary condition of the mother's apartment, on numerous occasions, did not place the child's physical, mental, or emotional state in imminent danger of impairment—is not supported by a sound and substantial basis in the record (*see generally Gada B.*, 112 AD3d at 1369).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 09-01189

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE L. WRAGG, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered February 25, 2009. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [3]). Contrary to defendant's contention, we conclude that, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant's contention is based primarily upon his challenge to the credibility of the victim, and there is no basis in the record before us to disturb the jury's credibility determinations (*see People v Johnson*, 94 AD3d 1563, 1564, *lv denied* 19 NY3d 962; *People v Ellison*, 302 AD2d 955, 955, *lv denied* 99 NY2d 654).

Defendant further contends that he was denied effective assistance of counsel because, inter alia, defense counsel failed to object to an investigator's testimony that constituted "inferential bolstering" of the victim's pretrial identification of defendant and because defense counsel asked questions during jury selection concerning the victim's pretrial identification. We reject that contention. With respect to the alleged inferential bolstering, we conclude that the investigator's passing reference to the victim's pre-arrest identification of "the individual" did not constitute improper bolstering inasmuch as it was "offered for the relevant, nonhearsay purpose of explaining the investigative process and completing the narrative of events leading to the defendant's arrest" several days later (*People v Rosario*, 100 AD3d 660, 661, *lv denied* 20

NY3d 1065; *see People v Perry*, 62 AD3d 1260, 1261, *lv denied* 12 NY3d 919; *People v Mendoza*, 35 AD3d 507, 507, *lv denied* 8 NY3d 987). The failure to make an objection that has "little or no chance of success" does not constitute ineffective assistance of counsel (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *see People v Dashnaw*, 37 AD3d 860, 863, *lv denied* 8 NY3d 945). In any event, even assuming, arguendo, that the testimony constituted inferential bolstering, we note that defense counsel "may have had a strategic reason for failing to [object to such testimony] inasmuch as he may not have wished to draw further attention to [such testimony]" (*People v Williams*, 107 AD3d 1516, 1517, *lv denied* 21 NY3d 1047; *see People v Bethune*, 80 AD3d 1075, 1076-1077, *lv denied* 17 NY3d 792).

With respect to defense counsel's reference during jury selection to the victim's prior identification of defendant, we conclude that defendant failed to " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's allegedly deficient conduct" (*People v Caban*, 5 NY3d 143, 152; *see People v Benevento*, 91 NY2d 708, 712). Identification was the central issue at trial, and defense counsel's primary strategy was to suggest that the victim had misidentified defendant as the perpetrator. The specific question during jury selection to which defendant objects was designed to enable defense counsel to determine whether the particular prospective juror believed that the victim's identification could be considered reliable when it was not contemporaneous with the incident and, thus, the question was consistent with defense counsel's strategy of attempting to discredit the reliability of the victim's identification. Viewing defense counsel's representation as a whole, we conclude that defendant received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant further contends that he was denied a fair trial based upon the cumulative effect of prosecutorial misconduct. Defendant failed to preserve his contention for our review with respect to many of the instances of alleged prosecutorial misconduct (*see People v Scission*, 60 AD3d 1391, 1392, *lv denied* 12 NY3d 859, *reconsideration denied* 13 NY3d 749), and we conclude in any event that "[a]ny 'improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Johnson*, 303 AD2d 967, 968, *lv denied* 100 NY2d 583).

We reject defendant's contention that the photo array was unduly suggestive and thus that County Court erred in refusing to suppress the identification evidence. The People met their initial burden of establishing the reasonableness of the police conduct with respect to the photo array, and defendant failed to meet his ultimate burden of proving that the identification procedure was unduly suggestive (*see generally People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833).

Finally, there is no merit to defendant's further contention that he was improperly sentenced as a second child sexual assault felony

offender (*see generally People v Armbruster*, 32 AD3d 1348, 1349).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00285

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

A&M GLOBAL MANAGEMENT CORP.,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

NORTHTOWN UROLOGY ASSOCIATES, P.C., DEFENDANT,
JOHN M. ROEHMHOLDT, DEFENDANT-APPELLANT-RESPONDENT,
AND JACEK T. SOSNOWSKI, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

DAMON MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

HOGAN WILLIG, PLLC, AMHERST (ROBERT MICHALAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (EARL K. CANTWELL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from a judgment of the Supreme Court, Erie County (John A. Michalek, J.), entered October 17, 2012. The judgment awarded plaintiff money damages against defendant John M. Roehmholdt and dismissed plaintiff's claims against defendant Jacek T. Sosnowski.

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

Memorandum: Defendants John M. Roehmholdt and Jacek T. Sosnowski were the sole directors and equal shareholders of defendant Northtown Urology Associates, P.C. (Northtown), and both were employed by Northtown as physicians. Northtown leased from plaintiff certain office space for a 10-year-term beginning in March 2004.

Sometime in 2006, Sosnowski began negotiations to move his practice out of state and, either at the end of October or in early November of that year, he signed a contract to do so. On November 20, 2006, Sosnowski advised Roehmholdt of his intention to move out of state, and the two, through their attorneys, subsequently entered into negotiations to determine the extent of Northtown's obligations to Sosnowski under their existing employment and buy/sell agreements. Sosnowski accepted the majority of the medical equipment and certain office furniture owned by Northtown in full satisfaction of Northtown's obligations to him, acceding to that arrangement only

because Northtown refused to satisfy its obligations to him in cash. Sosnowski ceased practicing with Northtown by mid-January 2007, and he resigned as a director of the corporation on or about January 23, 2007, tendering his stock to the corporation on that same date.

At that time, Roehmholdt did not believe that he could continue Northtown's practice without the assistance of another physician, nor did he believe that he could have recruited another physician in sufficient time to continue the Northtown practice. Consequently, in mid-December 2006, Roehmholdt began employment negotiations with another urology practice, Western New York Urology Associates (WNYUA). WNYUA was not interested in Northtown's medical equipment or its office space, but was interested in employing Roehmholdt and accepting his patients, and Roehmholdt was eventually hired by WNYUA.

In conjunction with his hiring at WNYUA and at WNYUA's expense, on or about January 15, 2007, Roehmholdt sent a letter to his and Sosnowski's patients informing them that, starting on February 5, 2007, he would practice with WNYUA, that "all office appointments [would] be seen at [WNYUA], and that patients were free to pick up their medical records from him if they wished to see a different urologist." Roehmholdt also stated in the letter that, "[i]n considering how [he] could best continue to serve all of the patients in the practice, [he] came to the conclusion that joining a strong, progressive group that practices caring and competent urology would serve [patients] best. [WNYUA] enjoys a well earned reputation as a leader in its field and offers to its patients state of the art care." He further stated in the letter that he would "continue to see all patients as before, just in a different office location."

On February 2, 2007, Sosnowski picked up the agreed-upon medical equipment and office furniture and moved out of state. Northtown subsequently vacated the premises it leased from plaintiff and, beginning with the March 2007 payment, ceased paying rent to plaintiff. Plaintiff commenced this action seeking damages for, inter alia, Northtown's alleged breach of its lease with plaintiff. Supreme Court (Curran, J.), granted in part plaintiff's motion seeking summary judgment against Northtown on the first through fourth and sixth causes of action by granting partial summary judgment against Northtown on liability on the first, second and sixth causes of action, which alleged, respectively, that Northtown was in default under the lease, that plaintiff was entitled to recover from Northtown money that it had expended for Northtown's specialized use of the property, and that Northtown was obligated to pay plaintiff reasonable attorneys' fees and costs associated with this action. The court also granted plaintiff a money judgment against Northtown on the third cause of action, which alleged that Northtown was liable for certain operating costs. In addition, the court, inter alia, granted the respective cross motions of Roehmholdt and Sosnowski for summary judgment dismissing the eighth "cause of action," by which plaintiff sought to pierce Northtown's corporate veil in order to recover damages from Roehmholdt and Sosnowski individually, but also afforded plaintiff leave to amend the complaint "to re-plead any facts necessary to add allegations for recovery against . . . Sosnowski and

Roehmholdt on the basis of piercing the corporate veil."

Plaintiff subsequently served a revised amended complaint in which it asserted additional facts supporting its attempt to pierce Northtown's corporate veil in order to recover damages from Roehmholdt and Sosnowski individually. Defendants joined issue through separate answers, and the matter eventually proceeded to a bench trial, prior to which the parties stipulated that the damages against Northtown would be $200,000. Following trial, Supreme Court (Michalek, J.), granted a judgment that, inter alia, awarded plaintiff money damages against Roehmholdt pursuant to the theory of piercing the corporate veil, dismissed plaintiff's remaining causes of action against Roehmholdt, including the seventh cause of action, for fraudulent conveyance, and dismissed the revised amended complaint against Sosnowski. Following further motion practice, the court granted an order that, inter alia, awarded Sosnowski attorneys' fees and costs against plaintiff. That order also awarded plaintiff attorneys' fees and costs against Roehmholdt, but the amount awarded was less than what plaintiff had requested. In appeal No. 1, Roehmholdt appeals and plaintiff cross-appeals from the judgment and, in appeal No. 2, plaintiff appeals from the order.

Contrary to Roehmholdt's contention in appeal No. 1, we conclude that the court did not err in piercing the corporate veil and finding Roehmholdt personally liable for Northtown's obligations to plaintiff. As a preliminary matter, we note that, "[o]n an appeal from a judgment rendered after a nonjury trial, our scope of review is as broad as that of the trial court (*see Matter of Capizola v Vantage Intl.*, 2 AD3d 843, 844 [2003]). Upon such a review, the record should be 'viewed in the light most favorable to sustain the judgment' (*Farace v State of New York*, 266 AD2d 870, 871 [1999]; *see Parone v Rivers*, 84 AD2d 686 [1981]), and this Court should evaluate 'the weight of the evidence presented and grant judgment warranted by the record, giving due deference to the trial court's determinations regarding witness credibility, so long as those findings could have been reached upon a fair interpretation of the evidence' (*New York Tel. Co. v Harrison & Burrowes Bridge Contrs.*, 3 AD3d 606, 608 [2004] [internal quotation marks and citations omitted]). '[T]he decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses' (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992] [internal quotation marks omitted], *rearg denied* 81 NY2d 835)" (*Matter of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170).

With respect to piercing the corporate veil, we note that it is not " 'a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners' " (*Nasca v DelMonte*, 111 AD3d 1427, 1429, quoting *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141). " 'A plaintiff seeking to pierce the corporate veil must establish that the

owners, through their domination, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff . . . Factors to be considered in determining whether [a corporation] has abused [that] privilege . . . include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use' " (*Abbott v Crown Mill Restoration Dev., LLC*, 109 AD3d 1097, 1101; *see Last Time Beverage Corp. v F & V Distrib. Co., LLC*, 98 AD3d 947, 951; *Fantazia Intl. Corp. v CPL Furs N.Y., Inc.*, 67 AD3d 511, 512).

The burden of establishing that the corporate veil should be pierced is a heavy one (*see Colonial Sur. Co. v Lakeview Advisors, LLC*, 93 AD3d 1253, 1255) but " '[b]roadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, pierce the corporate veil, whenever necessary to prevent fraud or to achieve equity' " (*Matter of Mercury Factoring, LLC v Partners Trust Bank*, 75 AD3d 1101, 1103, quoting *Morris*, 82 NY2d at 140). "A decision to pierce the corporate veil is a fact-laden [determination]" (*Abbott*, 109 AD3d at 1101 [internal quotation marks omitted]), and "[n]o one factor is dispositive" (*Fantazia*, 67 AD3d at 512).

Applying those rules here, and viewing the evidence in the light most favorable to sustain the judgment (*see Farace*, 266 AD2d at 871), we conclude that the court's decision to pierce the corporate veil to hold Roehmholdt liable for Northtown's obligations to plaintiff is supported by a fair interpretation of the evidence (*see generally Alterm, Inc.*, 20 AD3d at 170). The record establishes that Roehmholdt made no effort to continue the Northtown business and, through his solicitation of Northtown clients, took much more lucrative employment at WNYUA. Moreover, the record also establishes that Roehmholdt chose not to "cash out" Sosnowski from Northtown, subsequently wrote to Northtown's clients and took them as his own, used approximately $80,000 in Northtown funds to satisfy a line of credit for which he was personally liable and which may have encumbered Northtown's accounts receivable, issued a check for approximately $1,800 to himself for "Northtown . . . expenses," and paid for the collection of Northtown's accounts receivable.

Contrary to plaintiff's contention on its cross appeal in appeal No. 1, we conclude that the court properly granted the motions of Roehmholdt and Sosnowski for a directed verdict pursuant to CPLR 4401 seeking dismissal of the cause of action for fraudulent conveyance. "It is well settled that a directed verdict is appropriate where the . . . court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party . . . In determining whether to grant a motion for a directed verdict pursuant to CPLR 4401, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (*Brenner v Dixon*, 98 AD3d 1246, 1247 [internal quotation marks omitted]). Plaintiff's cause of action for fraudulent conveyance was based on

Debtor and Creditor Law §§ 273 and 276 and, pursuant to section 273, "[e]very conveyance made and every obligation incurred by a person *who is or will be thereby rendered insolvent* is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration" (emphasis added). "A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured" (§ 271 [1]). Here, plaintiff failed to establish the "insolvency" element of section 273 inasmuch as it failed to demonstrate that Northtown was insolvent at the time of the conveyances at issue (*see Colacino v Poyzer*, 178 AD2d 964, 966; *see also Matter of Steele*, 85 AD3d 1375, 1377). Thus, plaintiff failed to establish Debtor and Creditor Law § 273 as a basis for the cause of action for fraudulent conveyance.

Next, Debtor and Creditor Law § 276 provides that "[e]very conveyance made and every obligation incurred with actual intent . . . to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." A creditor seeking legal redress pursuant to that section must prove by "clear and convincing evidence that a defendant had the [actual] intent to hinder, delay or defraud creditors" (*Jensen v Jensen*, 256 AD2d 1162, 1162 [internal quotation marks omitted]) and, because direct evidence of fraudulent intent is often elusive, "courts will consider 'badges of fraud' which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent" (*Dempster v Overview Equities*, 4 AD3d 495, 498, *lv denied* 3 NY3d 612 [internal quotation marks omitted]). Badges of fraud include: (1) a close relationship between the parties to the transfer; (2) the inadequacy of consideration; (3) the transferor's knowledge of the creditor's claims and the transferor's inability to pay them; (4) the retention of control of the property by the transferor after the conveyance; (5) the fact that the transferred property was the only asset sufficient to pay the transferor's obligations; (6) the fact that the same attorney represented the transferee and transferor; and (7) a pattern or course of conduct by the transferor after it incurred its obligation to the creditor (*see Cadle Co. v Organes Enters., Inc.*, 29 AD3d 927, 928; *Dempster*, 4 AD3d at 498). We note, however, that the presence of one or more badges of fraud does not necessarily compel the conclusion that a conveyance is fraudulent (*see Taylor-Outten v Taylor*, 248 AD2d 934, 935).

Here, even assuming, arguendo, that there was a close relationship between Northtown to Sosnowski in the transfer of the medical equipment and office furniture, i.e., that there was evidence of the first badge of fraud, we conclude that such transfer was for adequate consideration and, thus, that plaintiff failed to establish the presence of the second badge. In view of Northtown's accounts receivable, the transferred assets were not the only assets by which Northtown could have satisfied its obligations to plaintiff, and thus plaintiff failed to establish the presence of the fifth badge. Moreover, the assets were not retained by the transferor, Northtown, after the conveyance, and the same attorney could not have represented

both Northtown and Sosnowski, and thus plaintiff failed to establish the presence of the fourth and sixth badges, respectively. Although the seventh badge—concerning a pattern or course of conduct—arguably applies here, the transfer of office and medical equipment probably benefitted Northtown in the short term inasmuch as it allowed Northtown to avoid outlaying cash, and thus any such pattern or course of conduct did not impair Northtown's ability to pay its rent to plaintiff and, thus, plaintiff failed to establish the presence of the third badge. Consequently, under those circumstances and mindful of the deferential standard of review, we decline to disturb the court's determination with respect to Debtor and Creditor Law § 276 as a basis for the cause of action for fraudulent conveyance inasmuch as plaintiff failed to establish sufficient badges of fraud to give rise to an inference of fraudulent intent.

Contrary to plaintiff's further contention on its cross appeal in appeal No. 1, we conclude that the court did not err in granting a directed verdict in favor of Sosnowski on the issue of piercing the corporate veil. Viewed in the light most favorable to the nonmoving party (*see generally Szczerbiak v Pilat*, 90 NY2d 553, 556; *Brenner*, 98 AD3d at 1247), the record establishes that, on November 30, 2006, Sosnowski announced that he would resign from Northtown effective February 2, 2007, and that Sosnowski had only one conversation with Roehmholdt after Sosnowski tendered his resignation and before Sosnowski actually left the practice on January 23, 2007. The record further establishes that Sosnowski only reluctantly accepted equipment and furniture, instead of cash, in satisfaction of Northtown's obligations to him, and that he had no part in Roehmholdt's decision to shutter the Northtown practice and encourage its patients to treat with Roehmholdt's new employer, WNYUA.

We reject plaintiff's contention in appeal No. 2 that the court erred in awarding attorneys' fees, costs and expenses against Roehmholdt in an amount less than plaintiff had requested. "Under the general rule in New York, attorneys' fees are deemed incidental to litigation and may not be recovered unless supported by statute, court rule or written agreement of the parties" (*Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, 15 NY3d 375, 379, citing *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491). Here, there is no dispute that plaintiff is entitled to an award of fees from Roehmholdt—the lease between Northtown and plaintiff provides for an award of attorneys' fees in favor of plaintiff because plaintiff prevailed in this action and, even as a nonparty to the lease, Roehmholdt is responsible for that award by virtue of the court piercing Northtown's corporate veil. With respect to the amount of the court's award, we note that, "[i]n evaluating what constitutes . . . reasonable attorney[s'] fee[s], factors to be considered include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount [of money] involved, the customary fee charged for such services, and the results obtained" (*Matter of Dessauer*, 96 AD3d 1560, 1561 [internal quotation marks omitted]). "[I]t is well settled that a trial court is in the best position to determine those

factors integral to fixing [attorneys'] fees . . . and, absent an abuse of discretion, the trial court's determination will not be disturbed" (*Pelc v Berg*, 68 AD3d 1672, 1673 [internal quotation marks omitted]). Upon our review of the record, we conclude that the court did not abuse its discretion in fixing that award.

Finally, we agree with plaintiff in appeal No. 2 that the court erred in awarding attorneys' fees and costs to Sosnowski (*see generally Flemming*, 15 NY3d at 379), and we therefore modify the order accordingly. " '[A] court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is *unmistakably clear* from the language of the promise' " (*Mount Vernon City Sch. Dist. v Nova Cas. Co.*, 19 NY3d 28, 39, quoting *Hooper Assoc.*, 74 NY2d at 492). "Furthermore, a party may not recover attorneys' fees arising from litigation with the other party to a contract unless an intent to provide for such reimbursement 'is unmistakably clear from the language of the promise' " (*Colonial Sur. Co. v Genesee Val. Nurseries, Inc.*, 94 AD3d 1422, 1423, quoting *Hooper Assoc.*, 74 NY2d at 492). Here, Sosnowski sought attorneys' fees under an article of the lease between Northtown and plaintiff that states, in relevant part, that "in the event that any legal matter, dispute, action or proceeding exists or is commenced by or between the *Lessor* and *Lessee* under this Lease, the prevailing party shall be entitled to reasonable attorney's fees in such matter" (emphasis added). Inasmuch as the lease defines the "lessor" as plaintiff and the "lessee" as Northtown, we are constrained to conclude that the court erred in awarding attorneys' fees and costs to Sosnowski, a nonparty to the lease, because the lease contains no authority for such an award (*cf. Colonial Sur. Co.*, 94 AD3d at 1423; *see generally Hooper Assoc.*, 74 NY2d at 492), and there is no basis for holding him responsible for Northtown's obligations to plaintiff.

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00287

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

A&M GLOBAL MANAGEMENT CORP.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NORTHTOWN UROLOGY ASSOCIATES, P.C.,
JOHN M. ROEHMHOLDT AND JACEK T. SOSNOWSKI,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

HOGAN WILLIG, PLLC, AMHERST (ROBERT MICHALAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAMON MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANT-RESPONDENT JOHN M. ROEHMHOLDT.

HURWITZ & FINE, P.C., BUFFALO (EARL K. CANTWELL OF COUNSEL), FOR DEFENDANT-RESPONDENT JACEK T. SOSNOWSKI.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered December 11, 2012. The order, among other things, awarded defendant Jacek T. Sosnowski attorneys' fees and costs against plaintiff.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendant Jacek T. Sosnowski and vacating the award of attorneys' fees and costs against plaintiff and as modified the order is affirmed without costs.

Same Memorandum as in *A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.* ([appeal No. 1] ___ AD3d ___ [Mar. 28, 2014).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

164.1

KA 09-01253

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSE ROBERITES, DEFENDANT-APPELLANT.

JOSEPH D. WALDORF, ROCHESTER, FOR DEFENDANT-APPELLANT.

JESSE ROBERITES, DEFENDANT-APPELLANT PRO SE.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered June 9, 2009. The judgment convicted defendant, upon a jury verdict, of arson in the third degree and insurance fraud in the second degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of arson in the third degree (Penal Law § 150.10) and insurance fraud in the second degree (§ 176.25). The conviction stems from defendant's efforts to obtain the proceeds of an insurance policy covering his residence, which was damaged by a fire.

Defendant contends in his main and pro se supplemental briefs that the evidence is legally insufficient to support the conviction and that the verdict is against the weight of the evidence. We reject those contentions. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences to support the jury's finding that defendant committed the crimes of which he was convicted based on the evidence presented at trial (*see generally People v Bleakley*, 69 NY2d 490, 495). 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), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends in his pro se supplemental brief that County Court failed to apprise him of a jury note requesting exhibits, and that such failure constitutes a mode of proceedings error requiring

reversal of the judgment, even if unpreserved (*see People v O'Rama*, 78 NY2d 270, 279-280; *see also* CPL 310.30). We agree. CPL 310.20 (1) provides that, upon retiring to deliberate, the jurors may take with them "[a]ny exhibits received in evidence at the trial which the court, *after according the parties an opportunity to be heard upon the matter*, in its discretion permits them to take" (emphasis added). CPL 310.30 provides that, "[a]t any time during its deliberation, the jury may request the court for further instruction or information with respect to . . . the content or substance of any trial evidence . . . Upon such a request, *the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant*, must give such requested information or instruction as the court deems proper" (emphasis added). Here, as part of its instructions to the jury, the court informed the jurors that "[e]xhibits that were received in evidence are available, upon your request, for your inspection and consideration." The court, however, neither elicited on the record whether defendant, who proceeded pro se at trial, waived his right to be present when such a request was made nor informed defendant on the record that the exhibits would be given to the jury without reconvening. Prior to receiving the jury's verdict, the court indicated that it had received a jury note "that has been marked as a Court Exhibit which was just the jury requesting certain items of evidence that had already been admitted and received in evidence, that they were provided with those items pursuant to discussions we had and what they were told before deliberations." We note that those "discussions" do not appear to have been transcribed, and no agreement by defendant to forego the right to be present for the receipt of jury notes appears in the record before us. Inasmuch as the court failed to obtain defendant's express agreement waiving his right to be present for the reading of the jury note at issue, we conclude that the court committed a mode of proceedings error when it provided exhibits to the jury in response to a jury note without notice to defendant, thereby requiring reversal of the judgment and a new trial (*cf. People v King*, 56 AD3d 1193, 1194, *lv denied* 11 NY3d 926; *People v Mitchell*, 46 AD3d 480, 480, *lv denied* 10 NY3d 842; *People v Knudsen*, 34 AD3d 496, 497).

In view of our decision, we do not address defendant's remaining contentions in his main and pro se supplemental briefs.

All concur except SMITH, J.P., who dissents and votes to affirm in the following Memorandum: I disagree with the majority's conclusion that County Court committed a mode of proceedings error in its handling of a note from the jury requesting the exhibits that were received in evidence. In view of defendant's failure to preserve the issue for our review, I respectfully dissent and would affirm the judgment.

Initially, I note that I agree with the majority's resolution of the issues concerning the legal sufficiency and weight of the evidence. With respect to the jury note at issue, the facts are set forth by the majority. Briefly, during its final jury instructions, the court informed the jurors that it would provide them with any item

that had been received in evidence upon their request. Defendant did not object. Later, the court informed the parties that the jury had asked to see certain pieces of evidence, and that those items had been provided pursuant to the court's discussions with the parties and the jury instructions. Defendant contends that the court thereby failed to comply with the procedures set forth in *People v O'Rama* (78 NY2d 270), and that such failure constituted a mode of proceedings error requiring reversal of the judgment, notwithstanding his failure to preserve it.

The *O'Rama* procedures are based on the principle that "CPL 310.30 . . . imposes two separate duties on the court following a *substantive* juror inquiry: the duty to notify counsel and the duty to respond" (*id.* at 276 [emphasis added]). The failure to follow those procedures when confronted with a jury note that raises a substantive inquiry is a mode of proceedings error that does not require preservation (*see id.* at 279). Only substantive inquiries, however, require adherence to the *O'Rama* procedures. "Section 310.30 does not require notice to defendant in every instance of communication from the jury to the court" (*People v Lykes*, 81 NY2d 767, 769). Where, as here, a defendant contends that a jury note contained a substantive question, and thus required adherence to the *O'Rama* procedures, this Court's "inquiry ultimately focuses on whether the matter discussed was merely ministerial and, thus, 'wholly unrelated to the substantive legal or factual issues of the trial.' [The issue is ministerial where] the challenged discussion . . . [bears] no substantial relationship to the defendants' opportunity to defend against the charges" (*People v Hameed*, 88 NY2d 232, 241, *cert denied* 519 US 1065).

In the note at issue, the jury merely requested certain items that had been admitted in evidence for their use during deliberations. Thus, the record reveals that the jury inquiry was purely ministerial in nature, containing only a request to view evidence. "Since the note[] [was] not substantive, any failure by the trial court to comply with CPL 310.30 did not constitute a mode of proceeding[s] error" (*People v Gerrara*, 88 AD3d 811, 812, *lv denied* 18 NY3d 957, *cert denied* ___ US ___, 133 S Ct 857; *see People v Bryant*, 82 AD3d 1114, 1114, *lv denied* 17 NY3d 792; *cf. People v Lockley*, 84 AD3d 836, 838, *lv denied* 17 NY3d 807).

Consequently, I conclude that "[d]efendant's reliance on [*O'Rama*] is misplaced. The note sent by the jury simply requested [some of the evidence], which both the jury and [defendant] were apprised was available for inspection upon request; the note did not request any substantive information to implicate the notice procedures outlined in *O'Rama*. Indeed, other than the production of [that evidence], the note called for no other response" (*People v Damiano*, 87 NY2d 477, 487; *see People v Green*, 37 AD3d 1131, 1131, *lv denied* 8 NY3d 946; *see also People v Rosado*, 262 AD2d 62, 62, *lv denied* 93 NY2d 1045). Inasmuch as no mode of proceedings error occurred and *O'Rama* was not implicated, defendant was required to object to the procedure used by the court and, having failed to do so, he failed to preserve his contention for our review (*see* CPL 470.05 [2]). I would decline to

exercise this Court's power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also failed to preserve for our review his related contention that the court violated CPL 310.20 (1), which permits a deliberating jury to take with them "[a]ny exhibits received in evidence at the trial which the court, after according the parties an opportunity to be heard upon the matter, in its discretion permits them to take." I conclude that the case law governing CPL 310.30 is equally applicable here, and thus I reject defendant's contention that the court's response to the jury's request to take the exhibits into the jury room was a mode of proceedings error. Therefore, in the absence of a proper objection, defendant's contention is not preserved for our review (*see* CPL 470.05 [2]), and I would decline to exercise this Court's power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

I have examined defendant's remaining contentions and conclude that none requires modification or reversal of the judgment.

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01330

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

ULYSSES JOHNSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TIME WARNER ENTERTAINMENT AND WILLIAM E. LONKEY, DEFENDANTS-RESPONDENTS.

STANLEY LAW OFFICES, LLP, SYRACUSE (H.J. HUBERT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND SCHOENECK & KING, PLLC, SYRACUSE (J.P. WRIGHT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered June 12, 2013 in a personal injury action. The order granted defendants' motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained when the truck in which he was a passenger was struck by a van driven by defendant William E. Lonkey. Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint. Defendants met their initial burden "by establishing that [Lonkey] was driving within the speed limit, that he did not have time to avoid the collision, and that plaintiff was entering the roadway from a parking lot" (*Rak v Kossakowski*, 24 AD3d 1191, 1191). Defendants submitted the affidavit of Lonkey, who averred that he was not speeding and that, when he saw the truck pulling out of the parking lot, he applied the brakes and attempted to steer to the right and the left but was unable to avoid the collision. He averred that "[t]here was virtually no time between when I first saw the truck and when the collision occurred[,] and there was nothing I could have done to avoid the collision." Defendants also submitted plaintiff's deposition testimony. Although plaintiff initially testified that he first saw the van driven by Lonkey "before it got to the bushes," he later testified that, when his coworker started to pull out of the parking lot, plaintiff "didn't see no van, no truck, period." He heard "a skid, 'errrr,' and boom, that was it."

In opposition to the motion, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d

557, 562). Plaintiff relies on his testimony at his deposition that Lonkey was speeding, but plaintiff testified that he believed that Lonkey was speeding based on the length of the skid mark and the fact that the collision caused the truck to flip over. Plaintiff was not qualified as an expert, and therefore his opinion that Lonkey was speeding based on the skid mark and force of the collision is speculative and without any probative value (*see Stewart v Kier*, 100 AD3d 1389, 1390). Moreover, even assuming, arguendo, that plaintiff's testimony raises a triable issue of fact whether Lonkey was speeding, we conclude that there was no triable issue raised whether Lonkey could have done anything different to avoid the collision (*see Daniels v Rumsey*, 111 AD3d 1408, 1410; *Simmons-Kindron v 1218770 Ontario Inc.*, 93 AD3d 1215, 1216). Indeed, we note that, when plaintiff was asked at his deposition whether his coworker took any action to avoid the collision, he responded, "what could you do? It was too late." Contrary to plaintiff's contention, the affidavit of his expert did not raise a triable issue of fact inasmuch as it was speculative and conclusory regarding Lonkey's speed and whether he could have avoided the collision (*see Shanahan v Mackowiak*, 111 AD3d 1328, 1330; *Lescenski v Williams*, 90 AD3d 1705, 1706, *lv denied* 18 NY3d 811).

All concur except WHALEN, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent because I conclude that plaintiff raised triable issues of fact through the conflicting, and in some respects similar, statements of defendant William E. Lonkey and plaintiff regarding, inter alia, Lonkey's speed, the distance at which Lonkey first saw the truck in which plaintiff was a passenger, and the time Lonkey had to stop or take evasive action. I would therefore reverse the order, deny defendant's motion for summary judgment, and reinstate the complaint.

Lonkey stated in an affidavit and testified at his deposition that he was traveling 30 to 35 miles per hour in a 35 mile per hour zone and first saw the truck in which plaintiff was a passenger after he rounded the bend, three to four seconds before impact. Plaintiff testified at his deposition that he first noticed Lonkey's van before it reached the bushes as it was coming around the bend, when he heard a screech, five or more seconds before impact. The three-, four-, or five-second estimates are similar, and this Court has refused to grant summary judgment to drivers with the right-of-way who had only seconds to react (*see e.g. DeBrine v VanHarken*, 83 AD3d 1437, 1438; *Strasburg v Campbell*, 28 AD3d 1131, 1132; *Deshaies v Prudential Rochester Realty*, 302 AD2d 999, 1000; *Lints v Fiore*, 302 AD2d 1010, 1010).

Lonkey further stated in an affidavit and testified at his deposition that he did not see the truck in which plaintiff was a passenger until it was approximately 10 feet away, at which point he "immediately applied the brakes," resulting in skid marks. Plaintiff testified at his deposition that the bushes, beyond which he first saw Lonkey, were 20 feet from his position and Lonkey's skid marks were 20 feet long. Lonkey's and plaintiff's 10- to 20-foot estimates are comparable, and those distances do not necessarily foreclose a finding that Lonkey did not act reasonably (*see generally DeBrine*, 83 AD3d at 1438; *Cooley v Urban*, 1 AD3d 900, 901; *Deshaies*, 302 AD2d 999; *King v*

Washburn, 273 AD2d 725, 726).

Moreover, even assuming, arguendo, that Lonkey was traveling 30 or 35 miles per hour, I conclude that the parties' time estimates are inconsistent with their estimates regarding the distance at which Lonkey would have first been able to react. If Lonkey and plaintiff saw each other three to five seconds before impact, that would have placed Lonkey well beyond 20 feet and within the 100- to 200-foot range provided by plaintiff's expert. While Lonkey testified that he immediately applied his brakes, plaintiff testified that the skid marks were only 20 feet long. On the other hand, if Lonkey's and plaintiff's estimates of distance are credited, then Lonkey had only fractions of a second to react. Issues of credibility are to be resolved by the trier of fact (*see generally Black v Chittenden*, 69 NY2d 665, 669), and a jury could find that Lonkey had more than 100 feet to react by honking, steering and/or braking, or that Lonkey had mere fractions of a second to react.

Of course, plaintiff disputes that Lonkey was traveling at or below the speed limit. Plaintiff testified at his deposition that Lonkey was speeding; he was able to observe Lonkey's van before impact, the length of the skid marks, and the condition of the truck after the accident; and he felt the force of the impact (*see Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295, 296-298). Lonkey testified that he braked and attempted to steer around the front of the truck, but it sped up, so he attempted to steer around the back of it. Lonkey "maneuvered pretty quickly" and hit the truck with the corner of his van, indicating that if the truck had stopped, he "would have went right around the front of [it]." Lonkey did not remember sounding his horn. Plaintiff claimed that the driver of the truck in which he was a passenger did not take any action to avoid the collision. Thus, viewing the facts in the light most favorable to plaintiff (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340), I conclude that there are questions of fact concerning Lonkey's speed and whether Lonkey may have been able to avoid the accident if he had been traveling at a lower speed (*cf. Daniels v Rumsey*, 111 AD3d 1408, 1410). " '[I]ssue-finding, rather than issue-determination, is the key to' " determining a summary judgment motion (*Wilk v James*, 107 AD3d 1480, 1485).

Frances E. Cafarell

Entered: March 28, 2014

Clerk of the Court

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

184

CA 13-01101

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

MARY T. HELTZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRUCE S. BARRATT AND ERIE LOGISTICS, LLC,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

PERSONIUS MELBER LLP, BUFFALO (SCOTT R. HAPEMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered October 16, 2012 in a personal injury action. The order granted defendants' motion for summary judgment dismissing the first amended complaint.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries she sustained when the vehicle in which she was a passenger, which was operated by her husband, was struck by a truck operated by Bruce S. Barratt (defendant) and owned by defendant Erie Logistics, LLC. On the evening in question, plaintiff's husband stopped his vehicle at a stop sign on East Centerville Road where it intersects with Route 243 in Rushford. Defendant was operating his truck at slightly above the speed limit of 55 miles per hour on Route 243, with the right-of-way. After coming to a stop, plaintiff's husband moved forward a bit and then stopped again. Not observing any oncoming traffic, plaintiff's husband drove into the intersection, where his vehicle was struck by defendant's truck. There is no stop sign or traffic control device for traffic on Route 243. In appeal No. 1, plaintiff appeals from an order granting defendants' motion for summary judgment dismissing the first amended complaint and, in appeal No. 2, she appeals from an order denying her motion for leave to reargue and renew her opposition to defendants' motion. With respect to appeal No. 2, we dismiss the appeal from the order therein to the extent that it denied leave to reargue (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984), and we otherwise affirm the order in each appeal.

"It is well settled that a driver who has the right-of-way is entitled to anticipate that drivers of other vehicles will obey the traffic laws requiring them to yield" (*Malbory v David Chevrolet Buick Pontiac, Inc.*, 108 AD3d 1109, 1110; *see* Vehicle and Traffic Law § 1142 [a]). Nevertheless, "a driver cannot blindly and wantonly enter an intersection . . . but, rather, is bound to use such care to avoid [a] collision as an ordinarily prudent [motorist] would have used under the circumstances" (*Strasburg v Campbell*, 28 AD3d 1131, 1132 [internal quotation marks omitted]).

Here, we conclude with respect to the order in appeal No. 1 that defendants met their initial burden of establishing that defendant was operating his vehicle " 'in a lawful and prudent manner and that there was nothing [he] could have done to avoid the collision' " (*Daniels v Rumsey*, 111 AD3d 1408, 1410; *see Ithier v Harnden*, 13 AD3d 1204, 1205). Defendant testified that he saw plaintiff's vehicle at the stop sign, braked as soon as he entered the intersection, and turned to the left "microseconds" after he braked. Despite defendant's efforts to avoid the accident, his truck struck the rear of plaintiff's vehicle on the passenger's side. In opposition to the motion, plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to plaintiff's contention, "the fact that [defendant] may have been driving at a speed in excess of five miles per hour over the posted speed limit . . . is inconsequential inasmuch as there is no indication that [defendant] could have avoided the accident even if [he] had been traveling at or below the posted speed limit" (*Daniels*, 111 AD3d at 1410).

We conclude with respect to the order in appeal No. 2 that Supreme Court properly denied that part of plaintiff's motion for leave to renew. It is well settled that a motion for leave to renew must be "based upon new facts not offered on the prior motion that would change the prior determination," and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]; *see Blazynski v A. Gareleck & Sons, Inc.*, 48 AD3d 1168, 1170, *lv denied* 11 NY3d 825). Here, the only reason proffered by plaintiff for failing to submit her expert's affidavit in opposition to defendants' motion is that she believed that she had raised an issue of fact without it and that the court would therefore deny defendants' motion. That is not a reasonable justification for the failure to present the affidavit on the initial motion. As we have previously stated, a motion for leave to renew "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Welch Foods v Wilson*, 247 AD2d 830, 831 [internal quotation marks omitted]; *see Deutsche Bank Natl. Trust Co. v Wilkins*, 97 AD3d 527, 528; *Tibbits v Verizon N.Y., Inc.*, 40 AD3d 1300, 1302-1303).

All concur except WHALEN, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent in appeal No. 1 because this case does not involve a truly unavoidable accident for which the grant of summary judgment would be appropriate

(*see generally DeBrine v VanHarken*, 83 AD3d 1437, 1438). I would therefore reverse the order in appeal No. 1, deny defendants' motion for summary judgment, and reinstate the first amended complaint.

Proximate cause is generally a question of fact for the jury (*see Prystajko v Western N.Y. Pub. Broadcasting Assn.*, 57 AD3d 1401, 1403), and " '[i]t cannot be said as a matter of law that [one] driver's conduct was the sole proximate cause of the accident simply because his approach into the intersection was regulated by a stop sign whereas no traffic control devices regulated [the other driver's] approach' " (*Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295, 297).

Supreme Court relied upon *Rogers v Edelman* (79 AD3d 1803, 1804) and *Galvin v Zacholl* (302 AD2d 965, 966-967, *lv denied* 100 NY2d 512) in granting defendants' motion for summary judgment dismissing the first amended complaint but here, in contrast, the actions of the driver of the vehicle in which plaintiff was a passenger were not so sudden. Unlike someone preparing to make a left turn across oncoming traffic in the absence of a traffic control device, or someone pulling into an intersection to make a left turn at a green light, here, Bruce S. Barratt (defendant) should have been alerted of a potential hazard based on the fact that the SUV in which plaintiff was a passenger accelerated from the stop sign and proceeded into the intersection.

This case is factually similar to *Nevarez* (58 AD3d at 296-298) and *Cooley v Urban* (1 AD3d 900, 900-901) in many important respects, and I see no reason why the outcome should be any different. From the stop sign on East Centerville Road, there is an eight-foot shoulder followed by the single east and westbound lanes of Route 243 and then another shoulder. There were no other cars on the road at the time of the accident. As noted by the majority, neither plaintiff nor her husband ever saw defendant's tractor trailer, and plaintiff's husband looked both ways before gradually accelerating across the intersection. Defendant first saw the SUV when he was between one eighth to one quarter of a mile from the intersection. His tractor trailer's "black box report" indicates that defendant's speed was likely 64 miles per hour at that time while the speed limit on the road on which he was traveling was 55 miles per hour. Defendant watched the SUV the whole way and, when he was "a couple hundred feet" away, saw the SUV accelerate from the stop sign in a standard fashion and enter the intersection. At that point, "[a]ll [defendant] could do was apply the brakes in anticipation of [the SUV] possibly spotting [him] and stopping or keeping going." Defendant turned to the left when he realized that a collision was unavoidable; the SUV had fully entered his lane and it appeared as though the SUV "was going to keep going and not spot [him] at all." Defendant did not sound his horn, and his right front fender collided with the right rear quarter panel of the SUV. The black box recorded that defendant applied his brakes one second before the collision; he was traveling at a speed of 58 miles per hour.

Because defendant observed that the SUV entered the intersection without appearing to notice defendant from a distance of 200 feet, and considering that the black box report contradicts defendant's

testimony that he first applied his brakes when he was 200 feet away, I conclude that there is a question of fact whether defendant used the requisite reasonable care when proceeding into the intersection and in attempting to avoid the collision (*see Dorr v Farnham*, 57 AD3d 1404, 1405-1406; *Cooley*, 1 AD3d at 900-901; *King v Washburn*, 273 AD2d 725, 726).

A difference in a matter of seconds, or perhaps less, could have prevented this accident. The SUV had almost made it across the intersection and was in the westbound lane when the collision occurred. Defendant saw the SUV accelerate from the stop sign despite his approach, yet did not take any evasive action until one second before impact. Even so, defendant impacted only the panel behind the rear wheel of the SUV. Had defendant been traveling at the speed limit, braked and/or veered sooner, the collision might have been completely avoided. Considering the SUV's location at the time of impact and standard acceleration, and defendant's understanding that the SUV was oblivious to his approach, if defendant had sounded his horn upon noticing the SUV accelerate the accident might have been avoided. Defendant testified that he could only apply his brakes in anticipation of the SUV possibly spotting him, but a trier of fact might disagree.

Questions of fact exist as to whether defendant should have been traveling slower, braked and veered sooner, and/or sounded his horn when he first observed the SUV enter the "intersection without appearing to slow down or to look in [defendant's] direction" (*King*, 273 AD2d at 726; *see Deshaies v Prudential Rochester Realty*, 302 AD2d 999, 1000).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

185

CA 13-01102

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

MARY T. HELTZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRUCE S. BARRATT AND ERIE LOGISTICS, LLC,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

PERSONIUS MELBER LLP, BUFFALO (SCOTT R. HAPEMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered March 26, 2013 in a personal injury action. The order denied plaintiff's motion for leave to reargue and renew her opposition to defendants' summary judgment motion.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is affirmed without costs.

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

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 05-01611

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLARENCE MILLER, DEFENDANT-APPELLANT.

CHRISTINE M. COOK, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered November 30, 2004. The judgment convicted defendant, after a jury trial, of kidnapping in the second degree, criminal use of a firearm in the first degree, criminal possession of a weapon in the second degree, assault in the second degree, assault in the third degree and reckless endangerment in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the determinate sentence imposed on count three of the indictment shall run concurrently with the determinate sentences imposed on counts one and two and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of, inter alia, kidnapping in the second degree (Penal Law § 135.20), criminal use of a firearm in the first degree ([CUF] § 265.09 [1] [a]), criminal possession of a weapon in the second degree ([CPW] § 265.03 [former (2)]), and assault in the second degree (§ 120.05 [2]). Although defendant contends that he was denied a fair trial based on prosecutorial misconduct during opening and closing statements, he did not raise any objection to the allegedly improper comments at trial and thus failed to preserve his contention for our review (*see People v Lane*, 106 AD3d 1478, 1480, *lv denied* 21 NY3d 1043). "In any event, '[w]e do not believe that the cumulative effect of the asserted instances of misconduct on the part of the prosecutor prejudiced the verdict and deprived defendant of a fair trial' and thus reversal is not required" (*People v Gates*, 6 AD3d 1062, 1063, *lv denied* 3 NY3d 659; *see People v Russell*, 50 AD3d 1569, 1570, *lv denied* 10 NY3d 939; *cf. People v Calabria*, 94 NY2d 519, 522-523). Defendant further contends that he was denied effective assistance of counsel based on defense counsel's failure to object to the allegedly improper comments of the prosecutor. We reject that contention. Defendant failed " 'to demonstrate the absence of

strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712), and the record establishes that defense counsel provided meaningful representation to defendant (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant further contends that County Court erred in admitting in evidence as excited utterances statements made by the victim to an emergency medical technician (EMT). We reject that contention. It is well settled that "[t]he admissibility of an excited utterance is entrusted in the first instance to the trial court. In making that determination, the court must ascertain whether, at the time the utterance was made, the declarant was under the stress of excitement caused by an external event sufficient to still his [or her] reflective faculties, thereby preventing opportunity for deliberation which might lead the declarant to be untruthful. The court must assess not only the nature of the startling event and the amount of time which has elapsed between the occurrence and the statement, but also the activities of the declarant in the interim to ascertain if there was significant opportunity to deviate from the truth. Above all, the decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of studied reflection" (*People v Edwards*, 47 NY2d 493, 497; *see People v Carroll*, 95 NY2d 375, 385). Notably, "the time for reflection is not measured in minutes or seconds, but rather is measured by facts" (*People v Dalton*, 88 NY2d 561, 579 [internal quotation marks omitted]).

There is no dispute that there was a period of time between the victim's treatment by the EMT and her statements. During that period of time, however, the victim's child and niece were still in the apartment with defendant, the man who had kidnapped the victim and beaten her with a loaded gun. We thus conclude that " 'at the time the utterance[s were] made [the victim] was in fact under the stress of excitement caused by an external event sufficient to still . . . her reflective faculties' . . . , including both the physical and emotional stress of the [kidnapping and] beating earlier administered by defendant[,] . . . the stress of being confined in [an apartment and car] with defendant following the attack," and the stress of having two small children still in harm's way (*People v Bryant*, 27 AD3d 1124, 1126, *lv denied* 7 NY3d 753, quoting *People v Johnson*, 1 NY3d 302, 306).

"By failing to raise a specific objection, defendant has failed to preserve for our review his contention that [the] testimony of [the EMT] constituted bolstering" (*People v Butler*, 2 AD3d 1457, 1458, *lv denied* 3 NY3d 637; *see People v West*, 56 NY2d 662, 663; *People v Comerford*, 70 AD3d 1305, 1306). In any event, because the statements made by the victim were properly determined to be excited utterances, they did not constitute improper bolstering (*see People v Stevens*, 57 AD3d 1515, 1516, *lv denied* 12 NY3d 822; *People v Simms*, 244 AD2d 920, 920, *lv denied* 91 NY2d 897).

We reject defendant's further contention that the evidence is legally insufficient to support the conviction of kidnapping, CUF, CPW

and assault in the second degree. "Although there were minor inconsistencies between the victim's trial testimony and her grand jury testimony, those inconsistencies did not render her testimony incredible as a matter of law" (*People v Ennis*, 107 AD3d 1617, 1618, *lv denied* 22 NY3d 1040), i.e., "it was not impossible of belief because it [was] manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Bieganowski*, 104 AD3d 1276, 1276, *lv denied* 21 NY3d 1002 [internal quotation marks omitted]; *see People v Gaston*, 100 AD3d 1463, 1464).

Viewing the evidence in light of the elements of the crimes of kidnapping, CUF, CPW and assault in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "[N]othing in the record suggests that the victim was 'so unworthy of belief as to be incredible as a matter of law' or otherwise tends to establish defendant's innocence of those crimes . . . , and thus it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Woods*, 26 AD3d 818, 819, *lv denied* 7 NY3d 765; *see generally Bleakley*, 69 NY2d at 495).

Defendant's final challenges concern the sentence. We agree with defendant that the court erred in ordering the sentences imposed on counts one and two, the kidnapping and CUF counts, to run consecutively to the sentence imposed on count three, the CPW count. Defendant's possession of the firearm was not a separate and distinct act from either the kidnapping or the CUF. With respect to the kidnapping count, the threatened use of force element of the kidnapping charge was accomplished because of defendant's possession of the gun with the intent to use it; there would have been no restraint or abduction without that conduct (*see People v Rivera*, 277 AD2d 470, 472, *lv denied* 96 NY2d 833; *People v Phillips*, 182 AD2d 648, 649, *lv denied* 79 NY2d 1052, 81 NY2d 765). With respect to the CUF count, one of the elements of that crime is the possession of a loaded deadly weapon, i.e., the very conduct encompassed by the CPW count (*see People v Laureano*, 87 NY2d 640, 644-645; *People v Jenkins*, 232 AD2d 504, 505, *lv denied* 89 NY2d 924, *reconsideration denied* 90 NY2d 859). We thus conclude that, pursuant to Penal Law § 70.25 (2), the court should have ordered the sentences on those three counts to run concurrently, and we therefore modify the judgment accordingly.

With respect to the remaining counts, we conclude that consecutive sentencing was permissible. Defendant's possession of the gun with the intent to use it unlawfully was completed before he used the gun to commit the remaining crimes, and it continued even after those crimes were completed (*see People v Okafore*, 72 NY2d 81, 87). Thus, defendant's possession of the weapon was a separate and distinct act for which consecutive sentences could be imposed (*see People v Salcedo*, 92 NY2d 1019, 1021-1022; *People v Hurd*, 246 AD2d 483, 484, *lv denied* 91 NY2d 1008; *People v Dugger*, 236 AD2d 483, 484, *lv denied* 89 NY2d 1034).

Defendant failed to preserve for our review his contention that he was penalized for asserting his right to a trial (*see People v Hurley*, 75 NY2d 887, 888; *People v Motzer*, 96 AD3d 1635, 1636, *lv denied* 19 NY3d 1104; *People v Singleton*, 67 AD3d 1455, 1456, *lv denied* 14 NY3d 773). In any event, that contention lacks merit. " '[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 a trial' " (*People v Stubinger*, 87 AD3d 1316, 1317, *lv denied* 18 NY3d 862; *see People v Trinidad*, 107 AD3d 1432, 1432-1433, *lv denied* 21 NY3d 1046).

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

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 10-02354

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALAN NORCUTT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered November 10, 2010. The judgment convicted defendant, upon a jury verdict, of arson 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 following a jury trial of arson in the third degree (Penal Law § 150.10 [1]), defendant contends that the People failed to establish that the "1978 Terry make Trailer" (trailer) to which he set fire was a "building" as defined in the arson statute and thus that the conviction is not supported by legally sufficient evidence. We reject that contention.

A conviction is supported by legally sufficient evidence when, upon "viewing the facts in a light most favorable to the People, 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349; *see generally People v Bleakley*, 69 NY2d 490, 495). "A person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion" (Penal Law § 150.10 [1]). For purposes of the arson statute, a " '[b]uilding[,]' in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein" (§ 150.00 [1]).

"The 'ordinary meaning' of the term 'building' has been alternatively defined as 'a constructed edifice designed to stand more or less permanently, covering a space of land, usu[ally] covered by a roof and more or less completely enclosed by walls, and serving as a

dwelling' . . . , 'a structure with a roof and walls' . . . and '[a] structure or edifice inclosing a space within its walls and usually, but not necessarily, covered with a roof' . . . The term generally, though not always, implies the idea of a habitat for a person's permanent use or an erection connected with his or her permanent use" (*People v Fox*, 3 AD3d 577, 578, *lv denied* 2 NY3d 739).

In *Fox*, the Second Department analyzed whether a structure erected by a group of homeless people constituted a building for purposes of the arson statute. That structure had "two side walls consist[ing] of . . . fixed and unmovable fences. The remaining two walls consisted of carpets draped over a clothesline . . . A piece of plywood provided additional support to one side of the structure . . . The entrance was covered by shower curtains and blankets and the entire shelter was covered by a [large] tarp. The residents slept in sleeping bags or on mattresses which were laid on carpeting on the ground" (*id.* at 577-578). The Court concluded "that the structure satisfied the statutory definition of a building either because it had been utilized for overnight lodging or because it fit[] within the 'ordinary meaning' of the term" (*id.* at 579).

Inasmuch as the trailer herein was "a constructed edifice enclosed by walls, covered by a roof, designed to stand permanently, and serving a useful purpose, it is included within the ordinary meaning of the word 'building' " (*People v Fennell*, 122 AD2d 69, 70-71, *lv denied* 68 NY2d 1000). Indeed, the structure's walls and roof were much more "permanent" than the carpets, shower curtains and tarp used to create the shanty deemed a building in *Fox*. In addition to furnishings for sleeping, the trailer had a bathroom and a kitchen. Moreover, the trailer was equipped with a power cord for immediate access to power and a propane tank that could be used to power the refrigerator and heaters. At the time of the arson, the trailer was being used to secure the owners' property while they were remodeling the inside of their house. In any event, with respect to the trailer's character as a building in the ordinary sense of the word, it is of no moment that no one was actually residing in the trailer on the day of the incident (*see People v Richberg*, 56 AD2d 279, 280-281; *see also Fennell*, 122 AD2d at 70-71).

Even assuming, arguendo, that the trailer did not fit within the ordinary meaning of the term, we conclude that it constituted a building under the secondary definition of building contained in the statute, i.e., a "structure . . . used for overnight lodging of persons, or used by persons for carrying on business therein" (Penal Law § 150.00 [1]). Defendant recognized that the trailer was used for overnight lodging "on 'vacations' or weekend retreats," and it is undisputed that defendant had previously rented the trailer as overnight lodging for a period of four months. Although no one was residing in the trailer on the day of the fire, we likewise conclude that such fact does not alter the essential character of the structure as one used for overnight lodging.

Defendant contends that the phrase "used for overnight lodging" requires that the structure be in current use for overnight lodging.

Otherwise, defendant posits, the statute would have set forth that a building is a structure that "could be" used for overnight lodging. In our view, it is defendant who is adding language to the statutory definition. The statute provides that a building is any structure used for overnight lodging; it does not provide that a building is any structure that is *currently* being used for overnight lodging. Inasmuch as defendant "used [the trailer] for overnight lodging" and recognized that such trailers were used for overnight lodging on vacations and weekend retreats, we conclude that the trailer was a building under the secondary definition contained in the statute.

Defendant further contends that the verdict is against the weight of the evidence because, inter alia, the jury was swayed by improper factors. Viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, County Court did not err in refusing to question the jurors concerning whether they may have disobeyed the court's order to avoid reading newspaper articles about the case. "[T]rial courts [have] wide flexibility in determining what, if any, steps are required to assure a defendant's right to a fair trial in light of the particular midtrial publicity and circumstances encountered, subject to appellate review for an abuse of discretion" (*People v Shulman*, 6 NY3d 1, 32, *cert denied* 547 US 1043). Here, we perceive no abuse of discretion. Indeed, we conclude that an inquiry by the court concerning a specific newspaper article would have "inevitably focus[ed] the jurors' attention on something that there was no indication any of them had seen, and might well [have] foster[ed] infelicitous speculation" (*id.* at 32).

Defendant failed to preserve for our review his contention that he was denied his constitutional right to present a defense inasmuch as he did not raise that contention in the trial court (*see People v Lane*, 7 NY3d 888, 889; *People v Baxter*, 108 AD3d 1158, 1160; *People v Dorn*, 71 AD3d 1523, 1523), 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]).

Based on defendant's significant criminal history, we conclude that his sentence of 25 years to life as a persistent felony offender is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that they lack merit.

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

200

CA 13-01404

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

BRANDON LLOYD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES H. MOORE, AS ADMINISTRATOR OF THE ESTATE OF LORRAINE PORTER, DECEASED, ET AL., DEFENDANTS, AND RONALD FERNANDES, DEFENDANT-APPELLANT.

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

HEMMING & STAEHR, P.C., WILLIAMSVILLE (JONATHAN E. STAEHR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered February 28, 2013. The order denied the motion of defendant Ronald Fernandes 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 granted and the complaint against defendant Ronald Fernandes is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as a result of his exposure to lead paint in two apartments rented to his mother by defendants when he was a child. One of the apartments was owned by defendant 487 Busti Avenue, Limited, which in turn was owned by Ronald Fernandes (defendant) and a nonparty, both of whom served as corporate officers. We conclude that Supreme Court erred in denying defendant's motion for summary judgment dismissing the complaint against him. "The 'commission of a tort' doctrine permits personal liability to be imposed on a corporate officer for misfeasance or malfeasance, i.e., an affirmative tortious act; personal liability cannot be imposed on a corporate officer for nonfeasance, i.e., a failure to act" (*Peguero v 601 Realty Corp.*, 58 AD3d 556, 559; *see MLM LLC v Karamouzis*, 2 AD3d 161, 161-162; *Michaels v Lispenard Holding Corp.*, 11 AD2d 12, 14). Such misfeasance may include exacerbating a hazardous lead paint condition by negligently attempting to correct it (*see generally Ward v Bianco*, 16 AD3d 1155, 1156-1157). Here, defendant met his initial burden by presenting "evidence that, if uncontroverted, would have established that [he] did not personally participate in malfeasance or misfeasance constituting an affirmative tortious act" (*Komonaj v Curanovic*, 90 AD3d 505; *see generally Alvarez v Prospect Hosp.*, 68

NY2d 320, 324). Plaintiff failed to raise an issue of fact in response, inasmuch as he submitted no evidence that defendant affirmatively created the dangerous lead condition at the property or did anything to make it worse; at most, defendant merely failed to remedy the condition. We thus conclude that he cannot be held individually liable to plaintiff in this action.

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

202

CA 13-01558

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

IN THE MATTER OF SIERRA CLUB, PEOPLE FOR A HEALTHY ENVIRONMENT, INC., COALITION TO PROTECT NEW YORK, JOHN MARVIN, THERESA FINNERAN, MICHAEL FINNERAN, VIRGINIA HAUFF AND JEAN WOSINSKI, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

VILLAGE OF PAINTED POST, PAINTED POST DEVELOPMENT, LLC, SWEPI, LP, RESPONDENTS-APPELLANTS, AND WELLSBORO AND CORNING RAILROAD, LLC, RESPONDENT-RESPONDENT.

HARRIS BEACH PLLC, PITTSFORD (JOSEPH D. PICCIOTTI OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

RICHARD J. LIPPES & ASSOCIATES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), AND RACHEL TREICHLER, HAMMONDSPORT, FOR PETITIONERS-RESPONDENTS.

JANE E. TSAMARDINOS, ALBANY, FOR NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS, AMICUS CURIAE.

JAMES BACON, NEW PALTZ, FOR COMMUNITY WATERSHEDS CLEAN WATER COALITION, INC., AMICUS CURIAE.

KATHERINE HUDSON, WATERSHED PROGRAM DIRECTOR, WHITE PLAINS, FOR RIVERKEEPER, INC. AND KATHERINE SINDING, NEW YORK CITY, FOR NATURAL RESOURCES DEFENSE COUNCIL, AMICI CURIAE.

Appeal from a judgment (denominated order) of the Supreme Court, Steuben County (Kenneth R. Fisher, J.), entered April 8, 2013 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, denied in part the motion of respondents Village of Painted Post, Painted Post Development, LLC, and SWEPI, LP to dismiss the petition and granted petitioners summary judgment on the first cause of action.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the motion of respondents-appellants is granted in its entirety and the petition is dismissed against them.

Memorandum: The Village of Painted Post (Village), Painted Post Development, LLC and SWEPI, LP (collectively, respondents) appeal from a judgment insofar as it denied that part of their motion pursuant to CPLR 3211 and 3212 with respect to the first cause of action and awarded petitioners summary judgment on that cause of action. Supreme Court otherwise granted respondents' motion and dismissed the second and third causes of action. In denying that part of respondents' motion with respect to the first cause of action, the court concluded that petitioner John Marvin was the only petitioner who had standing to bring the proceeding and that the sole ground upon which he had standing was his "proximity and [his] complaint of train noise newly introduced into his neighborhood." Based upon its determination that Marvin had standing, the court refused to dismiss the petition with respect to the remaining petitioners despite their lack of standing (*see generally Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 813, *cert denied* 540 US 1017; *Maraia v Orange Regional Med. Ctr.*, 63 AD3d 1113, 1115). We agree with respondents that Marvin lacked standing, and we thus conclude that the court erred in refusing to dismiss the petition against them.

There is no dispute that "[c]ourts surely do provide a forum for airing issues of vital public concern, but so do public hearings and publicly elected legislatures, both of which have functioned here. By contrast to those forums, a litigant must establish its standing in order to seek judicial review" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769). "With the growth of litigation to enforce public values, such as protection of the environment, the subject of standing has become a troublesome one for the courts" (*id.* at 771). " '[I]njury in fact' has become the touchstone" for standing (*id.* at 772), because "[t]he existence of an injury in fact–an actual legal stake in the matter being adjudicated–ensures that the party seeking review has some concrete interest in prosecuting the action" (*id.*).

It is well established that "[s]tanding requirements 'are not mere pleading requirements but [instead are] an indispensable part of the plaintiff's case[,]' and therefore 'each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof' " (*Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 306). Where, as here, the proceeding does not involve a "zoning-related issue . . . , there is no presumption of standing to raise" a challenge under the State Environmental Quality Review Act ([SEQRA] ECL art 8) based solely on a party's proximity (*Matter of Save Our Main St. Bldgs. v Greene County Legislature*, 293 AD2d 907, 908, *lv denied* 98 NY2d 609; *see Matter of Rent Stabilization Assn. of N.Y.C., Inc. v Miller*, 15 AD3d 194, 194-195, *lv denied* 4 NY3d 709; *Matter of Oates v Village of Watkins Glen*, 290 AD2d 758, 761). In such a situation, the party seeking to establish standing must establish that the injury of which he or she complains "falls within the 'zone of interests,' or concerns, sought to be promoted or protected" (*Society of Plastics Indus.*, 77 NY2d at 773), and that he or she "would suffer direct harm, injury that is in some way different from that of the public at large" (*id.* at 774; *see Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 NY2d 428, 433).

While we agree with petitioners that noise falls within the zone of interests sought to be protected by SEQRA (*see Matter of Long Is. Contractors' Assn. v Town of Riverhead*, 17 AD3d 590, 594-595; *Matter of McGrath v Town Bd. of Town of N. Greenbush*, 254 AD2d 614, 616, *lv denied* 93 NY2d 803; *see generally* ECL 8-0105 [6]), we conclude that respondents met their burden of establishing as a matter of law that Marvin did not sustain an injury that was different from that of the public at large.

This CPLR article 78 proceeding concerns Village resolutions that authorized the sale and export of excess water from the municipal water supply. To assist in the exportation of the water, the resolutions permitted the construction of a transloading facility to load the water onto trains that would then transport the water to the buyer in Pennsylvania. Respondents, in support of their motion, established that the trains that would transport the water would utilize an existing rail line that traversed the entire Village. In his affidavit in opposition to respondents' motion, Marvin contended that his house was "one-half block from the railroad line" and that, following commencement of the water shipments, he began to hear "train noises frequently, sometimes every night." Marvin averred that he "heard either the train whistle or the diesel engines themselves or both." The noise was allegedly so loud that it "woke [him] up and kept [him] awake repeatedly." Notably, Marvin raised no complaints concerning noise from the transloading facility itself.

The maps of the area submitted by respondents and petitioners in connection with the motion demonstrate that the rail line at issue runs through the entire Village, along a main thoroughfare. One image also establishes that there are a multitude of houses along the path of the railroad, many of which are closer to the rail line than Marvin's residence. As noted in an affidavit from two Village residents submitted by petitioners in opposition to the motion, the noise from the moving trains affected many of the Village residents, a large number of whom expressed their concerns at a village board meeting.

Inasmuch as we are dealing with the noise of a train that moves throughout the entire Village, as opposed to the stationary noise of the transloading facility, we conclude that Marvin will not suffer noise impacts "different in kind or degree from the public at large" (*Society of Plastics Indus.*, 77 NY2d at 778). "[S]tanding cannot be based on the claim that a project would indirectly affect . . . noise levels . . . throughout a wide area" (*Save Our Main St. Bldgs.*, 293 AD2d at 909 [internal quotation marks omitted]; *see Society of Plastics Indus.*, 77 NY2d at 775; *Oates*, 290 AD2d at 760-761; *cf. Matter of Muir v Town of Newburgh, N.Y.*, 49 AD3d 744, 746). Here, as in *Save Our Main St. Bldgs.*, because "none of the individual petitioners alleges a unique, direct environmental injury," none of the organizational petitioners can be found to have standing (*id.* at 909).

Based on our determination, we do not address respondents'

remaining contentions.

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

205

CA 13-01681

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

WATERFRONT OPERATIONS ASSOCIATES, LLC, AS RECEIVER FOR WATERFRONT HEALTH CARE CENTER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BETH A. CANDINO, D.D.S., DEFENDANT-RESPONDENT.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (SHARON STERN GERSTMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

STAMM LAW FIRM, WILLIAMSVILLE (GREGORY STAMM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered July 3, 2013. The order, among other things, denied plaintiff's motion for summary judgment.

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

Memorandum: Plaintiff operates a skilled nursing facility in Buffalo, where defendant's late husband (decedent) resided for the last 15 months of his life. Prior to decedent's admission to the facility, defendant signed a Long Term Care Agreement (Agreement) that obligated her to pay for all care and services provided to decedent at the facility. Following decedent's death, plaintiff commenced this action seeking $125,265.54 in unpaid invoices. Attached to the complaint served upon defendant was a copy of the Agreement, which specifies the daily rates at the facility and the cost of various other services, along with an invoice stating the balance due. In her verified answer, defendant admitted that she executed the Agreement but asserted as an affirmative defense that plaintiff failed to provide all of the agreed upon services. Defendant also asserted counterclaims for medical malpractice and wrongful death. Defendant later served a bill of particulars alleging in detail the failures of plaintiff to provide adequate care for decedent. Approximately one year later, and before any depositions were conducted, plaintiff moved for summary judgment under CPLR 3016 (f), contending that the answer failed to comply with the statute because it was not sufficiently specific with respect to its denials of allegations set forth in the complaint. Supreme Court properly denied the motion.

CPLR 3016 (f) provides that, in an action involving the

"performing of labor or services," the plaintiff "may set forth and number in his verified complaint the items of his claim and the reasonable value or agreed price of each." If the plaintiff does so, "the defendant by his verified answer shall indicate specifically those items he disputes and whether in respect of delivery or performance, reasonable value or agreed price." "To meet the requirements of CPLR 3016 (f), a complaint must contain a listing of the goods or services provided, with enough detail that it may readily be examined and its correctness tested entry by entry" (*Summit Sec. Servs., Inc. v Main St. Lofts Yonkers, LLC*, 73 AD3d 906, 907 [internal quotation marks omitted]). If the complaint lacks sufficient specificity, the defendant may serve a general denial answer (*see Anderson & Anderson, LLP-Guangzhou v Incredible Invs. Ltd.*, 107 AD3d 1520, 1522).

Here, we conclude that the complaint failed to meet the specificity standards of CPLR 3016 (f) and thus "did not trigger a duty on defendant[']s part to dispute each item specifically" (*Epstein, Levinsohn, Bodine, Hurwitz & Weinstein, LLP v Shakedown Records, Ltd.*, 8 AD3d 34, 35; *see Anderson & Anderson, LLP-Guangzhou*, 107 AD3d at 1522; *B & C Smith, Inc. v Lake Placid 1980 Olympic Games*, 84 AD2d 544, 544). Although the Agreement and a single-page invoice were attached to the complaint, those documents were not drafted in a manner such that defendant could "respond in a meaningful way on an item-by-item basis" (*Teal, Becker & Chiaramonte, CPAs v Sutton*, 197 AD2d 768, 769; *see Green v Harris Beach & Wilcox*, 202 AD2d 993, 993-994). In any event, defendant, in her answer and bill of particulars, which was demanded by plaintiff, explained in detail how and why the care and services provided to decedent by plaintiff were deficient. We thus conclude that the court properly denied plaintiff's motion for summary judgment pursuant to CPLR 3016 (b).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

214

KA 11-02372

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEROME A. THAGARD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Richard C. Kloch, Sr., A.J.), rendered April 12, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: We are advised that, by order dated December 9, 2013, Supreme Court granted defendant's motion to vacate the judgment of conviction pursuant to CPL 440.10. Thus, defendant's direct appeal from the judgment of conviction must be dismissed as moot (*see People v Mills*, 5 AD3d 1051, 1051; *see also People v James*, 212 AD2d 822, 822; *People v Pimental*, 189 AD2d 788, 788).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

218

CA 13-00545

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

DEREK MARTIN, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

COLLEEN MARTIN, DEFENDANT-RESPONDENT-APPELLANT.

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

MATTAR, D'AGOSTINO & GOTTLIEB, LLP, BUFFALO (DIANA CAVALL OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered December 20, 2012 in a divorce action. The judgment, inter alia, awarded defendant maintenance and child support.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by providing that plaintiff's net income is $953,600.93 and that the combined parental income is $983,792.93 and by providing in the fourth decretal paragraph that there shall be an adjustment of child support upon the termination of plaintiff's maintenance obligation and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Erie County, to determine the amount of that adjustment in accordance with the following Memorandum: Plaintiff appeals and defendant cross-appeals from a judgment of divorce that, inter alia, directed plaintiff to pay maintenance and child support and denied defendant's request for a directive requiring that plaintiff post security pursuant to Domestic Relations Law § 243. Contrary to plaintiff's contention, the maintenance award is not excessive either in its amount or duration. "Although '[a]s a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court, . . . the authority of this Court in determining issues of maintenance is as broad as that of [Supreme Court]' " (*Knope v Knope*, 103 AD3d 1256, 1257). There is no abuse of discretion here (*see Gately v Gately*, 113 AD3d 1093, 1093), and we decline to substitute our discretion for that of the court (*cf. Knope*, 103 AD3d at 1257).

Turning to the issue of child support, we conclude that the court erred in its calculation of the combined parental income (*see* Domestic Relations Law § 240 [1-b] [c] [1]), and we therefore modify the judgment by providing that plaintiff's net income is $953,600.93 and

that the combined parental income is $983,792.93. Contrary to plaintiff's further contention, the record establishes that the court articulated a proper basis for applying the Child Support Standards Act to the combined parental income in excess of the statutory cap (*see* § 240 [1-b] [c] [2], [3]; *Wideman v Wideman*, 38 AD3d 1318, 1319; *Corasanti v Corasanti*, 296 AD2d 831, 831). We also conclude, however, that the court erred in failing to order that child support be adjusted upon the termination of maintenance, pursuant to Domestic Relations Law § 240 (1-b) (b) (5) (vii) (C) (*see Ripka v Ripka*, 77 AD3d 1384, 1386; *Schiffer v Schiffer*, 21 AD3d 889, 890-891). We therefore further modify the judgment by providing in the fourth decretal paragraph that there shall be an adjustment of child support upon the termination of plaintiff's maintenance obligation to defendant, and we remit the matter to Supreme Court to determine, following a hearing if necessary, the proper amount of that adjustment (*see Ripka*, 77 AD3d at 1386). Contrary to plaintiff's contention, the court properly required him to maintain a policy of life insurance to secure his child support and maintenance obligations (*see* § 236 [B] [8] [a]; *Gately*, 113 AD3d at 1094).

With respect to defendant's cross appeal, we conclude that the court properly refused to require plaintiff to post security (*see* Domestic Relations Law § 243; *cf. Brinckerhoff v Brinckerhoff*, 53 AD3d 592, 593).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

222

CA 13-01155

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

MICHAEL J. REW, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF NIAGARA, NIAGARA COUNTY SHERIFF'S DEPARTMENT, NIAGARA COUNTY SHERIFF THOMAS BEILEIN AND NIAGARA COUNTY SHERIFF'S DEPUTY CORY DIEZ, DEFENDANTS-RESPONDENTS.

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

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ELIZABETH M. BERGEN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered November 29, 2012. The judgment, insofar as appealed from, granted those parts of the motion of defendants seeking summary judgment dismissing the first cause of action insofar as it asserts claims for negligent training and supervision against defendant Niagara County Sheriff Thomas Beilein and dismissing the fourth cause of action.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, defendants' motion is denied in part, and the first cause of action insofar as it asserts claims for negligent training and supervision against defendant Niagara County Sheriff Thomas Beilein and the fourth cause of action are reinstated.

Memorandum: In this action to recover damages for personal injuries he sustained when he was shot by defendant Niagara County Sheriff's Deputy Cory Diez (deputy sheriff), plaintiff appeals from an order granting defendants' motion for summary judgment dismissing the amended complaint. As a preliminary matter, we note that the order from which plaintiff appeals was subsumed in the final judgment, from which no appeal was taken. In the exercise of our discretion, we treat the notice of appeal as valid and deem the appeal as taken from the judgment (*see Gray v Williams*, 108 AD3d 1085, 1086; *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988; *see also* CPLR 5501 [c]; 5520 [c]).

Plaintiff contends for the first time on appeal that defendants failed to meet their initial burden on their motion because their

medical expert was not qualified to render an opinion with respect to the position of plaintiff's body and the path of the bullet in plaintiff's body when plaintiff was shot, and because the expert's affidavit was speculative and conclusory. We nevertheless review those contentions inasmuch as they involve "question[s] of law appearing on the face of the record . . . [that] could not have been avoided by the opposing party if brought to that party's attention in a timely manner" (*Oram v Capone*, 206 AD2d 839, 840; *see Mills v Mills*, 111 AD3d 1306, 1306-1307). Plaintiff's contention is without merit, however, because "the opinion at issue did not require expertise in the workings of firearms and ammunition, but in the effect of gunshots on human tissue and the conclusions to be drawn therefrom. The medical [expert]'s extensive training and experience qualified [him] to provide such an opinion" (*People v Harris*, 99 AD3d 608, 608, *lv denied* 21 NY3d 1004; *see People v Robinson*, 61 AD3d 784, 784, *lv denied* 12 NY3d 920; *People v South*, 47 AD3d 734, 735-736, *lv denied* 17 NY3d 862). We reject plaintiff's further contention that the affidavit of defendants' medical expert was speculative and conclusory (*see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544; *Romano v Stanley*, 90 NY2d 444, 451-452; *Potter v Polozie*, 303 AD2d 943, 944).

Plaintiff's additional contention that defendants failed to attach copies of the evidence upon which their medical expert relied in reaching his opinion is also raised for the first time on appeal. That contention is not properly before us, however, inasmuch as any evidentiary deficiency "could have been obviated or cured by factual showings or legal countersteps" by defendants had plaintiff raised the issue in Supreme Court (*Ring v Jones*, 13 AD3d 1078, 1079 [internal quotation marks omitted]; *see Oram*, 206 AD2d at 840; *see also Innovative Transmission & Engine Co., LLC v Massaro*, 37 AD3d 1199, 1201). We have considered plaintiff's remaining contentions with respect to the affidavit and opinion of defendants' medical expert, and conclude that they are without merit.

We agree, however, with plaintiff's further contention "that the court improperly resolved credibility issues on [the] motion for summary judgment when it determined that the deposition testimony of [plaintiff] was not credible" (*Auble v Doyle*, 38 AD3d 1264, 1265-1266). With respect to the fourth cause of action, against the deputy sheriff, defendants contended that the deputy sheriff's actions were entitled to qualified immunity. "To be entitled to qualified immunity, it must be established that it was objectively reasonable for the police officer involved to believe that his or her conduct was appropriate under the circumstances, or that officers of reasonable competence could disagree as to whether his or her conduct was proper" (*Delgado v City of New York*, 86 AD3d 502, 510). According to plaintiff, the actions of the deputy sheriff who shot him were not objectively reasonable because plaintiff was asleep when the deputy sheriff shot him, and plaintiff testified to that fact several times. The court nevertheless concluded that plaintiff was standing upright when the deputy sheriff shot him, thus implicitly determining that plaintiff's testimony was not credible. "It is not the court's function on a motion for summary judgment to assess credibility"

(*Ferrante v American Lung Assn.*, 90 NY2d 623, 631; *see Givens v Rochester City School Dist.*, 262 AD2d 933, 933). Inasmuch as plaintiff testified that he was asleep in a chair when the deputy sheriff shot him, he has raised a triable issue of fact whether the deputy sheriff's actions were objectively reasonable, and thus the court erred in granting the motion to that extent.

We agree with the further contention of plaintiff that the court erred in dismissing the first cause of action insofar as it asserts claims for negligent supervision and training against defendant Niagara County Sheriff Thomas Beilein (Sheriff). "It has been held that a cause of action sounding in negligence is legally sustainable . . . when the injured party demonstrates that he was injured due to the negligent training and supervision of a law enforcement officer" (*Barr v County of Albany*, 50 NY2d 247, 257). Here, defendants failed to sustain their initial burden of establishing their entitlement to summary judgment dismissing the first cause of action insofar as it asserts claims for negligent training and supervision against the Sheriff because defendants submitted no evidence establishing that the Sheriff was not negligent in training or supervising the deputy sheriff (*see Mendez v City of New York*, 7 AD3d 766, 768; *Beauchamp v City of New York*, 3 AD3d 465, 467). The court therefore should have denied that part of defendants' motion (*see Martinetti v Town of New Hartford Police Dept.*, 307 AD2d 735, 736), "regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01045

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

IN THE MATTER OF CHRISTIAN AIRMEN, INC.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF NEWSTEAD ZONING BOARD OF APPEALS,
RESPONDENT-APPELLANT,
ET AL., RESPONDENT.

J. MATTHEW PLUNKETT, AHMERST, FOR RESPONDENT-APPELLANT.

DAMON MOREY LLP, CLARENCE (COREY A. AUERBACH OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered March 25, 2013 in a proceeding pursuant to CPLR article 78. The judgment, among other things, vacated and annulled the determination of respondent Town of Newstead Zoning Board of Appeals denying a use variance to authorize the paving of an existing turf runway at the Akron Airport.

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

Memorandum: Respondent Town of Newstead Zoning Board of Appeals (ZBA) appeals from a judgment in a special proceeding pursuant to CPLR article 78, which annulled the ZBA's determination denying petitioner's request for a use variance authorizing the paving of an alternate runway at the Akron Airport, and granted the requested use variance. We reverse the judgment and dismiss the petition based on our conclusion that the ZBA's determination has a rational basis and is supported by substantial evidence.

Contrary to the ZBA's initial contention, Supreme Court was not obligated to articulate in greater detail the basis for its determination. Rather, the judgment of the court may simply "annul or confirm the determination in whole or in part, or modify it, and may [also] direct or prohibit specified action by the respondent" (CPLR 7806). Although an oral or written decision by the court must "state the facts [the court] deem[ed] essential" after it has sat as the trier of fact (*see* CPLR 4213 [b]; *Thompson v Unczur*, 55 AD2d 818, 818-819, *lv denied* 42 NY2d 806), there is no such requirement in a special proceeding (*see* CPLR 7804 [a]; *see generally United Buying Serv. Intl.*

Corp. v United Buying Serv. of Northeastern N.Y., 38 AD2d 75, 76-77, *affd* 30 NY2d 822). Thus, the court's failure to set forth specific reasons for annulling the ZBA's determination is not a ground for reversal.

The ZBA's additional contention that the court was required to remit the matter to the ZBA, rather than granting petitioner's request for a use variance, is likewise without merit. The ZBA's determination permitted "intelligent . . . review" by the court inasmuch as the determination addressed all four required components for establishing unnecessary hardship under Town Law § 267-b (2) (b) (*Matter of Iwan v Zoning Bd. of Appeals of Town of Amsterdam*, 252 AD2d 913, 914; *cf. Matter of Pazera v Drexelius*, 4 AD3d 804, 805; *see generally Matter of Luburic v Zoning Bd. of Appeals of Vil. of Irvington*, 106 AD3d 824, 825) and, in reviewing the determination, the court itself was authorized to "grant the petitioner the relief to which [it was] entitled" (CPLR 7806). Moreover, contrary to the ZBA's contention, there is no indication in the record that the court based its decision on a procedural defect in the administrative proceedings; instead, the court concluded that, as alleged in the petition, "the action taken by the [ZBA] was illegal, arbitrary, or an abuse of discretion" (*Matter of Kempisty v Town of Geddes*, 93 AD3d 1167, 1169, *lv denied* 19 NY3d 815, *rearg denied* 21 NY3d 930 [internal quotation marks omitted]; *see Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613). We therefore see no basis for concluding that the court should have remitted the matter to the ZBA for further clarification of its determination.

We nevertheless agree with the ZBA that the court erred in annulling the determination, and in granting petitioner's request for a use variance. Preliminarily, we conclude that there is no record support for petitioner's assertion that the alternate runway predated the enactment of the Town's first zoning ordinance. Thus, the subject property is not the site of a prior nonconforming use, regardless whether petitioner has used it as a runway since the effective date of the Town's first zoning ordinance. We further conclude that the ZBA properly determined that petitioner failed to prove that the denial of the variance would preclude its realizing a reasonable return on the subject property, i.e., the first component of establishing unnecessary hardship (*see* Town Law § 267-b [2] [b] [1]; *see also Matter of Vil. Bd. of Vil. of Fayetteville v Jarrold*, 53 NY2d 254, 257-258; *Matter of Conte v Town of Norfolk Zoning Bd. of Appeals*, 261 AD2d 734, 735-736). Specifically, petitioner failed to establish that the subject land could not be successfully used for agricultural purposes, that the requested variance would have alleviated the airport's preexisting financial woes, or even that it would have to stop using the land for airport purposes and, consequently, to repay grant money, if its request to pave the alternate runway were denied.

Notably, the ZBA does not dispute that petitioner established the second component of unnecessary hardship, i.e., that "the alleged hardship related to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood" (Town Law § 267-b [2] [b] [2]). Even assuming, arguendo, that petitioner

demonstrated the third component of unnecessary hardship, i.e., that the requested variance will not alter the essential character of the neighborhood (*see* § 267-b [2] [b] [3]), we conclude that the deeds proffered by the ZBA demonstrate that petitioner did not acquire portions of the subject property from the former owners until nearly a decade after enactment of the ordinance. We therefore conclude that the alleged hardship is self-created and, thus, petitioner failed to establish the fourth component of unnecessary hardship (*see Matter of Carrier v Town of Palmyra Zoning Bd. of Appeals*, 30 AD3d 1036, 1038, *lv denied* 8 NY3d 807; *Matter of Aiello v Saladino*, 132 AD2d 1002, 1002; *see also* § 267-b [2] [b] [4]).

While we agree with petitioner that the ZBA "may not base its decision on generalized community objections," we do not perceive any indication in the record that the ZBA based its determination on such objections (*Matter of Ifrah v Utschig*, 98 NY2d 304, 308). Although we are cognizant that petitioner advances safety concerns as a rationale for seeking the use variance, we note that, "[b]ecause nonconforming uses are viewed as detrimental to zoning schemes, public policy favors their reasonable restriction and eventual elimination" (*Matter of 550 Halstead Corp. v Zoning Bd. of Appeals of Town/Vil. of Harrison*, 1 NY3d 561, 562).

Finally, we reject petitioner's contention that, because the ZBA allegedly granted similar use variances for the subject property in prior years, its denial of petitioner's request for the use variance herein establishes that it acted arbitrarily and in contravention of its precedent. Rather, we conclude that the record is inadequate to establish that the ZBA "reach[ed] a different result on essentially the same facts" when it denied petitioner's request (*Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 93 [internal quotation marks omitted]; *see generally Matter of Davydov v Mammina*, 97 AD3d 678, 679-680). Specifically, the record is silent regarding the paving variance allegedly granted in 2008, and it is unclear from the record whether the 2004 and 2005 variances pertained to the specific property where the alternate runway is located.

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 10-02204

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH SANTOS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered September 30, 2010. The judgment convicted defendant, upon his plea of guilty, of rape 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 rape in the third degree (Penal Law § 130.25 [2]), defendant contends that his waiver of the right to appeal is unenforceable and that his sentence is unduly harsh and severe. We agree with defendant that County Court failed to engage him in an adequate colloquy to ensure that his right to appeal was a knowing and voluntary choice (*see People v Box*, 96 AD3d 1570, 1571, *lv denied* 19 NY3d 1024). Nevertheless, on the merits, we perceive no basis to exercise our power to modify defendant's negotiated sentence of probation as a matter of discretion in the interest of justice (*see* CPL 470.15 [6]).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

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KAH 13-00283

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
RONALD ACKRIDGE, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL SHEAHAN, SUPERINTENDENT, FIVE POINTS
CORRECTIONAL FACILITY AND NEW YORK STATE DIVISION
OF PAROLE, RESPONDENTS-RESPONDENTS.

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT.

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered November 20, 2012 in a habeas corpus proceeding. The judgment denied and dismissed the petition.

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

Memorandum: On appeal from a judgment denying his petition for a writ of habeas corpus, petitioner contends that his right to due process was violated because, following sentencing, he was not transferred to the Willard Drug Treatment Facility in a timely manner. While this appeal was pending, however, petitioner was released to parole supervision, thus rendering this habeas proceeding moot (*see People ex rel. Baron v New York State Dept. of Corr.*, 94 AD3d 1410, 1410, *lv denied* 19 NY3d 807). Contrary to petitioner's contention, this case does not fall within the exception to the mootness doctrine (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). The appeal is therefore dismissed.

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

237

CA 13-01417

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

BETTY L. KIMMEL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK AND NEW YORK STATE DIVISION OF STATE POLICE, DEFENDANTS-APPELLANTS.

EMMELYN LOGAN-BALDWIN, INTERESTED PARTY-RESPONDENT.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BRADLEY A. HOPPE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HARRIET L. ZUNNO, HILTON, FOR PLAINTIFF-RESPONDENT.

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR INTERESTED PARTY-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered June 5, 2013. The order granted the applications of plaintiff and former counsel for plaintiff for attorneys' fees and expenses.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs, plaintiff and Emmelyn Logan-Baldwin are awarded attorneys' fees and disbursements on appeal and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Plaintiff commenced the instant action in May 1995, alleging sex discrimination, sexual harassment, and retaliation under the Human Rights Law (Executive Law § 296) and Civil Rights Law §§ 40-c and 40-d. There have been numerous appeals since 1999 in this matter and, most recently, we determined that plaintiff and her former attorney, interested party Emmelyn Logan-Baldwin, were entitled to seek attorneys' fees and expenses under CPLR article 86, i.e., the New York State Equal Access to Justice Act (EAJA) (*Kimmel v State of New York*, 76 AD3d 188). Upon remittal to Supreme Court, the parties stipulated to the amount of the attorneys' fees. The parties however, litigated the issue whether plaintiff met her burden of establishing that, at the time the action was commenced, her net worth was less than $50,000 (*see* CPLR 8602 [d] [i]). The EAJA authorizes "the recovery of counsel fees and other reasonable expenses in certain actions against the state of New York, similar to the provisions of federal law contained in 28 U.S.C. § 2412 [d] [federal EAJA] and the significant body of case law that has

evolved thereunder" (CPLR 8600). In contrast to the EAJA, however, we note that the federal EAJA requires a prevailing party seeking counsel fees and expenses to establish a net worth of not more than $2 million (*see* 28 USC § 2412 [d] [2] [B]).

In addition to her own affidavit, plaintiff submitted a bankruptcy petition that was filed on July 5, 1995. The petition reflects that plaintiff and her husband retained an attorney for the bankruptcy on May 30, 1995, six days after this action was commenced. Plaintiff also submitted the affidavit of a certified public accountant (CPA), who prepared a "statement of financial condition" of plaintiff and averred "with a reasonable degree of accounting certainty" that plaintiff's net worth at the time she commenced the action was a negative figure. We reject defendants' contention that federal authority requires plaintiff to provide an integrated balance sheet with an affidavit from a CPA that the review complies with generally accepted accounting principles (GAAP) and that, here, the CPA's report and affidavit should be rejected because his report does not comply with the GAAP. Indeed, the Fourth Circuit Court of Appeals recognized that the federal EAJA does not "give instructions on how to calculate an applicant's net worth" (*Broaddus v United States Army Corps of Engrs.*, 380 F3d 162, 166 [2004]). The *Broaddus* Court concluded that the affidavit from plaintiff's accountant and two appraisals of the property at issue was "sufficient documentation to allow the district court to determine [plaintiff's] net worth" (*id.* at 168). By contrast, the 10th Circuit Court of Appeals concluded that plaintiff failed to meet its burden of proving its net worth at less than $2 million with only an "unverified and unsworn" letter from its accountant (*Shooting Star Ranch, LLC v United States*, 230 F3d 1176, 1178 [2000]).

We conclude that, here, plaintiff's proof is "more than ample to demonstrate [her] eligibility for an EAJA award" (*Broaddus*, 380 F3d at 169). The court properly determined that the bankruptcy petition reflected plaintiff's net worth at the time she commenced the action and properly credited plaintiff's affidavit and the affidavit of her accountant, all of which provided the court with sufficient information to determine plaintiff's assets and liabilities, and thus her net worth, at the time the action was commenced (*cf*. *Matter of Cintron v Calogero*, 99 AD3d 456, 457-458, *lv denied* 22 NY3d 855).

In their respective respondent's briefs, plaintiff and Logan-Baldwin seek sanctions, fees and costs associated with this appeal. Defendants failed to respond to the request in their reply brief. We conclude that sanctions are not warranted inasmuch as defendants' appeal does not constitute "frivolous conduct" as defined in 22 NYCRR 130-1.1 (c) (*see Amherst Magnetic Imaging Assoc., P.C. v Community Blue, HMO of Blue Cross of W. N.Y.*, 286 AD2d 896, 898, *lv denied* 97 NY2d 612). We nevertheless conclude that plaintiff and Logan-Baldwin are entitled to attorneys' fees, costs and disbursements incurred in defending this appeal because the position of the state on appeal was not "substantially justified" (CPLR 8601 [a]), i.e., it did not have "a reasonable basis both in law and fact" (*Matter of New York State*

Clinical Lab. Assn. v Kaladjian, 85 NY2d 346, 356 [internal quotation marks omitted]; *cf. Cintron*, 99 AD3d at 457). Here, the court's determination was supported by the record and applicable law, and defendants' appeal addressed only alleged technical deficiencies in plaintiff's proof that were rejected by the court. Indeed, "[t]he EAJA is meant to open the doors of the courthouse to parties, not to keep parties locked in the courthouse disputing fees well after the resolution of the underlying case. The EAJA's requirements must be interpreted accordingly" (*Sosebee v Astrue*, 494 F3d 583, 588-589). We therefore remit the matter to Supreme Court to determine the amount of reasonable attorneys' fees and disbursements incurred in defending this appeal (*see Deep v Clinton Cent. Sch. Dist.*, 48 AD3d 1125, 1127).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00999

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

VALERIE HEATTER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL E. DMOWSKI, DEFENDANT-APPELLANT.

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

WILLIAM K. MATTAR, P.C., WILLIAMSVILLE (APRIL J. ORLOWSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered March 5, 2013 in a personal injury action. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle she was driving was struck by a vehicle operated by defendant. According to plaintiff, she sustained a serious injury under four categories set forth in Insurance Law § 5102 (d), i.e., permanent loss of use, permanent consequential limitation of use, significant limitation of use and the 90/180-day category. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury under any of those categories, and Supreme Court denied the motion. We reverse. Defendant met his initial burden of establishing that plaintiff did not sustain a serious injury under those four categories by submitting an affirmed examining physician's report stating that, although plaintiff had sustained a cervical strain that had resolved within weeks of the accident, the post-accident MRI films of the cervical spine were unchanged from the prior cervical MRI films taken five years earlier and revealed no objective evidence of a recent traumatic or causally related injury (*see Womack v Wilhelm*, 96 AD3d 1308, 1309; *Fuentes v Sanchez*, 91 AD3d 418, 419; *Gentilella v Board of Educ. of Wantagh Union Free Sch. Dist.*, 60 AD3d 629, 629-630). We note in particular with respect to the 90/180-day category that plaintiff failed to submit the requisite objective evidence of "a medically determined injury or impairment of a non-permanent nature" (§ 5102 [d]), and failed to establish that the alleged limitations in plaintiff's daily activities resulted from injuries sustained in the

accident (*see Dann v Yeh*, 55 AD3d 1439, 1441; *Calucci v Baker*, 299 AD2d 897, 898).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

240

CA 13-01607

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

KATHLEEN M. KORTHALS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LCB CAPITAL, LLC, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered April 11, 2013 in a personal injury action. The order denied the motion of defendant for summary judgment.

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

Memorandum: In this slip and fall personal injury action, defendant property owner appeals from an order denying its motion for summary judgment dismissing the complaint. According to defendant, Supreme Court should have granted its motion because there was a storm in progress when plaintiff slipped and fell on ice outside its apartment building in Kenmore, and it therefore had no duty to remedy the allegedly dangerous condition prior to the accident (*see Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735; *Brierley v Great Lakes Motor Corp.*, 41 AD3d 1159, 1160). We conclude that the court properly denied defendant's motion.

The meteorological records submitted by defendant in support of its motion establish that the alleged storm, which consisted of intermittent freezing rain and mist, ended no later than 4:52 a.m., when the last precipitation was recorded in the area. Plaintiff fell approximately four hours later, and radar imagery submitted by defendant showed that there were "mainly clear skies" in Kenmore at the time of the accident. In addition, the last freezing rain advisory was cancelled at 6:49 a.m., and there had been no freezing rain since 12:27 a.m. We thus agree with plaintiff that "[d]efendant[']s[] submissions establish that the storm had ended at the time of plaintiff's fall, and there is a triable issue of fact whether a reasonable period of time had passed since the abatement of the storm to impose a duty on the defendant[]" to remedy the dangerous icy condition caused by the alleged storm (*Boarman v Siegel, Kelleher*

and Kahn, 41 AD3d 1247, 1248; *see Alexis v City of New York*, 111 AD3d 527, 528; *Helms v Regal Cinemas, Inc.*, 49 AD3d 1287, 1288). Inasmuch as defendant failed to meet its initial burden, we need not review the sufficiency of plaintiff's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

241

CA 13-01151

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

CATHLEEN CAMACHO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER CAMACHO, DEFENDANT-APPELLANT.

VENZON LAW FIRM PC, BUFFALO (CATHARINE M. VENZON OF COUNSEL), FOR DEFENDANT-APPELLANT.

TIMOTHY J. PAWARSKI, ELMA, FOR PLAINTIFF-RESPONDENT.

GAYLE T. MURPHY, ATTORNEY FOR THE CHILD, HAMBURG.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered April 18, 2013. The order, among other things, denied that part of defendant's motion seeking access to the subject child "until the child's counselor agrees that it would be appropriate."

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the provision conditioning defendant's access to the child upon the agreement of the child's counselor, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Defendant appeals from an order that, inter alia, denied that part of his motion seeking access with the parties' child "until the child's counselor agrees that it would be appropriate." We agree with defendant that Supreme Court thereby improperly delegated to the child's counselor the court's authority to determine issues involving the best interests of the child (*see Matter of Hameed v Alatawaneh*, 19 AD3d 1135, 1136; *Matter of Henrietta D. v Jack K.*, 272 AD2d 995, 995). We therefore modify the order accordingly, and we remit the matter to Supreme Court for a determination of that part of defendant's motion seeking access with the child.

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

245

CA 13-01698

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

CRAIG B. WINSHIP, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BARBARA A. WINSHIP, DEFENDANT-RESPONDENT.

COTTER & COTTER P.C., WILLIAMSVILLE (DAVID B. COTTER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GERALD J. VELLA, SPRINGVILLE, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered December 21, 2012 in a divorce action. The judgment, among other things, dissolved the marriage between the parties and distributed the marital assets.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the weekly awards of child support and maintenance to $210.85 and $290.40, respectively, and as modified the judgment is affirmed without costs.

Memorandum: In this matrimonial action, plaintiff husband appeals from a judgment entered following a nonjury trial on issues relating to child support, maintenance and equitable distribution. Plaintiff contends that he should be afforded a new trial because Supreme Court abdicated its judicial responsibilities by adopting, almost verbatim, the proposed findings of fact submitted by defendant's attorney. According to plaintiff, the court's error in this regard is particularly prejudicial to him because defendant's proposed findings of fact fail to comply with CPLR 4213 (a), inasmuch as they are impermissibly argumentative (*see Charles F. Ryan & Son v Lancaster Homes, Inc.*, 22 AD2d 186, 192, *affd* 15 NY2d 812; *Capasso v Capasso*, 119 AD2d 268, 275). We conclude that reversal is not warranted based on the court's findings of fact.

Of the 156 findings of fact proposed by defendant, only 4 contain improper language, and the underlying factual assertions are not challenged by plaintiff. Although the court adopted many of defendant's proposed findings, the court did not adopt the proposed finding regarding plaintiff's income. The court determined that the amount of plaintiff's income was $63,636.46, whereas defendant proposed an amount of $77,170.42. As a result, the amounts of child support and maintenance set forth in the court's findings of fact are less than those proposed by defendant. Under the circumstances, it

cannot be said that the court abdicated its judicial responsibilities (*see Henery v Henery*, 105 AD3d 903, 904; *Noble v Noble*, 78 AD3d 1386, 1387).

Plaintiff further contends that the court's award of maintenance is excessive. We note at the outset that plaintiff failed to submit a sworn financial statement, as required by Domestic Relations Law § 236 (B). He also failed to submit copies of his recent tax returns, his W-2 statements, or his 1099 statements, as required by 22 NYCRR 202.16. Thus, plaintiff "cannot be heard to complain that the court erred in drawing inferences favorable to defendant with respect to the disputed financial issues," including maintenance (*Anfang v Anfang*, 243 AD2d 340, 340; *see Glass v Glass*, 233 AD2d 274, 275). In any event, considering the factors set forth in Domestic Relations Law § 236 (B) (6) (a), we conclude that the court's award of maintenance, as set forth in its findings of fact, does not constitute an abuse of discretion (*see generally Sharlow v Sharlow*, 77 AD3d 1430, 1431; *Smith v Winter*, 64 AD3d 1218, 1220, *lv denied* 13 NY3d 709). As plaintiff points out, however, the judgment sets weekly maintenance at a higher amount than that set forth in the court's findings of fact, and we therefore modify the judgment by reducing plaintiff's weekly maintenance obligation from $337.15 to $290.40 (*see Berry v Williams*, 87 AD3d 958, 961; *Oliver v Oliver*, 70 AD3d 1428, 1430).

With respect to child support, plaintiff contends that the court did not properly calculate defendant's income because it failed to consider funds she receives from land and gas leases. In his own proposed findings of fact, however, plaintiff stated that defendant's income for support purposes was $18,334, which is the exact figure determined by the court. Thus, plaintiff's contention is unpreserved for our review. Again, however, the judgment provides for a higher award of child support than that set forth in the court's findings of fact, which control (*see Berry*, 87 AD3d at 961; *Oliver*, 70 AD3d at 1430). We thus further modify the judgment by reducing plaintiff's weekly child support obligation from $254.23 to $210.85.

Plaintiff's primary challenge to the equitable distribution award relates to the court's determination that Pine Top Plantation (Pine Top), a 128-acre Christmas tree farm formerly owned and operated by plaintiff's deceased father, is marital property subject to equitable distribution. The court determined that, pursuant to an installment contract dated January 8, 2000, plaintiff purchased Pine Top from his father. According to plaintiff, he and his father terminated the installment contract, and he inherited the business and its land from his father upon his father's death in February 2010. In the joint tax returns filed from 2000 through 2008, however, the parties depreciated Pine Top's equipment and property, and identified plaintiff as its "proprietor." Plaintiff signed those tax returns. As the Court of Appeals has made clear, "[a] party to litigation may not take a position contrary to a position taken in an income tax return" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422). Here, plaintiff's tax returns are inconsistent with his position that his father owned Pine Top after 2000, inasmuch as a party cannot depreciate property that he or she does not own. In any event, giving deference to the

trial court's credibility determinations, we perceive no basis to disturb the court's finding that plaintiff acquired Pine Top from his father during the marriage and prior to his father's death.

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

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

249

KA 08-00334

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER D. HUNTER, DEFENDANT-APPELLANT.

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

CHRISTOPHER D. HUNTER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Stephen K. Lindley, J.), rendered December 17, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). We reject defendant's contention that he was denied a fair trial based on comments by the prosecutor during summation concerning the defense of extreme emotional disturbance and Supreme Court's ruling in response to his objection to those comments. We agree with defendant that, in making its ruling, the court improperly stated that "mercy" was an element of that defense (*see* § 125.25 [1] [a]). We note, however, that the court thereafter properly instructed the jury on the statutory elements of the defense and properly stated the fundamental legal principles applicable thereto. We conclude that the isolated misstatement by the court was satisfactorily corrected by the court's proper jury instructions (*see generally People v Higgins*, 188 AD2d 839, 841, *lv denied* 81 NY2d 972).

Contrary to defendant's further contention, we conclude that the prosecutor's comments during summation concerning the lack of mercy shown by defendant toward the victim were a fair response to defense counsel's summation (*see People v Ali*, 89 AD3d 1412, 1414, *lv denied* 18 NY3d 881). "Even assuming, arguendo, that the prosecutor's comments were beyond [the broad bounds of rhetorical comment permissible], we conclude that they were not so egregious as to deprive defendant of a fair trial" (*People v McEathron*, 86 AD3d 915,

916, *lv denied* 19 NY3d 975).

We reject defendant's contention that he was denied the right to be present during a material stage of the trial. Here, in his omnibus motion, defendant sought a ruling to preclude the People from admitting evidence of defendant's prior convictions and bad acts, while the People, pursuant to *Sandoval* and *Molineux*, sought a pretrial ruling permitting them to use at trial defendant's five prior misdemeanor and felony convictions and six letters that he had written to his wife. Defense counsel agreed on the record to the procedure whereby the court would render a decision on the parties' written submissions with respect to those matters before opening statements, and we conclude that defendant had the opportunity to contribute to defense counsel's written submission (*see People v Liggins*, 19 AD3d 324, 325, *lv denied* 5 NY3d 853). Prior to opening statements, the court called the prosecutor and defense counsel to the bench to apprise them of its *Sandoval* and *Molineux* rulings. Defendant's physical presence was not required at that bench conference inasmuch as the court was " 'simply placing on the record the [rulings] it had already made' " with respect to the People's *Sandoval* and *Molineux* applications, and defendant could not reasonably have contributed his views even if he had been present (*see People v Guerrero*, 27 AD3d 386, 386; *People v Rivera*, 201 AD2d 377, 377, *lv denied* 83 NY2d 875). We also note that the court thereafter, in defendant's presence in open court, announced the essence of its rulings with respect to the People's *Sandoval* and *Molineux* applications. To the extent that defendant contends that he was denied the right to be present at a pretrial *Ventimiglia* hearing, we note that a defendant is not entitled to such a hearing (*see People v Robinson*, 28 AD3d 1126, 1128, *lv denied* 7 NY3d 794). We have reviewed the contentions raised in defendant's pro se supplemental brief and conclude that they are without merit.

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

252

KA 11-00002

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EUGENE WOFFORD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered October 21, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, criminal possession of marihuana in the third degree and reckless endangerment 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 criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), criminal possession of marihuana in the third degree (§ 221.20), and reckless endangerment in the second degree (§ 120.20). Contrary to defendant's contention, Supreme Court did not err in refusing to suppress the gun and drugs discarded by defendant and later found by the police. A police officer testified at the suppression hearing that he received an anonymous tip regarding drug activity taking place at a certain location. Upon proceeding to the location, the officer found defendant sitting in a parked vehicle, which was similar to the description of the vehicle given by the anonymous caller. As the officer spoke with defendant, he noticed what appeared to be a pile of cigar tobacco on the ground outside the vehicle, and the officer knew, based on his training and experience, that emptying a cigar was a common method of preparing a marihuana cigar, or a "blunt." When the officer asked defendant to step out of the vehicle, defendant instead started the vehicle and sped off, almost striking another officer who was approaching the vehicle on foot. During the ensuing chase, defendant discarded a bag out of the passenger-side window. The bag was later recovered by the police and was found to contain a loaded weapon and marihuana.

The officer's initial approach of defendant and request for

identification was a permissible level one encounter under *People v De Bour* (40 NY2d 210; *see generally People v Hollman*, 79 NY2d 181, 191). Although the officer's request that defendant exit the parked vehicle elevated the situation to a level three encounter under *De Bour* (*see People v Atwood*, 105 AD2d 1055, 1055; *see also People v Harrison*, 57 NY2d 470, 475-476), we conclude that the officer had reasonable suspicion that defendant was engaged in illegal activity based on the anonymous tip and the officer's observation of drug activity, i.e., the pile of cigar tobacco on the ground (*see People v Mays*, 190 Misc 2d 310, 316, *affd* 10 AD3d 556, *lv denied* 4 NY3d 765; *see also Matter of Camille H.*, 215 AD2d 143, 143-144). In any event, even assuming, arguendo, that defendant was unlawfully detained, we conclude that his criminal conduct in speeding off and almost striking the second officer—conduct for which defendant was convicted of reckless endangerment in the second degree—"severed any causal connection between the unlawful detention and the subsequently-acquired evidence" (*People v May*, 100 AD3d 1411, 1411, *lv denied* 20 NY3d 1063).

Contrary to defendant's contention, the evidence is legally sufficient to support the conviction of criminal possession of a weapon in the second degree and criminal possession of marihuana in the third degree inasmuch as the evidence established that the bag later found by the police had been possessed by and then discarded by defendant during the chase (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence with respect to them (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's contention that the court erred in denying his request for a missing witness charge. The testimony of a third officer involved in the police chase would have been cumulative (*see People v Santiago*, 101 AD3d 1715, 1717, *lv denied* 21 NY3d 946; *People v Duda*, 45 AD3d 1464, 1466, *lv denied* 10 NY3d 764; *see generally People v Gonzalez*, 68 NY2d 424, 427). In any event, any error in failing to give that charge is harmless inasmuch as the evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the alleged error (*see People v McCune*, 210 AD2d 978, 979, *lv denied* 85 NY2d 864; *see generally People v Crimmins*, 36 NY2d 230, 241-242). Finally, the sentence is not unduly harsh or severe.

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

269

KA 12-01932

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GABRIEL VANN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered July 16, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]), defendant contends that his waiver of the right to appeal is unenforceable and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is unenforceable (*see People v Williams*, 46 AD3d 1424, 1425; *People v Whipple*, 37 AD3d 1148, *lv denied* 8 NY3d 928), or that it does not otherwise preclude his challenge to the severity of his sentence (*see People v Maracle*, 19 NY3d 925, 928), we nevertheless conclude that the negotiated sentence of a determinate term of one year plus one year of postrelease supervision is not unduly harsh or severe. We note that County Court initially placed defendant on interim probation, but defendant was arrested on new charges prior to sentencing and failed to comply with the terms and conditions of probation. We also note that defendant was released from prison in April 2013 and is nearing his maximum expiration date. We thus perceive no basis to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6]).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

272

KA 07-00149

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD REED, DEFENDANT-APPELLANT.

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

EDWARD REED, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered January 3, 2007. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts), aggravated assault upon a police officer or a peace officer and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of aggravated assault upon a police officer or a peace officer (Penal Law § 120.11) and two counts each of burglary in the first degree (§ 140.30 [1], [2]) and criminal possession of a weapon in the second degree (§ 265.03 [former (2)]). Defendant contends that reversal is required based on a *Brady* violation, i.e., the prosecutor's failure to turn over copies of police reports concerning an earlier unrelated shooting, one of which contained a hearsay statement from a confidential informant implicating one of the prosecution witnesses who testified in this case. Even assuming, arguendo, that the reports were required to be turned over notwithstanding the fact that the majority of them indicated that the witness did not commit the crime and indeed that the crime was directed toward that witness in retaliation for another incident, and further assuming, arguendo, that the information was possessed by the prosecution and not by the defense, we conclude that reversal is not warranted. "[T]here is [no] reasonable probability that had it been disclosed to the defense, the result would have been different—i.e., a probability sufficient to undermine the [reviewing] court's confidence in the outcome of the trial" (*People v Bryce*, 88 NY2d 124, 128; *see People v Hunter*, 11 NY3d 1, 5). That witness was heavily cross-

examined at trial concerning his numerous convictions, the serious new charges still pending against him, his failure to come forward with information concerning this defendant until after the witness was arrested on those new charges, and the benefit that he received with respect to those charges in return for testifying against this defendant. Thus, there is no reasonable probability that additional cross-examination of that witness concerning one more charge would have yielded a different result (*see generally People v Salton*, 74 AD3d 997, 998-999, *lv denied* 15 NY3d 895).

By failing to object to County Court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his present challenge to that ruling (*see People v Wilson*, 104 AD3d 1231, 1233, *lv denied* 21 NY3d 1011, *reconsideration denied* 21 NY3d 1078; *People v Williams*, 101 AD3d 1730, 1732, *lv denied* 21 NY3d 1021). In any event, that contention is without merit inasmuch as the record establishes that the court "weighed appropriate concerns and limited both the number of convictions and the scope of permissible cross-examination" (*People v Hayes*, 97 NY2d 203, 208).

In addition to his contention concerning the court's *Sandoval* ruling, defendant contends that the court improperly allowed the People to present evidence that he had a prior conviction when a prosecution witness testified that the People's DNA expert sent a DNA profile, which was obtained from evidence at the crime scene, to the CODIS database of convicted felons for comparison. Defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]; *see generally People v Page*, 105 AD3d 1380, 1382), and we conclude in any event that the People did not in fact thereby present evidence of a prior conviction. The expert did not testify that a match was obtained from that source after she submitted the profile, and thus there was no evidence that defendant's DNA was in the database of felons. Similarly, we reject defendant's contention that the court erred in admitting evidence that the police seized sneakers from his house that were consistent with sneaker prints left at the scene of the crime, inasmuch as such evidence was relevant to defendant's guilt (*see e.g. People v Jurgensen*, 288 AD2d 937, 938, *lv denied* 97 NY2d 684; *People v Turcotte*, 252 AD2d 818, 819, *lv denied* 92 NY2d 1054; *People v Samiec*, 181 AD2d 983, 983).

Defendant further contends that the court erred in denying the request of a codefendant's attorney for a jury instruction that one of the witnesses was an accomplice whose testimony required corroboration. "Defendant failed to join in [the] codefendant's request [for that] charge . . . and thus has failed to preserve his present contention for our review" (*People v Hill*, 300 AD2d 1125, 1126, *lv denied* 99 NY2d 615; *see People v Thompson*, 59 AD3d 1115, 1116-1117, *lv denied* 12 NY3d 860; *People v Fuller*, 286 AD2d 910, 911, *lv denied* 97 NY2d 682). In any event, we conclude that "the failure of the court to give that instruction is of no moment, inasmuch as the testimony of the witness was in fact amply corroborated" (*People v Fortino*, 61 AD3d 1410, 1411, *lv denied* 12 NY3d 925).

Defendant contends in his main and pro se supplemental briefs that he was denied effective assistance of counsel based on, inter alia, defense counsel's failure to challenge a prospective juror or object to the expert's testimony that the DNA profile from the baseball hat was submitted to the CODIS database. We reject that contention, inasmuch as defendant "failed to show the absence of a strategic explanation for defense counsel's" alleged failures (*People v Mendez*, 77 AD3d 1312, 1312-1313, *lv denied* 16 NY3d 799; *see People v Benevento*, 91 NY2d 708, 712-713). Furthermore, defense counsel was not ineffective in failing to pursue his motion to suppress DNA evidence obtained from liquid that defendant spit out in his driveway, which the police seized therefrom. It is well settled that "[t]here can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702), and it is clear that the motion was subject to denial on several grounds, among them that defendant failed to post signs excluding the public from the exterior areas of his property and that defendant had no reasonable expectation of privacy in the liquid that he spit out. Defendant's remaining contentions concerning ineffective assistance of counsel "involve[] matters outside the record on appeal, and thus the proper procedural vehicle for raising [those contentions] is by way of a motion pursuant to CPL 440.10" (*People v Wilson*, 49 AD3d 1224, 1225, *lv denied* 10 NY3d 966; *see People v Hall*, 50 AD3d 1467, 1469, *lv denied* 11 NY3d 789). Viewed as a whole, the record establishes that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

As we noted with respect to the prosecutor's summation in the context of the appeal by a codefendant, the majority of defendant's contentions in his pro se supplemental brief with respect to alleged instances of prosecutorial misconduct during summation are not preserved for our review (*see* CPL 470.05 [2]) "and, in any event, we conclude that any improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Freeman*, 78 AD3d 1505, 1505-1506, *lv denied* 15 NY3d 952 [internal quotation marks omitted]). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

The sentence is not unduly harsh or severe. "We note, however, that the aggregate maximum term of the sentence exceeds the 40-year limitation set forth in Penal Law § 70.30 (1) (e) (iv), and thus the sentence should be recalculated accordingly by the Department of [Corrections and Community Supervision]" (*Freeman*, 78 AD3d at 1506). We have considered defendant's remaining contentions raised in his main and pro se supplemental briefs and conclude that none warrant reversal or modification of the judgment.

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

274

KA 12-00547

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALE A. BELL, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered January 13, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the period of postrelease supervision and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for further proceedings in accordance with the following Memorandum: On this appeal by defendant from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), the People correctly concede that the period of postrelease supervision imposed by County Court must be vacated because the court "misapprehended its sentencing discretion with respect to that period" (*People v Britt*, 67 AD3d 1023, 1024, *lv denied* 14 NY3d 770; *see People v Trott*, 105 AD3d 1416, 1417-1418, *lv denied* 21 NY3d 1020; *People v Wilkins*, 104 AD3d 1156, 1157, *lv denied* 21 NY3d 1011). The record demonstrates that, during the plea colloquy, the court informed defendant that the minimum period of postrelease supervision for the crime to which he pleaded guilty, a class C violent felony offense (*see* § 70.02 [1] [b]), was five years when, in fact, the minimum period is 2½ years (*see* § 70.45 [2] [f]). We therefore vacate the period of postrelease supervision and remit the matter to County Court for "reconsideration of the length of that period and the reimposition of a period of postrelease supervision thereafter" (*Britt*, 67 AD3d at 1024).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

279

CAF 13-00710

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

IN THE MATTER OF WAYNE YADDOW,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LISA BIANCO, RESPONDENT-RESPONDENT.

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

SAUNDERS, KOHLER, L.L.P., UTICA (JAMES S. RIZZO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered April 1, 2013 in a proceeding pursuant to Family Court Act article 6. The order denied the petition.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order denying his petition seeking permission for the parties' child, who is now eight years old, to relocate with him from New York to Maryland. We note at the outset that, although Family Court failed " 'to set forth those facts essential to its decision' " (*Matter of Rocco v Rocco*, 78 AD3d 1670, 1671; *see* CPLR 4213 [b]; Family Ct Act § 165 [a]), the record is sufficient to enable us to make the requisite findings (*see Matter of Mathewson v Sessler*, 94 AD3d 1487, 1489, *lv denied* 19 NY3d 815; *Matter of Williams v Tucker*, 2 AD3d 1366, 1367, *lv denied* 2 NY3d 705). Based on our review of the record, we conclude that the father failed to demonstrate by a preponderance of the evidence that it was in the best interests of the child to relocate to Maryland, where the father wished to live with his new wife (*see generally Matter of Tropea v Tropea*, 87 NY2d 727, 738-741).

The father's primary motivation for relocating was financial, and he testified that he had obtained an offer of a full-time teaching position at a middle school in Maryland. The father failed, however, to offer any proof of that job offer, and the court made clear during its questioning of him that it had doubts whether the offer actually existed. In any event, the father did not diligently seek teaching positions in the surrounding counties, and his wife, a teacher in

Maryland, made no efforts to find employment in New York. We note that the father's wife, who has no children of her own, has ties to New York, having graduated from the State University of New York at Oswego, where she met the father. Finally, a relocation to Maryland would make it difficult for the child to maintain a meaningful relationship with his mother and two brothers, who reside in central New York. In sum, we conclude that the court's determination to deny the father's relocation petition has a sound and substantial basis in the record and therefore should not be disturbed (*see Matter of Ramirez v Velazquez*, 91 AD3d 1346, 1347, *lv denied* 19 NY3d 802; *Matter of Murphy v Peace*, 72 AD3d 1626, 1626-1627).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

285

CA 13-01564

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

IN THE MATTER OF ARBITRATION BETWEEN ALDEN CENTRAL SCHOOL DISTRICT, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

ALDEN CENTRAL SCHOOLS ADMINISTRATORS' ASSOCIATION, RESPONDENT-RESPONDENT.

HODGSON RUSS LLP, BUFFALO (JEFFREY F. SWIATEK OF COUNSEL), FOR PETITIONER-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOSEPH L. GUZA OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered February 1, 2013. The order, insofar as appealed from, denied the petition for a stay of arbitration and granted that part of the cross petition seeking to compel arbitration.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the petition is granted and the cross petition is denied in its entirety.

Memorandum: Petitioner commenced this proceeding seeking a stay of arbitration pursuant to CPLR 7503, and respondent cross-petitioned to compel arbitration of its grievance and for other relief. Supreme Court denied the petition and granted that part of the cross petition seeking to compel arbitration. We reverse the order insofar as appealed from. The grievance in this case was filed by respondent on behalf of a member whose position as principal of an elementary school was abolished. The member was placed on the Preferred Eligibility List and then hired, at a lower salary, as an assistant principal of a middle school. Respondent filed a grievance on behalf of its member, contending that her new position is sufficiently "similar" within the meaning of Education Law § 2510 (3) (a) such that she is entitled to the same level of pay. After petitioner denied the grievance, respondent demanded arbitration under the parties' collective bargaining agreement (CBA). Petitioner then commenced this proceeding.

It is well settled that, in deciding an application to stay or compel arbitration under CPLR 7503, the court is concerned only with the threshold determination of arbitrability, and not with the merits of the underlying claim (*see* CPLR 7501; *Matter of Board of Educ. of*

Watertown City Sch. Dist. [Watertown Educ. Assn.], 93 NY2d 132, 142-143). In making the threshold determination of arbitrability, the court applies a two-part test. It first determines whether "there is any statutory, constitutional or public policy prohibition against arbitration of the grievance" (*Matter of City of Johnstown [Johnstown Police Benevolent Assn.]*, 99 NY2d 273, 278). "If no prohibition exists,[the court then determines] whether the parties in fact agreed to arbitrate the particular dispute by examining their collective bargaining agreement" (*Matter of County of Chautauqua v Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO, County of Chautauqua Unit 6300, Chautauqua County Local 807*, 8 NY3d 513, 519; *see Matter of Mariano v Town of Orchard Park*, 92 AD3d 1232, 1233).

Here, we agree with petitioner that the Commissioner of Education has primary jurisdiction over the parties' dispute, and that arbitration is therefore prohibited by public policy. As we have previously noted, " 'the Commissioner of Education has the specialized knowledge and expertise to resolve the factual issue of whether the . . . former position and the new position are similar within the meaning of Education Law § [2510 (3) (a)]' " (*Matter of DiTanna v Board of Educ. of Ellicottville Cent. Sch. Dist.*, 292 AD2d 772, 773, *lv denied* 98 NY2d 605; *see Matter of Donato v Board of Educ. of Plainview, Old Bethpage Cent. Sch. Dist.*, 286 AD2d 388, 388). Based on his or her specialized knowledge and expertise, the Commissioner of Education should "resolve, in the first instance," the issue of fact whether two positions are sufficiently similar under Education Law § 2510 (*Matter of Ferencik v Board of Educ. of Amityville Union Free Sch. Dist.*, 69 AD3d 938, 938; *see Matter of Moraitis v Board of Educ. Deer Park Union Free Sch. Dist.*, 84 AD3d 1090, 1091; *Matter of Hessney v Board of Educ. of Pub. Schs. of Tarrytowns*, 228 AD2d 954, 955, *lv denied* 89 NY2d 801). Respondent's reliance on *Matter of Board of Educ. v Portville Faculty Assn.* (96 AD2d 739) is misplaced, inasmuch as the dispute in that case involved an employee's right to tenure, and not whether two positions are similar in nature and duties.

In light of our determination, we need not address petitioner's additional contention that there is no reasonable relationship between respondent's grievance and the parties' CBA.

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

287

CA 13-01371

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

ANTHONY P. FANTI AND DEBORAH FANTI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JUAN CONCEPCION AND DARLENE CAMACHO,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JILL Z. FLORKOWSKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FREID AND KLAWON, WILLIAMSVILLE (WAYNE I. FREID OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered October 23, 2012. The order, insofar as appealed from, denied the motion of defendants-appellants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Anthony P. Fanti (plaintiff) in May 2007 when the vehicle he was driving was struck from behind by a vehicle owned by Juan Concepcion and driven by Darlene Camacho (defendants). In October 2007 plaintiff was involved in a virtually identical rear-end collision, and plaintiffs commenced a separate action against the owner and driver of the vehicle that struck plaintiff's vehicle in that accident. This Court previously modified the instant order in a prior appeal taken by those defendants therefrom (*Fanti v McLaren*, 110 AD3d 1493).

We conclude that Supreme Court erred in denying defendants' motion seeking summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) in the May 2007 accident. Plaintiffs have conceded that plaintiff did not sustain a serious injury as the result of the first accident, but they contend that defendants are nevertheless liable for the injuries sustained in the second accident. We reject that contention. "Defendants are not liable for injuries sustained in the second accident that are distinguishable from the injuries sustained in the first accident" (*Owens v Nolan*, 269 AD2d

794, 795; *cf. Daliendo v Johnson*, 147 AD2d 312, 313).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

293

KA 12-02053

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PERCY L. SCOTT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered June 16, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Erie County Court for further proceedings in accordance with the following Memorandum: Defendant appeals 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 County Court erred in failing to determine whether he was eligible for youthful offender status. Defendant, an eligible youth, pleaded guilty pursuant to a plea bargain that included a promised sentence and a waiver of the right to appeal. There was no mention during the plea proceedings whether he would be afforded youthful offender treatment.

"Upon conviction of an eligible youth, the court must order a [presentence] investigation of the defendant. After receipt of a written report of the investigation and at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender" (CPL 720.20 [1]). A sentencing court must determine whether to grant youthful offender status to every defendant who is eligible for it because, inter alia, "[t]he judgment of a court as to which young people have a real likelihood of turning their lives around is just too valuable, both to the offender and to the community, to be sacrificed in plea bargaining" (*People v Rudolph*, 21 NY3d 497, 501).

We therefore hold the case and remit the matter to County Court to make and state for the record a determination whether defendant should be afforded youthful offender status (*see Rudolph*, 21 NY3d at

503).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

295

KA 12-01680

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

RAFAEL DIAZ, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Monroe County Court (James J. Piampiano, J.), entered August 21, 2012. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of murder in the second degree and robbery in the first degree.

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

Memorandum: Defendant was convicted following a jury trial of murder in the second degree (Penal Law § 125.25 [3] [felony murder]) and robbery in the first degree (§ 160.15 [4]), and the judgment of conviction was affirmed on appeal (*People v Diaz*, 38 AD3d 1314, *lv denied* 9 NY3d 864). Defendant thereafter moved pursuant to CPL 440.10 to vacate the judgment on the ground that he was denied effective assistance of counsel at trial. County Court summarily denied the motion, and we granted defendant's CPL 460.15 application for a certificate granting leave to appeal.

"To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709; *see People v Benevento*, 91 NY2d 708, 712-713). At trial, the People were limited to using the indicted robbery as the underlying felony for the felony murder charge, and were precluded from using an unindicted robbery of the murder victim as the underlying felony (*see Diaz*, 38 AD3d at 1314). In his CPL 440.10 motion, defendant contended that trial counsel was ineffective in failing to use the statement of his codefendant at trial inasmuch as that statement supported the theory that the fatal shooting occurred during the robbery of the murder

victim and not the victim of the indicted robbery. We reject that contention inasmuch as the statement of the codefendant, together with the other evidence at the trial, established that the fatal shooting occurred during the robbery of both the murder victim and the victim of the indicted robbery. The statement of the codefendant would not have undermined the People's theory and proof at trial but, rather, would have undermined trial counsel's reasonable defense strategy to preclude any evidence of the unindicted robbery. Trial counsel's decision not to use the statement of the codefendant therefore cannot be characterized as ineffective assistance of counsel (*see Benevento*, 91 NY2d at 712-713).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

296

KA 12-02101

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAWRENCE E. WILLIAMS, II, DEFENDANT-APPELLANT.

LOTEMPIO & BROWN, P.C., BUFFALO (MICHAEL H. KOOSHOIAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered May 22, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, unlawful possession of marihuana and operating a motor vehicle with excessively tinted windows.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), unlawful possession of marihuana (§ 221.05), and operating a motor vehicle with excessively tinted windows (Vehicle and Traffic Law § 375 [12-a] [b] [2]). The conviction arises out of a lawful traffic stop of the vehicle driven by defendant (*see People v Fagan*, 98 AD3d 1270, 1271, *lv denied* 20 NY3d 1061, *cert denied* ___ US ___, 134 S Ct 262), and a subsequent search of the vehicle after the police detected the odor of marihuana emanating therefrom (*see People v Cuffie*, 109 AD3d 1200, 1201, *lv denied* 22 NY3d 1087; *see generally People v Blasich*, 73 NY2d 673, 678). Defendant contends that Supreme Court erred in refusing to suppress evidence of the marihuana and handgun found by the police, as well as his statements to the police. Specifically, defendant contends that the evidence before the court was not sufficient to sustain a factual determination that the vehicle driven by defendant was lawfully searched by the police officers inasmuch as the testimony of the police officers at the suppression hearing was "contradictory, confusing[,] and ha[d] the appearance[] of being . . . tailored to nullify constitutional objections." We reject that contention. "Questions of credibility are primarily for the suppression court to determine and its findings will be upheld unless clearly erroneous" (*People v Squier*, 197 AD2d 895, 896, *lv denied* 82 NY2d 904; *see*

generally People v Prochilo, 41 NY2d 759, 761). Here, although one of the arresting officers was unable to recall certain details of the traffic stop, his testimony was sufficiently corroborated by that of the other arresting officer (*see People v Walker*, 155 AD2d 916, 916, *lv denied* 75 NY2d 819; *see also People v Ponzo*, 111 AD3d 1347, 1347). "Nothing about the officer[s'] testimony was unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v James*, 19 AD3d 617, 618, *lv denied* 5 NY3d 829). We therefore discern no basis in the record to disturb the suppression court's credibility assessment, and we conclude that its determination is supported by sufficient evidence in the record (*see generally People v Yukl*, 25 NY2d 585, 588, *cert denied* 400 US 851; *People v Lopez*, 85 AD3d 1641, 1641-1642, *lv denied* 17 NY3d 860).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

314

KA 12-02253

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYON K. SELLS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered November 13, 2012. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that County Court erred in denying his request for a downward departure from his presumptive risk level. According to defendant, the effect of incarceration on him was a mitigating circumstance warranting a downward departure. "A departure from the presumptive risk level is warranted where there exists an aggravating or mitigating factor of a kind or to a degree, not otherwise adequately taken into account by the guidelines" (*People v Scott*, 111 AD3d 1274, 1275, *lv denied* 22 NY3d 861 [internal quotation marks omitted]). In our view, "defendant failed to establish his entitlement to a downward departure from the presumptive risk level inasmuch as he failed to present the requisite clear and convincing evidence of the existence of special circumstances warranting a downward departure" (*People v Marks*, 31 AD3d 1142, 1143, *lv denied* 7 NY3d 715).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

318

KA 09-01937

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EKISHA N. ALLIGOOD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered August 21, 2009. The judgment convicted defendant, upon a jury verdict, of grand larceny in the third degree and criminal possession of a forged instrument in the second degree (six counts).

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of grand larceny in the third degree (Penal Law § 155.35 [1]) and six counts of criminal possession of a forged instrument in the second degree (§ 170.25). The counts charging criminal possession of a forged instrument involved six pension checks payable to defendant's father, a resident in the long-term care unit of Monroe Community Hospital (MCH). In 2006, defendant endorsed those checks to her landlord with the forged signature of her father, in partial payment of her rent. According to defendant, she negotiated the checks pursuant to the authority granted her by a power of attorney executed by her father in 2003. However, the People established that, in 2004, the bank issuing the pension checks notified MCH that the father's checks were being diverted to defendant under a power of attorney allegedly signed by the father in 2003. After learning of the diversion of the pension checks, MCH staff assisted the father in preparing a letter to the issuing bank directing that the pension checks were to be mailed to him at MCH and informing the issuing bank that the father had not signed a power of attorney in 2003 and in fact had revoked a prior power of attorney executed in 2001. Over defendant's hearsay objection, Supreme Court admitted the letter in evidence as a CPLR 4518 (a) "business record." Although a defense witness who owned a liquor store testified that defendant's father had walked into his store in 2003 and signed a

document that the store owner notarized, the People established that in 2003 the father suffered from a number of debilitating medical conditions that rendered him unable to ambulate on his own, and he had not in any event left MCH since at least 2001.

Even assuming, arguendo, that the court erred in admitting in evidence the letter prepared by MCH staff and signed by the father, we conclude that any error is harmless. The People presented overwhelming evidence establishing that the father had not, and could not have, walked into the liquor store in Rochester in 2003 and executed a power of attorney naming defendant as his power of attorney, and there is no significant probability that the jury would have acquitted defendant if the letter had not been admitted in evidence (*see People v Crimmins*, 36 NY2d 230, 241-242; *People v Glover*, 4 AD3d 852, 852, *lv denied* 2 NY3d 740). We agree with defendant that the court erred in allowing the People to present expert testimony on the law pertaining to the execution and revocation of a power of attorney and the duties of the agent thereunder (*see People v Johnson*, 76 AD2d 983, 984; *see generally Colon v Rent-A-Center*, 276 AD2d 58, 61-62). However, inasmuch as the evidence overwhelmingly established that the father did not execute the power of attorney proffered by defendant and there is no significant probability that the "jury's verdict . . . would have been different" without the expert testimony, the error is harmless (*People v Clyde*, 18 NY3d 145, 154). Defendant failed to preserve for our review the majority of the instances of alleged prosecutorial misconduct that she now contends deprived her of a fair trial, and we note that objections otherwise made by defense counsel were largely sustained by the court, with no request by defendant for further relief, including a mistrial (*see People v Williams*, 8 NY3d 854, 855). In any event, "[r]eversal on grounds of prosecutorial misconduct 'is mandated only when the conduct has caused such substantial prejudice to the defendant that [s]he has been denied due process of law' " (*People v Rubin*, 101 AD2d 71, 77, *lv denied* 63 NY2d 711), and that cannot be said here (*see id.* at 77-78).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

320

CAF 12-02038

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

IN THE MATTER OF MIKEL B., MIGUEL B.,
EMADI B., NASSAIR B. AND CARLOS B., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, MEMORANDUM AND ORDER
PETITIONER-RESPONDENT;

CARLOS B., RESPONDENT-APPELLANT.

IN THE MATTER OF GADA B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

CARLOS B., RESPONDENT-APPELLANT,
AND VIANEZ V., RESPONDENT.

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

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL).

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered October 15, 2012 in proceedings pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent-appellant's parental rights with respect to his five oldest children.

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

Memorandum: Respondent father appeals from an order that, inter alia, revoked a suspended judgment entered upon a finding of permanent neglect, terminated his parental rights with respect to his five oldest children, and determined that he derivatively neglected his youngest child. Initially, we note that the father contends that he has been denied adequate appellate review because several parts of the transcript of the proceedings are missing due to apparent failures in the recording device. We reject that contention. The father failed to seek a reconstruction hearing with respect to the missing parts of the record (*cf. Matter of China Fatimah S.*, 272 AD2d 138, 138, *lv denied* 95 NY2d 769) and, indeed, he stipulated to the accuracy of the record on appeal. In any event, we conclude that "the record as

submitted is sufficient for this Court to determine" the issues raised on appeal (*Matter of Stephen B.* [appeal No. 2], 195 AD2d 1065, 1065).

The father contends that the order on appeal should be reversed because the terms of the suspended judgment were too restrictive, i.e., it "was unrealistic to expect [him] to step in and take care of all five of the children by himself." That contention is in fact a challenge to the terms of the suspended judgment, which "was entered on consent of [the father] and thus is beyond appellate review" (*Matter of Bryan W.*, 299 AD2d 929, 930, *lv denied* 99 NY2d 506).

With respect to the father's contention that petitioner failed to establish that he violated the terms of the suspended judgment, "it is well established that, during the period of the suspended judgment, the parent[] must comply with [the] terms and conditions set forth in the judgment that are designed to ameliorate [his or her] actions" (*Matter of Ronald O.*, 43 AD3d 1351, 1352 [internal quotation marks omitted]). "If [petitioner] establishes 'by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, [Family C]ourt may revoke the suspended judgment and terminate parental rights' " (*Matter of Shad S. [Amy C.Y.]*, 67 AD3d 1359, 1360; *see* Family Ct Act § 633 [f]). Here, contrary to the father's contention, a preponderance of the evidence supports the court's determination that he violated numerous terms of the suspended judgment and that it is in the children's best interests to terminate his parental rights (*see Matter of Giovanni K.*, 68 AD3d 1766, 1766-1767, *lv denied* 14 NY3d 707; *see also Matter of Malik S. [Jana M.]*, 101 AD3d 1776, 1777).

Contrary to the father's further contention, the court properly determined that the evidence with respect to the finding that the father permanently neglected his older children established his derivative neglect of the youngest child. "A finding of derivative neglect may be made where the evidence with respect to [a] child found to be abused or neglected 'demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [the parent's] care' " (*Matter of Jovon J.*, 51 AD3d 1395, 1396; *see generally* Family Ct Act § 1046 [a] [i]). Here, the "circumstances surrounding the neglect of the [father]'s other children can be said to evidence fundamental flaws in the [father's] understanding of the duties of parenthood" (*Matter of Angel L.H. [Melissa H.]*, 85 AD3d 1637, 1637-1638, *lv denied* 17 NY3d 711 [internal quotation marks omitted]), and thus they support the finding of derivative neglect (*see Jovon J.*, 51 AD3d at 1396; *see also Matter of Ariel C.W.-H. [Christine W.]*, 89 AD3d 1438, 1439).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

322

CAF 13-00097

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

IN THE MATTER OF DENVER KOMENDA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SAMANTHA DININNY, RESPONDENT-RESPONDENT.
(PROCEEDING NO. 1.)

IN THE MATTER OF EMMA DIRRE, PETITIONER,

V

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENT.
(PROCEEDING NO. 2.)

IN THE MATTER OF EMMA DIRRE,
PETITIONER-RESPONDENT,

V

DENVER KOMENDA, RESPONDENT-APPELLANT.
(PROCEEDING NO. 3.)

MINDY L. MARRANCA, BUFFALO, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

JENNIFER M. LORENZ, LANCASTER, FOR RESPONDENT-RESPONDENT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR RESPONDENT.

FRANCIS W. TESSEYMAN, JR., ORCHARD PARK, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL).

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered October 22, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded custody of Denver Komenda’s son to Emma Dirre.

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

Memorandum: On appeal from an order granting sole custody of the subject child to petitioner-respondent (petitioner), a nonparent, respondent-appellant father contends that there was no showing of extraordinary circumstances. We reject that contention. It is well settled that, "as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981, quoting *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544; *see Matter of Howard v McLoughlin*, 64 AD3d 1147, 1147). Here, the record establishes that the father had a history of alcohol, substance, and prescription drug abuse; that he used heroin during the period of time that he had custody of the subject child; and that he ultimately lost custody of the child due to his drug use (*see Matter of Beth M. v Susan T.*, 81 AD3d 1396, 1397; *Matter of Pamela S.S. v Charles E.*, 280 AD2d 999, 1000). At the time of the hearing, the father had custody of a teenage son from another relationship, and he admitted that his son also had substance abuse issues. Despite a court order granting him weekly visitation, the father visited the subject child only three or four times during a nearly two-year period (*see Matter of Campbell v January*, 114 AD3d 1176). Further, the child has significant mental health issues, and the father "demonstrated that he has no interest in learning about the child's conditions and needs and how to treat them" (*id.* at ___). Contrary to the further contention of the father, we conclude that the record supports Family Court's determination that the award of custody to petitioner is in the best interests of the child (*see Pamela S.S.*, 280 AD2d at 1000). The record reflects, among other things, that petitioner has provided the child with a safe and stable home environment, that the child is doing well in petitioner's care, and that the child enjoys a close and loving relationship with his half sister, who also resides with petitioner (*see Matter of James GG. v Bamby II.*, 85 AD3d 1227, 1228; *Matter of Fynn S.*, 56 AD3d 959, 961-962; *Gary G.*, 248 AD2d at 982).

The father's challenges to the temporary order of removal are not properly before us inasmuch as he ultimately consented to the child's placement with petitioner (*see Matter of Guck v Prinzing*, 100 AD3d 1507, 1508, *lv denied* 21 NY3d 851; *see generally Matter of Violette K. [Sheila E.K.]*, 96 AD3d 1499, 1499; *Matter of Fox v Coleman*, 93 AD3d 1187, 1187). In any event, even assuming, arguendo, that the court erred in awarding temporary custody of the child to petitioner, we conclude that "there [would be] no need to reverse on that basis because the court subsequently conducted a full custody hearing[,] . . . [and t]he record does not support the contention of [the father] that he was prejudiced by the temporary order" (*Matter of Heintz v Heintz*, 275 AD2d 971, 971-972; *see Matter of Vieira v Huff*, 83 AD3d 1520, 1521; *Matter of Owens v Garner*, 63 AD3d 1585, 1585-1586).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

325

CA 13-01230

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

ACCADIA SITE CONTRACTING, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ERIE COUNTY WATER AUTHORITY,
DEFENDANT-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (ANDREW O. MILLER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAMON MOREY LLP, BUFFALO (AMBER E. STORR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John A. Michalek, J.), entered April 9, 2013. The order and judgment granted defendant's motion for summary judgment.

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

Memorandum: In this action for breach of contract and related relief, plaintiff appeals from an order and judgment granting defendant's motion for summary judgment dismissing the complaint. Initially, we note that plaintiff does not raise any issues concerning the dismissal of the third cause of action and has therefore abandoned any contentions with respect to that cause of action (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). In addition, we do not address plaintiff's contention, raised for the first time on appeal, that Supreme Court erred in granting summary judgment in defendant's favor because defendant failed to plead the defense of failure to comply with a condition precedent with sufficient specificity (*see* CPLR 3015 [a]). "An issue may not be raised for the first time on appeal . . . where it 'could have been obviated or cured by factual showings or legal countersteps' in the trial court" (*Oram v Capone*, 206 AD2d 839, 840, quoting *Telaro v Telaro*, 25 NY2d 433, 439, *rearg denied* 26 NY2d 751). Here, defendant could have attempted to cure that alleged deficiency by seeking leave to amend the answer (*see generally Smith v Besanceney*, 61 AD3d 1336, 1336-1337). In any event, defendant's failure to plead that defense in its answer with sufficient specificity does not preclude an award of summary judgment based on that defense. " '[A] court may grant summary judgment based upon an unpleaded defense where[, as here,] reliance upon that defense neither surprises nor prejudices the plaintiff' " (*Schaefer v Town of Victor*,

77 AD3d 1346, 1347).

Contrary to plaintiff's further contention, the court properly granted defendant's motion on the ground that plaintiff failed to satisfy a condition precedent. "[A] condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises' " (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645, quoting *Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690). Here, paragraph 10.05 of the contract mandated that plaintiff provide the project engineer with "[w]ritten notice stating the general nature of each Claim, dispute, or other matter" within 20 days of the event giving rise to the claim. It is well settled that "[c]ontract clauses that 'require the contractor to promptly notice and document its claims made under the provisions of the contract governing the substantive rights and liabilities of the parties . . . are . . . conditions precedent to suit or recovery' " (*Rifenburg Constr., Inc. v State of New York*, 90 AD3d 1498, 1498, quoting *A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 30-31, *rearg denied* 92 NY2d 920). We conclude that "defendant established as a matter of law that plaintiff was obligated to seek compensation for the extra work pursuant to the terms of the contract when it learned that the [relocation of the lateral lines] constituted extra work and that plaintiff failed to do so in a timely manner" (*Adonis Constr., LLC v Battle Constr., Inc.*, 103 AD3d 1209, 1210). Consequently, defendant met its burden on the motion by establishing that plaintiff did not timely comply with the notice and reporting requirements of the contract, and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Plaintiff further contends that it was excused from compliance with the notice and reporting requirements of paragraph 10.05 based on defendant's breach of the contract; that such compliance was prevented or hindered because of misconduct by defendant; and that such compliance would have been futile. Those contentions are unavailing. First, it is well settled that a "party's obligation to perform under a contract is only excused where the other party's breach of the contract is so substantial that it defeats the object of the parties in making the contract" (*Frank Felix Assoc., Ltd. v Austin Drugs, Inc.*, 111 F3d 284, 289; *see Robert Cohn Assoc., Inc. v Kosich*, 63 AD3d 1388, 1389), and plaintiff failed to raise a triable issue of fact whether defendant's actions defeated the parties' objectives in entering into the contract. With respect to plaintiff's remaining two contentions, we conclude that "there is no evidence to support [plaintiff]'s contention[s] that [defendant's misconduct] frustrated its ability to comply with the applicable notice provision or that notice to [the engineer] would have been futile" (*Matter of Brenda DeLuca Trust [Elhannon, LLC]*, 108 AD3d 902, 904). We note in any event with respect to plaintiff's second contention that, although "it is undisputedly the rule that one who frustrates another's performance cannot hold that party in breach" (*Water St. Dev. Corp. v City of New York*, 220 AD2d 289, 290, *lv denied* 88 NY2d 809; *see Young v Hunter*, 6 NY 203, 207), plaintiff failed to raise a triable issue of fact

whether its performance with the notice and reporting requirements was prevented or hindered by defendant's alleged misconduct (*see A.H.A. Gen. Constr.*, 92 NY2d at 34; *DiPizio Constr. Co., Inc. v Niagara Frontier Transp. Auth.*, 107 AD3d 1565, 1566; *cf. Turbo Carpentry Corp. v Brancadoro*, 21 AD3d 479, 480).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

334

KA 12-01706

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALI O., DEFENDANT-APPELLANT.

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

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

Appeal from an adjudication of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 10, 2012. Defendant was adjudicated a youthful offender upon his plea of guilty to attempted robbery in the third degree.

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

Memorandum: On appeal from an adjudication based upon his plea of guilty of attempted robbery in the third degree (Penal Law §§ 110.00, 160.05), defendant contends that Supreme Court erred in imposing an enhanced sentence without conducting a sufficient inquiry into his alleged violation of the conditions of the plea agreement (*see People v Outley*, 80 NY2d 702, 713). Because defendant "failed to request such a hearing and did not move to withdraw his plea on that ground," his contention is unpreserved for our review (*People v Scott*, 101 AD3d 1773, 1773, *lv denied* 21 NY3d 1019). In any event, the court was not required to conduct an inquiry because defendant was rearrested prior to sentencing, in violation of the plea agreement, and he did not "deny that he committed the new offense[s] or otherwise challenge the validity of his postplea arrest" (*People v Mills*, 90 AD3d 1518, 1519, *lv denied* 18 NY3d 960).

We agree with defendant that the waiver of the right to appeal does not encompass his challenge to the severity of the sentence because the court, during the plea colloquy, merely advised him that he was waiving his right to appeal from the conviction (*see People v Maracle*, 19 NY3d 925, 927). We nevertheless reject defendant's contention that the enhanced sentence is unduly harsh and severe. Notably, although the court could have sentenced defendant as an adult because of his violation of the plea agreement, it adhered to its promise to adjudicate him a youthful offender. We also note that

defendant participated in a violent attack upon the victim, and that this case was not his first contact with the criminal justice system.

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

339

KA 10-01196

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD R. KROUTH, DEFENDANT-APPELLANT.

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

GERALD R. KROUTH, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered February 19, 2010. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [3]), defendant contends that his waiver of the right to appeal is unenforceable and that Supreme Court erred in denying his motion to suppress identification testimony from the child victim. We conclude that the waiver of the right to appeal is enforceable and that it therefore precludes defendant from challenging the court's suppression ruling. "A waiver of the right to appeal is effective only so long as the record demonstrates that it was made knowingly, intelligently and voluntarily" (*People v Lopez*, 6 NY3d 248, 256). Here, the court "engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v James*, 71 AD3d 1465, 1465 [internal quotation marks omitted]; *cf. People v Adger*, 83 AD3d 1590, 1591, *lv denied* 17 NY3d 857), and informed him that the waiver was a condition of the plea agreement (*cf. People v Williams*, 49 AD3d 1281, 1282, *lv denied* 10 NY3d 940). The record also establishes that defendant "indicated that he had spoken with defense counsel and understood that he was waiving his right to appeal as a condition of the plea" (*People v Dunham*, 83 AD3d 1423, 1424, *lv denied* 17 NY3d 794). Finally, the court made clear to defendant that the right to appeal was separate and distinct from the rights automatically forfeited upon plea (*see Lopez*, 6 NY3d

at 256; *see also People v Bradshaw*, 18 NY3d 257, 264).

We note in any event that the court properly denied defendant's suppression motion pursuant to *People v Gee* (286 AD2d 62, 72-73, *affd* 99 NY2d 158, *rearg denied* 99 NY2d 652).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

350

CA 13-01663

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

CARLETTA SIMS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, DEFENDANT-RESPONDENT.

PARISI & BELLAVIA, LLP, ROCHESTER (TIMOTHY C. BELLAVIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (SCOTT P. ROGOFF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered July 2, 2013. The order denied the motion of plaintiff for partial summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries she allegedly sustained while performing asbestos abatement work during a construction project at Midtown Plaza, which is owned by defendant. According to plaintiff, she was scraping asbestos from the ceiling while standing on a free-standing scaffold when the scaffold shifted and she fell to the ground, thereby sustaining injuries. We conclude that Supreme Court properly denied plaintiff's motion for partial summary judgment on the issue of liability with respect to the Labor Law § 240 (1) claim.

"To be entitled to a judgment on liability for a violation of section 240 (1) of the Labor Law, [a] plaintiff [is] required to prove, as a matter of law, not only a violation of the section, but also that the violation was a proximate cause of his [or her] injuries" (*Rossi v Main-South Hotel Assoc.*, 168 AD2d 964, 964; *see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287), and it is well settled that "an accident alone does not establish a [section] 240 (1) violation or causation" (*Blake*, 1 NY3d at 289). Here, we conclude that plaintiff failed to meet her initial burden on the motion inasmuch as "inconsistent versions of how the accident occurred raise a question of fact as to the credibility of the plaintiff, and are insufficient to prove, as a matter of law, that the defendant['s alleged] failure to provide the plaintiff with proper protection proximately caused [her] injuries" (*Nelson v Ciba-Geigy*,

268 AD2d 570, 572; *see Reborchick v Broadway Mall Props., Inc.*, 10 AD3d 713, 714; *Alava v City of New York*, 246 AD2d 614, 615). Although plaintiff claimed in her deposition and in an affidavit that she was working on a scaffold when it shifted, thereby causing her to fall to the ground, she also submitted the affidavits of two coworkers who averred that plaintiff was not on the scaffold when the accident occurred. According to the coworkers, both of whom witnessed the accident, plaintiff was working on the ground level cleaning debris from the floor when the unoccupied scaffold tipped over and fell while one of the coworkers was attempting to move it to another location. The coworker who was moving the scaffold did not see the scaffold fall on plaintiff or otherwise come into contact with her, although plaintiff later told him that the scaffold had hit her arm and hand. The other coworker averred that he had observed one of plaintiff's coworkers push her out of the way of the falling scaffold and that plaintiff then fell to the ground. He did not see the scaffold fall on or otherwise strike plaintiff. Plaintiff's failure to eliminate all questions of fact mandates the denial of her motion, regardless of the sufficiency of defendant's opposing papers (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

353

CA 13-01362

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

VEHDIN BAJRIC AND EMINA BAJRIC, INDIVIDUALLY,
AND AS HUSBAND AND WIFE, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ESTATE OF ZEHRA HETO, BY FARUK HETO,
ADMINISTRATOR, DEFENDANT-APPELLANT.

LAW OFFICE OF KAREN L. LAWRENCE, DEWITT (THERESA M. ZEHE OF COUNSEL),
FOR DEFENDANT-APPELLANT.

FRANK POLICELLI, UTICA, AND GEORGE F. ANEY, HERKIMER, FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered April 29, 2013 in a personal injury action. The order, among other things, denied in part defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Vehdin Bajric (plaintiff) when he was removing a porch on a two-family residence then owned by Zehra Heto (decedent). Supreme Court properly denied that part of defendant's motion seeking summary judgment dismissing the common-law negligence claim. Plaintiffs allege that plaintiff's injury was caused by the defective condition of the premises, and we conclude that defendant failed to meet its initial burden of establishing that decedent lacked actual or constructive notice of the alleged defective condition (*see Shrout v Rochester Gas & Elec. Corp.*, 77 AD3d 1372, 1373). Because defendant failed to meet its initial burden, it is of no consequence that the court rejected plaintiffs' opposing papers as untimely (*see Roushia v Harvey*, 276 AD2d 970, 972).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

354

KA 10-02121

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUINCEY L. WALKER, JR., DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered June 23, 2010. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (three counts) and criminal possession of a controlled substance in the seventh degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and three counts of criminal possession of a controlled substance in the seventh degree (§ 220.03). Contrary to defendant's contention, County Court did not abuse its discretion in denying defendant's request for a lengthier adjournment. "The decision whether to grant an adjournment lies in the sound discretion of the trial court . . . , and the court's exercise of that discretion 'in denying a request for an adjournment will not be overturned absent a showing of prejudice' " (*People v Adair*, 84 AD3d 1752, 1754, *lv denied* 17 NY3d 812). Here, defendant requested an adjournment at the start of the trial because he had received documents from the People the previous evening showing that marked buy money was recovered from defendant upon his arrest after one of the alleged sales. Defense counsel indicated that he wanted to contact defendant's two former attorneys inasmuch as he believed that they had been told that no buy money was ever recovered from defendant. The court granted a half-day adjournment, and we conclude that it was not an abuse of discretion for the court to deny defendant's request for a more extended adjournment (*see generally People v Spears*, 64 NY2d 698, 699-700).

We reject defendant's contention that he was denied effective assistance of counsel. Defendant failed to show the absence of strategic or other legitimate explanations for defense counsel's waiver of the *Huntley* and *Wade* hearings and, indeed, the record establishes that defense counsel waived those hearings in exchange for early discovery of *Rosario* material (*see People v Sinkler*, 112 AD3d 1359, 1361; *People v Jurjens*, 291 AD2d 839, 840, *lv denied* 98 NY2d 652; *see generally People v Rivera*, 71 NY2d 705, 709). Moreover, defendant failed to show that those hearings would have been successful (*see generally People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). We further conclude that defense counsel was not ineffective based on certain comments he made about defendant during his opening and closing statements (*see People v Washington* [appeal No. 2], 19 AD3d 1180, 1180-1181, *lv denied* 5 NY3d 833).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant failed to preserve for our review his contention that he was penalized for rejecting the plea offer and exercising his right to a jury trial (*see People v Stubinger*, 87 AD3d 1316, 1317, *lv denied* 18 NY3d 862). In any event, that contention is without merit (*see id.*), and the sentence is not unduly harsh or severe.

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

355

KA 12-01952

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. HILTON, ALSO KNOWN AS MICHAEL HILTON, ALSO KNOWN AS MICHAEL JAMES HILTON, DEFENDANT-APPELLANT.

KELIANN M. ARGY ELNISKI, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered May 9, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

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 plea was not knowing, intelligent and voluntary because the People's offer required defendant to stipulate to an unspecified restitution amount, was coupled with the threat of additional charges, and required him to respond immediately to it during the plea proceeding. Although that contention survives defendant's valid waiver of the right to appeal, defendant failed to preserve it for our review by failing to move to withdraw the plea or to vacate the judgment of conviction (*see People v Davis*, 99 AD3d 1228, 1229, *lv denied* 20 NY3d 1010; *People v Small*, 82 AD3d 1451, 1452, *lv denied* 17 NY3d 801; *People v Swart*, 20 AD3d 691, 692). In any event, defendant's contention is without merit inasmuch as the record establishes that the plea was knowingly, intelligently and voluntarily entered (*see People v Wolf*, 88 AD3d 1266, 1267, *lv denied* 18 NY3d 863; *People v Sartori*, 8 AD3d 748, 749; *see also People v Mullen*, 77 AD3d 686, 686). The valid waiver by defendant of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256; *see generally People v Hidalgo*, 91 NY2d 733, 737).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

356

KA 12-01931

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REQUIERE BOGAN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered September 17, 2012. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: 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 County Court erred in denying his request for a downward departure to risk level two. We reject that contention. "A departure from the presumptive risk level is warranted where 'there exists an aggravating or mitigating factor of a kind or to a degree, not otherwise adequately taken into account by the guidelines' (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [1997 ed]). There must exist clear and convincing evidence of the existence of special circumstance to warrant an upward or downward departure" (*People v Guaman*, 8 AD3d 545, 545; *see People v McDaniel*, 27 AD3d 1158, 1159, *lv denied* 7 NY3d 703; *People v Douglas*, 18 AD3d 967, 968, *lv denied* 5 NY3d 710).

Here, the reasons proffered by defendant in support of his request for a downward departure — the fact that he participated in various programs offered to him in prison, thus making him a "changed man," and his assertion that he is not a "serial rapist" — were already taken into account by the guidelines, as reflected by the scoring on the risk assessment instrument, and thus may not provide the basis for a downward departure (*see People v Smith*, 108 AD3d 1215, 1216, *lv denied* 22 NY3d 856; *People v Kotzen*, 100 AD3d 1162, 1162-1163, *lv denied* 20 NY3d 860). Defendant thus "failed to establish his

entitlement to a downward departure from the presumptive risk level inasmuch as he failed to present the requisite clear and convincing evidence of the existence of special circumstances warranting a downward departure" (*People v Marks*, 31 AD3d 1142, 1143, *lv denied* 7 NY3d 715; *see People v Hamelinck*, 23 AD3d 1060, 1060).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

357

KA 12-01878

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM J. MOORE, DEFENDANT-APPELLANT.

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Onondaga County Court (Joseph E. Fahey, J.), dated August 14, 2012. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following 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.*). Based upon the total risk factor score of 85 points on the risk assessment instrument, defendant was presumptively classified as a level two risk. County Court determined that defendant was a level three risk based on the automatic override for a prior felony conviction of a sex crime. That was error. "[N]o basis in law exists for . . . an automatic override [to] increase[] defendant's presumptive risk level two designation to risk level three" (*People v Moss*, 22 NY3d 1094, 1095, citing Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 3-4 [2006]). "A departure from the presumptive risk level is warranted where there exists an aggravating or mitigating factor of a kind or to a degree, not otherwise adequately taken into account by the guidelines" (*People v Scott*, 111 AD3d 1274, 1275, *lv denied* 22 NY3d 861 [internal quotation marks omitted]). " 'There must exist clear and convincing evidence of the existence of special circumstance[s] to warrant an upward or downward departure' " (*id.*, quoting *People v Guaman*, 8 AD3d 545, 545). Because the court erred in increasing defendant's risk level based on its determination that there was an automatic override, we reverse the order, vacate defendant's risk level determination and remit the matter to County Court for further proceedings in compliance with Correction Law § 168-

n (3) (*see People v Hackett*, 89 AD3d 1479, 1479-1480).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

358

KA 13-00328

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHE A. VILLAR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered December 4, 2012. The judgment convicted defendant, upon his plea of guilty, of promoting a sexual performance by a child (three counts) and failure to register as a sex offender.

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, three counts of promoting a sexual performance by a child (Penal Law § 263.15). We reject defendant's contention that his waiver of the right to appeal was invalid. County Court " 'expressly ascertained from defendant that, as a condition of the plea, he was agreeing to waive his right to appeal, and the court did not conflate that right with those automatically forfeited by a guilty plea' " (*People v Porter*, 55 AD3d 1313, 1313, *lv denied* 11 NY3d 899). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see id.*). To the extent that defendant's contention that the court erred in denying his motion to withdraw his plea of guilty survives the valid waiver of the right to appeal (*see People v Barnello*, 56 AD3d 1214, 1215, *lv denied* 12 NY3d 780), we conclude that it lacks merit (*see People v Canales*, 48 AD3d 1105, 1105-1106, *lv denied* 10 NY3d 860).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

359

KA 05-00889

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

MARVIN FORSYTHE, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Oneida County Court (Michael L. Dwyer, J.), dated April 6, 2005. The order granted that part of defendant's motion seeking to dismiss the indictment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of the motion seeking to dismiss the indictment is denied, the indictment is reinstated and the matter is remitted to Oneida County Court for further proceedings on the indictment.

Memorandum: After defendant was charged with criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), County Court granted that part of defendant's motion seeking to dismiss the indictment charging him with those crimes. The People appealed, and we reversed the order and reinstated the indictment (*People v Forsythe*, 20 AD3d 936). After a jury trial, defendant was convicted of attempted criminal possession of a controlled substance in the first degree (§§ 110.00, 220.21 [1]) and attempted criminal possession of a controlled substance in the third degree (§§ 110.00, 220.16 [1]). We affirmed the judgment on direct appeal (*People v Forsythe*, 59 AD3d 1121, *lv denied* 12 NY3d 816). Defendant moved to vacate the judgment pursuant to CPL 440.10 on the ground that he was denied his right to counsel or his right to effective assistance of counsel on the People's interlocutory appeal from the order in *Forsythe* (20 AD3d 936). The court denied the motion, and we granted defendant permission to appeal. We converted defendant's appeal from the order denying his CPL 440.10 motion to a motion for a writ of error coram nobis, and granted the motion (*People v Forsythe*, 105 AD3d 1430, 1431). We therefore vacated the orders of this Court entered July 1, 2005 (*Forsythe*, 20 AD3d 936) and February 11, 2009 (*Forsythe*, 59 AD3d 1121), and we vacated the judgment of conviction. We now consider the People's appeal de novo.

We agree with the People that the court erred in concluding that there was legally insufficient evidence before the grand jury to permit the inference that defendant constructively possessed the drugs. On a motion to dismiss the indictment pursuant to CPL 210.20 (1) (b), "the inquiry of the reviewing court is limited to the legal sufficiency of the evidence; the court may not examine the adequacy of the proof to establish reasonable cause" (*People v Jennings*, 69 NY2d 103, 115; *see People v Reyes*, 75 NY2d 590, 593). The "reviewing court must consider 'whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury' " (*People v Bello*, 92 NY2d 523, 525; *see People v Mikuszewski*, 73 NY2d 407, 411; *Jennings*, 69 NY2d at 115). In the context of grand jury proceedings, "legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*Bello*, 92 NY2d at 526). Thus, we must determine " 'whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes,' and whether 'the [g]rand [j]ury could rationally have drawn the guilty inference' " (*id.*).

With respect to constructive possession, "the People must show that the defendant exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized" (*People v Manini*, 79 NY2d 561, 573). The People may establish constructive possession through circumstantial evidence (*see People v Torres*, 68 NY2d 677, 678-679).

The People presented evidence before the grand jury that a package containing cocaine was opened by an employee of the United Parcel Service (UPS) upon determining that the address listed on the package did not exist. The police were called, and they seized the package. Later, a customer called UPS looking for the package and gave the correct address. The police delivered the package to that address and arrested a woman who resided at that address and signed for the package. The police also arrested defendant, who was observed "hanging around the front of the house" before and after the delivery. We conclude that the evidence before the grand jury was legally sufficient to establish that defendant exercised dominion and control over the woman who signed for the package or over the package containing cocaine. The People presented evidence that defendant went to the house earlier that morning looking for the package. In addition, the telephone number listed on the package and given by the customer who called UPS looking for the package was the telephone number of one of the cellular telephones found on defendant's person at the time of his arrest.

We further agree with the People that the court erred in determining that the integrity of the grand jury proceeding was impaired when the People instructed the jurors that the woman who signed for the package was an accomplice as a matter of law. Dismissal of an indictment pursuant to CPL 210.20 (1) (c) is warranted "only where a defect in the indictment created a possibility of prejudice" (*People v Huston*, 88 NY2d 400, 409; *see* CPL 210.35 [5]).

It is "limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the [g]rand [j]ury" (*Huston*, 88 NY2d at 409). Accomplice testimony must be supported by corroborative evidence (*see* CPL 60.22 [1]). An accomplice "means a witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated in . . . [t]he offense charged; or . . . [a]n offense based upon the same or some of the same facts or conduct which constitute the offense charged" (CPL 60.22 [2] [a], [b]; *see People v Besser*, 96 NY2d 136, 147; *People v Berger*, 52 NY2d 214, 219). Here, the People presented evidence that the woman who signed for the package agreed to plead guilty to criminal facilitation in the fourth degree (Penal Law § 115.00 [1]), and to cooperate with the police, and we therefore agree with the People that the woman was an accomplice as a matter of law (*see Besser*, 96 NY2d at 147). Moreover, even assuming, arguendo, that the woman was not an accomplice as a matter of law, we cannot agree with the court that the error in so instructing the jury prejudiced the ultimate decision reached by the grand jury.

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

360

KA 09-02133

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BURNIE DANIELS, DEFENDANT-APPELLANT.

JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO, FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered August 4, 2009. The judgment convicted defendant, upon a jury verdict, of criminal mischief in the third degree 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 jury verdict of criminal mischief in the third degree (Penal Law § 145.05 [2]) and petit larceny (§ 155.25). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we reject defendant's contention that the evidence is legally insufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147) and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we also conclude that defendant's contention that the verdict is against the weight of the evidence lacks merit (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant that County Court erred in allowing the People to elicit testimony that defendant invoked his right to counsel (*see People v Nicholas*, 286 AD2d 861, 862, *affd* 98 NY2d 749; *People v Morrice*, 61 AD3d 1390, 1391; *People v Hunt*, 18 AD3d 891, 892), but we conclude that reversal is not required; the error is harmless beyond a reasonable doubt "inasmuch as there is no reasonable possibility that the error[] might have contributed to defendant's conviction" (*People v Capers*, 94 AD3d 1475, 1476, *lv denied* 19 NY3d 971 [internal quotation marks omitted]; *see People v Kithcart*, 85 AD3d 1558, 1559-1560, *lv denied* 17 NY3d 818; *see generally People v Crimmins*, 36 NY2d

230, 237). We also reject defendant's contention that he is entitled to a new trial based on a *Brady* violation. " '[W]hile the People unquestionably have a duty to disclose exculpatory material in their control,' a defendant's constitutional right to a fair trial is not violated when, as here, he is given a meaningful opportunity to use the allegedly exculpatory material . . . as evidence during his case" (*People v Cortijo*, 70 NY2d 868, 870; *see People v Comfort*, 60 AD3d 1298, 1300, *lv denied* 12 NY3d 924; *People v Barney*, 295 AD2d 1001, 1002, *lv denied* 98 NY2d 766).

Finally, we reject defendant's contention that he is entitled to a new trial based on an alleged *Rosario* violation. Even assuming, arguendo, that all of the disputed evidence is *Rosario* material (*see People v Turner*, 233 AD2d 932, 933, *lv denied* 89 NY2d 1102; *People v Stern*, 226 AD2d 238, 239-240, *lv denied* 88 NY2d 969, *reconsideration denied* 88 NY2d 1072), we conclude that reversal is not warranted here. With respect to the evidence that defendant contends was not timely disclosed, we conclude that defendant failed to make a showing that there is "a reasonable possibility that the result at trial would have been different if [that] material[] had been timely disclosed" (*People v Williams*, 50 AD3d 1177, 1180; *see* CPL 240.75). With respect to the evidence disclosed only after trial, we conclude that defendant failed to "show[] 'that there is a reasonable possibility that the non-disclosure materially contributed to the result of the trial' " (*Williams*, 50 AD3d at 1179, quoting CPL 240.75).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

361

KA 12-00360

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON K. MACIOSZEK, ALSO KNOWN AS BRANDON KARL MACIOSZEK, ALSO KNOWN AS BRANDON MACIOSZEK, DEFENDANT-APPELLANT.

KELIANN M. ARGY ELNISKI, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered February 2, 2012. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of assault in the first degree (Penal Law § 120.10 [1]). The evidence at trial established that defendant intentionally struck the victim with the motor vehicle he was driving, causing the victim to fly over the roof of the vehicle and land on the side of the road. Defendant drove away but was arrested the next day. At trial, defendant testified that he inadvertently struck the victim, who had been arguing with defendant's passenger, and he stipulated that the victim sustained a serious injury. On appeal, defendant contends that County Court committed reversible error during voir dire by making a negative comment about his character. By failing to object to the comment, however, defendant failed to preserve his contention for our review (*see* CPL 470.05 [2]). In any event, we conclude that the comment was not so prejudicial as to taint the jury pool or otherwise deprive defendant of a fair trial.

Defendant similarly failed to preserve for our review his further contention that the prosecutor engaged in misconduct during summation (*see People v Martin*, 114 AD3d 1154, ____; *People v Bowman*, 113 AD3d 1100, 1100-1101), and his contention lacks merit in any event. Defendant further contends that the court failed to take proper measures to remedy juror misconduct, i.e., the jury's discussion of the case prior to deliberations. In response to an objection by defendant, the court instructed the jury, as it had at the outset of

the trial, not to discuss the case until deliberations commenced, and defendant did not object to that instruction or request further relief. Defendant thus failed to preserve for our review his contention that the court should have more closely "scrutinized" the jurors who had been discussing the case prematurely (*see* CPL 470.05 [2]). In any event, we conclude that the court's response was proper (*see generally People v Mejias*, 21 NY3d 73, 79-80, *rearg denied* 21 NY3d 1058).

We reject defendant's contentions that the evidence is legally insufficient to support the conviction and the verdict is against the weight of the evidence. As noted, defendant admittedly struck the victim with the vehicle he was driving, and he stipulated that the victim sustained serious injuries as a result. The primary issue at trial was whether defendant intentionally struck the victim or whether, as defendant testified, he accidently did so. Two prosecution witnesses testified that they observed the victim running from defendant's vehicle and the vehicle swerve into the victim at a high rate of speed. This occurred after the victim had been arguing with a passenger in defendant's vehicle. After striking the victim, defendant did not stop or immediately contact the police. We conclude that the above evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish that defendant possessed the requisite intent (*see People v Moreland*, 103 AD3d 1275, 1276, *lv denied* 21 NY3d 945). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although a different verdict would not have been unreasonable, it cannot be said that the jurors failed to give the evidence the weight it should be accorded (*see People v Canfield*, 111 AD3d 1396, 1397, *lv denied* 22 NY3d 1087; *People v Ettleman*, 109 AD3d 1126, 1128).

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

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

365

CAF 13-00686

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

IN THE MATTER OF ZACKERY B.,
RESPONDENT-APPELLANT. ORDER

CRYSTAL H., PETITIONER-RESPONDENT.

PAMELA THIBODEAU, WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

CLAUDE A. JOERG, COUNTY ATTORNEY, LOCKPORT (JOHN S. SANSONE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered March 27, 2013 in a proceeding pursuant to Family Court Act article 7. The order, inter alia, adjudged that respondent is a person in need of supervision.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 5, 2014,

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

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

366

CAF 12-01784

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

IN THE MATTER OF CHRISTOPHER G. SALO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PATRICIA A. SALO, RESPONDENT-RESPONDENT.

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

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

PAUL M. DEEP, ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered July 30, 2012 in proceedings pursuant to Family Court Act article 6. The order dismissed the petitions for lack of jurisdiction.

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

Memorandum: Petitioner filed two petitions alleging violations of a prior custody order, and a modification petition based on a change in circumstances. Petitioner appeals from an order in which Family Court dismissed the petitions for lack of jurisdiction because a divorce action was pending in Supreme Court. We dismiss the appeal as moot because, while the appeal was pending, the parties and the Attorney for the Child entered into a stipulation modifying their custody and visitation arrangement "in full satisfaction of all petitions." Upon consent of the parties, the court awarded petitioner primary physical custody, with visitation to respondent, and ordered that "all prior orders are hereby vacated." Thus, "because the stipulation resulted in a new order that super[s]eded the order being appealed, this appeal is moot" (*Matter of Mace v Miller*, 93 AD3d 1086, 1086; *see Matter of Justeen T.*, 17 AD3d 1148, 1148).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

369

CA 13-01638

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

KRISTOPHER SPAIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VICTOR HOLL AND ROBERT M. SMITH,
DEFENDANTS-RESPONDENTS.

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

BOND SCHOENECK & KING, PLLC, SYRACUSE (DANIEL J. PAUTZ OF COUNSEL), FOR DEFENDANT-RESPONDENT VICTOR HOLL.

WILLIAMSON, CLUNE & STEVENS, ITHACA (PAUL D. SWEENEY OF COUNSEL), FOR DEFENDANT-RESPONDENT ROBERT M. SMITH.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered April 5, 2013 in a personal injury action. The order and judgment granted the motions of defendants for summary judgment dismissing the complaint against them and denied the cross motion of plaintiff for, inter alia, partial summary judgment on the issues of notice and negligence against defendant Robert M. Smith.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion of defendant Robert M. Smith and reinstating the complaint against him, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as a result of his exposure to lead paint as a child in two apartments in which he resided. Defendants, the owners of the subject properties, each moved for summary judgment dismissing the complaint against him, and plaintiff cross-moved for, inter alia, partial summary judgment on the issues of notice and negligence against defendant Robert M. Smith. Plaintiff appeals from an order and judgment granting defendants' motions and denying his cross motion. We conclude that Supreme Court properly denied plaintiff's cross motion and properly granted the motion of defendant Victor Holl and dismissed the complaint against him. In order for a landlord to be held liable for a lead paint condition, it must be established that the landlord had actual or constructive notice of the hazardous condition and a reasonable opportunity to remedy it, but failed to do so (*see Stokely v Wright*, 111 AD3d 1382, 1382). We agree

that Holl met his initial burden by establishing that he did not have actual or constructive notice of the hazardous lead paint condition, and plaintiff failed to raise an issue of fact (*see id.* at 1382-1383; *see generally Chapman v Silber*, 97 NY2d 9, 15). We agree with plaintiff, however, that the court erred in granting the motion of Smith, and we therefore modify the order accordingly. We conclude on the record before us that there are issues of fact whether Smith took reasonable measures to abate the lead paint hazard after he received actual notice thereof and whether plaintiff sustained additional injuries after defendant received such notice (*see Pagan v Rafter*, 107 AD3d 1505, 1506-1507).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court

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

372

CA 13-01632

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

DAVID SMALLEY AND JUDITH SMALLEY,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

HARLEY-DAVIDSON MOTOR COMPANY, INC. AND
STAN'S HARLEY-DAVIDSON, INC.,
DEFENDANTS-RESPONDENTS.

LADUCA LAW FIRM, LLP, ROCHESTER (ANTHONY J. LADUCA OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

QUARLES & BRADY LLP, MILWAUKEE, WISCONSIN (LARS E. GULBRANDSEN, OF THE WISCONSIN BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND HARTER SECREST & EMERY LLP, ROCHESTER, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered February 22, 2013. The order granted the motion of defendants seeking to preclude the trial testimony of two of plaintiffs' experts and seeking to strike those expert disclosures as well as a third expert disclosure.

It is hereby ORDERED that the order so appealed from is reversed in the exercise of discretion without costs and the motion is denied.

Memorandum: Plaintiffs appeal from an order that granted defendants' motion seeking to preclude the trial testimony of two of plaintiffs' experts based on plaintiffs' failure to make timely expert disclosures, and seeking to strike those expert disclosures as well as a third expert disclosure. "[W]e have repeatedly recognized that '[a] trial court has broad discretion in supervising the discovery process, and its determinations will not be disturbed absent an abuse of that discretion' . . . We have also repeatedly noted, however, 'that, where discretionary determinations concerning discovery and CPLR article 31 are at issue, [we] "[are] vested with the same power and discretion as [Supreme Court, and thus we] may also substitute [our] own discretion *even in the absence of abuse*" ' " (*Daniels v Rumsey*, 111 AD3d 1408, 1409). Under the circumstances of this case, we substitute our discretion for that of Supreme Court, and we conclude that the court should have adjourned the trial rather than granting defendants' motion, thereby precluding the subject expert testimony and striking the subject expert disclosures.

All concur except CENTRA, J.P., and SCONIERS, J., who dissent in

part and vote to modify in accordance with the following Memorandum: We respectfully dissent in part because we cannot agree with the majority's conclusion that this is an appropriate case in which to substitute our discretion for that of Supreme Court with respect to plaintiffs' late and even almost eve of trial disclosure of an entirely new products liability expert and a second amended disclosure for their previously disclosed liability expert, both of which proffer new liability theories (*see Daniels v Rumsey*, 111 AD3d 1408, 1409). We agree with the majority, however, with respect to the preclusion of plaintiffs' damages expert and we would therefore modify the order accordingly.

By stipulated order, the parties agreed to complete expert disclosure in 2009. Based at least in part on an amended expert disclosure dated May 4, 2010, plaintiffs were granted leave to amend their complaint in July 2010, which changed the theory of liability in response to defendants' motion for summary judgment. The court's order granting leave to amend was affirmed by this Court in 2011 (*Smalley v Harley-Davidson Motor Co., Inc.*, 82 AD3d 1662, 1662). In 2012, as the parties prepared for trial, the court sent a letter advising the parties of the court's schedule, but noting that any prior scheduling order controlled. The court advised the parties in November 2012 that the trial would no longer be bifurcated. In January 2013, approximately a month and a half before trial, plaintiffs disclosed, inter alia, a new products liability expert, who espoused a new theory of liability, and an amended disclosure with respect to another liability expert.

The "trial court has 'the inherent power . . . to control its own calendar' " (*People v Thompson*, 59 AD3d 1115, 1117, *lv denied* 12 NY3d 860; *see Headley v Noto*, 22 NY2d 1, 4, *rearg denied* 22 NY2d 973; *Matter of Grisi v Shainswit*, 119 AD2d 418, 421). Generally, " '[a]bsent an abuse of discretion, we will not disturb the court's control of the discovery process' " (*Marable v Hughes*, 38 AD3d 1344, 1345; *see Charter Sch. for Applied Tech. v Board of Educ. for City Sch. Dist. of City of Buffalo*, 105 AD3d 1460, 1464). Under the circumstances of this case, we conclude that the court properly exercised its discretion in precluding the new products liability expert and striking any proof based on the new and amended expert disclosure relating to liability (*see Getty v Zimmerman*, 37 AD3d 1095, 1096; *cf. Tung Wa Ma v New York City Tr. Auth.*, 113 AD3d 839, 839-840; *Castor Petroleum, Ltd. v Petroterminal de Panama, S.A.*, 90 AD3d 424, 424). "[T]he willful and contumacious nature of [plaintiffs'] conduct . . . may be inferred from [their] failure to comply with the court's order and [their] inadequate excuses for that failure" (*Getty*, 37 AD3d at 1096-1097; *see Vatel v City of New York*, 208 AD2d 524, 525). Moreover, defendants established that they would be prejudiced by plaintiffs' late disclosure (*see Atkinson v Golub Corp. Co.*, 278 AD2d 905, 906; *cf. Tronolone v Praxair, Inc.*, 39 AD3d 1146, 1147).

Entered: March 28, 2014

Frances E. Cafarell
Clerk of the Court