SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 2, 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

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

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CA 13-00808

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

ACEA MOSEY, AS ADMINISTRATOR OF THE ESTATE OF
LAURA CUMMINGS, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

CONNORS & VILARDO, LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 10, 2012. The order denied the motion of plaintiff to strike defendant's answer, granted the motion of defendant to dismiss the complaint and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendant's motion in part and reinstating the first, second, fifth, and sixth causes of action and as modified the order is affirmed without costs.

Memorandum: Following the death of plaintiff's decedent, who was tortured and killed at the hands of her mother and half-brother, plaintiff filed two notices of claim with the County of Erie (County), for wrongful death and tort, respectively. Thereafter, plaintiff commenced action No. 1 against the County and commenced action No. 2 against Timothy B. Howard, Erie County Sheriff (Sheriff). The complaint in action No. 1 asserts six causes of action to recover damages for the pain and suffering of decedent, and for her wrongful death, and also seeks punitive damages. The first cause of action alleges that the County, through its child protective services (CPS) and adult protective services (APS), was negligent in repeatedly failing to investigate adequately reports of abuse concerning decedent and thereby breached a duty to protect her from further abuse. The first cause of action further alleges, inter alia, that the County failed to take certain actions to protect decedent, to provide proper training and supervision for employees, and to meet standards regarding caseloads. The second cause of action alleges that the County is vicariously liable for the negligent omissions of employees of CPS and APS, and is premised upon the County's breach of the special duty it assumed to protect decedent when reports of alleged

abuse were received, and decedent's justifiable reliance upon that duty. The third cause of action alleges in part that the County is vicariously liable for the actions of a Sheriff's deputy who returned decedent to her home without entering the home or investigating why decedent ran away from home. The third cause of action also alleges that the County failed to take certain actions to protect decedent, failed to provide proper training and supervision for its employees and those of the Sheriff's Office, and failed to maintain proper standards for caseloads, and by reason of these failures decedent was caused to suffer sexual, physical and emotional abuse and ultimately death from scalding and suffocation. The fourth cause of action alleges that the County is vicariously liable for the negligence of the deputy who returned decedent to her home after she ran away and breached a mandatory duty to report suspected abuse concerning decedent pursuant to the Social Services Law. The fourth cause of action further alleges that the County is vicariously liable for the negligence of employees of the Sheriff's Office and other employees who inadequately investigated reports, failed to remove decedent from her home and returned her to her home after she ran away. The fifth cause of action alleges that the County negligently hired, trained, supervised and retained employees in CPS, APS and the Sheriff's Office. Lastly, the sixth cause of action asserts a claim for wrongful death based upon the foregoing allegations.

The complaint in action No. 2 asserts four causes of action against the Sheriff to recover for the pain and suffering of decedent, and for her wrongful death. The first cause of action alleges that the Sheriff is vicariously liable for the negligence of the deputy and the employees of the Sheriff's Office who knew or should have known that decedent was being abused at her home, failed to remove her from her home and returned her there after she ran away. The second cause of action alleges that the Sheriff is vicariously liable for the negligence of the deputy who returned decedent to her home and failed to report suspected abuse concerning decedent in violation of a mandatory duty to report pursuant to the Social Services Law. The third cause of action alleges that the Sheriff is liable for negligently hiring, training, supervising and retaining the deputy and others who were involved in returning decedent to her home and in not removing decedent from her home. The fourth cause of action alleges that the Sheriff is liable for decedent's wrongful death based upon the conduct underlying the first three causes of action.

In action No. 1, following joinder of issue, plaintiff moved to compel the County to disclose certain records, and the County cross-moved for a protective order. Supreme Court granted plaintiff's motion, and the County disclosed some records to plaintiff. Plaintiff subsequently sought to depose various County employees, and the County canceled the first deposition the day before it was to occur and informed plaintiff of its intention to move to dismiss the complaint in each action.

Plaintiff thereafter moved to strike the County's answer in action No. 1 pursuant to CPLR 3126, based on the County's failure to respond to discovery demands and to comply with the court's discovery

order. The County and the Sheriff moved to dismiss the respective complaints against them. The County asserted that the complaint in action No. 1 was subject to dismissal because "[p]laintiff's negligence claims . . . are based upon discretionary acts . . . and barred by governmental immunity"; "[p]laintiff cannot maintain . . . claims for negligent hiring, training, and supervision" inasmuch as she failed to include them in her notices of claim; the County is not vicariously liable for the acts or omissions of the Sheriff or his deputies; and the County cannot be held liable for punitive damages.

In moving to dismiss the complaint in action No. 2, the Sheriff contended that the "common-law claims" are barred by the plaintiff's failure to file a notice of claim naming the Sheriff; he is not vicariously liable for the acts or omissions of his deputy, as asserted in the "negligence claims and [the] alleged violation of Social Services Law"; and governmental immunity bars the "negligence claims based upon discretionary determinations and actions."

By the order in appeal No. 1, the court denied plaintiff's motion and granted the County's motion in action No. 1 for reasons asserted by the County and, by the order in appeal No. 2, the court likewise granted the Sheriff's motion. We note with respect to appeal No. 2, however, that the court did not specifically address the Sheriff's assertion that the complaint against him was subject to dismissal because he was not named in a notice of claim, but addressed only the other two grounds for dismissal asserted by the Sheriff.

We reject plaintiff's contention in appeal No. 1 that the court erred in denying her motion to strike the County's answer. The nature and degree of a sanction to be imposed on a motion pursuant to CPLR 3126 is within the discretion of the court, and the striking of a pleading is appropriate only upon a clear showing that a party's failure to comply with a discovery demand or order is willful, contumacious, or in bad faith (*see Legarreta v Neal*, 108 AD3d 1067, 1070-1071; *Kimmel v State of New York*, 286 AD2d 881, 882-883). Under the circumstances here, we perceive no abuse of discretion (*see* CPLR 3126; *Sayomi v Rolls Kohn & Assoc., LLP*, 16 AD3d 1069, 1070).

We agree with plaintiff in each appeal, however, that the court erred in granting defendants' respective motions dismissing the complaints in their entirety based on defendants' assertions that they were entitled to governmental immunity for their acts. Whether the acts in question were discretionary and thus immune from liability "is a factual question which cannot be determined at the pleading stage" (*CPC, Intl. v McKesson Corp.*, 70 NY2d 268, 286; *see Valdez v City of New York*, 18 NY3d 69, 78-80; *Bawa v City of New York*, 94 AD3d 926, 928, *lv denied* 19 NY3d 809; *Arias v City of New York*, 22 AD3d 436, 437; *see also Newsome v County of Suffolk*, 109 AD3d 802, 802-803; *Delanoy v City of White Plains*, 83 AD3d 773, 774, *lv dismissed* 17 NY3d 881; *see generally Johnson v City of New York*, 15 NY3d 676, 680-681, *rearg denied* 16 NY3d 807).

The court, however, properly granted defendants' respective

motions insofar as defendants asserted that they were not vicariously liable for the conduct of the deputy sheriff. " '[A] county may not be held responsible for the negligent acts of the Sheriff and his deputies on the theory of respondeat superior in the absence of a local law assuming such responsibility' " (*Trisvan v County of Monroe*, 26 AD3d 875, 876, *lv dismissed* 6 NY3d 891). Here, inasmuch as the County did not assume such responsibility by local law, the court properly dismissed the fourth cause of action in its entirety and those claims based on such vicarious liability in the third cause of action in action No. 1. "[I]t is also well established that 'a Sheriff cannot be held personally liable for the acts or omissions of his deputies while performing criminal justice functions, and that . . . principle precludes vicarious liability for the torts of a deputy' " (*id*.). Thus, the court properly dismissed the first and second causes of action in action No. 2, which are based on the Sheriff's vicarious liability for the alleged tortious conduct of the deputy sheriff.

We further conclude that the court erred in granting the County's motion in appeal No. 1 insofar as the County asserted that it was not liable for claims of negligent hiring, training, and supervision based upon alleged insufficiencies in her notices of claim. We agree with plaintiff that the notices of claim in that action were sufficient to notify the County "that the qualifications, knowledge, training, experience, abilities and supervision of its employees involved with [decedent] were at issue" and to apprise the County of a need to examine the personnel records of the relevant employees (*see Rodriguez v New York City Tr. Auth.*, 90 AD3d 552, 552; *Blanco v County of Suffolk*, 51 AD3d 700, 701; *see also Jones v City of Buffalo*, 267 AD2d 1101, 1101; *see generally Trader v State of New York*, 259 AD2d 951, 951). Contrary to the court's conclusion, we conclude that the claims for negligent hiring, training, and supervision as asserted in the first, third and fifth causes of action in action No. 1 were not beyond the scope of plaintiff's notices of claim in that action (*see generally Wahl v County of Wayne*, 78 AD3d 1608, 1609). We nevertheless further conclude that the claims of negligent training and supervision as alleged in the third cause of action in action No. 1 are duplicative of claims in the first cause of action, and thus the remainder of the third cause of action in action No. 1 was properly dismissed (*see Dischiavi v Calli*, 68 AD3d 1691, 1693).

In appeal No. 2, we agree with plaintiff that, under the circumstances herein, she was not required to file a notice of claim naming the Sheriff in his official capacity prior to commencing action No. 2 (*see Bardi v Warren County Sheriff's Dept.*, 194 AD2d 21, 23-24; *Bowman v Campbell*, 193 AD2d 921, 923, *lv dismissed in part and denied in part* 82 NY2d 740).

We also agree with plaintiff's contention in appeal No. 2 that the court erred in dismissing the third cause of action in action No. 2. Accepting the facts as alleged in that cause of action as true, we conclude that plaintiff has adequately stated a cause of action against the Sheriff for negligent hiring, training, supervision and retention (*see generally J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21

NY3d 324, 334). The court likewise erred in dismissing the fourth cause of action, for wrongful death, to the extent that it is based upon the claims for alleged negligent hiring, training, supervision and retention asserted in the third cause of action (*cf. Sanchez v United Rental Equip. Co.*, 246 AD2d 524, 525-526).

We therefore modify the order in each appeal accordingly.

Entered: May 2, 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 13-00809

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

ACEA MOSEY, AS ADMINISTRATOR OF THE ESTATE OF
LAURA CUMMINGS, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TIMOTHY B. HOWARD, ERIE COUNTY SHERIFF,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

CONNORS & VILARDO, LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 10, 2012. The order granted the motion of defendant to dismiss the complaint and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendant's motion in part and reinstating the third cause of action and the fourth cause of action to the extent that it is based on the third cause of action and as modified the order is affirmed without costs.

Same Memorandum as in *Mosey v County of Erie* ([appeal No. 1] ___ AD3d ___ [May 2, 2014]).

Entered: May 2, 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 13-01325

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

ROAR LOGISTICS, INC., PLAINTIFF-RESPONDENT,

V ORDER

JET PLASTICA INDUSTRIES, INC., ET AL., DEFENDANTS, MCG CAPITAL CORPORATION, DENNIS GERRARD AND RON TURCOTTE, DEFENDANTS-APPELLANTS.

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP, NEW YORK CITY (MICHAEL C. HARWOOD OF COUNSEL), FOR DEFENDANT-APPELLANT MCG CAPITAL CORPORATION.

KNOX, MCLAUGHLIN, GORNALL & SENNETT, P.C., ERIE, PENNSYLVANIA (PETER W. YOARS, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS DENNIS GERRARD AND RON TURCOTTE.

PHILLIPS LYTLE LLP, BUFFALO (JOANNA DICKINSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered April 25, 2013. The order, insofar as appealed from, denied the motion of defendants Dennis Gerrard and Ron Turcotte to dismiss the amended complaint against them and denied in part the motion of defendant MCG Capital Corporation to dismiss the amended complaint against it.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 11 and 20, 2014,

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

Entered: May 2, 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 13-01257

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

LAKEISHA WILLIAMS, INDIVIDUALLY AND AS NEXT FRIEND OF JAVON WILLIAMS, THERESA ANDERSON, INDIVIDUALLY AND AS NEXT FRIEND OF AVERY ANDERSON AND CARTER ANDERSON, AND WALIDA LORDE, INDIVIDUALLY AND AS NEXT FRIEND OF KALIYAH LORDE, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

GLADYS CARRIÓN, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, DEFENDANT-RESPONDENT.

EMPIRE JUSTICE CENTER, ALBANY (SUSAN C. ANTOS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered November 26, 2012. The judgment, among other things, granted defendant's cross motion for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the first decretal paragraph and granting judgment in favor of defendant as follows:

> It is ADJUDGED and DECLARED that 18 NYCRR 415.3 (e) (3) is not violative of Social Services Law § 410-x (1) or (6), and does not violate plaintiffs' constitutional right to travel or their right to equal protection of the law,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this class action seeking declaratory and injunctive relief on behalf of low-income families who are eligible for child care assistance but who are required to pay more than 10% of their respective gross incomes for such care. The second amended complaint alleges that defendant's copayment regulation, 18 NYCRR 415.3 (e), violates Social Services Law § 410-x (1) and (6) because it does not provide for a single sliding fee scale; the existing sliding fee scales used to determine a family's share of child care costs are not based on the family's ability to

pay; and the regulation fails to provide equitable access to child care as required by statute. The second amended complaint also challenges the copayment regulation on constitutional grounds, alleging that it violates plaintiffs' right to travel within the state and their right to equal protection of the law. Following discovery, plaintiffs moved for, inter alia, summary judgment seeking a declaration that the copayment regulation is invalid, and defendant cross-moved for summary judgment dismissing the second amended complaint. We conclude that Supreme Court properly denied the motion and granted the cross motion. We note, however, that the court erred in "dismissing the [second amended] complaint rather than declaring the rights of the parties" (*Alexander v New York Cent. Mut.*, 96 AD3d 1457, 1457; *see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954), and we therefore modify the judgment accordingly.

The challenged regulation authorizes social services districts across the state to select a multiplier between 10% and 35% to use in the formula for calculating the share of child care costs allocated to eligible families (*see* 18 NYCRR 415.3 [e] [3]). An eligible family's weekly share is calculated by subtracting the state income standard for the specific family size, i.e., the federal poverty level income, from the eligible family's gross income, multiplying the difference by a factor of between 10% and 35% (hereafter, multiplier), and then dividing that amount by 52. Plaintiffs contend that the regulation violates Social Services Law § 410-x (1), which provides that each social services district shall expend its allocation of child care funds "in a manner that provides for equitable access." We reject that contention.

As defendant points out and plaintiffs do not dispute, the amount of funds for child care available to each social services district is finite and, inasmuch as all of the allocated funds must be expended, districts have no financial incentive to increase the multiplier. Although increasing the multiplier in a particular district decreases the subsidy to each eligible family, it allows more families to be served by the district's limited resources. Conversely, a decrease in the multiplier, and a corresponding increase in the subsidy, reduces the number of families eligible for assistance. We conclude that the copayment regulation provides for "equitable access" to child care assistance, as required by Social Services Law § 410-x (1). Although similarly situated families in different districts may pay different amounts for child care under the regulation, equitable does not necessarily mean equal (*see generally McBride-Head v Head*, 23 AD3d 1010, 1011); rather, equitable is defined as "[j]ust; consistent with principles of justice and right" (Black's Law Dictionary 617 [9th ed 2009]). In our view, the principles of equity and justice are not violated by a district choosing to use its limited funds to serve more families through a lower subsidy, rather than fewer families through a higher subsidy.

Plaintiffs further contend that the copayment regulation violates Social Services Law § 410-x (6) because it does not provide for a single sliding fee scale, as required by statute, and instead allows each of the 58 social services districts to set its own sliding fee

scale. We reject that contention as well. "It is well settled that the Legislature may authorize an administrative agency 'to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation' " (*Raffellini v State Farm Mut. Auto. Ins. Co.*, 9 NY3d 196, 201; *see Matter of Medical Socy. of State of N.Y. v Serio*, 100 NY2d 854, 865). "In so doing, an agency can adopt regulations that go beyond the text of that legislation, provided they are not inconsistent with the statutory language or its underlying purposes" (*Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 NY3d 249, 254). An agency's interpretation of a governing statute will not be disturbed unless it is unreasonable or irrational (*see Goodwin v Perales*, 88 NY2d 383, 392).

Here, section 410-x (6) delegates regulatory authority to the Office of Children and Family Services, of which defendant is Commissioner, by providing that, "[p]ursuant to department regulations, child care assistance shall be provided on a sliding fee basis based on the family's ability to pay." The statute does not expressly require defendant to adopt a single state-wide sliding fee scale, and we do not consider it unreasonable or irrational for defendant to adopt a regulation that gives flexibility to social services districts to choose a multiplier between 10% and 35% to use in calculating an eligible family's share of child care costs.

Plaintiffs' constitutional challenges are similarly unavailing. The right to travel does not guarantee that an individual moving to a new location will have the same benefits that he or she received at the former location. Instead, it simply "insure[s] new residents the same right to vital government benefits and privileges in the [social services district] to which they migrate as are enjoyed by other residents" (*Califano v Gautier Torres*, 435 US 1, 4 [internal quotation marks omitted]). The copayment regulation at issue here does not treat newcomers to a district differently from people who already reside there. Plaintiffs' right to travel within the state is therefore not implicated. Moreover, the regulation does not run afoul of the equal protection clause of the State or Federal Constitution inasmuch as it is supported by a rational basis (*see generally Affronti v Crosson*, 95 NY2d 713, 720, *cert denied* 534 US 826), namely, giving flexibility to social services districts to determine how to allocate finite child care resources. We note that, in "the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws [or regulations] are imperfect" (*Dandridge v Williams*, 397 US 471, 485; *see Goodwin*, 88 NY2d at 398).

Entered: May 2, 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 13-00856

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

RICHARD PIOTROWSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MCGUIRE MANOR, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered March 7, 2013. The judgment, among other things, awarded plaintiff money damages as against defendant.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs and a new trial is granted.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell from a wobbly ladder while painting the kitchen walls of a nursing home owned by defendant. The case proceeded to trial, and a jury found in favor of plaintiff and awarded damages to him.

Plaintiff contends that Supreme Court erred in denying his motion seeking partial summary judgment on the issue of liability on the Labor Law § 240 (1) claim, and that contention is properly before us on defendant's appeal from the final judgment (*see Crapsi v South Shore Golf Club Holding Co., Inc.*, 19 AD3d 1024, 1026, *lv denied* 5 NY3d 711). We reject that contention. Where a plaintiff's own actions are the sole proximate cause of his injuries, there is no liability under Labor Law § 240 (1) (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39). Thus, there is no liability under the statute when the evidence establishes that a "plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Cahill*, 4 NY3d at 40; *see Gallagher v New York Post*, 14 NY3d 83, 88). In support of his motion, plaintiff failed to establish that his decision to use a ladder that he knew was defective instead of another available ladder was not the sole proximate cause of his injuries (*see*

Robinson, 6 NY3d at 554-555).

We reject defendant's contention that the court erred in denying its trial motion for judgment as a matter of law pursuant to CPLR 4401 on the Labor Law §§ 240 (1) and 241 (6) claims. Defendant argued that plaintiff had not been engaged in a protected activity under Labor Law §§ 240 (1) and 241 (6) at the time of his fall. Labor Law § 240 (1) applies to owners and contractors and their agents "in the . . . painting . . . of a building or structure," and the painting need not be incidental to construction (*see Cornacchione v Clark Concrete Co.* [appeal No. 2], 278 AD2d 800, 801; *see also Soodin v Fragakis*, 91 AD3d 535, 535-536). Labor Law § 241 (6) applies to "construction, excavation or demolition work." In determining what is construction work within the meaning of the statute, courts look to the definition of such in the Industrial Code (*see* 12 NYCRR 23-1.4 [b] [13]; *see also Joblon v Solow*, 91 NY2d 457, 466), which includes painting (*see Pittman v S.P. Lenox Realty, LLC*, 91 AD3d 738, 739).

In its trial motion for judgment as a matter of law pursuant to CPLR 4401, defendant also argued that plaintiff had not been exposed to an elevation-related risk during the work, and that plaintiff's actions were the sole proximate cause of his injuries. "Viewing the evidence in [the] light most favorable to . . . plaintiff and affording him the benefit of every favorable inference, we conclude that the evidence adduced at trial provided a rational basis upon which the jury could have determined" that a ladder was required for plaintiff to carry out his assigned task (*Sung Kyu-To v Triangle Equities, LLC*, 84 AD3d 1058, 1060; *see Barrow v Dubois*, 82 AD3d 1685, 1686; *cf. Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681-682), and that plaintiff's actions were not the sole proximate cause of his injuries (*cf. Robinson*, 6 NY3d at 554-555). We reject defendant's further contention that the verdict is against the weight of the evidence (*see Barrow*, 82 AD3d at 1686; *see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746).

We agree with defendant, however, that the court erred in failing to give an expanded sole proximate cause charge to the jury, and we conclude that the error requires reversal of the judgment and a new trial. By way of background, we note that, following discovery, defendant had cross-moved for summary judgment dismissing, inter alia, the Labor Law § 240 (1) claim on the ground that plaintiff's choice to use a wobbly ladder when other ladders were available was the sole proximate cause of his injuries, and the court denied that part of the cross motion. As noted above, defendant subsequently moved during trial for judgment as a matter of law pursuant to CPLR 4401 on the ground that plaintiff's choice of ladder was the sole proximate cause of his injuries. In denying that motion, the court held that plaintiff's choice of ladder could not be the sole proximate cause of his injuries unless he had been told to use another safety device and had ignored that directive. That was an incorrect statement of the law inasmuch as it is not necessary that a plaintiff be *told* to use another safety device. Rather, there will be no liability imposed on a defendant if the defendant establishes that the plaintiff *knew* he should use another safety device and knew that such was available at

the job site, but chose not to use it (*see Robinson*, 6 NY3d at 554-555; *Montgomery v Federal Express Corp.*, 4 NY3d 805, 806).

At the time the parties discussed the jury charge, defendant did not request the recalcitrant worker charge under PJI 2:217.2 or an expansion of 2:217 to include a more detailed sole proximate cause defense; however, the parties immediately thereafter discussed the verdict sheet, and defendant objected to the first question, which asked "[d]id the ladder used by the plaintiff fail to provide proper protection under Labor Law 240 (1)?" Defendant argued that there should "be a question regarding the sole proximate cause and the plaintiff being the sole proximate cause that is not included." The court responded, "sole proximate cause *I am not going to charge* because if the failure to provide it is a substantial factor, . . . plaintiff's [conduct] could not be the sole proximate cause" (emphasis added). Defendant objected, arguing that the jury could find that plaintiff had "options available to him that were provided and he just chose not to use it, that is sole proximate cause," but the court disagreed with defendant "on the law on that." Again, the court's view of the sole proximate cause defense was erroneous. As the Court of Appeals held in *Robinson*, in order for there to be liability under section 240 (1), "the owner or contractor must breach the statutory duty under section 240 (1) to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries. *These prerequisites do not exist if adequate safety devices are available at the job site, but the worker either does not use or misuses them*" (*Robinson*, 6 NY3d at 554 [emphasis added]).

We conclude that defendant's objections to the verdict sheet adequately preserved for our review the issue now raised on appeal, which is that the jury charge did not adequately convey the principles of the sole proximate cause defense to the jury, i.e., that plaintiff's *choice* to use the defective ladder when adequate ladders were available could be the sole proximate cause of his injuries. Defendant placed that issue "squarely before the court," and defendant's "arguments were sufficient to alert [the c]ourt to the relevant question and sufficiently preserved the legal issue for appellate review" (*Geraci v Probst*, 15 NY3d 336, 342; *cf. Salazar v Fries & Assoc.*, 251 AD2d 210, 211).

The court's failure to give an expanded charge with respect to the sole proximate cause defense under the facts of this case resulted in a substantial right of defendant being prejudiced, and thus reversal and a new trial is required (*see Nestorowich v Ricotta*, 97 NY2d 393, 400; *see also* CPLR 2002). The court gave a charge similar to that set forth in PJI 2:217, and we agree with defendant that the final sentence of that charge did not adequately convey to the jury the sole proximate cause defense raised in this case. That sentence instructed that "[i]f you conclude that the plaintiff in this action was the only substantial factor in bringing about this injury you will find for the defendant on this issue." Immediately before that sentence, however, the court instructed the jury that "[i]f you find that the ladder was not so constructed, placed, operated and/or maintained, as to give proper protection to plaintiff in the

performance of the work and that the construction, placement, operation and/or maintenance of the ladder was a substantial factor in causing plaintiff's injury *you will find for plaintiff on this issue*" (emphasis added). The charge therefore instructed the members of the jury that they must find for plaintiff and impose liability on defendant if they concluded that the ladder was defective, without allowing them to consider whether plaintiff's choice of that ladder could defeat the imposition of liability on defendant. The court should have charged PJI 2:217.2, or at least a more expansive charge using PJI 2:217 as a foundation, to convey to the members of the jury that they should find defendant not liable if they found that plaintiff knew that there were other safety devices available, that he was expected to use them, and that he chose for no good reason not to do so (*see Cahill*, 4 NY3d at 40).

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

CENTRA, J.P., LINDLEY, and SCONIERS, JJ., concur; FAHEY, J., dissents and votes to affirm in the following Memorandum: I respectfully dissent and would affirm the judgment. I agree with the majority that Supreme Court properly denied plaintiff's motion seeking partial summary judgment on the issue of liability on the Labor Law § 240 (1) claim, and that the court properly denied defendant's trial motion for judgment as a matter of law pursuant to CPLR 4401. I also agree with the majority that defendant's objections to the verdict sheet preserved for our review defendant's contention that the jury charge did not sufficiently convey the principles of the sole proximate cause defense to the jury. I cannot agree with the majority, however, that the court erred in failing to give an expanded sole proximate cause charge to the jury. Rather, I agree with my dissenting colleague that the court's charge was sufficient on the issue of sole proximate cause, i.e., that the charge adequately conveyed the principles of the sole proximate cause defense to the jury (*see Nestorowich v Ricotta*, 97 NY2d 393, 400-401; *Howlett Farms, Inc. v Fessner*, 78 AD3d 1681, 1683, *lv denied* 17 NY3d 710; *Garris v K-Mart, Inc.*, 37 AD3d 1065, 1066). I would therefore affirm the judgment.

WHALEN, J., dissents and votes to affirm in the following Memorandum: I respectfully dissent and would affirm the judgment. Initially, I agree with my dissenting colleague and the majority that Supreme Court properly denied plaintiff's motion seeking partial summary judgment on the issue of liability on the Labor Law § 240 (1) claim, and that the court properly denied defendant's trial motion for judgment as a matter of law pursuant to CPLR 4401. The majority concludes, however, that the court erred in failing to give an expanded sole proximate cause charge to the jury and, as a result of this error, reversal of the judgment and a new trial are required. In order to reach that conclusion, the majority must conclude that defendant preserved a challenge to the jury charge on this issue. I respectfully disagree with the majority's and my dissenting colleague's conclusion that defendant preserved a challenge to the sole proximate cause charge. Furthermore, I conclude that, had the issue been preserved, the court's charge was sufficient on the issue

of sole proximate cause.

Defendant contends that the court should have given the jury the recalcitrant worker charge under PJI 2:217.2 or an expanded charge of PJI 2:217, which included a more detailed sole proximate cause defense. Initially, I note that there is a long line of cases establishing that a party must preserve a challenge to the charge by requesting the instruction at issue and specifically objecting to the charge as given (*see* CPLR 4017, 4110-b, 5501 [a] [3]; *De Long v County of Erie*, 60 NY2d 296, 306; *Maurer v Tops Mkts., LLC* [appeal No. 3], 70 AD3d 1504, 1505; *Fitzpatrick & Weller, Inc. v Miller*, 21 AD3d 1374, 1375; *see also Delong v County of Chautauqua* [appeal No. 2], 71 AD3d 1580, 1581). CPLR 4110-b specifically states that "any party may file written requests that the court instruct the jury on the law as set forth in the requests . . . No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds of his objection." It is undisputed, and the majority concedes, that at the time the parties discussed the jury charge, defense counsel did not request the recalcitrant worker charge under PJI 2:217.2 or an expansion of PJI 2:217 to include a more detailed sole proximate cause defense.

The majority concludes, however, that those issues were preserved based upon a discussion between the court and counsel relative to the verdict sheet—a discussion that took place after counsel and the court finished discussing jury charge issues. While addressing questions on the verdict sheet, defendant argued that there should "be a question regarding the sole proximate cause and the plaintiff being the sole proximate cause that is not included." The court responded, "sole proximate cause I am not going to charge because if the failure to provide it is a substantial factor, . . . plaintiff's [conduct] could not be the sole proximate cause." Defense counsel responded that "there were options available to [plaintiff] that were provided and he just chose not to use it, that is sole proximate cause and there is, should be a question on it I respectfully submit." This exchange clearly shows that defense counsel and the court were discussing the verdict sheet and not the jury charge. In fact, defense counsel's last comment was that there should be a question on the verdict sheet about sole proximate cause. Defense counsel makes no reference to any aspect of the jury charge during this exchange. The majority focuses on the court's comment "sole proximate cause I am not going to charge" to conclude that defendant preserved objections to the jury charge. The majority improperly takes this comment out of context because, when it is read in conjunction with the entire exchange between the court and defense counsel, it is clear that the court and counsel were discussing a question requested on the verdict sheet and not the jury charge. The majority's conclusion that this exchange regarding the verdict sheet preserves an objection to the charge is directly contrary to settled law that an objection to a verdict sheet cannot preserve a challenge to a jury charge (*see Strach v Doin*, 288 AD2d 640, 642). Courts have repeatedly stated that, in the absence of "a clear record articulating [defendant's] claimed objections to the court's refusal to charge the jury as requested," the issue is not

preserved (*Klotz v Warick*, 53 AD3d 976, 979, *lv denied* 11 NY3d 712; *see also Donaldson v County of Erie*, 209 AD2d 947, 947-948). The result the majority reaches here is untenable because there is no way to conclude, based upon the court's comment "sole proximate cause I am not going to charge" exactly what issue was preserved. As I previously stated, defense counsel never requested the recalcitrant worker charge under PJI 2:217.2 or an expansion of PJI 2:217 to include a more detailed sole proximate cause defense. The majority now concludes that jury charges that were never requested by a party are preserved for our review based upon a conversation about the contents of the verdict sheet. I cannot go this far. This conclusion puts an unreasonable burden on trial courts because it opens up any discussion over the verdict sheet into a potentially reversible error with respect to the charge and would be completely contrary to CPLR 4110-b and the well-settled case law requiring specific objections to the charge. Thus, I conclude that this issue was not preserved for our review (*see Strach*, 288 AD2d at 642; *see also Klotz*, 53 AD3d at 978-979).

I also note that the case upon which the majority relies—*Geraci v Probst* (15 NY3d 336)—in support of its conclusion that the issue is preserved for our review is distinguishable. *Geraci* was a libel case and the primary issue on appeal was whether it was error to admit into evidence a republication of defendant Probst's defamatory statement, made years later without his knowledge or participation. The majority quotes *Geraci*, and says that the issue regarding sole proximate cause was "squarely before the court" and that defendant's "arguments were sufficient to alert Supreme Court to the relevant question and sufficiently preserved the legal issue for appellate review" (*id.* at 342). I respectfully submit that the application of the language quoted to the case now before us is strained because it does not apply to preservation of an objection to a jury charge or lack thereof. The language in *Geraci* applied to the court's ruling to admit evidence of the republication of defamatory statements by defendant in a news article. The court concluded that the republication argument was preserved for appellate review because the parties discussed the issue on more than one occasion and the "issue was placed squarely before the court" (*id.*). Thus, the analysis in *Geraci* was with respect to an evidentiary ruling and not a jury charge and is inapplicable here. I further note that, if the majority's use of *Geraci* is taken to its logical conclusion as it is applied here, trial courts will be required to make note of every evidentiary objection during a trial and determine whether a jury charge might flow from these evidentiary objections regardless of whether a party requested a charge on the issue.

I also respectfully disagree with the majority that the charge that the court did give the jury (*see* PJI 2:217) was insufficient to set forth the sole proximate cause defense. The key language in that charge is as follows: "If you conclude that the plaintiff's action was the only substantial factor in bringing about the injury, you will find for the defendant on this issue" (PJI 2:217). This charge is based upon cases such as *Cahill v Triborough Bridge & Tunnel Auth.* (4 NY3d 35) and *Blake v Neighborhood Housing Servs. of N.Y. City* (1 NY3d

280), which were the initial cases to set forth the sole proximate cause defense in Labor Law cases. The Court of Appeals held that, where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability (*see Cahill*, 4 NY3d at 39). Thus, it is clear that PJI 2:217 sets forth the sole proximate cause defense.

I also conclude that the language of this charge did not prevent defendant from making the argument to the jury that plaintiff was the sole proximate cause of his accident. In fact, defense counsel argued in summation that plaintiff was the sole proximate cause of this accident. I disagree with the majority that the charge instructed the jury members that they must find for plaintiff and impose liability if they concluded that the ladder was defective, without allowing them to consider whether plaintiff's choice of that ladder could defeat liability. The court's instruction to the jury that, "[i]f you find that the ladder was not so constructed, placed, operated and/or maintained, as to give proper protection to plaintiff in the performance of the work and that the construction, placement, operation and/or maintenance of the ladder was a substantial factor in causing plaintiff's injury[,] you will find for plaintiff on this issue" did not foreclose a determination that plaintiff's conduct could have been the sole proximate cause. The majority's focus on this aspect of the charge also ignores that prior to this, the court instructed the jury that, "[i]f you find the ladder being used by the plaintiff was so constructed, placed or operated and/or maintained as to give proper protection to plaintiff[,] you will find for defendant on this issue." This language sets forth the standard from Labor Law § 240 (1) under which defendant could be held not liable. Not only did the charge set forth the proper standard under Labor Law § 240 (1), it clearly included sole proximate cause language, which allowed the jury to consider whether plaintiff was the sole cause of the accident. Finally, if the jury members had concluded, based upon the charge given, that plaintiff was the sole proximate cause of the accident, they would have answered "no" to the questions on the verdict sheet asking if defendant's violation of Labor Law §§ 240 (1) and 241 (6) was a substantial factor in causing the accident. They did not. In fact, when asked to apportion responsibility between plaintiff and defendant, they assigned 40% to defendant and 60% to plaintiff. Based on this apportionment, it is clear the jury did not conclude that plaintiff was the sole proximate cause of the accident. Thus, I conclude that the charge here is not fundamentally flawed and that the failure to object to the charge at trial precludes our review, and I would therefore affirm the judgment (*see Maurer*, 70 AD3d at 1505; *see also Howlett Farms, Inc. v Fessner*, 78 AD3d 1681, 1682-1683, *lv denied* 17 NY3d 710).

Entered: May 2, 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 13-00857

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

RICHARD PIOTROWSKI, PLAINTIFF-RESPONDENT,

V ORDER

MCGUIRE MANOR, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

GOLDBERG SEGALLA LLP, BUFFALO (ALBERT J. D'AQUINO 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 (Paula L. Feroleto, J.), entered March 18, 2013. The order denied defendant's motion to set aside the jury verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1], [2]).

Entered: May 2, 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 13-01123

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

THE PRESERVE HOMEOWNERS' ASSOCIATION, INC.,
ACTING BY AND THROUGH ITS BOARD OF DIRECTORS,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SONNY Z. ZHAN AND HONG XU, DEFENDANTS-RESPONDENTS.

MICHAEL J. KAWA, SYRACUSE, FOR PLAINTIFF-APPELLANT.

SONNY Z. ZHAN, DEFENDANT-RESPONDENT PRO SE.

HONG XU, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered March 19, 2013. The order denied the motion of plaintiff for summary judgment, granted the cross motion of defendants for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, defendants' cross motion is denied, the complaint is reinstated and plaintiff's motion is granted.

Memorandum: Plaintiff is a not-for-profit corporation comprised of property owners—including defendants—within The Preserve, a residential subdivision (subdivision) in the Town of Pompey, Onondaga County and plaintiff, inter alia, enforces the "Declaration of Covenants, Conditions and Restrictions for the Preserve" (Declaration). Plaintiff's Board of Directors (Board) directed defendants to remove two chickens from their property because the presence of the chickens violated a restrictive covenant of the Declaration, but defendants refused to do so. Plaintiff thereafter commenced this action seeking a permanent injunction ordering defendants to remove the chickens. Plaintiff moved for summary judgment with respect to the relief demanded in the complaint, and defendants cross-moved for summary judgment dismissing the complaint. Supreme Court denied the motion and granted the cross motion. We reverse.

"It is well settled that, '[s]o long as the [B]oard [of directors of a homeowners' association] acts for the purposes of the [homeowners' association], within the scope of its authority and in good faith, courts will not substitute their judgment for [that of] the [B]oard[ ]' " (*Spaulding Lake Club, Inc. v Haibo Jiang*, 78 AD3d

1668, 1669, quoting *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538). The Declaration provides that plaintiff's Board "shall have the absolute power to prohibit a pet from being kept on the Properties, including inside residences constructed thereon." Here, plaintiff established that its Board was acting for the purposes of the homeowners' association and within the scope of its authority when it directed defendants to remove the chickens from the property. In addition, there is no evidence that defendants were " 'deliberately single[d] out . . . for harmful treatment' " inasmuch as no other residents of the subdivision had chickens or were in violation of the applicable restrictive covenant (*Spaulding Lake Club, Inc.*, 78 AD3d at 1669), and defendants otherwise " 'failed to present evidence of bad faith . . . or other misconduct' " (*id.*).

All concur except SMITH, J.P., and FAHEY, J., who dissent and vote to affirm in the following Memorandum: This case turns on the issue whether the Silkie chickens raised by defendants' daughters can be considered "normal household pets." If they are "normal household pets," then plaintiff has no basis to seek their removal from defendants' property. We conclude that the "Declaration of Covenants, Conditions and Restrictions for the Preserve" (Declaration) does not unambiguously empower plaintiff to order the removal of the chickens from defendants' property. We would thus affirm the order granting defendants' cross motion for summary judgment dismissing the complaint, and we therefore respectfully dissent.

" ' " [T]he law has long favored . . . free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them" ' (*Ledda v Chambers*, 284 AD2d 690, 691 [2001], quoting *Witter v Taggart*, 78 NY2d 234, 237 [1991]; *see also Greek Peak v Grodner*, 155 AD2d 827 [1989], *affd* 75 NY2d 981 [1990]). Therefore, a party seeking to enforce a restrictive covenant 'must prove, by clear and convincing evidence, the scope, as well as the existence, of the restriction' (*Greek Peak*, 75 NY2d at 982). 'The presence of an ambiguity in a restrictive covenant . . . requires the court to construe the covenant to limit, rather than extend, its restriction' (*Turner v Caesar*, 291 AD2d 650, 651 [2002]). Moreover, where the language used in a restrictive covenant is equally susceptible of two interpretations, the less restrictive interpretation must be adopted (*see Bear Mtn. Books v Woodbury Common Partners*, 232 AD2d 595 [1996], *lv denied* 90 NY2d 808 [1997]; *Sunrise Plaza Assoc. v International Summit Equities Corp.*, 152 AD2d 561 [1989], *lv denied* 75 NY2d 703 [1990])" (*Ludwig v Chautauqua Shores Improvement Assn.*, 5 AD3d 1119, 1120, *lv denied* 3 NY3d 601; *see Erie Otto Corp. v Inland Southeast Thompson Monticello, LLC*, 91 AD3d 1155, 1156, *lv denied* 19 NY3d 802).

Here, the relevant restrictive covenant states in its entirety that "[n]o animals, livestock, or poultry of any kind shall be raised, bred, or kept on the Properties, except that no more than a total of two (2) dogs, cats, or other normal household pets may be kept in residences subject to rules and regulations adopted by [plaintiff] through its Board of Directors, provided that such pets are not kept, bred, or maintained for any commercial purpose and provided that pet

waste shall be removed from the Lot and/or the Common Area by the owner of such pet. The Board shall have the absolute power to prohibit a pet from being kept on the Properties, including inside residences constructed thereon."

There is no dispute that, subject to the limitations of the restrictive covenant, up to two household pets may be kept on each property encumbered by the restrictive covenant. Affording the least restrictive interpretation of the phrase "normal household pets," we conclude that there is no evidence in the record that chickens are not "normal household pets" within the meaning of the restrictive covenant.

The issue is whether that part of the restrictive covenant declaring that plaintiff's Board of Directors (hereafter, Board) has "absolute power to prohibit a pet from being kept on the Properties" applies to the "two . . . dogs, cats or other normal household pets" permitted by the covenant, or whether such power applies only to pets outside the two "dog[], cat[] or other normal household pet[]" limit. In our view, the restrictive covenant is unclear as to the scope of power of the Board, i.e., the restrictive covenant does not specify whether the Board is empowered to prohibit only a pet or pets beyond the two-pet limit, or whether the Board can prohibit the keeping of *any* pet on defendants' property. Indeed, under plaintiff's interpretation of the restrictive covenant, the Board's power to determine the pets not permitted on defendants' property would be so broad as to allow the Board to regulate and to discriminate by breed, mix, color or gender, and we decline to read the restrictive covenant to permit such selectivity and disparate treatment. Under plaintiff's interpretation, any animal of which the Board disapproves can be prohibited regardless whether it is a "normal household pet." Apparently, without offering any rationale, the Board is free to determine "absolute[ly]" what constitutes a "normal household pet." In our view, the restrictive covenant is ambiguous under any fair reading and, thus, the ambiguity must be resolved against plaintiff, i.e., the party seeking to enforce it (*see Ludwig*, 5 AD3d at 1120). We would therefore affirm the order granting defendants' cross motion for summary judgment dismissing the complaint.

Entered: May 2, 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 13-01511

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

DANIELLE DOWNIE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN T. MCDONOUGH, DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM K. MATTAR, P.C., WILLIAMSVILLE (ASHLEY FASSO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered February 6, 2013. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle she was driving collided with a vehicle operated by defendant. In her bill of particulars, plaintiff alleged that, as a result of the accident, she sustained a serious injury under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories set forth in Insurance Law § 5102 (d). Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of those categories, and Supreme Court granted the motion only with respect to the 90/180-day category. We agree with defendant that the court should have granted the motion in its entirety.

Defendant met his initial burden of establishing that plaintiff did not sustain a serious injury under the permanent consequential limitation of use and significant limitation of use categories, and plaintiff failed to raise a triable issue of fact (*see Heller v Jansma*, 103 AD3d 1160, 1161; *Carfi v Forget*, 101 AD3d 1616, 1617). In support of his motion, defendant submitted the affirmed report of an orthopedic surgeon who examined plaintiff less than three months after the accident, reviewed her medical records, and concluded that there was no objective evidence to substantiate plaintiff’s subjective complaints of pain or to warrant further orthopedic treatment. He

concluded instead that plaintiff sustained only a cervical spine sprain or strain as a result of the accident, which had resolved by the time of the examination (*see Herbst v Marshall* [appeal No. 2], 49 AD3d 1194, 1195). The orthopedic surgeon noted that plaintiff exhibited no palpable spasm, motor deficits, or objective sensory deficits, and had full range of motion in her cervical spine. Defendant also submitted copies of plaintiff's medical records, including an X ray report from the date of the accident. The X rays revealed no fractures, disc herniations, subluxations, soft tissue swelling, or any other abnormalities in her cervical, thoracic, or lumbosacral spine. In addition, defendant submitted excerpts from plaintiff's deposition, in which plaintiff testified that she returned to her physically demanding job as a full-time house cleaner less than two months after the accident, and that she performed the same duties both before and after the accident. Plaintiff further testified that there are no activities in which she is unable to participate because of the accident, although she is somewhat limited in "[r]ock climbing [and] some physical sports."

In opposition to the motion, plaintiff submitted, inter alia, the certified records of her treating chiropractor, which included an MRI report reflecting the existence of bulging discs in plaintiff's cervical spine. Even assuming, arguendo, that the report is in admissible form, we conclude that it is insufficient to raise an issue of fact as to serious injury. It is well settled that "[p]roof of a herniated [or bulging] disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury" (*Pommells v Perez*, 4 NY3d 566, 574; *see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 n 4; *Carfi*, 101 AD3d at 1618). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel v Green*, 84 NY2d 795, 798; *see Accurso v Kloc*, 77 AD3d 1295, 1296).

Here, plaintiff relies on mild to moderate range of motion limitations in her cervical spine exhibited the day after the accident. "[W]hile a significant limitation of use of a body function or member need not be permanent in order to constitute a serious injury, . . . any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well" (*Lively v Fernandez*, 85 AD3d 981, 982 [internal quotation marks omitted]; *see Griffiths v Munoz*, 98 AD3d 997, 998). The records of plaintiff's own chiropractor reflect that, less than four months after the accident, plaintiff exhibited normal flexion, extension, and right lateral bending, with restrictions of approximately 10% to 11% in left lateral bending and bilateral rotation. Those limitations are "minor, mild or slight" and thus are properly characterized as "insignificant" or inconsequential within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 236; *see e.g. Il Chung Lim v Chrabaszcz*, 95 AD3d 950, 951; *Canelo v Genolg Tr., Inc.*, 82 AD3d 584, 585; *Sarkis v Gandy*, 15

AD3d 942, 943).

Finally, we agree with defendant that the court erred in concluding that plaintiff raised an issue of fact based upon her complaints of headaches. Although plaintiff submitted excerpts from her deposition in which she testified that "basically every day I would have some type of headache," it is well settled that "subjective complaints of pain or headaches are insufficient to establish 'serious injury' " (*Kivlan v Acevedo*, 17 AD3d 321, 322; *see Licari*, 57 NY2d at 238-239; *Smith v Reeves*, 96 AD3d 1550, 1552). Here, the record contains no objective basis for plaintiff's headache complaints (*see Smith*, 96 AD3d at 1551; *Grayer v Jerez*, 192 AD2d 637, 637; *Solarzano v Power Test Petro*, 181 AD2d 631, 631, *lv denied* 80 NY2d 759). Moreover, plaintiff "offered no proof that [her] headaches in any way incapacitated [her] or interfered with [her] ability to work or engage in activities at home" (*Licari*, 57 NY2d at 239; *see Wiegand v Schunk*, 294 AD2d 839, 840).

All concur except WHALEN, J., who dissents and votes to affirm in the following Memorandum: I respectfully disagree with the majority's conclusion that plaintiff's complaints of headaches were insufficient to create an issue of fact regarding whether she sustained a serious injury. I therefore dissent, and would affirm the order.

Initially, I note that it is of course well established that "subjective complaints of occasional, transitory headaches" are insufficient to qualify as a serious injury (*Licari v Elliott*, 57 NY2d 230, 238). In *Licari*, the Court of Appeals noted that the injured plaintiff offered no proof that his headaches in any way incapacitated him or interfered with his ability to work or engage in activities at home. There, the plaintiff testified that his headaches occurred only once every two or three weeks and were relieved by aspirin. The Court concluded that "the subjective quality of an ordinary headache" does not fall within the definition of serious injury (*id*. at 239). However, our case is different and the rule from *Licari* should not act as a bar to a potential recovery for plaintiff herein.

In the case now before us, plaintiff testified that every day since the accident she has headaches. She also testified that they are not getting any better. Plaintiff did not testify to having occasional or transitory headaches that are of the type described in *Licari*. Importantly, the orthopedic surgeon who examined plaintiff on defendant's behalf noted in his report that plaintiff complained of headaches and that this complaint "is out of the scope of my specialty as an orthopedist" and that he would "defer comment on treatment for the head to the neurologist." He also causally related plaintiff's injuries to the accident. Additionally, he opined that a neurological exam was necessary to assess the headaches, and yet defendant did not have plaintiff examined by a neurologist. The orthopedic surgeon had access to plaintiff's medical records and could have opined that plaintiff was suffering from the type of minor, transitory headaches contemplated by *Licari* that would not qualify as a serious injury. However, he did not offer such an opinion. In fact, he did just the opposite. He thought, after reviewing the medical records, that

plaintiff should see a neurologist for the types of headaches she was experiencing. Thus, because the only proof in the record is that plaintiff was having headaches every single day since the accident that were not improving, and because defendant did not have plaintiff examined by a neurologist, defendant failed to meet his initial burden on his motion (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325). I note that there is evidence in the record that plaintiff could not go to see a neurologist on her own because she did not have any insurance, which is a reasonable excuse for not seeking treatment (*see Alexander v Guevara*, 2008 NY Slip Op 33473[U], *5 [Sup Ct, Nassau County], citing *Frankcovig v Senekis Cab Corp.*, 41 AD3d 643).

Additionally, I respectfully disagree with the majority that plaintiff offered no proof that the headaches incapacitated her or interfered with her ability to work or engage in activities at home. Again, I note that it was defendant's initial burden on the summary judgment motion to establish that plaintiff did not sustain a serious injury. The physician who examined plaintiff on defendant's behalf stated in his report that plaintiff was working at the same job "with limitations," and there is a notation in the medical records that plaintiff quit her job as a house cleaner due to pain. Thus, viewing the facts in the light most favorable to plaintiff, the nonmoving party (*see generally Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340), I conclude that there is evidence that plaintiff's headaches interfered with her activities and that summary judgment for defendant is improper with respect to the two remaining categories of serious injury.

Entered: May 2, 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 13-01559

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

IN THE MATTER OF THE ESTATE OF NYLA J. GEHR, DECEASED.

BRANDON A. JONES, PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

MARIAN G. HOEFT, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF NYLA J. GEHR, DECEASED, RESPONDENT-RESPONDENT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR PETITIONER-APPELLANT.

MICHAEL J. RYAN, BUFFALO, AND STEPHEN P. ZANGHI, WESTFIELD, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Chautauqua County (Stephen W. Cass, S.), entered February 11, 2013. The order granted the motion of respondent to dismiss the petition to revoke letters testamentary.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated and the matter is remitted to Surrogate's Court, Chautauqua County, for further proceedings in accordance with the following Memorandum: Nyla J. Gehr (decedent) passed away on October 8, 2012, and was survived by her sister (respondent). Decedent executed a will on December 17, 2002 (2002 will), which named respondent as the sole beneficiary and executor. The 2002 will was admitted to probate on November 2, 2012, and letters testamentary were issued to respondent.

On November 8, 2012, petitioner sought to admit to probate a will that decedent purportedly executed on June 6, 2012 (2012 will), which named petitioner as the sole beneficiary. Petitioner subsequently filed a petition, dated November 19, 2012, seeking pursuant to SCPA 711 (1) to revoke the letters testamentary issued to respondent on the ground that the 2012 will was decedent's last will and testament and therefore should be admitted to probate instead of the 2002 will. Petitioner attached the affidavits of the two attesting witnesses to the 2012 will in accordance with SCPA 1406. The attesting witnesses swore that, on June 6, 2012, they saw decedent sign the 2012 will in their presence, that they heard decedent declare the document to be her last will and testament, and that they then signed the document in the presence of decedent and each other. In a separate affidavit,

petitioner explained that he did not learn of decedent's death until approximately November 2, 2012, due to his absence from the state and, because he was not a person entitled to notice of the proceeding to admit the 2002 will to probate pursuant to SCPA 1403, he had no earlier opportunity to file objections to probate of the 2002 will.

By notice of motion dated November 28, 2012, respondent moved to dismiss the instant petition on the ground that it fails to state a cause of action (*see* CPLR 3211 [a] [7]; *see also* SCPA 102). Respondent argued that the 2012 will was a holographic will and therefore could not be admitted to probate. Respondent also filed objections to probate of the 2012 will, alleging, inter alia, that the 2012 will was a forgery, that it was not duly executed or attested, that decedent lacked testamentary capacity, and that the 2012 will was the product of undue influence.

Surrogate's Court determined that it would not accept the affidavits of the two attesting witnesses as a substitute for in-court testimony because objections to probate of the 2012 will had been filed, and because the 2012 will was not executed under the supervision of an attorney and contained no attestation clause. The Surrogate also concluded that the will was handwritten, although it was not a holographic will inasmuch as it was written by someone other than decedent (*see* EPTL 3-2.2 [a] [2]). The Surrogate further concluded that the 2012 will was not testamentary in character and could not be admitted to probate because the final sentence of the document stated that "[t]he above will, will take place preceding my death," whereas a proper will takes effect upon death (*see* EPTL 1-2.19 [a]). The Surrogate therefore granted respondent's motion to dismiss the petition.

On appeal, petitioner contends that the Surrogate erred in granting respondent's motion without conducting a hearing. We agree. Petitioner sought to revoke the letters testamentary issued to respondent on the ground that the 2002 will was no longer valid due to the making of the 2012 will (*see* SCPA 719 [4]), and thus admission of the 2002 will to probate should be vacated. To be entitled to vacatur of probate of the 2002 will, petitioner was required to "demonstrate a substantial basis for [his] contest and a reasonable probability of success through competent evidence that would have probably altered the outcome" of the Surrogate's determination to admit the 2002 will to probate (*Matter of American Comm. for Weizmann Inst. of Science v Dunn*, 10 NY3d 82, 96). We conclude that petitioner demonstrated a substantial basis for contesting the 2002 will. Execution of a subsequent will revokes a former will if the subsequent will is "so inconsistent with the former will that the two cannot stand together," even in the absence of an express revocation clause in the subsequent will (*Matter of Cunnion*, 201 NY 123, 126; *see* EPTL 3-4.1 [a] [1] [A]; *Matter of Sheldon*, 158 App Div 843, 848; *Matter of Moore*, 6 Misc 2d 107, 109). Here, the 2002 will named respondent as the sole beneficiary, but the 2012 will named petitioner as the sole beneficiary and purported to dispose of all of decedent's property. We therefore conclude that the provisions of the 2002 will are so inconsistent with those of the 2012 will that, if the Surrogate were

"satisfied with the genuineness of the [2012] will and the validity of its execution" (SCPA 1408 [1]), the 2012 will would revoke the 2002 will. Thus, in this case, whether petitioner had a reasonable probability of successfully vacating probate of the 2002 will was dependent upon whether he could prove, through competent evidence, that the 2012 will was genuine and duly executed and attested (*see* EPTL 3-2.1; *American Comm. for Weizmann Inst. of Science*, 10 NY3d at 96).

Initially, we conclude that the Surrogate properly refused to accept the affidavits of the attesting witnesses as a substitute for their in-court testimony to prove due execution and attestation of the 2012 will because respondent "raise[d] objections thereto" (SCPA 1406 [1] [a]). Furthermore, "for any other reason," the Surrogate may reject out-of-court affidavits and require that the witnesses "be produced and examined" (SCPA 1406 [1] [b]). Here, the Surrogate amply supported his refusal to accept the out-of-court affidavits of the attesting witnesses by noting that the 2012 will was handwritten, was not supervised by an attorney, and contained no attestation clause.

We further conclude, however, that the Surrogate erred in granting, without first conducting a hearing, respondent's motion to dismiss the petition on the ground that the 2012 will was not testamentary in character (*see Matter of Loverme*, 27 AD3d 747, 748). We therefore reverse the order, deny the motion, reinstate the petition, and remit the matter to Surrogate's Court for a hearing pursuant to SCPA 1404, at which the attesting witnesses may be examined and respondent's objections to probate of the 2012 will may be explored. The Surrogate properly noted that a will by its definition must "take effect upon death" (EPTL 1-2.19 [a]). The test to determine whether a document is testamentary is "whether the maker intended the instrument to have no effect until after the maker's death, or whether he intended it to transfer some present interest" (*McCarthy v Pieret*, 281 NY 407, 409, *rearg denied* 282 NY 800 [internal quotation marks omitted]; *see Matter of Wolf*, 38 Misc 3d 564, 568). Here, decedent purportedly stated in the 2012 will that she had made her "final decision" on behalf of her estate, and she labeled the document her "final will." Furthermore, she stated that she was leaving her "entire estate" to petitioner, including "all real estate" and all of her "personal belongings" and "money." Inasmuch as it is unlikely that decedent intended to part with all of her property and possessions at some unspecified time prior to her death—and, indeed, there is no evidence that she did so—we conclude that it is possible that, in writing that the will should "take place preceding [her] death," decedent was attempting to articulate that the 2002 will was no longer valid and that the 2012 will expressed her present intent for disposition of her property upon her death. We therefore conclude that the Surrogate should conduct a hearing before deciding whether to revoke the letters testamentary issued for the 2002 will and to vacate probate of that will.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

229

KA 11-01398

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NJERA WILSON, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

NJERA WILSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered April 15, 2011. The judgment convicted defendant, upon a nonjury verdict, of criminal contempt in the first degree and criminal contempt 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 nonjury verdict of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]) and criminal contempt in the second degree (§ 215.50 [3]). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The People presented evidence establishing that, pursuant to an order of protection entered in June 2009, defendant was directed to stay away from the victim and her home. The victim testified that, on October 19, 2009, defendant attacked her at her home and punched her face, and that, on November 1, 2009, she heard defendant "banging" on her front door and yelling. Although there were inconsistencies in the victim's testimony regarding both incidents, "it cannot be said that her testimony was 'manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Westbrooks*, 90 AD3d 1536, 1536, *lv denied* 18 NY3d 963). Furthermore, the responding officer testified that the victim had a bloody lip following the first incident, and that defendant was apprehended in the vicinity of the victim's home within minutes of the second incident. We further conclude that the sentence is not unduly harsh or severe.

We reject defendant's contention in his pro se supplemental brief that he was denied effective assistance of counsel. The order of protection was relevant to the trial and a matter of record, and thus we conclude that defense counsel was not ineffective in consenting to its admission in evidence (*see generally People v Rivera*, 22 AD3d 888, 890, *lv denied* 6 NY3d 780). We further conclude that defense counsel was not ineffective in conceding defendant's guilt of criminal contempt in the October incident in the hope that he would be acquitted of the far more serious charge of burglary in the second degree. Such a defense tactic is "a perfectly acceptable strategy which should not be second guess[ed] by the courts" (*People v Washington* [appeal No. 2], 19 AD3d 1180, 1181, *lv denied* 5 NY3d 833 [internal quotation marks omitted]; *see People v Plaza*, 133 AD2d 857, 858, *lv denied* 70 NY2d 936). We note, moreover, that defense counsel successfully obtained an acquittal on the burglary count (*see generally People v Nuffer*, 70 AD3d 1299, 1301). Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

236

CA 13-01534

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

EDWARD GAWRON AND JOANNE GAWRON,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF CHEEKTOWAGA AND DAVID J. GRZYBEK,
DEFENDANTS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MARTHA E. DONOVAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

LAW OFFICE OF MICHAEL D. HOLLENBECK, BUFFALO (MICHAEL D. HOLLENBECK OF COUNSEL), FOR PLAINTIFF-RESPONDENT JOANNE GAWRON.

Appeal from an amended order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered June 11, 2013. The amended order, insofar as appealed from, denied the cross motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the amended order so appealed from is modified on the law by granting defendants' cross motion in part and dismissing the negligence claims in the first cause of action and as modified the amended order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries they sustained when the vehicle operated by Edward Gawron (plaintiff), in which plaintiff Joanne Gawron was a passenger, was struck by a truck owned by defendant Town of Cheektowaga (Town) and operated by defendant David J. Grzybek, an employee of the Town. The truck was equipped with a plow and, at the time of the accident, the plow was down and Grzybek was in the process of using that plow to remove accumulated water and debris from the road. As plaintiffs allege, "the water was propelled onto the windshield of the . . . truck . . . , blocking [Grzybek's] vision and causing him to cross over into an oncoming lane and into . . . [plaintiffs'] vehicle." Plaintiffs alleged that the accident "was caused as a result of the negligent, careless, reckless and unlawful conduct on the part of the defendants."

Plaintiff moved for partial summary judgment on the issue of defendants' negligence as well as the affirmative defenses asserted

against him, and defendants cross-moved for summary judgment dismissing the complaint. As relevant on appeal, Supreme Court denied defendants' cross motion in its entirety.

Defendants contend on appeal that the court erred in denying their cross motion because they established that Vehicle and Traffic Law § 1103 (b) applies as a matter of law and that Grzybek was not acting recklessly at the time of the accident. We agree with defendants that, as a matter of law, the truck operated by Grzybek was "actually engaged in work on a highway" at the time of the accident (*id.*), "and thus that it was exempt from the rules of the road except to the extent that its operation constituted a 'reckless disregard for the safety of others' " (*Curella v Town of Amherst*, 77 AD3d 1301, 1301-1302; *see generally Riley v County of Broome*, 95 NY2d 455, 462). We further conclude, however, that there are triable issues of fact whether Grzybek acted with such reckless disregard at the time of the accident. We therefore modify the amended order by granting only that part of defendants' cross motion for summary judgment seeking dismissal of the negligence claims asserted in the first cause of action.

Vehicle and Traffic Law § 1103 "exempts all persons and vehicles 'while actually engaged in work on a highway' from the Vehicle and Traffic Law provisions (§ 1103 [b]), except for those provisions relating to driving while intoxicated offenses" (*Kabir v County of Monroe*, 68 AD3d 1628, 1632, *affd* 16 NY3d 217). A "highway" is defined as "[t]he entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel" (§ 118). Although the road on which the accident occurred was a service road, it was publicly maintained and open to the use of the public for the purpose of vehicular travel (*see generally Groninger v Village of Mamaroneck*, 17 NY3d 125, 129; *People v County of Westchester*, 282 NY 224, 228-229). We thus conclude that the service road constitutes a highway within the meaning of section 1103 (b) as a matter of law.

As we have recently written, "the inclusion of the language 'actually engaged in work on a highway' indicates that the exemption applies only when such work is in fact being performed at the time of the accident . . . To conclude otherwise would render superfluous the phrase 'actually engaged' " (*Hofmann v Town of Ashford*, 60 AD3d 1498, 1499). Grzybek was a maintenance janitor whose normal and routine duties included driving a truck, patching roads and snow plowing. The accident occurred after Grzybek had taken his lunch break at one Town building and was returning to another Town building to continue his work. He took the service road for a "change of scenery." It is undisputed that, on the day of the accident, Grzybek had not received any specific assignment to plow the water and debris from the road and that he did so on his own "initiative." It is also undisputed that, while not a common endeavor, Town maintenance employees such as Grzybek had taken it upon themselves to use the plows attached to their trucks to plow puddles, similar to the one plowed by Grzybek, from highways on other occasions. Plaintiffs contend that, because Grzybek was not performing his "assigned work," section 1103 (b) does

not apply. We are thus called upon to interpret the word "work" as used in the statute.

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature . . . As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof . . . In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning" (*Majewski v Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577, 583 [internal quotation marks omitted]). Indeed, "[t]he function of the courts is to enforce statutes, not to usurp the power of legislation, and to interpret a statute where there is no need for interpretation, to conjecture about or to add to or to subtract from words having a definite meaning, or to engraft exceptions where none exist are trespasses by a court upon the legislative domain" (McKinney's Cons Laws of NY, Book 1, Statutes § 76, Comment at 168). Thus, "new language cannot be imported into a statute to give it a meaning not otherwise found therein" (§ 94, Comment at 190), and "a court cannot amend a statute by inserting words that are not there" (§ 363, Comment at 525; *see Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 394, *rearg denied* 85 NY2d 1033).

Here, the statute exempts "all [municipal] vehicles 'actually engaged in work on a highway' . . . from the rules of the road" (*Riley*, 95 NY2d at 461). The statute does not state that it exempts only those vehicles engaged in "assigned" work. Plowing water and debris from a road is work, and that work is within the scope of Grzybek's duties. Plaintiffs do not suggest otherwise. Rather, their contention is that the statute applies only when the vehicles are "performing their assigned work" and that Grzybek was not assigned to plow water and debris from the service road on the day of the accident. In our view, interpreting the statute as the dissent and plaintiffs suggest improperly adds language to the statute by qualifying the word "work." It is not the function of this Court to usurp the power of the legislature and rewrite a clear and unambiguous statute. Aside from statutory exceptions not relevant herein, all municipal vehicles actually engaged in work are exempt from the rules of the road. Inasmuch as Grzybek's vehicle was actually engaged in work, albeit unassigned work, the reckless disregard standard of care set forth in Vehicle and Traffic Law § 1103 (b) applies as a matter of law.

Defendants further contend that, as a matter of law, Grzybek's conduct did not rise to the level of reckless disregard for the safety of others within the meaning of Vehicle and Traffic Law § 1103 (b). We reject that contention. Even assuming, arguendo, that defendants established their entitlement to judgment as a matter of law on that issue, we conclude that plaintiffs, in opposition to defendants' cross motion, submitted evidence from which a jury could find that Grzybek

"had intentionally committed an act of an unreasonable character in disregard of a known or obvious risk ' "that was so great as to make it highly probable that harm would follow" and [did] so with conscious indifference to the outcome' " (*Ferreri v Town of Penfield*, 34 AD3d 1243, 1243-1244, quoting *Saarinen v Kerr*, 84 NY2d 494, 501).

All concur except LINDLEY and SCONIERS, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent because we conclude, based on the facts and circumstances of the subject motor vehicle accident, that Vehicle and Traffic Law § 1103 (b) does not apply as a matter of law in this case. We therefore conclude that Supreme Court properly refused to dismiss the negligence claims in the first cause of action. Specifically, while we agree with the majority that the access road where the accident occurred constitutes a "highway" (*see generally Groninger v Village of Mamaroneck*, 17 NY3d 125, 129; *Healy v City of Tonawanda*, 234 AD2d 982, 983), we conclude that the actions of defendant David J. Grzybek, an employee of defendant Town of Cheektowaga (Town), at the time of the accident are not protected by the statute because he was not "actually engaged in work on a highway" as contemplated by the statute (§ 1103 [b]).

It is undisputed that (1) Grzybek's duties had included plowing snow, but on the day of the accident he was assigned to perform maintenance and janitorial work at the Town's senior center; (2) on this date in late March, the snow plow was on the pickup truck that Grzybek was driving only because the Town had not yet had the time or opportunity to remove it; (3) Grzybek was returning from lunch at the time of the accident and he had chosen this route along this access road simply for "a change of scenery"; (4) it was not common to use a plow to move water from a road, but it had been done on previous occasions; (5) there was no proof that plows were ever used to remove debris from a road; (6) Grzybek was not instructed to remove the water and debris from this access road, but did so on his own initiative; (7) he had, in fact, never been instructed by a supervisor to use a plow to remove either water or debris from roads; (8) there is no evidence suggesting that the water or debris posed an immediate hazard on this access road; and (9) Grzybek was terminated as a result of this incident. Notably, Grzybek testified that, depending on the nature of the debris, the usual procedure for removing debris from roads involved using high lifts or brooms.

Vehicle and Traffic Law § 1103 is a statute in derogation of the common law. " 'The Legislature in enacting statutes is presumed to have been acquainted with the common law, and generally, statutes in derogation or in contravention thereof, are strictly construed, to the end that the common law system be changed only so far as required by the words of the act and the mischief to be remedied' " (*Kirshtein v AmeriCU Credit Union*, 65 AD3d 147, 152, quoting McKinney's Cons Laws of NY, Book 1, Statutes § 301 [a], Comment). Moreover, given that this statute is " 'in derogation of [a] plaintiff's common-law rights,' the statute . . . should be strictly construed in the plaintiff[s'] favor" (*Goodwin v Pretorius*, 105 AD3d 207, 216).

The majority's overly broad application of section 1103 (b) in this case stands in stark contrast to the much narrower scope that courts have afforded to Vehicle and Traffic Law § 1104. Section 1104 applies the reckless disregard standard to an "authorized emergency vehicle," but only if the driver of that vehicle is engaged in an "emergency operation" as that term is defined in Vehicle and Traffic Law § 114-b and the driver is engaged in one of the specific types of protected conduct enumerated in Vehicle and Traffic Law § 1104 (b) (*see Kabir v County of Monroe*, 16 NY3d 217, 220; *LoGrasso v City of Tonawanda*, 87 AD3d 1390, 1391).

Given the limits that the statute and case law apply to Vehicle and Traffic Law § 1104 for first responders, we conclude that the legislature could not possibly have intended to apply such a broad interpretation to the phrase "actually engaged in work on a highway" in Vehicle and Traffic Law § 1103 (b) as that applied by the majority here. It is clear that, on the day of the subject accident, Grzybek was not assigned to clear water or debris from this access road or any other road in the Town. Moreover, he was not assigned that day to use the plow on this pickup in any way whatsoever, and his use of the truck on this day was solely to transport himself and any equipment necessary to perform maintenance and janitorial work. By applying Vehicle and Traffic Law § 1103 (b) as a matter of law in this case, the majority is effectively holding that the statute applies in every case to all public employees, no matter their status, duties or job assignments, who, at any time, decide, in their sole discretion, to use even the most inept, incompetent and ill-advised methods to perform a task that could possibly be construed as "work on a highway," thereby leaving injured persons uncompensated for their injuries unless they can satisfy the "reckless disregard for the safety of others" standard. Such a result extends the scope of Vehicle and Traffic Law § 1103 (b) far beyond what the legislature intended, especially given the corresponding limits that Vehicle and Traffic Law § 1104 places on the police and other first responders. We would therefore apply the standard of ordinary negligence to defendants in this personal injury action, and we would affirm the amended order.

Entered: May 2, 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 09-02277

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DESMOND T. MCCULLOUGH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered September 2, 2009. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the second degree (Penal Law § 120.05 [2]), arising from defendant's shooting of the victim. Defendant contends that County Court erred in denying his request for a missing witness charge. We conclude that any error of the court in failing to give the missing witness charge is harmless inasmuch as the evidence of defendant's guilt is overwhelming, and there is no significant probability that the jury would have acquitted defendant but for the alleged error (*see People v White*, 265 AD2d 843, 844, *lv denied* 94 NY2d 868). The overwhelming evidence of defendant's guilt included the testimony of three eyewitnesses, all of whom were personally familiar with defendant. Notably, all three witnesses testified that the shooting occurred in broad daylight, and that the assailant was not wearing a mask to cover his face. We reject defendant's related contention that the court erred when it precluded defense counsel from commenting on the missing witness during summation (*see generally People v Miller*, 213 AD2d 271, 271, *lv denied* 86 NY2d 844).

Finally, we reject defendant's contention that the court erred in admitting in evidence a letter purportedly written by defendant. "In New York, the general rule is that all relevant evidence is admissible unless its admission violates some exclusionary rule . . . Evidence is relevant if it has any tendency in reason to prove the existence of any material fact, i.e., it makes determination of the action more

probable or less probable than it would without the evidence" (*People v Scarola*, 71 NY2d 769, 777). Even relevant evidence, however, may be held inadmissible in the exercise of the court's discretion if its "probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury" (*id.*). Here, we conclude that the probative value of the letter far outweighs any unfair prejudice inasmuch as it was relevant to the issue of the shooter's identity. "[W]hether . . . defendant actually wrote the letter [goes] to the [evidentiary] weight to be accorded the [letter], not to its admissibility" (*People v Pearce*, 81 AD3d 856, 856, *lv denied* 16 NY3d 898).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

255

KA 12-02112

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

D'ALLYN E. WASHINGTON, DEFENDANT-APPELLANT.

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

D'ALLYN E. WASHINGTON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered August 13, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree and robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]) and robbery in the second degree (§ 160.10 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver encompasses his challenge to the severity of the sentence (*see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737). We have examined defendant's contentions in his pro se supplemental brief and conclude that none requires reversal or modification of the judgment.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

257

CA 13-01680

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

ANNIE MOSLEY, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 117444.)

ALEXANDER & CATALANO, LLC, ROCHESTER (WILLIAM P. SMITH, JR., OF COUNSEL), FOR CLAIMANT-APPELLANT.

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

Appeal from an order of the Court of Claims (Renée Forgensi Minarik, J.), entered December 10, 2012. The order granted the motion of defendant to dismiss the claim and dismissed the claim.

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

Memorandum: On September 25, 2009, claimant commenced this action seeking damages for injuries she allegedly sustained on December 7, 2008 when she slipped and fell on ice and snow on the walkway while approaching the entrance to the Orleans Correctional Facility. Claimant served a document entitled "Notice of Claim" (document) on the Attorney General on February 13, 2009. We agree with claimant that the Court of Claims erred in granting defendant's motion to dismiss the claim on the grounds that the document could not be considered a notice of intention to file a claim and that it failed to provide sufficient specificity as to where the accident occurred.

Court of Claims Act § 10 (3) provides in relevant part that a claimant seeking to recover damages for personal injuries caused by the negligence of an officer or employee of the State must file and serve a claim or a notice of intention to file a claim upon the Attorney General within 90 days after the accrual of such claim. A notice of intention to file a claim (notice of intent) "shall state the time when and place where such claim arose [and] the nature of same" (§ 11 [b]). The failure to state the time and place of the accident in the notice of intent is a jurisdictional defect mandating dismissal of the claim (*see Wilson v State of New York*, 61 AD3d 1367, 1368; *Czynski v State of New York*, 53 AD3d 881, 883, *lv denied* 11 NY3d 715).

Here, we conclude that the document is a proper notice of intent. We agree with defendant that the document "had all the hallmarks of a notice of claim against a municipality," rather than a notice of intent against the State, including the title of the document, the stated venue as "Supreme Court," the references to the General Municipal Law, and the naming of the County of Orleans as a "respondent." Nevertheless, the document names the State as a "respondent" and alleges that the premises where claimant fell were owned by the State, and claimant served the document on the Attorney General. In addition, we conclude that the mistake in naming the place where the claim arose as the "Orleans *County* Correctional Facility" (emphasis added) does not require dismissal of the claim. Claimant provided the proper address where the claim arose, which showed that her fall occurred at the Orleans Correctional Facility, and not at the Orleans County Jail, which is located on a different street.

With regard to the requisite specificity as to the place where the claim arose, we note that " '[w]hat is required is not absolute exactness, but simply a statement made with sufficient definiteness to enable [defendant] to be able to investigate the claim promptly and to ascertain its liability under the circumstances' " (*Deep v State of New York*, 56 AD3d 1260, 1260-1261; *see Lepkowski v State of New York*, 1 NY3d 201, 207). The document herein, i.e., the notice of intent, stated that the accident occurred when claimant "slipped on ice and snow on the walk way" as she "approached the entry to [the] correctional facility." We conclude that such description in the notice of intent satisfies the requirements of Court of Claims Act § 11 (b) (*see Acee v State of New York*, 81 AD3d 1410, 1411).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

258

CA 13-01020

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

HELEN LUPA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF OSWEGO, DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, OSWEGO (DOUGLAS M. MCRAE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (LEIGH A. LIEBERMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered March 12, 2013. 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: Plaintiff commenced this action seeking to recover damages for injuries she allegedly sustained when she tripped and fell on the elevated edge of a parking space maintained by defendant. Defendant moved for summary judgment dismissing the complaint on the ground that the defect was trivial as a matter of law. Supreme Court denied the motion, and we affirm.

"[W]hether 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 Tesak v Marine Midland Bank*, 254 AD2d 717, 717-718). "[T]here is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*Trincere*, 90 NY2d at 977). Although, "in some instances, the trivial nature of the defect may loom larger than another element[,] . . . [a] mechanistic disposition of a case based exclusively on the dimension of the [pavement] defect" is inappropriate (*id.* at 977-978). Thus, a determination of whether a particular defect is actionable requires examination of "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (*id.* at 978 [internal quotation marks omitted]; *see Tesak*, 254 AD2d at 717-718).

Here, we conclude that defendant failed to meet its initial burden of establishing that the defect was trivial and nonactionable as a matter of law (see *Brenner v Herricks Union Free Sch. Dist.*, 106 AD3d 766, 767-768; *Gafter v Buffalo Med. Group, P.C.*, 85 AD3d 1605, 1605-1606; *Seivert v Kingpin Enters., Inc.*, 55 AD3d 1406, 1407). The photographs submitted in support of defendant's motion depict a lengthy edge in the pavement that was more than two-thirds of an inch deep and spanned the width of the painted walking area adjacent to the designated handicapped parking space (*see Brenner*, 106 AD3d at 767). Defendant also submitted plaintiff's deposition testimony, in which she testified that her right foot caught on "a quite high ledge" in the pavement at the rear of the parking space (*see Gafter*, 85 AD3d at 1605-1606; *Tineo v Parkchester S. Condominium*, 304 AD2d 383, 383). Although defendant characterizes the edge as "a small, rounded lip in the pavement," the photographs depict crumbling asphalt, and the edge appears to be irregular, jagged and abrupt as opposed to gradual (*see Jacobsen v Krumholz*, 41 AD3d 128, 128-129; *McKenzie v Crossroads Arena*, 291 AD2d 860, 860-861, *lv dismissed* 98 NY2d 647; *see generally Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 166). Unlike *Squires v County of Orleans* (284 AD2d 990, 990), where the trivial defect involved " 'a small area' " of a " 'cracked and crumbly' " curb that "had no 'measurable depth,' " plaintiff's deposition testimony and the photographs in this case, particularly the photographs depicting the area closest to plaintiff's vehicle, suggest a measurable edge in the pavement that could pose a tripping hazard. Because defendant "failed to meet [its] initial burden on the motion, we need not consider the sufficiency of plaintiff's opposing papers" (*Gafter*, 85 AD3d at 1606; *see Seivert*, 55 AD3d at 1407-1408; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

262

CA 13-01366

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

BRIAN HYATT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DANIEL YOUNG, DOING BUSINESS AS CY CONSTRUCTION, DEFENDANT-RESPONDENT.

FARACI LANGE, LLP, ROCHESTER (JOSEPH A. REGAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LACY KATZEN LLP, ROCHESTER (JOHN M. WELLS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered November 19, 2012. The order and judgment, insofar as appealed from, denied that part of the motion of plaintiff seeking partial summary judgment on liability on his Labor Law § 240 (1) claim and granted that part of the cross motion of defendant seeking summary judgment dismissing that claim.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs, that part of the cross motion for summary judgment dismissing the Labor Law § 240 (1) claim is denied, that claim is reinstated, and that part of the motion seeking partial summary judgment on liability on that claim is granted.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained while delivering materials for a roofing project. Plaintiff was unloading roofing supplies using a conveyor on a flatbed truck, and the accident occurred when plaintiff attempted to raise a four-foot by eight-foot plywood sheet onto the roof. The plywood became unbalanced on the conveyor and, as plaintiff attempted to steady it, he fell from the bed of the flatbed truck to the ground five feet below and sustained injuries. Supreme Court denied plaintiff's motion for partial summary judgment on the issue of liability on all of plaintiff's claims and granted defendant's cross motion for summary judgment dismissing the complaint. We note at the outset that, as limited by his brief, plaintiff appeals from the order and judgment insofar as it granted defendant's cross motion and denied that part of his motion seeking partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1). We agree with plaintiff.

Although flatbed trucks "d[o] not present the kind of elevation-related risk that the statute contemplates" (*Toefer v Long Is. R.R.*, 4 NY3d 399, 408), the accident in this case was caused by a falling object, which distinguishes this case from *Toefer* (*cf. Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 1426-1427). The accident that caused plaintiff's injuries "flow[ed] directly from the application of the force of gravity to the object" (*Runner v New York State Stock Exch., Inc.*, 13 NY3d 599, 604; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501). In other words, the injuries were the result of "the direct consequence of a failure to provide statutorily required protection against a risk plainly arising from a workplace elevation differential" (*Runner*, 13 NY3d at 605). Inasmuch as plaintiff established that the plywood fell while being hoisted because of the absence or inadequacy of a safety device of the kind enumerated in the statute, we conclude that he is entitled to summary judgment on the section 240 (1) claim (*see generally Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268).

As an alternative ground for affirmance (*see generally Parochial Bus. Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 546), defendant contends that he cannot be held liable because he did not direct or control the method of unloading the roofing materials. We reject that contention. Defendant was the roofing contractor at the job site and purchased supplies from plaintiff's employer. It is well settled that a contractor's duties under Labor Law § 240 (1) are nondelegable, and a contractor may be held liable regardless of whether he actually exercised supervision or control over the work (*see Ross*, 81 NY2d at 500). As a further alternative ground for affirmance, defendant contends that plaintiff was not engaged in a protected activity under Labor Law § 240 (1) at the time of the accident. We reject that contention inasmuch as plaintiff's work in unloading the roofing material is a protected activity under the statute (*see Orr v Christa Constr.*, 206 AD2d 881, 881).

Entered: May 2, 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 13-00034

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

ROSALIE A. CALEB AND THE ESTATE OF BRENT C. CALEB, DECEASED, ROSALIE A. CALEB, EXECUTOR, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SEVENSON ENVIRONMENTAL SERVICES, INC., DEFENDANT-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (EDWARD J. MARKARIAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated judgment and order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered May 2, 2012 in a breach of contract action. The judgment, among other things, awarded plaintiffs money damages as against defendant.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the amount of prejudgment interest awarded from April 18, 1990 and providing that prejudgment interest is to commence from April 18, 1996, and as modified the judgment is affirmed without costs.

Memorandum: Defendant appeals from a judgment based on a jury verdict in plaintiffs' favor that awarded money damages in this breach of contract action. We reject defendant's contention that Supreme Court erred in charging the jury that it could consider, inter alia, whether defendant failed to perform the contract within "a reasonable time" in determining when plaintiffs' cause of action accrued for purposes of defendant's statute of limitations defense. While the parties' contract stated that the work would be completed by November 30, 1989, the evidence established that after the work was not completed by the end of the 1989 work season defendant informed plaintiffs through a principal that defendant would "return in the [s]pring of 1990, as early as weather permits, to complete" the work required by the contract. Thus, there was a reasonable view of the evidence that the parties "effectively converted the contract into one under which performance within a reasonable time was all that was required" (*Schenectady Steel Co. v Trimpoli Gen. Constr. Co.*, 43 AD2d 234, 237, *affd* 34 NY2d 939). As a result, we conclude that "the court's charge accurately stated the law as it applie[d] to the facts

in this case" (*Shumway v Kelley* [appeal No. 2], 109 AD3d 1092, 1094, *lv denied* 22 NY3d 859 [internal quotation marks omitted]).

We reject defendant's further contention that there was no evidentiary foundation for the testimony of plaintiffs' damages expert, a construction cost estimator. It is well settled that " '[o]pinion evidence must be based on facts in the record or personally known to the witness' " (*Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725). It is also well settled, however, that an expert is permitted to offer opinion testimony based on facts not in evidence where the material is " 'of a kind accepted in the profession as reliable in forming a professional opinion' " (*id.* at 726; *see Wagman v Bradshaw*, 292 AD2d 84, 86-87). "The professional reliability exception to the hearsay rule 'enables an expert witness to provide opinion evidence based on otherwise inadmissible hearsay, provided it is demonstrated to be the type of material commonly relied on in the profession' " (*Matter of State of New York v Motzer*, 79 AD3d 1687, 1688, quoting *Hinlicky v Dreyfuss*, 6 NY3d 636, 648). Here, the expert's damages testimony was based, in part, on measurements contained in a report that was not admitted in evidence, but those measurements were not otherwise disputed or challenged by defendant. Moreover, the expert testified that the information on which he relied was of the type relied on in his profession. Thus, the court properly overruled defendant's objections to the expert's testimony.

We agree with defendant, however, that the court erred in awarding prejudgment interest from April 18, 1990. The jury did not specify a date on which plaintiffs' cause of action for breach of contract accrued and where, as here, "the precise date from which to fix interest is ambiguous, 'the date of commencement of the . . . action' is an appropriate date to choose" (*Della Pietra v State of New York*, 125 AD2d 936, 938, *affd* 71 NY2d 792). We therefore modify the judgment by vacating the amount of prejudgment interest awarded from April 18, 1990 and providing that prejudgment interest is to commence from April 18, 1996, the date on which the action was commenced, to May 2, 2012, the date of the judgment. We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: May 2, 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 12-02009

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

CHARLES R. HILL AND CATHY HILL, INDIVIDUALLY AND AS HUSBAND AND WIFE, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

THOMAS P. CASH, AS COADMINISTRATOR OF THE ESTATE OF BRETT W. RIETHMILLER, DECEASED, CYNTHIA D. RIETHMILLER, AS COADMINISTRATOR OF THE ESTATE OF BRETT W. RIETHMILLER, DECEASED, THOMAS P. CASH AND CYNTHIA D. RIETHMILLER, AS COADMINISTRATORS OF THE ESTATE OF BRETT W. RIETHMILLER, DOING BUSINESS AS ELM STREET AUTOMOTIVE, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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

BROWN & KELLY, LLP, BUFFALO (H. WARD HAMLIN, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered February 15, 2012. The order denied plaintiffs' motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiffs' motion in part and dismissing the fifth affirmative defense of defendants Thomas P. Cash and Cynthia D. Riethmiller, as coadministrators of the estate of Brett W. Riethmiller, doing business as Elm Street Automotive, and the second affirmative defense of defendants Thomas P. Cash and Cynthia D. Riethmiller, as coadministrators of the estate of Brett W. Riethmiller, and as modified the order is affirmed without costs.

Memorandum: In appeal No. 1, plaintiffs appeal from an order that denied their motion for "[s]ummary judgment on negligence, serious injury and liability," as well as "dismissal of certain affirmative defenses." In appeal No. 2, defendant Charles R. Hill (Hill), who is also a plaintiff in appeal No. 1, appeals from an order that denied his motion for summary judgment "on negligence," which thus sought summary judgment dismissing the complaint against him. We modify the order in appeal No. 1 by granting plaintiffs' motion in part and dismissing the fifth affirmative defense of defendants Thomas P. Cash and Cynthia D. Riethmiller, as coadministrators of the estate

of Brett W. Riethmiller, doing business as Elm Street Automotive, which alleges Hill's culpable conduct, and the second affirmative defense of defendants Thomas P. Cash and Cynthia D. Riethmiller, as coadministrators of the estate of Brett W. Riethmiller, which also alleges Hill's culpable conduct. We reverse the order in appeal No. 2, and we grant Hill's motion.

These actions arise from a motor vehicle accident that occurred on August 12, 2007 on Route 16 near its intersection with Plymouth Avenue in Farmersville. The relevant part of Route 16 is straight and flat, and it has two lanes of travel that are bounded by fog lines and separated by a broken yellow line. The posted speed limit in that area of Route 16 is 45 miles per hour.

At approximately 9:25 a.m. on the date of the accident, the weather was dry and sunny, and Hill was driving his pickup truck southbound at a speed of 40 miles per hour on the part of Route 16 in question. At the same time, Brett W. Riethmiller (decedent) was operating his vehicle in the northbound lane of the relevant part of Route 16, with his wife, Penny C. Riethmiller (Penny), traveling as a front seat passenger. The administratrix of Penny's estate is the plaintiff in appeal No. 2, while Hill and his wife are the plaintiffs in appeal No. 1. According to Hill's deposition testimony, he observed decedent's vehicle from a distance of approximately a quarter of a mile, and at some point thereafter he noticed a deer approximately 200 to 300 yards ahead of his vehicle and 100 yards to the right of the roadway. Hill was traveling at a speed of 35 to 40 miles per hour at the time, and the deer was running full speed through a grass field toward Route 16.

There was nothing to obstruct the deer's path from the field to Route 16, and at some point the deer entered the southbound lane of traffic ahead of Hill's vehicle. Hill continuously watched the deer from the time he noticed it to the time it entered the roadway, and he immediately removed his foot from the accelerator of his vehicle when he saw the deer enter the roadway. Hill watched the deer until it left his lane and entered the northbound lane of traffic, and he did not move his vehicle to the left or to the right between the time he first saw the deer and the time it entered the northbound lane of traffic on Route 16, i.e., Hill continued to drive straight down Route 16 during that time. The deer was approximately 200 yards in front of Hill when it was in the southbound lane of traffic, and Hill did not apply his brakes between the time he first noticed the deer and the point at which it entered the northbound lane of traffic on Route 16 because the deer was far enough away that Hill knew he would not strike it with his vehicle. Hill did not see the deer after it entered the northbound lane of traffic on Route 16, and he assumed that it was going to continue straight across the roadway into a nearby cornfield.

Hill, however, observed decedent's vehicle leave its northbound lane of travel on Route 16 and enter the southbound lane as the deer entered northbound traffic. Hill did not hear the sound of a horn from decedent's vehicle before it entered the southbound lane of

traffic, nor did he hear the sound of any tires screeching until just before decedent's vehicle collided with Hill's vehicle. Hill applied his brakes as soon as he noticed decedent's vehicle leave the northbound lane of Route 16 and enter Hill's southbound lane of traffic, and at the same time he swerved to the right in an unsuccessful attempt to avoid an impact. Hill's vehicle collided with decedent's vehicle on the shoulder adjacent to the southbound lane of Route 16 between the fog line and the guide rail that ran parallel to that part of that roadway.

We conclude in appeal No. 1 that Supreme Court properly denied that part of plaintiffs' motion seeking summary judgment on the issue of serious injury solely under the 90/180-day category (*see* Insurance Law § 5102 [d]). That category requires proof that the injury "prevents a person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment" (*Nitti v Clerrico*, 98 NY2d 345, 357 n 5). A plaintiff must establish that he or she suffered a " 'medically determined injury or impairment of a non-permanent nature . . . as well as . . . that [his or her] activities were curtailed to a great extent' by that injury" (*Cummings v Jiayan Gu*, 42 AD3d 920, 921). "Although this statutory category lacks the 'significant' and 'consequential' terminology of the two [abovementioned categories], a plaintiff must present objective evidence of 'a medically determined injury or impairment of a non-permanent nature' " (*Nitti*, 98 NY2d at 357, quoting Insurance Law § 5102 [d]).

"[A] causally-related emotional injury, alone or in combination with a physical injury, can constitute a serious injury" (*Smith v Besanceney*, 61 AD3d 1336, 1337 [internal quotation marks omitted]), and posttraumatic stress disorder (PTSD) "may constitute such an injury when it is causally related to a motor vehicle accident and demonstrated by objective medical evidence" (*Krivit v Pitula*, 79 AD3d 1432, 1432). Moreover, "PTSD may be demonstrated without diagnostic testing for purposes of Insurance Law § 5102 (d) by symptoms objectively observed by treating physicians and established by the testimony of the injured plaintiff and others who observe the injured plaintiff" (*id.* at 1434).

Even assuming, arguendo, that plaintiffs met their initial burden on the issue of serious injury, we conclude that defendants raised an issue of fact sufficient to defeat the motion by submitting the records of Hill's psychologist (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to plaintiffs' contention, defendants were entitled to rely on those records despite the fact that they were unsworn inasmuch as they were prepared by plaintiff's treating psychologist (*see Franchini v Palmieri*, 1 NY3d 536, 537; *Meely v 4 G's Truck Renting Co., Inc.*, 16 AD3d 26, 29-30; *Pagano v Kingsbury*, 182 AD2d 268, 270-271).

We agree with plaintiffs in appeal No. 1, however, that the court

erred in denying those parts of their motion seeking dismissal of the affirmative defenses alleging Hill's culpable conduct based on the application of the emergency doctrine, and we conclude that the court likewise erred in denying Hill's motion for summary judgment in appeal No. 2 on the issue of his alleged negligence based on the application of that doctrine. "Under the emergency doctrine, ' "when [a driver] is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes [the driver] to be reasonably so disturbed that [he or she] must make a speedy decision without weighing alternative courses of conduct, the [driver] may not be negligent if the actions taken are reasonable and prudent in the emergency context, provided the [driver] has not created the emergency" ' (*Caristo v Sanzone*, 96 NY2d 172, 174 [2001] [citation omitted]; *see Lifson v City of Syracuse*, 17 NY3d 492, 497 [2011]; *Stewart v Kier*, 100 AD3d 1389, 1389-1390 [2012]). It is well established that a driver is 'not required to anticipate that [a] vehicle, traveling in the opposite direction, [will] cross over into his [or her] lane of travel' " (*Shanahan v Mackowiak*, 111 AD3d 1328, 1329).

Here, plaintiffs met their initial burden on that part of the motion with respect to the affirmative defenses, and Hill met his initial burden on his motion in appeal No. 2, by demonstrating that the accident occurred after the vehicle operated by decedent entered the path of the oncoming automobile operated by Hill suddenly and without warning, and that there was nothing Hill could have done to avoid the collision (*see Shanahan*, 111 AD3d at 1329; *Kweh v Edmunds*, 93 AD3d 1247, 1248; *Wasson v Szafarski*, 6 AD3d 1182, 1183). The record establishes that, on the dry and sunny day in question, Hill was driving under the posted speed limit on the straight, flat part of Route 16 in the area where the accident occurred. Hill monitored the deer in question, which initially was running through a grass field, and continued to drive straight but slowed his vehicle as he approached that animal. The vehicle operated by decedent entered Hill's lane of traffic without warning, and Hill applied his brakes and swerved to the right as soon as he saw decedent's vehicle cross into his lane. The absence of expert evidence on this issue is of no moment inasmuch as, "[i]n a cross-over collision case, a defendant [or a plaintiff seeking dismissal of an affirmative defense] may meet the burden of establishing entitlement to summary judgment [or dismissal of the affirmative defense] under the emergency doctrine even when '[t]he only evidence in the record concerning [the movant's] conduct' is [his or her] own [deposition] testimony" (*Cancellaro v Shults*, 68 AD3d 1234, 1236-1237, *lv denied* 14 NY3d 706).

In opposition to the motions, defendants in appeal No. 1 and plaintiff in appeal No. 2 failed to raise an issue of fact as to the applicability of the emergency doctrine to Hill's actions (*see Stewart*, 100 AD3d at 1390; *see generally Zuckerman*, 49 NY2d at 562). Their submissions do not include any evidence on the issue of Hill's negligence, and to the extent they contend that the *Noseworthy* rule entitles them to a less stringent burden of proof in establishing the existence of an issue of fact with respect to Hill's negligence (*see Noseworthy v City of New York*, 298 NY 76, 80), we reject that

contention. They have " 'the burden of raising a triable issue of fact . . . before the *Noseworthy* rule may be applied, and [they] failed to meet that burden' " (*Shanahan*, 111 AD3d at 1330; *see Noseworthy*, 298 NY at 80).

Finally, we conclude with respect to appeal No. 1 that the court properly denied that part of plaintiffs' motion seeking summary judgment on negligence inasmuch as there is an issue of fact whether the emergency doctrine applies to decedent's actions. Plaintiffs' submissions establish that a deer, i.e., a large animal (*cf. generally Kizis v Nehring*, 27 AD3d 1106, 1107), charged into the roadway from decedent's left to his right and in front of both his vehicle and Hill's vehicle as those drivers approached each other. Although Hill testified that he was able to see the deer as it ran through a grass field, there is nothing in the record establishing that decedent should have been able to see the deer at that time. There is no evidence in the record concerning the height of the grass, nor is there any indication in the record whether decedent's view of the field was in some way impeded. Moreover, we are unable to ascertain the size of the deer; Hill testified that it was a doe, but even with his hunting experience he was unable to give an estimate as to its size. Under these circumstances, we conclude that there is an issue of fact with respect to the applicability of the emergency doctrine to decedent's actions (*cf. Stewart*, 100 AD3d at 1390; *see generally Zuckerman*, 49 NY2d at 562).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

284

CA 12-02010

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

LINDA J. CASH, AS ADMINISTRATRIX OF THE ESTATE
OF PENNY C. RIETHMILLER, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES R. HILL, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

HAGELIN KENT LLC, BUFFALO (BRENT C. SEYMOUR 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, Cattaraugus County (Michael L. Nenno, A.J.), entered April 5, 2012. The order denied the motion of defendant Charles R. Hill for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion of defendant Charles R. Hill is granted and the complaint is dismissed against him.

Same Memorandum as in *Hill v Cash* ([appeal No. 1] ___ AD3d ___ [May 2, 2014]).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

286

CA 12-02252

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

JAYNE DODDS, AS EXECUTRIX OF THE ESTATE OF LEONARD P. BORYSZAK, DECEASED, AND JAYNE DODDS, AS EXECUTRIX OF THE ESTATE OF ELEANORE C. BORYSZAK, DECEASED,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF HAMBURG AND JOHN A. BLUMAN,
DEFENDANTS-APPELLANTS-RESPONDENTS.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

BENNETT, SCHECHTER, ARCURI & WILL, LLP, CHEEKTOWAGA (JAMES F. GRANVILLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered May 3, 2012. The order denied the motion of defendants for summary judgment and denied the cross motion of Leonard P. Boryszak and Eleanore C. Boryszak for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendants' motion and dismissing the complaint and as modified the order is affirmed without costs.

Memorandum: On March 4, 2010, defendant John A. Bluman, a police officer employed by defendant Town of Hamburg, was on patrol in an unmarked police vehicle traveling southbound on Route 75 in the Town of Hamburg when, at the intersection with Lake Shore Road, he saw a vehicle traveling northbound with snow covering its windshield and the driver operating the vehicle with his head stuck out of the side window. As Bluman approached the traffic light at the intersection, the light turned green, whereupon he accelerated quickly ahead of other southbound traffic and watched other vehicles in two rear-view mirrors in preparation for making a U-turn to pursue the vehicle with the obstructed windshield. Bluman looked in his rear-view mirror, observed a couple of vehicles that he believed were sufficiently behind him, looked to his left, braked and started to make a U-turn. Bluman engaged his left turn signal prior to beginning the turn, but he did not activate the vehicle's emergency lights or siren. As Bluman began the U-turn from the right lane, another southbound

vehicle, traveling in the left southbound lane, crashed into the side of Bluman's police vehicle. That vehicle was operated by former plaintiff Leonard P. Boryszak, and former plaintiff Eleanore C. Boryszak was a passenger therein. They both died during the pendency of this action, and plaintiff was substituted as the executrix of their estates. Defendants appeal and plaintiff cross-appeals from an order that denied defendants' motion for summary judgment and denied the former plaintiffs' cross motion for partial summary judgment on the issue of negligence.

We agree with defendants that Supreme Court erred in denying their motion for summary judgment, and we therefore modify the order accordingly. At the time of the accident, Bluman was operating an "authorized emergency vehicle" (Vehicle and Traffic Law § 1104 [a]) and was engaged in an emergency operation by virtue of the fact that he was attempting a U-turn in order to "pursu[e] an actual or suspected violator of the law" (§ 114-b). As the Court of Appeals recognized in *Kabir v County of Monroe* (16 NY3d 217, 220), "the reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b). Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence." We conclude that, by attempting to execute a U-turn, Bluman's conduct was exempted from the rules of the road by section 1104 (b) (4). As a result, his conduct is governed by the reckless disregard standard of care in section 1104 (e).

It is well settled that a " 'momentary judgment lapse' does not alone rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach" (*Szczerbiak v Pilat*, 90 NY2d 553, 557). Here, Bluman acted under the mistaken belief that the other southbound vehicles were sufficiently behind him and that it was, at that moment, safe to execute a U-turn. This "constituted a momentary lapse in judgment not rising to the level of 'reckless disregard for the safety of others' " (*Green v State of New York*, 71 AD3d 1310, 1312, quoting Vehicle and Traffic Law § 1104 [e]). "Given the evidence of precautions taken by [Bluman] before he attempted his U-turn, we [conclude] that he did not act with 'conscious indifference' to the consequences of his actions" (*id.*).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

297

KA 11-02598

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JURELL D. BARBER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered September 8, 2010. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]) and, in appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (§ 265.03 [3]). Defendant contends in both appeals that his waiver of the right to appeal is invalid. We reject that contention. The record establishes that County 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 Ripley*, 94 AD3d 1554, 1554, *lv denied* 19 NY3d 976; *see People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912), and that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty (*see People v Lopez*, 6 NY3d 248, 256; *Ripley*, 94 AD3d at 1554; *People v Korber*, 89 AD3d 1543, 1543, *lv denied* 19 NY3d 864). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence in appeal No. 1 (*see Lopez*, 6 NY3d at 256).

Although defendant's contention in appeal No. 2 that his guilty plea was not knowing, voluntary and intelligent survives his waiver of the right to appeal, defendant failed to preserve that contention for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Theall*, 109 AD3d 1107, 1107-1108; *People v Rossborough*, 101 AD3d 1775, 1776; *People v*

Russell, 55 AD3d 1314, 1314-1315, *lv denied* 11 NY3d 930), and this case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666). Although defendant stated during the plea colloquy that he possessed the weapon in his home, he further admitted that he "ha[d] been previously convicted of a[ ] crime" (Penal Law § 265.02 [1]; *see* § 265.03 [3]; *see generally People v Hughes*, 22 NY3d 44, 49-50). Where, as here, "the defendant has a previous conviction, the [home exception] never comes into play, [and] its inapplicability is not an element of the offense" (*People v Jones*, 22 NY3d 53, 60).

Finally, defendant contends in appeal No. 2 that the indictment was jurisdictionally defective because it did not allege that the home exception was inapplicable (*see* Penal Law § 265.03 [3]). Although that contention survives his waiver of the right to appeal (*see People v Iannone*, 45 NY2d 589, 600-601; *People v Holmes*, 101 AD3d 1632, 1633, *lv denied* 21 NY3d 944; *People v Crummell*, 84 AD3d 1393, 1394, *lv denied* 17 NY3d 858), it is without merit (*see Jones*, 22 NY3d at 60).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

298

KA 11-02599

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JURELL D. BARBER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered September 8, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Same Memorandum as in *People v Barber* ([appeal No. 1] ___ AD3d ___ [May 2, 2014]).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

299

CA 13-01356

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

JEROME BURGESS, II AND JUSTIN RELIFORD,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MALCOM MEYER AND PETER MONACELLI,
DEFENDANTS-RESPONDENTS.

ATHARI & ASSOCIATES, LLC, UTICA (MO ATHARI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

FELDMAN KIEFFER, LLP, BUFFALO (ALAN J. BEDENKO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered June 17, 2013. The order, among other things, denied that part of plaintiffs' motion seeking to strike parts of a report submitted by defendants' expert.

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

Memorandum: Plaintiffs appeal from an order that, inter alia, denied that part of their motion seeking to strike parts of a report submitted by defendants' expert. Before a note of issue was filed and before there was any expert disclosure between the parties (*cf. Heyward v Shanne*, 114 AD3d 1212, 1213-1214), plaintiffs moved in part pursuant to CPLR 3103 and 22 NYCRR 100.3 (B) (5) for an order striking all references in the report "to socio-economic, eugenic, or other euthenics as an alternative intervening event sufficient to supersede cause." We conclude that Supreme Court properly denied that part of plaintiffs' motion inasmuch as neither CPLR 3103 nor 22 NYCRR 100.3 (B) (5) authorizes the court to grant the relief sought by plaintiffs.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

300

TP 13-01542

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

IN THE MATTER OF FREDERICK FRANKLIN, JR.,
PETITIONER,

V MEMORANDUM AND ORDER

JOSEPH A. D'AMICO, SUPERINTENDENT, NEW YORK
STATE DIVISION OF STATE POLICE, RESPONDENT.

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Joseph R. Glownia, J.], entered March 26, 2013) to annul a determination of respondent. The determination dismissed petitioner from the Division of State Police.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner, a former New York State Trooper, commenced this CPLR article 78 proceeding seeking to annul respondent's determination finding him guilty of misconduct or, in the alternative, to vacate the penalty of dismissal. He contends that the determination is not supported by substantial evidence and that the penalty is shocking to one's sense of fairness.

Petitioner, a Trooper for over 18 years, was a member of a social club that rented its clubhouse to another Trooper, who used the premises to host parties where strippers performed. Several witnesses, including two other Troopers who attended one party, testified that the strippers performing at the parties also engaged in prostitution, i.e., exchanging sexual favors for money, and that they used the second floor of the clubhouse to do so. It is undisputed that alcohol was sold to patrons attending the parties, despite the fact that the club did not have a license to sell alcohol. Petitioner admitted that he was present for three such parties. In the charges against petitioner, it was alleged that he knew of the illegal activities and did not take proper police action to stop them; that he knowingly frequented an establishment where violations of the law

existed; that he provided false information during the internal investigation; and that, by his conduct, he brought discredit to the Division of State Police. Following a hearing conducted by a Hearing Board (*see* 9 NYCRR 479.7), all but one of the charges against him were sustained. Respondent accepted the findings and recommendations of the Hearing Board and dismissed petitioner from the Division of State Police.

It is well established that, "[i]n CPLR article 78 proceedings to review determinations of administrative tribunals, the standard of review for the Appellate Divisions and th[e] Court [of Appeals] is whether there was substantial evidence to support the Hearing Officer's decision" (*Matter of Wilson v City of White Plains*, 95 NY2d 783, 784-785; *see* CPLR 7803 [4]; *Matter of Kelly v Safir*, 96 NY2d 32, 38, *rearg denied* 96 NY2d 854; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231). Contrary to petitioner's contention, we conclude that respondent's determination is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-180).

Although petitioner denied having any knowledge of the illegal activities taking place at the parties, there was substantial evidence establishing the contrary, i.e., that he was aware of those activities. He gave numerous inconsistent statements regarding whether he knew the club lacked a liquor license. He evaded answering basic questions, and the Hearing Board found incredible his testimony that he had no idea what the term "extras" meant in relationship to strippers. When asked by one patron at a party what was occurring on the second floor, petitioner told the patron, "you don't want to know," thereby implying that petitioner knew what was occurring. Inasmuch as others who attended the parties assumed that prostitution was occurring on the second floor, the Hearing Board concluded that it was reasonable to assume that a Trooper with over 18 years of experience "would surmise that the area was being used for sexual favors." Moreover, after petitioner learned that the Trooper hosting the parties had been questioned by authorities, petitioner immediately recommended to his club president and to other Troopers that they disassociate themselves from that Trooper. We conclude that the Hearing Board properly determined that such evidence is indicative of a consciousness of guilt.

Although a different finding would not have been unreasonable, " 'where[, as here,] substantial evidence exists' to support a decision being reviewed by the courts, 'that determination must be sustained, irrespective of whether a similar quantum of evidence is available to support other varying conclusions' " (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 503, quoting *Matter of Collins v Codd*, 38 NY2d 269, 270; *see Matter of Park Outdoor Adv. of N.Y. v City of Syracuse*, 210 AD2d 907, 908).

We reject petitioner's further contention that the penalty of dismissal is shocking to one's sense of fairness. "Judicial review of an administrative penalty is limited to whether the measure or mode of

penalty or discipline imposed constitutes an abuse of discretion as a matter of law . . . [T]he Appellate Division is subject to the same constraints as th[e] Court [of Appeals]—a penalty must be upheld unless it is 'so disproportionate to the offense as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law" (*Kelly*, 96 NY2d at 38, quoting *Pell*, 34 NY2d at 237). Moreover, "[i]n matters concerning police discipline, 'great leeway' must be accorded to the [Superintendent's] determinations concerning the appropriate punishment, for it is the [Superintendent], not the courts, who 'is accountable to the public for the integrity of the [Division of State Police]' " (*Kelly*, 96 NY2d at 38, quoting *Matter of Berenhaus v Ward*, 70 NY2d 436, 445; *see Pell*, 34 NY2d at 237; *Matter of Panek v Bennett*, 38 AD3d 1251, 1252; *Matter of Santos v Chesworth*, 133 AD2d 1001, 1003). Given the nature of the offenses, the " 'higher standard of fitness and character [that] pertains to police officers,' " petitioner's evasive conduct and his refusal to accept any responsibility for his conduct, we conclude that the penalty of dismissal does not shock one's sense of fairness (*Matter of Bassett v Fenton*, 68 AD3d 1385, 1387-1388; *see e.g. Matter of Boyd v Constantine*, 81 NY2d 189, 196; *Matter of Tessiero v Bennett*, 50 AD3d 1368, 1370; *Matter of Hricik v McMahon*, 247 AD2d 935, 936; *Matter of Costa v McMahon*, 225 AD2d 694, 695; *Matter of Elwood v Constantine*, 213 AD2d 870, 872).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

301

CA 13-01384

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

HILLCREST HOMES, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALBION MOBILE HOMES, INC., DOING BUSINESS AS HERITAGE ESTATES AND RICHARD DECARLO, DEFENDANTS-RESPONDENTS.

CROPSEY & CROPSEY, ALBION (CONRAD F. CROPSEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (JAMES W. KILEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered November 1, 2012. The order, among other things, granted defendants' motion to dismiss plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking dismissal of the 45th cause of action and reinstating that cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action alleging, inter alia, conversion and violations of Real Property Law § 233, and sought damages and injunctive relief. Plaintiff purchased a manufactured home from a tenant of defendants' manufactured home park on September 28, 2009. The tenant had a month-to-month lease with defendants, and plaintiff did not request or apply to become a tenant of defendants' park. Instead, plaintiff sought to remove the manufactured home in November and December 2009 but, before it could do so, it was instructed to leave by defendants because plaintiff had not paid the storage fees or the refundable security deposit required by defendants. Lyman Rice, Inc., doing business as Rice Homes (Lyman), a corporation related to plaintiff, commenced an action against defendants seeking relief similar to that sought by plaintiff, and we affirmed the dismissal of the complaint on the ground that Lyman lacked standing (*see Lyman Rice, Inc. v Albion Mobile Homes, Inc.*, 89 AD3d 1488). Thereafter, plaintiff commenced the present action, and Supreme Court granted defendants' motion to dismiss the complaint for failure to state a cause of action.

The court properly dismissed all causes of action related to violations of Real Property Law § 233. Real Property Law § 233 is a

comprehensive statute governing the duties and responsibilities of manufactured home tenants and manufactured home park owners (*see Miller v Valley Forge Vil.*, 43 NY2d 626, 629; *Ba Mar v County of Rockland*, 164 AD2d 605, 610-611, *appeal dismissed* 78 NY2d 877, *lv denied* 78 NY2d 982; *Frontier Mgt. Corp. v Homgren*, 154 Misc 2d 526, 527). Plaintiff sought to recover damages pursuant to section 233 (u) as a manufactured home tenant. We agree with the court that plaintiff failed to state a cause of action under section 233 inasmuch as plaintiff is not a tenant as defined in the statute. Real Property Law § 233 (a) (1) defines a "manufactured home tenant" as "one who rents space in a manufactured home park from a manufactured home park owner or operator for the purpose of parking his manufactured home or one who rents a manufactured home in a manufactured home park from a manufactured home park owner or operator." Here, plaintiff never sought to become a tenant of defendants' park upon purchasing the manufactured home (*see generally* § 233 [i] [1], [3]) but, rather, it intended to remove the manufactured home from the park after the sale.

We agree with plaintiff, however, that the court erred in granting that part of the motion seeking dismissal of the 45th cause of action, for conversion, and we therefore modify the order accordingly. "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50; *see Tudisco v Duerr* [appeal No. 2], 89 AD3d 1372, 1373; *LHR, Inc. v T-Mobile USA, Inc.*, 88 AD3d 1301, 1304). We conclude that the complaint alleged sufficient facts to state a cause of action for conversion (*see LHR, Inc.*, 88 AD3d at 1304). The complaint alleged that plaintiff was the owner of the manufactured home and that defendants interfered with plaintiff's possession of that property by preventing plaintiff from removing the home from defendants' park. The court dismissed that cause of action on the ground that there was no showing that defendants took ownership of the unit or obtained any benefit from the unit remaining on the property. We conclude, however, that plaintiff's allegation that defendants interfered with plaintiff's right to possess the property is sufficient to state a cause of action for conversion (*see Colavito*, 8 NY3d at 50), which, contrary to the court's analysis, does not require an allegation, much less a showing, that defendants took ownership of the property or benefitted therefrom.

Defendants contend that plaintiff failed to state a cause of action for conversion because defendants made efforts in March 2010 to have the manufactured home removed from their property once they learned that plaintiff, as opposed to Lyman, was the owner. Defendants contend that plaintiff cannot seek relief on behalf of Lyman for the events that occurred in late 2009. We reject that contention. Lyman was acting as plaintiff's agent or representative when it attempted to remove the manufactured home in late 2009 and was prohibited from doing so by defendants. To the extent that defendants' conduct was wrongful, we conclude that plaintiff, as the owner of the manufactured home, was the injured party in fact and not

Lyman (*see generally Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

302

CA 13-01310

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

ANGELA D. GREEN, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF KUMANI RICKS, AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CATHERINE M. HOSLEY, ROBERT L. RICKS AND SUSAN STILL, DEFENDANTS-APPELLANTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (ALISON K.L. MOYER OF COUNSEL), FOR DEFENDANT-APPELLANT CATHERINE M. HOSLEY.

HURWITZ & FINE, P.C., BUFFALO (DANIEL T. HUNTER OF COUNSEL), FOR DEFENDANTS-APPELLANTS ROBERT L. RICKS AND SUSAN STILL.

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (ANTHONY J. ZITNIK, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered March 29, 2013. The order, insofar as appealed from, denied the motion of defendant Catherine M. Hosley for summary judgment and denied in part the motion of defendants Robert L. Ricks and Susan Still for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant Catherine M. Hosley is granted, the motion of defendants Robert L. Ricks and Susan Still is granted in its entirety, and the amended complaint and all cross claims are dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained by the eight-year-old daughter of plaintiff and defendant Robert L. Ricks (hereafter, child). The child exited a vehicle owned by defendant Susan Still and driven by Ricks, then immediately darted out into traffic in an attempt to reach her school bus stop across the street, whereupon she was struck by a vehicle driven by defendant Catherine M. Hosley. Hosley moved for summary judgment dismissing the amended complaint and all cross claims against her, contending that she could not be held liable as a matter of law. Ricks and Still also moved for summary judgment dismissing the amended complaint against them. Supreme Court denied Hosley's motion, and granted only that part of the motion of Ricks and Still seeking summary judgment dismissing the negligent supervision claims against them. We reverse the order insofar as appealed from, grant Hosley's

motion, grant the motion of Ricks and Still in its entirety, and dismiss the amended complaint and all cross claims.

With respect to Hosley's motion, we conclude that she met her initial burden of proving that the child darted into the road (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Specifically, the evidence establishes as a matter of law that, "without looking in the direction of oncoming traffic" (*Brown v Muniz*, 61 AD3d 526, 527, *lv denied* 13 NY3d 715), the child darted from behind the front of Still's parked vehicle, "directly into the path of" Hosley's vehicle, leaving Hosley "unable to avoid contact with the [child]" (*Perez v City of New York*, 104 AD3d 661, 661-662; *see Rosa v Scheiber*, 89 AD3d 827, 828; *Afghani v Metropolitan Suburban Bus Auth.*, 45 AD3d 511, 512; *Ledbetter v Johnson*, 27 AD3d 698, 698), and plaintiff failed to raise an issue of fact (*see Zuckerman*, 49 NY2d at 562). Contrary to plaintiff's contention, the record does not establish that there is an issue of fact whether Hosley operated her vehicle in a negligent manner. Rather, the record establishes as a matter of law that Hosley acted as a reasonably prudent person when she slowed her rate of speed immediately upon seeing the parked vehicle ahead, and that she proceeded with caution while attempting to pass it safely on the left (*see DeJesus v Alba*, 63 AD3d 460, 463-464, *affd* 14 NY3d 860; *see also Sheppeard v Murci*, 306 AD2d 268, 269; *cf. St. Andrew v O'Brien*, 45 AD3d 1024, 1027-1028, *lv dismissed in part and denied in part* 10 NY3d 929).

With respect to the motion of Ricks and Still, we note that "[t]he operator of a private passenger vehicle owes to his passengers a duty of reasonable care [in] providing a safe place to alight" (*Liebman v Heiss*, 256 AD2d 449, 449; *see Loder v Greco*, 5 AD3d 978, 979; *Ross v Ching*, 146 AD2d 55, 58). Ricks and Still met their initial burden on their motion by establishing that Ricks did not breach that duty to the child when, intending to escort the child, he parked the vehicle against the curb on a side street. Plaintiff's "[m]ere conclusions, expressions of hope or unsubstantiated allegations" asserted in opposition to the motion failed to raise an issue of fact (*Irwin v Mucha*, 154 AD2d 895, 896; *see generally Zuckerman*, 49 NY2d at 562).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

305

CA 13-00761

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

IN THE MATTER OF RICCELLI ENTERPRISES, INC., ET AL., PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK WORKERS' COMPENSATION BOARD AND ROBERT E. BELOTEN, AS CHAIRMAN OF THE WORKERS' COMPENSATION BOARD, RESPONDENTS-DEFENDANTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE (PATRICIA S. NAUGHTON OF COUNSEL), AND COSTELLO COONEY & FEARON, P.L.L.C., FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered August 14, 2012 in a CPLR article 78 proceeding and declaratory judgment action. The order, among other things, granted the application of petitioners-plaintiffs for a stay.

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

Memorandum: Respondents-defendants (hereafter, Board) appeal from that part of an order granting petitioners-plaintiffs' application pursuant to CPLR 7805 for a stay of, inter alia, the enforcement of the Board's determination to levy deficit assessments against them under the authority of Workers' Compensation Law § 50 (3-a) (7) (b) pending the determination of the instant CPLR article 78 proceeding/declaratory judgment action (hereafter, proceeding). Petitioners-plaintiffs (petitioners) are former members of a group self-insured trust (GSIT or Trust), which provided workers' compensation benefits to their respective employees. In 2008, the Board terminated the Trust and assumed the administration of it for the purpose of "final distribution of the [Trust's] assets and liabilities." Petitioners and the Board agree that the third-party administrator of the Trust, Compensation Risk Managers, LLC (CRM), acted fraudulently in its management of the Trust, and the Board has commenced a separate action against CRM for its alleged mismanagement of the Trust and other failed GSITs. The Board levied assessments against petitioners totaling more than $140 million for their alleged pro rata share of the deficits of the Trust in 2010, prompting

petitioners to commence this proceeding. Petitioners allege, inter alia, that the Trust was not validly formed; that the Board's oversight of the Trust amounted to nonfeasance; and that the Board's attempts to impose deficit assessments against them pursuant to Workers' Compensation Law § 50 (3-a) (7) (b) are illegal and violate their procedural and due process rights.

As an initial matter, we note that, although petitioners moved for a stay pursuant to CPLR 7805, preventing the Board from, inter alia, taking any further action against them to enforce the alleged deficit assessments, Supreme Court properly considered their request for relief as "a request for preliminary injunction," and thus properly considered the requisite factors for granting such relief, i.e., irreparable harm, likelihood of success on the merits, and a balancing of the equities (*see* CPLR 6301; *see also Melvin v Union Coll.*, 195 AD2d 447, 447-448). "[W]e note the well-settled proposition that '[a] motion for a preliminary injunction is addressed to the sound discretion of the trial court[,] and the decision of the trial court on such a motion will not be disturbed on appeal, unless there is a showing of an abuse of discretion' " (*Marcone APW, LLC v Servall Co.*, 85 AD3d 1693, 1695). We conclude that the court did not abuse its discretion in granting petitioners' request for a preliminary injunction pending the outcome of this proceeding (*see Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216; *see also Melvin*, 195 AD2d at 448-449).

The Board contends that petitioners have failed to demonstrate the imminent risk of irreparable harm because, inter alia, the Board is seeking only the payment of judgments against petitioners pursuant to Workers' Compensation Law § 26 for the amounts of the workers' compensation benefits paid to their respective employees, and that petitioners have not established that they will sustain irreparable harm if such judgments are filed. We reject that contention. Petitioners established that the Board has the authority to institute collection actions against them for the pro rata share of the deficit assessment, and to file judgments against them pursuant to section 26—the viability of which petitioners contest—and, additionally, that the Board has the authority to issue stop work orders in the event of a petitioner's failure to pay a section 26 judgment (*see* § 141-a [4] [a]). Because the loss of business, as the result of an action seeking the collection of the pro rata share of the deficit assessment or as the result of a potential stop work order, is an imminent risk that is " 'impossible, or very difficult, to quantify,' " we conclude that the court did not abuse its discretion in determining that petitioners established by clear and convincing evidence that there is a risk of irreparable harm (*Marcone APW, LLC*, 85 AD3d at 1696).

We further conclude that the court did not abuse its discretion in determining that petitioners have established the likelihood of success on the merits of at least some of their claims. Notably petitioners established by clear and convincing evidence that the Board failed to provide petitioners with the amount of the deficiency assessment "to discharge all liabilities of the group self-insurer" within 120 days of the dissolution of the Trust (Workers' Compensation

Law § 50 (3-a) (7) (b); *see generally Destiny USA Holdings, LLC*, 69 AD3d at 216). We further conclude that the court did not abuse its discretion in determining that the balancing of the equities favor granting the preliminary injunction. The Board's ability to fulfill its obligation to pay the claims of petitioners' employees that accrued during the lifetime of the Trust is not jeopardized by granting the preliminary injunction, while, as noted above, petitioners could suffer irreparable harm if the Board were permitted to proceed with its attempt to recoup not only the amounts subject to judgments pursuant to section 26, but also the pro rata shares of the deficiency assessment (*see generally Marcone APW, LLC*, 85 AD3d at 1697; *Destiny USA Holdings, LLC*, 69 AD3d at 216).

All concur except FAHEY, J., who concurs in the result in the following Memorandum: I respectfully concur in the result reached by the majority. I disagree, however, with the majority's reliance on *Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.* (69 AD3d 212, 216) for the reasons stated in my dissenting opinion in that case.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

315

KA 11-02125

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD WALKER, ALSO KNOWN AS SHORTY,
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 (BRIAN D. DENNIS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered March 11, 2011. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that he was deprived of a fair trial by instances of prosecutorial misconduct during, inter alia, the prosecutor's cross-examination of him. Initially, we note that only some of the instances raised on appeal are preserved for our review, and we decline to exercise our power to address the unpreserved instances as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to those contentions that are preserved for our review, we note that, "where, as here, the defendant's testimony leaves open only the suggestion that the People's witnesses have lied . . . , the prosecution has the right to [cross-examine defendant on the issue] whether the witnesses are liars" (*People v Overlee*, 236 AD2d 133, 139, *lv denied* 91 NY2d 976; *see People v Allen*, 13 AD3d 892, 897-898, *lv denied* 4 NY3d 883; *see also People v Morris*, 267 AD2d 1032, 1033, *lv denied* 95 NY2d 800). In any event, we conclude that defendant was not thereby denied a fair trial (*see People v Shinebarger*, 110 AD3d 1478, 1480; *People v Gonzalez*, 206 AD2d 946, 947, *lv denied* 84 NY2d 867).

Contrary to defendant's further contention, the prosecutor did not engage in prosecutorial misconduct on summation by vouching for

the credibility of the informant, and, in any event, the instances of alleged prosecutorial misconduct on summation of which defendant complains were " 'either a fair response to defense counsel's summation or fair comment on the evidence' " (*People v Green*, 60 AD3d 1320, 1322, *lv denied* 12 NY3d 915; *see People v Halm*, 81 NY2d 819, 821). Furthermore, even assuming, arguendo, that the burden of proof was impermissibly shifted by other comments made by the prosecutor during summation (*see People v Grant*, 94 AD3d 1139, 1141, *lv denied* 20 NY3d 1099), we conclude that the comments were not so pervasive or egregious as to deny defendant a fair trial (*see People v Rogers*, 103 AD3d 1150, 1153-1154, *lv denied* 21 NY3d 946).

Defendant further contends that the verdict is contrary to the weight of the evidence in light of his acquittal of the first four counts of the indictment charging him with other sales of controlled substances on other days, and in light of the jury's apparent acceptance of his agency defense with respect to those counts. We reject that contention. Generally, "[w]e accord great deference to the resolution of credibility issues by the trier of fact 'because those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record' " (*People v Ange*, 37 AD3d 1143, 1144, *lv denied* 9 NY3d 839, quoting *People v Lane*, 7 NY3d 888, 890; *see generally People v Bleakley*, 69 NY2d 490, 495). Here, the first four counts of the indictment were based entirely upon the testimony of a witness who was a paid police informant and an admitted drug user, and who had personal animus toward defendant, but the fifth count was also based on the testimony of an undercover sheriff's investigator who purchased the drugs at issue. Consequently, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), after exercising our factual review power and according deference to the jury's credibility determinations, we find that the People disproved the agency defense beyond a reasonable doubt with respect to the fifth count, of which defendant was convicted (*see People v Foster*, 50 AD3d 1559, 1559, *lv denied* 10 NY3d 934), and that the verdict is not contrary to the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

317

KA 12-01568

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES KURKOWSKI, DEFENDANT-APPELLANT.

MICHAEL J. DOWD, LEWISTON, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO 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 Erie County Court (Thomas P. Franczyk, J.), dated July 13, 2012. The order denied the motion of defendant to vacate the judgment of conviction pursuant to CPL 440.10.

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

Memorandum: Defendant was convicted following a nonjury trial of assault in the second degree (Penal Law § 120.05 [4]), and the judgment of conviction was affirmed on appeal (*People v Kurkowski*, 83 AD3d 1595, *lv denied* 16 NY3d 896). Defendant thereafter moved pursuant to CPL 440.10 to vacate the judgment on the ground of ineffective assistance of counsel and, after a hearing, County Court denied the motion. We granted defendant leave to appeal from that order, and we now affirm.

"To prevail on his claim that he was denied effective assistance of counsel, defendant must demonstrate that his attorney failed to provide meaningful representation" (*People v Caban*, 5 NY3d 143, 152; *see People v Benevento*, 91 NY2d 708, 712-713; *People v Baldi*, 54 NY2d 137, 147). "In applying this standard, counsel's efforts should not be second-guessed with the clarity of hindsight to determine how the defense might have been more effective" (*Benevento*, 91 NY2d at 712). To that end, "a reviewing court must avoid confusing 'true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis' " (*id.*, quoting *Baldi*, 54 NY2d at 146). Moreover, " 'it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*id.*, quoting *People v Rivera*, 71 NY2d 705, 709).

Here, defendant contends that he was denied effective assistance of counsel because trial counsel failed to conduct an adequate investigation into the facts, and failed to call a witness for the purpose of testifying that another person had confessed to the assault. We reject that contention. "A defendant's right to effective assistance of counsel includes defense counsel's reasonable investigation and preparation of defense witnesses" (*People v Jenkins*, 84 AD3d 1403, 1408, *lv denied* 19 NY3d 1026; *see People v Oliveras*, 21 NY3d 339, 346), and thus "the failure to investigate or call exculpatory witnesses may amount to ineffective assistance of counsel" (*People v Nau*, 21 AD3d 568, 569; *see People v Dombrowski*, 87 AD3d 1267, 1268). Here, however, the record establishes that defense counsel sufficiently investigated the facts and searched for potential witnesses, and that there are legitimate explanations for defense counsel's failure to locate the three allegedly exculpatory witnesses identified in defendant's motion (*cf. People v Blackman*, 90 AD3d 1304, 1311-1312, *lv denied* 19 NY3d 971; *see generally Benevento*, 91 NY2d at 712).

Defense counsel testified at the CPL article 440 hearing that, in preparing his defense, he visited the bar where the assault occurred at least 50 times; took measurements of the scene in an attempt to show that defendant could not have assaulted the victim based upon defendant's location at the time of the incident; obtained surveillance videotapes from the bar and a nearby police camera; reviewed the videotapes with defendant on multiple occasions; and obtained the victim's clothing from the night of the assault in order to identify him on the videos. As for witnesses, defense counsel testified that he questioned employees about potential witnesses during his many visits to the bar, and that he had numerous telephone conversations with the bar owner concerning the existence and identity of witnesses to the incident. Further, defense counsel sought the owner's assistance in trying to locate those witnesses. Defense counsel also identified other potential witnesses by reviewing the surveillance videos with defendant. Ultimately, defense counsel obtained two exculpatory witnesses who testified on defendant's behalf at trial—a bouncer at the bar and a bar patron. We thus conclude that the record does not support defendant's contention that defense counsel made only a "cursory" investigation of the crime scene or that he "abdicate[d]" his responsibility to investigate potential witnesses (*cf. Oliveras*, 21 NY3d at 348; *People v Fogle*, 10 AD3d 618, 618-619; *People v Bussey*, 6 AD3d 621, 622-623, *lv denied* 4 NY3d 828).

With respect to the three allegedly exculpatory witnesses identified in defendant's CPL article 440 motion, defense counsel testified that one of the three names never came up during the course of his investigation and, indeed, that name does not appear in the police records. The first name of another witness, who was identified by defendant and others as a drug dealer, was mentioned during the investigation and defense counsel obtained a telephone number for that individual. Defense counsel, however, was unable to reach the individual. As for the third witness, defense counsel testified that his name came up during the investigation, but that defense counsel was never able to locate the witness. Defense counsel was told that

the witness had moved to Florida and, although he obtained several telephone numbers for that witness, all had been disconnected. The police were likewise unable to locate the alleged witness. Notably, the record indicates that defendant knew or at least was familiar with each of the three alleged exculpatory witnesses. We thus conclude that any failure to identify or locate those three witnesses prior to trial was not the result of ineffectiveness on the part of defense counsel. In any event, we conclude that defense counsel's failure to locate and call the three witnesses identified by defendant "did not prejudice the defense or defendant's right to a fair trial" (*People v Hobot*, 84 NY2d 1021, 1024; *see Benevento*, 91 NY2d at 713-714). As the court noted, the statements provided by the three witnesses were "in some respects, inconsistent with each other and with the defendant's own version of events," and the court, which presided over defendant's bench trial, ultimately concluded despite the conflicting testimony that defendant assaulted the victim.

Contrary to the further contention of defendant, we conclude that defense counsel had a strategic reason for failing to subpoena the bar owner to testify that another individual had allegedly confessed to the crime in a written statement (*see generally Baldi*, 54 NY2d at 146). The People called that individual as a witness and, on cross-examination, defense counsel confronted him with his alleged confession and he admitted that he authored it. Thus, there was no reason to call the bar owner to testify to that fact.

Finally, we conclude that the record, viewed as a whole, demonstrates that defense counsel provided meaningful representation (*see generally id.* at 147).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

326

CA 13-01250

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

ROSE PARK PLACE, INC., COLUMN DEVELOPMENT, INC., E.L. FREEMAN ROAD, LLC, FRED HANANIA, MARY JO LOBRUTTO AND ROGER PASQUARELLA, CLAIMANTS-RESPONDENTS,

V OPINION AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT. (CLAIM NO. 114089.) (APPEAL NO. 1.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR CLAIMANTS-RESPONDENTS.

Appeal from a judgment of the Court of Claims (Michael E. Hudson, J.), entered September 14, 2012. The judgment awarded claimants money damages for the appropriation of land pursuant to the Eminent Domain Procedure Law and the Highway Law.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the award of consequential damages and substituting therefor an award of $1,925,275 with interest of 9% per annum for the period from July 25, 2006 to September 14, 2012 and as modified the judgment is affirmed without costs.

Opinion by FAHEY, J.: Here we address the issue whether consequential damages may be awarded when the real property in question was sold months before the taking of other real property that affects the land in question. Claimants commenced this proceeding seeking damages for the diminished value of approximately 16 acres of what claimants characterized as “remaining land” following defendant’s taking of approximately 1.22 acres of land from what was claimants’ 17.3-acre parcel. Following a trial, the Court of Claims awarded claimants consequential damages with respect to what the court concluded was 12.835 acres of that parcel. Included in the 12.835 acres of land for which the court awarded consequential damages were 4.63 acres of land sold by claimants to Progressive Casualty Insurance Company (Progressive Parcel) for $1,800,000. That sale occurred in November 2005, i.e., before the taking of the aforementioned 1.22 acres of land in July 2006. Defendant now contends that the award of consequential damages was excessive inasmuch as the court erroneously

awarded consequential damages for the Progressive Parcel. We agree.

I

Our analysis begins "with the proposition that [i]t is constitutionally mandated that the sovereign will pay just compensation for property it takes by its powers of eminent domain. Just compensation is properly measured by determining what the owner has lost" (*Matter of USA Niagara Dev. Corp. [Settco, LLC]*, 51 AD3d 377, 379, *lv denied* 11 NY3d 704 [internal quotation marks omitted]). Put differently, "[w]hen [defendant] takes property by eminent domain, the Constitution requires that it compensate the owner 'so that he may be put in the same relative position, insofar as this is possible, as if the taking had not occurred' " (*Matter of City of New York [Kaiser Woodcraft Corp.]*, 11 NY3d 353, 359, *rearg denied* 11 NY3d 903, quoting *City of Buffalo v J. W. Clement Co., Inc.*, 28 NY2d 241, 258, *rearg denied* 29 NY2d 640 [hereafter, *Clement*]).

"When there is a partial taking of land, damages are measured 'by finding the difference between the fair market value of the whole before the taking and the fair market value of the remainder after the taking' " (*Erie County Indus. Dev. Agency v Fry*, 254 AD2d 721, 721-722, quoting *Acme Theatres v State of New York*, 26 NY2d 385, 388; *see McDonald v State of New York*, 42 NY2d 900, 900; *National Fuel Gas Supply Corp. v Goodremote*, 13 AD3d 1134, 1135). Therefore, "when [defendant] takes part of a condemnee's property and leaves a remainder, just compensation includes not only the direct damages for the portion that was taken, but also any consequential or indirect damages caused by the taking that impaired the remaining portion of the property . . . Consequential damages are measured by the difference between the before and after values, less the value of the land and improvements appropriated . . . The burden of proof is on the claimant to establish indirect damages and to furnish a basis upon which a reasonable estimate of those damages can be made" (*Lerner Pavlick Realty v State of New York*, 98 AD3d 567, 568).

II

Before us here is not an issue concerning the *amount* of consequential damages with respect to the Progressive Parcel, but the issue whether *any* such damages should have been awarded relative to that parcel. Viewed as a whole, the Court of Appeals' decision in *Wilmot v State of New York* (32 NY2d 164, 167-168, *rearg denied* 33 NY2d 657) stands for the proposition that the condemnee is allowed to multiply the higher per-acre value of the original parcel by the number of acres under his or her ownership at the time of the taking, not by the acreage he or she once owned and had previously sold (*see also 90 Front St. Assoc., LLC v State of New York*, 79 AD3d 708, 710). In view of that proposition of law, here the court properly excluded the sale of the Progressive Parcel in calculating the pre-taking, per-acre value of claimants' parcel. The court, however, erred in including the Progressive Parcel in the acreage for which it awarded consequential damages.

Claimants attempt to evade *Wilmot* by contending that the part of that case providing that consequential damages are unavailable relative to property that is sold prior to a planned taking and from which no land is ultimately appropriated is dicta. We reject that contention. " 'To identify dictum, it is useful to turn the questioned proposition around to assert its opposite, or to assert whatever alternative proposition the court rejected in its favor. If the insertion of the rejected proposition into the court's reasoning, in place of the one adopted, would not require a change in either the court's judgment or the reasoning that supports it, then the proposition is dictum. It is superfluous. It had no functional role in compelling the judgment' " (*People v Taylor*, 9 NY3d 129, 164 [Read, J., dissenting], quoting Leval, Madison Lecture: *Judging Under the Constitution: Dicta about Dicta*, 81 NYU L Rev 1249, 1257 [2006]). Applying that test here, we conclude that the part of *Wilmot* at issue is a secondary holding, i.e., that such determination was necessary to *Wilmot*'s primary holding with respect to the unsold land and is therefore law (*see Pollicino v Roemer & Featherstonhaugh*, 277 AD2d 666, 667-668; *see also Matter of Hellner v Board of Educ. of Wilson Cent. Sch. Dist.*, 78 AD3d 1649, 1650-1651; *cf. United States v Henderson*, 961 F2d 880, 882).

Claimants further attempt to avoid the holding of *Wilmot* through reference to the "condemnation blight" doctrine, but that attempt likewise fails. *Clement* teaches that a de facto taking "requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property. On the other hand, 'condemnation blight' relates to the impact of certain [value-depressing] acts [on the part of the condemning authority] upon the value of the subject property. It in no way imports a *taking* in the constitutional sense, but merely permits of a more realistic valuation of the condemned property in the subsequent *de jure* proceeding. In such a case, compensation shall be based on the value of the property at the time of the taking, as if it had not been subjected to the debilitating effect of a threatened condemnation" (28 NY2d at 255; *see id.* at 254).

Clement also teaches that, "[i]n . . . cases where true condemnation blight is present, the claimant may introduce evidence of value prior to the onslaught of the 'affirmative value-depressing acts' " (*id.* at 257-258). In other words, the concept of condemnation blight "relates to the rules of evidence" (*id.* at 254), and is relevant to the measurement of damages; indeed, "when damages are assessed on [a] claim for [a] *de jure* appropriation, the claimant's property should be evaluated not on its diminished worth caused by the condemnor's action, but on its value except for such 'affirmative value-depressing acts' of the appropriating sovereign" (*id.* at 258). *Clement* does not, however, impact the application of the *Wilmot* principle, pursuant to which consequential damages are unavailable relative to property that is sold prior to a planned taking and from which no land is ultimately appropriated.

Inasmuch as claimants did not own the Progressive Parcel at the time of the taking, the concept of condemnation blight is irrelevant here. Moreover, even if claimants frame their claim for de facto taking by reference to condemnation blight, such characterization is unpersuasive inasmuch as there was no "physical entry by the condemnor, . . . physical ouster of the owner, . . . legal interference with the physical use, possession or enjoyment of the property or . . . legal interference with the owner's power of disposition of the [Progressive Parcel]" (*id.* at 255).

III

We now turn to the issue of the remedy. Here, defendant challenges not the amount of consequential damages per square foot, but the square feet subject to an award of consequential damages. The square footage at issue is known to us, and defendant does not contest either the court's pre-taking valuation of the land at issue ($450,000 per acre or $10.33 per square foot) or the post-taking value of the land at issue ($1,766,625).

Our analysis is therefore straightforward: absent the Progressive Parcel, there are 8.21 acres of land for which consequential damages may be awarded. Multiplying the pre-taking value of $10.33 per square foot by 357,628 square feet yields a product of $3,694,297.24. Subtracting $1,766,625 (the post-taking value of the land at issue) yields a difference of $1,927,672.24 in consequential damages. That figure is $281,103 less than what the court awarded in consequential damages and, consistent with claimants' suggestion, we conclude that the judgment should be modified by vacating the award of consequential damages and substituting therefor an award of $1,925,275 with an interest rate of 9% per annum covering the period from July 25, 2006 to September 14, 2012.

IV

Accordingly, we conclude that the court erred in awarding consequential damages for the Progressive Parcel, and that the judgment should be modified by vacating the award of consequential damages and substituting therefor an award of $1,925,275 with an interest rate of 9% per annum covering the period from July 25, 2006 to September 14, 2012.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

327

CA 13-01251

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

ROSE PARK PLACE, INC., COLUMN DEVELOPMENT, INC., E.L. FREEMAN ROAD, LLC, FRED HANANIA, MARY JO LOBRUTTO AND ROGER PASQUARELLA, CLAIMANTS-RESPONDENTS,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 114089.)
(APPEAL NO. 2.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR CLAIMANTS-RESPONDENTS.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered April 30, 2013. The order denied the motion of defendant to vacate a judgment entered September 14, 2012.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

332

KA 12-00342

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM MIDDLEBROOKS, 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 a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered January 30, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (three counts) and robbery 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, inter alia, three counts of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that County Court erred in failing to make a youthful offender determination. We reject that contention. The Court of Appeals recently held that, "*where a defendant is eligible to be treated as a youthful offender*, the sentencing court 'must' determine whether he or she is to be so treated[,] . . . even where defendant has failed to ask to be treated as a youthful offender, or has purported to waive his or her right to make such a request" (*People v Rudolph*, 21 NY3d 497, 499, quoting CPL 720.20 [1] [emphasis added]). According to the Court of Appeals, "the legislature's use of the word 'must' in this context . . . reflect[s] a policy choice that there be a youthful offender determination *in every case where the defendant is eligible*" (*id.* at 501 [emphasis added]). Pursuant to the statute, "a defendant is 'eligible' for youthful offender status if he or she was younger than 19 at the time of the crime, *unless the crime is one of several serious felonies excluded by the statute*, or unless defendant has a prior felony conviction or has been adjudicated a youthful offender in a previous case" (*id.* at 500 [emphasis added]; *see* CPL 720.10 [1], [2]).

In this case, defendant was convicted of robbery in the first degree, which is an "armed felony" for purposes of the youthful offender statute (CPL 720.10 [2] [a]; *see* CPL 1.20 [41]; Penal Law §§

70.02, 160.15 [4]). Defendant therefore is "eligible to be adjudicated a youthful offender *only if* the court determined that there were 'mitigating circumstances that bear directly upon the manner in which the crime[s were] committed; or . . . [, inasmuch as] defendant was not the sole participant in the crime[s], [that] defendant's participation was relatively minor' " (*People v Lugo*, 87 AD3d 1403, 1405, *lv denied* 18 NY3d 860, quoting CPL 720.10 [3]). Here, defendant offered no evidence of mitigating circumstances relating to the manner in which the robberies were committed, nor did he specify any facts indicating that his participation in those crimes was "relatively minor" (CPL 720.10 [3]). Defendant did not dispute the circumstances of the crimes as alleged and, given that defendant's DNA was found on the duct tape used to restrain at least nine victims and the handcuffs used to restrain another victim, there was no basis for the court itself to conclude that defendant was a minor participant in the crimes. Because defendant was not eligible for youthful offender treatment, the court did not err in failing to make a youthful offender determination (*see People v Frontuto*, 114 AD3d 1271, 1271-1272; *see also People v Watts*, 91 AD3d 678, 679, *lv denied* 18 NY3d 963; *Lugo*, 87 AD3d at 1405; *cf. Rudolph*, 21 NY3d at 499).

Finally, contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the bargained-for sentence (*see id.* at 255; *see also People v Vincent*, 114 AD3d 1171, ___; *People v Williams*, 49 AD3d 1280, 1280; *see generally People v Lococo*, 92 NY2d 825, 827).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

333

KA 12-01074

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICARDO A. AYALA, 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 (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered June 8, 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: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Contrary to defendant's contention, he knowingly, voluntarily, and intelligently waived his right to appeal as a condition of the plea (*see generally People v Lopez*, 6 NY3d 248, 256). County 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 Ripley*, 94 AD3d 1554, 1554, *lv denied* 19 NY3d 976; *see People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912). Further, the record as a whole establishes "that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Lopez*, 6 NY3d at 256; *see Ripley*, 94 AD3d at 1554). Defendant contends that the court erred in refusing to allow him to withdraw his plea on the ground that defense counsel had led him to believe that the plea did not preclude him from filing an appeal. Although that contention survives defendant's waiver of the right to appeal (*see People v Theall*, 109 AD3d 1107, 1107-1108), it is unpreserved for our review because the record establishes that defendant did not in fact move to withdraw his plea on that ground (*see People v Hall*, 82 AD3d 1619, 1619, *lv denied* 16 NY3d 895; *People v Carlisle*, 50 AD3d 1451, 1451, *lv denied* 10 NY3d 957). This case does not fall within the rare exception to the preservation requirement because nothing in the plea allocution calls into question the voluntariness of the plea or casts "significant doubt" upon defendant's guilt (*People v Lopez*, 71 NY2d

662, 666). We conclude that the court did not otherwise abuse its discretion in denying defendant's motion to withdraw his plea, inasmuch as there is no "evidence of innocence, fraud, or mistake in inducing the plea" (*People v Watkins*, 107 AD3d 1416, 1416, *lv denied* 22 NY3d 959; *see People v Zimmerman*, 100 AD3d 1360, 1361, *lv denied* 20 NY3d 1015; *People v Robertson*, 255 AD2d 968, 968, *lv denied* 92 NY2d 1053).

Defendant's contention that he was denied effective assistance of counsel " 'does not survive his guilty plea or his waiver of the right to appeal because there was no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance' " (*People v Russell*, 55 AD3d 1314, 1314, *lv denied* 11 NY3d 930; *see People v Lugg*, 108 AD3d 1074, 1075; *People v Lucieer*, 107 AD3d 1611, 1612).

Defendant's waiver of his right to appeal does not encompass his challenge to the severity of his sentence because " 'no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal' with respect to his conviction that he was also waiving his right to appeal any issue concerning the severity of the sentence" (*People v Peterson*, 111 AD3d 1412, 1412; *see People v Maracle*, 19 NY3d 925, 928; *People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076). We nevertheless conclude that defendant's sentence is not unduly harsh or severe.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

336

KA 09-02212

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANHAILE R. REID, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered August 17, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, assault in the second degree (Penal Law § 120.05 [3]), defendant contends that he was denied his right to be present at all material stages of his trial when a *Sandoval* hearing was conducted in his absence. We reject that contention. Although it is undisputed that defendant was not present at a pretrial conference at which *Sandoval* issues were discussed, the record establishes that Supreme Court declined to make a *Sandoval* ruling at that time because it did not know whether defendant would admit to the allegations of a special information concerning a robbery conviction in 1993. Even assuming, arguendo, that discussions at the pretrial conference with respect to *Sandoval* issues constituted a *Sandoval* hearing, we note that the record further establishes that, immediately prior to trial, the court conducted a de novo *Sandoval* hearing at which defendant was present, and defendant stated at that time that he would admit to the aforementioned allegations of the special information. The court then provided defendant a meaningful opportunity to argue his position with respect to the *Sandoval* issues before the court, including those raised by defendant in a submission to the court after the pretrial conference (*see generally People v Matthews*, 68 NY2d 118, 123). We conclude that, because the court did not issue a *Sandoval* ruling at the pretrial conference, and "[b]ecause defendant was afforded an opportunity to participate at [a] de novo *Sandoval* hearing, reversal

is not required" (*People v Bartell*, 234 AD2d 956, 956, *lv denied* 89 NY2d 983; *see People v Lynch*, 216 AD2d 929, 929, *lv denied* 87 NY2d 904; *cf. People v Monclavo*, 87 NY2d 1029, 1030-1031).

Defendant further contends that he was convicted of an unindicted crime because the trial testimony revealed a second "physical injury causing act" that had not been presented to the grand jury. "Because defendant's right to be tried and convicted of only those crimes charged in the indictment is fundamental and nonwaivable, we reach th[at] issue despite the fact that it is unpreserved" (*People v McNab*, 167 AD2d 858, 858). We nevertheless reject defendant's contention inasmuch as we conclude that defendant's actions constituted "a single, uninterrupted assault rather than a series of distinct criminal acts" (*People v Snyder*, 100 AD3d 1367, 1367, *lv denied* 21 NY3d 1010; *see People v James*, 114 AD3d 1202, 1205; *see also People v Alonzo*, 16 NY3d 267, 270).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

340

KA 09-01764

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE L. MACK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered June 17, 2009. The judgment convicted defendant, upon a jury verdict, of gang assault in the first 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 gang assault in the first degree (Penal Law § 120.07). The gang assault resulted in the death of the victim from two stab wounds. Although a police witness testified that between 75 and 100 people may have seen the incident, only one eyewitness identified defendant as a participant, and that eyewitness testified that defendant hit the victim with a bottle and held the victim while others beat her. Defendant contends, inter alia, that it was reversible error for County Court to accept the verdict without first responding to three notes from the jury. We agree, and we therefore reverse the judgment and grant a new trial.

The record establishes that the court advised the attorneys at 6:02 p.m. that they could "remain unavailable" until 7:30 p.m., at which time any "questions or concerns" raised by the jury would be addressed. During that recess, the jury sent three notes into the court. The first note stated that "we would like to have the instructions regarding the importance of a single witness in a case versus multiple witnesses and the instructions about the meaning of reasonable doubt read back to us." The second note contained a request "to hear [the eyewitness's] testimony regarding [defendant's] leaving of the crime scene" and a request for "more jury request sheets." The third note contained a request for a "smoke break." Upon reconvening at 7:51 p.m., the court read the notes into the record in the presence of counsel. The court indicated that it would

read the requested instructions to the jury and, while determining whether there was testimony from the eyewitness about defendant leaving the scene, the court received a further note at 7:54 p.m. stating that the jury had come to a verdict. The court recessed until 8:10 p.m., at which time it accepted the verdict without any further mention of the jury notes.

As a preliminary matter, we conclude that "the core requirements of CPL 310.30 [were] triggered" inasmuch as the jury requested a readback of a portion of the testimony of the sole witness who had identified defendant (*People v Kahley*, 105 AD3d 1322, 1325), as well as a readback of certain legal instructions (*see People v O'Rama*, 78 NY2d 270, 277-278). We agree with defendant that, although defense counsel failed to object to the court's procedure of accepting the verdict without responding to the jury's notes, the failure of the court to provide a meaningful response to the substantive requests of the jury is a mode of proceedings error for which preservation is not required (*see People v Kisoon*, 8 NY3d 129, 135; *O'Rama*, 78 NY2d at 279; *cf. People v Geroyianis*, 96 AD3d 1641, 1643, *lv denied* 19 NY3d 996, *reconsideration denied* 19 NY3d 1102). Indeed, "there are few moments in a criminal trial more critical to its outcome than when the court responds to a deliberating jury's request for clarification of the law or further guidance on the process of deliberations" (*Kisoon*, 8 NY3d at 134-135 [internal quotation marks omitted]). The jury may have resolved the factual issue regarding whether the eyewitness testified that she saw defendant leave the scene without further instruction assistance from the court (*see People v Sanders*, 227 AD2d 506, 506, *lv denied* 88 NY2d 994). However, the request for a readback of the instruction on reasonable doubt, the determination of which is the crux of a jury's function, and for a readback of the instruction regarding "the importance a single witness in a case versus multiple witnesses," "demonstrates the confusion and doubt that existed in the minds of the jury with respect to . . . crucial issue[s] . . . The jury is entitled to the guidance of the court and may not be relegated to its own unfettered course of procedure" (*People v Hall*, 101 AD2d 956, 957). We therefore conclude that the court's failure to respond to the jury's notes seeking clarification of those instructions before the verdict was accepted "seriously prejudiced" defendant (*People v Lourido*, 70 NY2d 428, 435; *see People v Clark*, 108 AD3d 797, 800; *People v Smith*, 68 AD3d 1021, 1022; *cf. People v Agosto*, 73 NY2d 963, 966; *People v Lynch*, 60 AD3d 1479, 1481, *lv denied* 12 NY3d 926).

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

All concur except LINDLEY, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent. In my view, the jury, by issuing a note stating that it had reached a verdict, impliedly rescinded its outstanding notes requesting a readback of certain instructions and certain testimony, and County Court therefore did not err in concluding that "the jury had resolved its questions and was no longer in need of the requested information" (*People v Sorrell*, 108 AD3d 787, 793; *see People v Cornado*, 60 AD3d 450, 451, *lv denied* 12 NY3d 913; *People v Quintana*, 262 AD2d 101, 101, *lv denied* 94

NY2d 865). In any event, even assuming, arguendo, that the court erred in failing to respond to the outstanding jury notes, I note that defendant did not object to the court's taking of the verdict, and his contention that the court erred in accepting the verdict without responding to the jury notes is thus unpreserved for our review (*see generally* CPL 470.05 [2]).

Unlike the majority, I do not perceive the court's failure to respond to the outstanding notes to be a mode of proceedings error that does not require preservation (*see People v Geroyianis*, 96 AD3d 1641, 1643, *lv denied* 19 NY3d 996, *reconsideration denied* 19 NY3d 1102; *Cornado*, 60 AD3d at 451). Although providing a meaningful response to notes from the jury is clearly among the court's "core responsibilities" under CPL 310.30 (*People v Tabb*, 13 NY3d 852, 853; *see People v O'Rama*, 78 NY2d 270, 277), the statute does not expressly require the court to respond to a note that is followed by an announcement from the jury that it has reached a verdict. Nor is there any case law specifically directing trial courts to respond to outstanding notes under such circumstances. Unlike in *O'Rama* and its progeny, the court here properly read the notes into the record and solicited input from defense counsel with respect to an appropriate response. While the court and counsel were discussing how to respond to the notes, the jury announced that it had reached a verdict. Despite having full knowledge of all the relevant facts, defense counsel elected not to object to the court's taking of the verdict and, indeed, may well have consented to it during an off-the-record sidebar discussion.

As the Court of Appeals has emphasized, "[n]ot every procedural misstep in a criminal case is a mode of proceedings error," a term that is "reserved for the most fundamental flaws" (*People v Becoats*, 17 NY3d 643, 651; *see People v Alcide*, 21 NY3d 687, 695). In my view, the court's failure to respond to the outstanding jury notes, even if error, was not so significant or prejudicial as to constitute a fundamental flaw in the criminal process. I would therefore affirm the judgment of conviction.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

341

CAF 12-01897

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

IN THE MATTER OF ELEANOR BRAUN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LACEY DECICCO, RESPONDENT-APPELLANT,
AND JOSEPH F. LOCKWOOD, RESPONDENT.
(APPEAL NO. 1.)

MARY R. HUMPHREY, NEW HARTFORD, FOR RESPONDENT-APPELLANT.

RICHARD A. COHEN, ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered May 18, 2012 in a proceeding pursuant to Family Court Act article 6. The order granted the parties joint legal custody of the subject child, with petitioner having primary physical custody.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order determining that her three-year-old son's paternal grandmother, the petitioner therein, established extraordinary circumstances in seeking custody of him. In appeal No. 2, the mother appeals from an amended order determining that her one-year-old daughter's maternal grandmother, the petitioner therein, established extraordinary circumstances in seeking custody of the daughter, based upon the testimony of the paternal grandmother with respect to her petition in appeal No. 1 seeking custody of the mother's son. Following Family Court's finding in each case of extraordinary circumstances, the mother consented to a finding in each case that it is in the best interests of each child that the mother and the respective grandmother shall share joint custody of the child at issue and that the physical placement of the child shall be with the respective grandmother. We note at the outset that, in light of the mother's consent, her contention in each appeal that the court erred in determining that it is in the best interests of each child to be placed with their respective grandmothers is not properly before us inasmuch as those parts of the orders are not appealable (*see Matter of Cherilyn P.*, 192 AD2d 1084, 1084, *lv denied* 82 NY2d 652). We nevertheless review the mother's contention that the court erred in determining that

extraordinary circumstances exist to consider the best interests of the children inasmuch as her consent to the custody disposition does not eviscerate the right to contest that finding (*see generally* CPLR 5501 [a] [3]). As a preliminary matter, we note that, with respect to the petition of the maternal grandmother in appeal No. 2, the court was not required to hold a hearing on the issue of extraordinary circumstances because it "possesse[d] sufficient information to render an informed determination on that issue" based upon the evidence presented at the hearing in connection with the paternal grandmother's petition in appeal No. 1 (*Matter of Howard v McLoughlin*, 64 AD3d 1147, 1148).

It is well established that, "[i]n a custody dispute between a parent and a nonparent, the nonparent has the burden of proving that extraordinary circumstances exist . . . To establish extraordinary circumstances, the nonparent must establish that the parent has relinquished the right to custody by means of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" (*Ruggieri v Bryan*, 23 AD3d 991, 992 [internal quotation marks omitted]). Here, the paternal grandmother testified with respect to the petition in appeal No. 1 that, during the period from January 2011 to September 2011, the mother moved with the children six times after being evicted from her apartment. The mother lived with friends and in motels during that period, and the paternal grandmother observed extremely dirty living conditions in the various locations. The paternal grandmother testified that, at one of the locations, the mother's friends had thrown the mother's and her son's belongings into the street. The paternal grandmother also testified that the mother had failed to obtain necessary medical care for her son. She further testified with respect to the negative change in her grandson's demeanor and behavior, which she observed during his alternate weekend visitation with her, particularly when she returned him to his mother.

We conclude that the court properly determined that the paternal grandmother in appeal No. 1 and the maternal grandmother in appeal No. 2 established that the mother's unstable and unsanitary living conditions rendered her unfit, and thus established that extraordinary circumstances existed to warrant a hearing to determine the best interests of the children (*see Matter of Brault v Smugorzewski*, 68 AD3d 1819, 1819). To the extent that the orders in each appeal conflict with the court's oral decision that the respective grandmothers met their burden of establishing extraordinary circumstances, by instead stating that the mother consented to that determination, it is well settled that the " 'decision controls' " (*Matter of Triplett v Scott*, 94 AD3d 1421, 1421). We have reviewed the mother's remaining contentions in each appeal and conclude that they are without merit.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

342

CAF 12-01898

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

IN THE MATTER OF ROBIN HELLINGER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LACEY DECICCO, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

MARY R. HUMPHREY, NEW HARTFORD, FOR RESPONDENT-APPELLANT.

RICHARD A. COHEN, ATTORNEY FOR THE CHILD, UTICA.

Appeal from an amended order of the Family Court, Oneida County (Joan E. Shkane, J.), entered August 13, 2012 in a proceeding pursuant to Family Court Act article 6. The amended order granted the parties joint legal custody of the subject child, with petitioner having primary physical custody.

It is hereby ORDERED that said appeal from the amended order insofar as it concerns the best interests of the child is unanimously dismissed and the amended order is affirmed without costs.

Same Memorandum as in *Matter of Braun v Decicco* (___ AD3d ___ [May 2, 2014]).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

343

CAF 12-02022

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

IN THE MATTER OF BURKE H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RICHARD H., RESPONDENT-APPELLANT,
AND TIFFANY H., RESPONDENT.

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

JOSEPH T. JARZEMBEK, BUFFALO, 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 August 24, 2012 in a proceeding pursuant to Family Court Act article 10. The order, among other things, determined Burke H. to be a neglected child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order adjudicating the subject child to be neglected by him. Contrary to the father's contention, Family Court's finding of derivative neglect is supported by a preponderance of the evidence (*see Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401, *lv denied* 21 NY3d 862). Petitioner established that the father failed to address the problems that led to the findings of neglect with respect to his other three children (*see Matter of Krystal J.*, 267 AD2d 1097, 1098), and we conclude that the evidence with respect to those children "demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [his] care" (*Matter of Daniella HH.*, 236 AD2d 715, 716; *see Matter of Majerae T. [Crystal T.]*, 74 AD3d 1784, 1785). Contrary to the father's further contention, the court properly drew " 'the strongest possible negative inference' against [him] after he failed to testify at the fact-finding hearing" (*Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1545, *lv denied* 18 NY3d 808; *see Matter of Jayden B. [Erica R.]*, 91 AD3d 1344, 1345; *Matter of Serenity P. [Shameka P.]*, 74 AD3d 1855, 1855).

Finally, we reject the father's contention that the court

accorded too much weight to a psychological evaluation conducted several years prior to the hearing. It is well settled that the court's assessment of conflicting expert testimony is entitled to deference and will not be disturbed if supported by the record (*see Matter of Robert A. [Kelly K.]*, 109 AD3d 611, 613; *Matter of Suffolk County Dept. of Social Servs. [Ellen S.]*, 215 AD2d 395, 396). Here, the record supports the court's determination that the testimony of petitioner's expert—which was based on his older, but more thorough, evaluation—was more credible than the testimony provided by the father's expert, which was based entirely on the father's self-reported history. We therefore see no basis to disturb the court's assessment of the expert testimony (*see Matter of Diamond K.*, 31 AD3d 553, 554).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

344

CAF 13-01912

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

IN THE MATTER OF MARK QUISTORF,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TONIA M. LEVESQUE, RESPONDENT-RESPONDENT.

TROTTO LAW FIRM, P.C., ROCHESTER (JONATHAN C. TROTTO OF COUNSEL), FOR PETITIONER-APPELLANT.

KAREN SMITH CALLANAN, ROCHESTER, FOR RESPONDENT-RESPONDENT.

MATTHEW J. FERO, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered January 10, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded the parties joint custody of the subject children.

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

Memorandum: Petitioner father commenced this proceeding seeking, inter alia, "sole custody" and "primary residency" of the parties' children after respondent mother relocated to Maine with the children without the father's consent, and the mother cross-petitioned for "primary residency of the children with periods of residency" with the father. The father appeals from an order in which Family Court, inter alia, granted the mother's cross petition. We affirm.

Inasmuch as this case involves an initial custody determination, "it cannot properly be characterized as a relocation case to which the application of the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) need be strictly applied" (*Matter of Saperston v Holdaway*, 93 AD3d 1271, 1272, *appeal dismissed* 19 NY3d 887, 20 NY3d 1052; *see Matter of Moore v Kazacos*, 89 AD3d 1546, 1546, *lv denied* 18 NY3d 806). "Although a court may consider the effect of a parent's relocation as part of a best interests analysis, relocation is but one factor among many in its custody determination" (*Saperston*, 93 AD3d at 1272; *see Matter of Torkildsen v Torkildsen*, 72 AD3d 1405, 1406).

Giving deference to the court's assessment of the credibility of the witnesses, we conclude that the court's determination to award the

mother primary residency of the children has a sound and substantial basis in the record (*see Matter of Cross v Caswell*, 113 AD3d 1107, 1107; *Matter of Thillman v Mayer*, 85 AD3d 1624, 1625; *Salerno v Salerno*, 273 AD2d 818, 818). The mother had been the children's primary caretaker since their birth and was more involved in the children's lives than the father. Although the children's relocation arguably has had a negative impact on the children's relationship with the father, "relocation is not a proper basis upon which to award primary physical custody to [the father] . . . inasmuch as the children will need to travel between the parties' two residences regardless of which parent is awarded primary physical [residency]" (*Sitts v Sitts*, 74 AD3d 1722, 1723, *lv dismissed* 15 NY3d 833, *lv denied* 18 NY3d 801; *see Saperston*, 93 AD3d at 1272).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

351

CA 13-01103

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

IN THE MATTER OF SMALL SMILES LITIGATION

KELLY VARANO, AS PARENT AND NATURAL GUARDIAN OF INFANT JEREMY BOHN, SHANNON FROIO, AS PARENT AND NATURAL GUARDIAN OF INFANT SHAWN DARLING, BRENDA FORTINO, AS PARENT AND NATURAL GUARDIAN OF INFANT JULIE FORTINO, MARIE MARTIN, AS PARENT AND NATURAL GUARDIAN OF INFANT KENNETH KENYON, JENNY LYNN COWHERM, AS PARENT AND NATURAL GUARDIAN OF INFANT WILLIAM MARTIN, HOLLAN CRIPPEN, AS PARENT AND NATURAL GUARDIAN OF INFANT DEVAN MATHEWS, JESSICA RECORE, AS PARENT AND NATURAL GUARDIAN OF INFANT SAMANTHA MCLOUGHLIN, LAURIE RIZZO AND DOMINICK RIZZO, AS LEGAL CUSTODIANS OF INFANT JACOB MCMAHON, JASON MONTANYE, AS PARENT AND NATURAL GUARDIAN OF INFANT KADEM MONTANYE, AND FRANCES SHELLINGS, AS PARENT AND NATURAL GUARDIAN OF INFANT RAYNE SHELLINGS, PLAINTIFFS-RESPONDENTS,

MEMORANDUM AND ORDER

V

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, ET AL., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.
(ACTION NO. 1.)

SHANTEL JOHNSON, AS PARENT AND NATURAL GUARDIAN OF INFANT KEVIN BUTLER, VERONICA ROBINSON, AS PARENT AND NATURAL GUARDIAN OF INFANT ARIANA FLORES, DEMITA GARRETT, AS PARENT AND NATURAL GUARDIAN OF INFANT I'YANA GARCIA SANTOS, KATHRYN JUSTICE, AS PARENT AND NATURAL GUARDIAN OF INFANT BREYONNA HOWARD, ELIZABETH LORRAINE, AS PARENT AND NATURAL GUARDIAN OF INFANT SHILOH LORRAINE, JR., LAPORSHA SHAW, AS PARENT AND NATURAL GUARDIAN OF INFANT ALEXIS PARKER, ROBERT RALSTON, AS PARENT AND NATURAL GUARDIAN OF INFANT BRANDIE RALSTON, KATRICE MARSHALL, AS PARENT AND NATURAL GUARDIAN OF INFANT LESANA ROSS, TIFFANY HENTON, AS PARENT AND NATURAL GUARDIAN OF INFANT COREY SMITH, AND JANET TABER, AS PARENT AND NATURAL GUARDIAN OF INFANT JON TABER, PLAINTIFFS-RESPONDENTS,

V

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, ET AL., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.
(ACTION NO. 2.)

TIMOTHY ANGUS, AS PARENT AND NATURAL GUARDIAN OF INFANT JACOB ANGUS, JESSALYNN PURCELL, AS PARENT AND NATURAL GUARDIAN OF INFANT ISAIAH BERG, BRIAN CARTER, AS PARENT AND NATURAL GUARDIAN OF INFANT BRIANA CARTER, APRIL FERGUSON, AS PARENT AND NATURAL GUARDIAN OF INFANT JOSEPH FERGUSON, SHERAIN RIVERA, AS PARENT AND NATURAL GUARDIAN OF INFANT SHADAYA GILMORE, TONYA POTTER, AS PARENT AND NATURAL GUARDIAN OF INFANT DESIRAEE HAGER, NANCY WARD, LEGAL CUSTODIAN OF INFANT AALYIAROSE LABOMBARD-BLACK, NANCY WARD, AS LEGAL CUSTODIAN OF INFANT MANUEL LABORDE JR., JENNIFER BACON, AS PARENT AND NATURAL GUARDIAN OF INFANT ASHLEY PARKER, COURTNEY CONRAD, AS PARENT AND NATURAL GUARDIAN OF INFANT ZAKARY WILSON, PLAINTIFFS-RESPONDENTS,

V

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, ET AL., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.
(ACTION NO. 3.)

DENTONS US LLP, WASHINGTON, D.C. (DAVID I. ACKERMAN OF COUNSEL), AND SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE, FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered May 29, 2013. The order, insofar as appealed from, granted that part of plaintiffs' motion seeking to compel production of corporate integrity documents and denied that part of defendants-appellants' cross motion for a protective order with respect to those documents.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of the motion seeking to compel production of the corporate integrity documents is denied, and that part of the cross motion seeking a protective order with respect to those documents is granted.

Memorandum: Plaintiffs commenced these three actions alleging, inter alia, fraud and dental malpractice. Although there are four groups of defendants involved in the three actions (*Matter of Small*

Smiles Litig., 109 AD3d 1212, 1212-1213), the only group relevant to the instant appeal is Forba Holdings, LLC, now known as Church Street Health Management, LLC, et al. (New FORBA). Plaintiffs moved, inter alia, to compel New FORBA to produce documents associated with two corporate integrity agreements (corporate integrity documents), and New FORBA cross-moved for a protective order with respect thereto. Supreme Court granted plaintiffs' motion and denied New FORBA's cross motion. We reverse the order insofar as appealed from, deny that part of the motion seeking to compel production of the corporate integrity documents, and grant that part of the cross motion seeking a protective order with respect to those documents.

We conclude that the court erred in determining that the requested corporate integrity documents were not privileged under Education Law § 6527 (3). New FORBA met its burden of establishing that the corporate integrity documents sought by plaintiffs were related to the "performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program" (*id.*; *see Slayton v Kolli*, 111 AD3d 1314, 1314; *Learned v Faxton-St. Luke's Healthcare*, 70 AD3d 1398, 1399; *Aldridge v Brodman*, 49 AD3d 1192, 1193). Specifically, New FORBA established that the corporate integrity documents were prepared pursuant to state and federal corporate integrity agreements, which set forth procedures for the review and monitoring of the quality of care of the dental clinics. Thus, New FORBA established " 'that it has a review procedure and that the [corporate integrity documents] for which the [privilege] is claimed [were] obtained or maintained in accordance with that review procedure' " (*Kivlehan v Waltner*, 36 AD3d 597, 599; *see Learned*, 70 AD3d at 1398). Contrary to plaintiffs' contention, there is nothing in the language of section 6527 (3) limiting applicability of the privilege to agencies located in New York or records prepared in the state (*see id.*; *Little v Hicks*, 236 AD2d 794, 795).

We reject plaintiffs' contention that New FORBA waived the statutory privilege when it disclosed the corporate integrity documents in a bankruptcy proceeding in a different jurisdiction. As an initial matter, we note that plaintiffs failed to establish which of the requested corporate integrity documents it alleges were disclosed in the bankruptcy proceeding and, in any event, the record establishes that any disclosed documents were subject to a protective order in that proceeding. We therefore conclude that New FORBA intended to retain the confidentiality of the corporate integrity documents and took reasonable precautions to prevent further disclosure of them (*see Baliva v State Farm Mut. Auto. Ins. Co.*, 275 AD2d 1030, 1031-1032; *see also Campbell v Aerospace Prods. Intl.* [appeal No. 2], 37 AD3d 1156, 1157).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

373

CA 13-00363

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

CELLINO & BARNES, P.C., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARTIN, LISTER & ALVAREZ, PLLC,
DEFENDANT-APPELLANT.

ANTHONY D. PARONE, NIAGARA FALLS, FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 14, 2013. The order granted the motion of plaintiff for leave to reargue and, upon reargument, denied the prior motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff, a New York law firm, commenced this action against defendant, a Florida law firm, seeking quantum meruit damages for plaintiff's legal representation of a client who later retained defendant to represent her. Defendant eventually settled the client's personal injury claim for $495,000, and kept $164,000 as its fee. Plaintiff seeks a portion of that fee as damages in this action. Defendant moved to dismiss the complaint pursuant to CPLR 3211 (a) (8), contending that Supreme Court lacked personal jurisdiction over the firm. More specifically, defendant contended that it was not properly served with process, inasmuch as the receptionist upon whom the summons and complaint were served was not authorized to accept service, and that, in any event, the court lacks long-arm jurisdiction over defendant because the firm did not have the requisite minimum contacts with New York. In the alternative, defendant sought dismissal of the action on the ground of forum non conveniens (*see* CPLR 327 [a]). Although the court initially granted the motion, it granted plaintiff's motion for leave to reargue and, upon reargument, denied the motion. We now affirm.

Personal service on a corporation may be obtained by delivering the summons and complaint to, among other people, any "agent authorized by appointment or by law to receive process" (CPLR 311 [a] [1]; *see Rosario v NES Med. Servs. of N.Y., P.C.*, 105 AD3d 831, 832). Although a corporation is "free to choose its own agent for receipt of

process without regard to title or position" (*Fashion Page, Ltd. v Zurich Ins. Co.*, 50 NY2d 265, 272), the process server is not expected to be familiar with the corporation's internal practices, and is thus entitled to rely upon the "employees to identify the proper person to accept service" (*id.*).

Moreover, a process server's affidavit ordinarily constitutes prima facie evidence of proper service (*see U.S. Bank, N.A. v Arias*, 85 AD3d 1014, 1015; *Wells Fargo Bank, N.A. v Christie*, 83 AD3d 824, 825). "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing . . . , no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavit[]" (*Indymac Fed. Bank FSB v Quattrochi*, 99 AD3d 763, 764 [internal quotation marks omitted]; *see Countrywide Home Loans Servicing, LP v Albert*, 78 AD3d 983, 984-985).

Here, plaintiff submitted an affidavit from the process server, who stated that, upon entering defendant's office, she asked the receptionist for an authorized agent to accept service of the summons and complaint. The receptionist identified herself as a legal assistant and said that she was in charge of the office. When asked whether she was authorized to accept service, the receptionist answered in the affirmative, whereupon the process server handed her the papers. Defendant submitted no evidence to contradict the process server's sworn assertions. Instead, defendant offered an affidavit from one of its partners, who merely stated that the receptionist was not authorized to accept service. The partner was not present when the receptionist was served and had no personal knowledge whether she stated that she was authorized to accept service. Notably, defendant did not submit an affidavit from the receptionist. Under the circumstances, we conclude that the court properly rejected defendant's contention that it was not properly served with process (*see Dunn v Pallett*, 66 AD3d 1179, 1180-1181).

We further conclude that defendant is subject to long-arm jurisdiction under CPLR 302 (a) (1), which provides that New York has jurisdiction over a nondomiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state." Under the statute, personal jurisdiction "is proper 'even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted' " (*Fischbarg v Doucet*, 9 NY3d 375, 380, quoting *Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71, *cert denied* 549 US 1095). "Purposeful activities are those with which a defendant, through volitional acts, 'avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws' " (*id.* at 380, quoting *McKee Elec. Co. v Rauland-Borg Corp.*, 20 NY2d 377, 382).

Here, defendant represented a client who was injured in a motor vehicle accident in New York and then obtained "a favorable settlement

of her New York personal injury claim from New York tortfeasors in accordance with New York law" (*Liberatore v Calvino*, 293 AD2d 217, 221). In addition, before settling the action, the attorney handling the claim for defendant became admitted to practice law in New York. Based on those purposeful activities in New York, we conclude that defendant had the requisite "minimum contacts" with this state to warrant the exercise of long-arm jurisdiction pursuant to CPLR 302 (a) (1) (*International Shoe Co. v State of Washington*, 326 US 310, 316; *see LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216). We further conclude that the exercise of jurisdiction here comports with due process (*see generally LaMarca*, 95 NY2d at 217-218; *Halas v Dick's Sporting Goods*, 105 AD3d 1411, 1413).

Finally, upon consideration of the relevant factors (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479, *cert denied* 469 US 1108), we conclude that defendant failed to meet its "heavy burden" of establishing that New York is an inconvenient forum for this action (*ACE Fire Underwriters Ins. Co. v ITT Indus., Inc.*, 44 AD3d 404, 406; *see Fonda v Wapner*, 103 AD3d 510, 510). The court therefore did not abuse its discretion in denying defendant's motion insofar as it sought to dismiss the action pursuant to CPLR 327 (a) (*see Bodea v TransNat Express*, 286 AD2d 5, 7).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

377

KA 12-01730

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTHONY M. JONES, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (ROBERT C. JEFFRIES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered September 14, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (three counts) and criminal possession of a controlled substance in the third degree.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

380

KA 11-01665

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CEDRIC J. WILLIAMS, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL), FOR DEFENDANT-APPELLANT.

CEDRIC J. WILLIAMS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered November 16, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends in his main and pro se supplemental briefs that the waiver of the right to appeal is invalid and challenges the severity of the sentence. Although we agree with defendant that the waiver of the right to appeal is invalid because the perfunctory inquiry made by County Court was "insufficient to establish that the court 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767; *see People v Hamilton*, 49 AD3d 1163, 1164), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

381

KA 12-01782

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JERMAINE NOWELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered April 3, 2006. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

382

KA 10-00680

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELVIN ROIG, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered December 18, 2009. The judgment convicted defendant, upon a nonjury verdict, of robbery in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon a nonjury verdict, of robbery in the third degree (Penal Law § 160.05) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (§ 140.20). With respect to appeal No. 1, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "The evidence supports the conclusion that defendant's use of force against store employees was for the purpose, at least in part, of retaining control of the stolen merchandise that was in his possession, that he did not voluntarily abandon any of the merchandise, and that he did not use force merely for the purpose of escaping" (*People v Nieves*, 37 AD3d 277, 277, *lv denied* 9 NY3d 848; *see People v Thomas*, 226 AD2d 120, 120, *lv denied* 88 NY2d 886; *People v Miller*, 217 AD2d 970, 970-971).

"In view of our determination affirming the judgment in appeal No. [1], we reject defendant's contention that the judgment in appeal No. [2] must be reversed on the ground that he pleaded guilty in appeal No. [2] based on the promise that the sentence in appeal No. [2] would run concurrently with the sentence in appeal No. [1]" (*People v Khammonivang*, 68 AD3d 1727, 1727-1728, *lv denied* 14 NY3d

889; *cf. People v Fuggazzatto*, 62 NY2d 862, 863).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

384

KA 12-00824

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DORIAN FACEN, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 16, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]), defendant contends that all of the physical evidence seized by the police, as well as his statements to the police, should have been suppressed because they were obtained as the result of an improper stop of the vehicle in which he was riding. Defendant failed to raise that contention in his motion papers or before the suppression court, and thus it is not preserved for our review (*see generally People v Fuentes*, 52 AD3d 1297, 1298, *lv denied* 11 NY3d 736; *People v Ricks*, 49 AD3d 1265, 1266, *lv denied* 10 NY3d 869, *reconsideration denied* 11 NY3d 740). In any event, that contention is without merit inasmuch as "the testimony adduced at the suppression hearing established that the police officers' traffic stop was supported by the requisite probable cause to believe that there had been a violation of Vehicle and Traffic Law § 375 (12-a) (b)" (*People v Collins*, 105 AD3d 1378, 1379, *lv denied* 21 NY3d 1003; *see People v Estrella*, 48 AD3d 1283, 1285, *affd* 10 NY3d 945, *cert denied* 555 US 1032).

Contrary to defendant's further contention, Supreme Court did not err in refusing to suppress the physical evidence that the police investigator removed from defendant's clenched buttocks after defendant informed the investigator that "he had some crack in his pants and he would take it out before we went to the holding center."

The court properly found that "defendant voluntarily consented to the search of . . . his person" (*People v Herndon*, 75 AD3d 1083, 1084, *lv denied* 15 NY3d 852; *see generally People v Meredith*, 49 NY2d 1038, 1039). In any event, the court also properly determined that the evidence was not seized as the result of either a body cavity search or a visual body cavity inspection. It is well settled that a " 'visual body cavity inspection' [] occurs when a police officer looks at the arrestee's anal or genital cavities, usually by asking the arrestee to bend over; however, the officer does not touch the arrestee's body cavity. In contrast, a 'manual body cavity search' includes some degree of touching or probing of a body cavity that causes a physical intrusion beyond the body's surface" (*People v Hall*, 10 NY3d 303, 306-307, *cert denied* 555 US 938). Here, to the contrary, the evidence establishes that the investigator initially saw the string that was at the end of the bag when defendant pulled back the waistband of his pants and exhibited the top of his buttocks. The investigator then, "without touching [defendant] or invading his anal cavity, retrieved a plastic bag protruding from his buttocks" (*Matter of Demitrus B.*, 89 AD3d 1421, 1422; *see People v Butler*, 105 AD3d 1408, 1409, *lv denied* 21 NY3d 1072).

We have considered defendant's remaining contentions and conclude that they do not warrant modification or reversal of the judgment.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

387

KA 10-00681

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELVIN ROIG, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered December 18, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Same Memorandum as in *People v Roig* ([appeal No. 1] ___ AD3d ___ [May 2, 2014]).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

388

KA 13-00671

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COREY E. BECOATS, ALSO KNOWN AS JOKER,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, 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 Supreme Court, Monroe County (Francis A. Affronti, J.), dated March 20, 2013. The order denied the motion of defendant pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: We granted defendant leave to appeal from an order denying his motion pursuant to CPL 440.10 (1) seeking to vacate the judgment convicting him of manslaughter in the second degree (Penal Law § 125.15 [1]) and robbery in the first degree (§ 160.15 [1]) (*People v Becoats*, 71 AD3d 1578, *affd* 17 NY3d 643, *cert denied* ___ US ___, 132 S Ct 1970). Defendant contends that he is entitled to vacatur of the judgment on the ground that he was denied effective assistance of counsel (*see* CPL 440.10 [1] [h]), based upon his attorney's failure to make an adequate attempt to secure the appearance of a federal prisoner to testify. The People had reported to defense counsel, as part of their ongoing *Brady* obligation, that the federal prisoner advised an assistant district attorney that he had observed the beating of the victim and that defendant was not present. That purported witness identified three participants, one of whom was a prosecution witness. Defendant's request for an adjournment of the trial to attempt to secure the attendance of that witness was made on the last business day before trial and more than three weeks after defense counsel was advised of the potential witness, and was denied (*see Becoats*, 17 NY3d at 652). In support of his CPL 440.10 motion, defendant provided an affidavit of his trial counsel, who stated that his request for an adjournment "was not a ploy or stratagem." Trial counsel averred that he had spoken to the

attorney for the witness and had determined that the testimony would be helpful. Trial counsel did not recall why he had not initiated proceedings pursuant to CPL 650.30 to arrange for the presence of a federal prisoner at a state court proceeding.

Supreme Court properly determined that defendant established the lack of strategic or other legitimate reason for trial counsel's failure to take steps to secure the presence of the federal prisoner as a witness. "It is well established that 'the failure to investigate or call exculpatory witnesses may amount to ineffective assistance of counsel' " (*People v Dombrowski*, 87 AD3d 1267, 1268), and we conclude that there is an issue of fact whether the error in failing to do so here "so seriously compromise[d] . . . defendant's right to a fair trial" that he was denied his constitutional right to a fair trial (*People v Hobot*, 84 NY2d 1021, 1022; *see People v Cosby*, 82 AD3d 63, 67, *lv denied* 16 NY3d 857; *cf. People v Ozuna*, 7 NY3d 913, 915). We therefore reverse the order and remit the matter to Supreme Court for a hearing to determine whether the failure to take adequate steps to secure the testimony of the federal prisoner constituted ineffective assistance of counsel (*see People v Flagg*, 30 AD3d 889, 893, *lv denied* 7 NY3d 848; *see generally Dombrowski*, 87 AD3d at 1268).

Defendant further contends that statements made by his codefendant during his plea colloquy following the reversal of the original judgment convicting him of, inter alia, manslaughter in the second degree (*People v Wright*, 63 AD3d 1700, *revd* 17 NY3d 643) constitutes newly discovered evidence warranting vacatur of defendant's judgment of conviction (*see* CPL 440.10 [1] [g]). The codefendant stated during his colloquy that he acted alone and that defendant was not present when he was beating the victim. The court properly determined that the codefendant's colloquy constitutes inadmissible hearsay inasmuch as, contrary to defendant's contention, it is not an admission against the codefendant's penal interest (*see People v Ennis*, 11 NY3d 403, 413, *cert denied* 556 US 1240). Nevertheless, in light of the information the People provided to trial counsel regarding the purported observations of the federal prisoner, we cannot conclude on the record before us that " 'there is no reasonable possibility' " that the codefendant's statements are true (*People v Crenshaw*, 34 AD3d 1315, 1316, *lv denied* 8 NY3d 879). We therefore further direct Supreme Court to determine at the hearing on remittal whether the codefendant is available to testify, and if so, to assess his credibility (*see People v Staton*, 224 AD2d 984, 984-985; *cf. People v Jackson*, 238 AD2d 877, 878-879, *lv denied* 90 NY2d 859; *see generally People v McFarland*, 108 AD3d 1121, 1122-1123).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

389

KA 12-00795

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HENRY H. DONALDSON, JR., ALSO KNOWN AS PUDDIN,
DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (M. William Boller, A.J.), rendered February 27, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal sale of a controlled substance in the fourth degree (Penal Law §§ 110.00, 220.34 [1]). Initially, we agree with defendant that his waiver of the right to appeal is invalid because "the minimal inquiry made by County Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Box*, 96 AD3d 1570, 1571, *lv denied* 19 NY3d 1024 [internal quotation marks omitted]; *see People v Doxey*, 112 AD3d 1364, 1364-1365; *People v Jones*, 107 AD3d 1589, 1589-1590, *lv denied* 21 NY3d 1075), and because the court "improperly conflated the rights automatically forfeited by operation of law as the consequence of a guilty plea with those rights voluntarily relinquished as the consequence of a waiver of the right to appeal" (*People v Daniels*, 68 AD3d 1711, 1712, *lv denied* 14 NY3d 887).

We reject defendant's further contention that the court violated CPL 430.10 in resentencing him as a second felony offender. Contrary to defendant's contention, " 'the trial court had the inherent power to correct an illegal sentence' over the defendant's objection where[, as here,] the corrected sentence fell within the range initially stated by the court" (*People v DeValle*, 94 NY2d 870, 871-872, quoting

People v Williams, 87 NY2d 1014, 1015, *rearg denied* 89 NY2d 861; *see People v Coble*, 17 AD3d 1165, 1165-1166, *lv denied* 5 NY3d 787). The initial sentence was illegal because the information available to the court and the parties established that defendant was a second felony drug offender, and the court therefore could not impose a one-year period of postrelease supervision (*see* Penal Law §§ 70.45 [2] [d]; 70.70 [3] [b] [ii]). Consequently, the People were required to file a predicate felony statement and the court, upon concluding that he had such a conviction, was required to sentence defendant as a second felony drug offender (*see generally People v Stubbs*, 96 AD3d 1448, 1450, *lv denied* 19 NY3d 1001; *People v Griffin*, 72 AD3d 1496, 1497).

Finally, to the extent that defendant's contention that he was denied effective assistance of counsel at sentencing survives his guilty plea, we conclude that it lacks merit (*see People v LaCroce*, 83 AD3d 1388, 1388, *lv denied* 17 NY3d 807). Defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404).

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

394

CA 13-01376

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

ROY PURDY AND ELINOR PURDY,
PLAINTIFFS-APPELLANTS,

V ORDER

UNIVERSITY OF ROCHESTER MEDICAL
CENTER/STRONG MEMORIAL HOSPITAL,
DEFENDANT-RESPONDENT.

FITZSIMMONS, NUNN & PLUKAS, LLP, ROCHESTER (JASON E. ABBOTT OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered May 22, 2013. The order and judgment granted the motion of defendant for summary judgment dismissing the complaint.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

398

KA 10-02301

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYQWAN COLES, ALSO KNOWN AS SMOOTH/SMOOVE/KEVIN HARRIS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CHRISTOPHER HAMMOND OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered July 16, 2010. The appeal was held by this Court by order entered April 26, 2013, decision was reserved and the matter was remitted to Ontario County Court for further proceedings (105 AD3d 1360). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision and remitted the matter to County Court to determine whether the evidence seized from defendant's apartment and his statement to the police should be suppressed as the fruit of the illegal entry into his apartment prior to the issuance of the search warrant (*People v Coles*, 105 AD3d 1360, 1363). We determined in our prior decision that none of defendant's remaining contentions on the appeal from the judgment of conviction after a jury trial warranted reversal or modification of the judgment (*id.* at 1360-1362). Upon remittal, the court denied defendant's request for suppression, and we now affirm. The court properly concluded that defendant's statements given at the police station and the evidence seized from the apartment upon the execution of the search warrant were not causally related to the earlier illegal entry into defendant's apartment (*see People v Boyson*, 105 AD3d 1364, 1364, *lv denied* 22 NY3d 1039; *see generally People v Arnau*, 58 NY2d 27, 33, *cert denied* 468 US 1217).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

399

KA 09-01488

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

SAMUEL L. RIVALDO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Stephen T. Miller, A.J.), rendered June 2, 2009. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the second degree (Penal Law § 155.40 [1]). On this record, we conclude that defendant's challenge to the amount of the monthly restitution payments ordered by County Court is not foreclosed by his valid waiver of the right to appeal because the amount of those monthly payments was not included in the terms of the plea agreement (*see People v Tessitore*, 101 AD3d 1621, 1622, *lv denied* 20 NY3d 1104). Even assuming, arguendo, that defendant preserved for our review his challenge to the amount of the monthly restitution payments (*see generally People v Connors*, 91 AD3d 1340, 1341-1342, *lv denied* 18 NY3d 956; *People v Farewell*, 90 AD3d 1502, 1503, *lv denied* 18 NY3d 957), we conclude that it lacks merit (*see generally People v Zimmerman*, 12 AD3d 1105, 1105, *lv denied* 4 NY3d 750).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

400

KA 12-00917

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LESLIE J. PELTIER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THOMAS R. VILLECCO, JERICHO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered January 7, 2010. The judgment convicted defendant, upon her plea of guilty, of attempted assault in the first degree.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

401

KA 13-00974

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LESLIE J. PELTIER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THOMAS R. VILLECCO, JERICHO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered April 1, 2010. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

403

KA 12-01161

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

EDRAS ELIAS HERNANDEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered August 27, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

404

KA 09-02280

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARGARET MOONEY, DEFENDANT-APPELLANT.

JASON J. BOWMAN, ONTARIO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered June 18, 2009. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree (two counts) and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting her following a jury trial of assault in the second degree (Penal Law § 120.05 [6]) and two counts of robbery in the second degree (§ 160.10 [1], [2] [a]), defendant contends that the evidence of physical injury is legally insufficient to support her conviction. Because defendant's motion for a trial order of dismissal was not " 'specifically directed' at th[at] alleged error," defendant failed to preserve her contention for our review (*People v Gray*, 86 NY2d 10, 19). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495; *People v Robinson*, 104 AD3d 1312, 1312, *lv denied* 21 NY3d 1008).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

408

KA 12-00507

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS BROWNING, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI 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 Erie County Court (Michael L. D'Amico, J.), rendered January 12, 2012. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a nonjury trial, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We reject defendant's contention that County Court erred in admitting the testimony of a police officer regarding the meaning of coded language used in a recorded conversation. Contrary to defendant's contention, expert testimony interpreting the meaning of words is not restricted to narcotics cases (*see People v Inoa*, 109 AD3d 765, 766; *People v Pendelton*, 90 AD3d 1234, 1235 n 2, *lv denied* 18 NY3d 996), and the record establishes that the police officer was qualified to interpret the language based on his experience (*see Matott v Ward*, 48 NY2d 455, 459; *People v Wyant*, 98 AD3d 1277, 1277-1278).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

411

KAH 13-00519

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DAVID F. TUSZYNSKI, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SUPERINTENDENT DAVID STALLONE, CAYUGA
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

DAVID F. TUSZYNSKI, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered October 29, 2012 in a habeas corpus proceeding. The judgment denied the petition.

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

Memorandum: Supreme Court properly denied the petition for a writ of habeas corpus. Petitioner's contentions were, or could have been, raised on direct appeal from the judgment of conviction or in a motion pursuant to CPL article 440, and thus habeas corpus relief is unavailable (*see People ex rel. Montgomery v Artus*, 114 AD3d 1171, 1172; *see also People v Tuszynski*, 71 AD3d 1407, *lv denied* 15 NY3d 810). Additionally, "petitioner has shown no reason to justify a departure 'from traditional orderly procedure' " (*People ex rel. Lanfair v Corcoran*, 60 AD3d 1351, 1351, *lv denied* 12 NY3d 714; *see People ex rel. Johnson v Fischer*, 69 AD3d 1100, 1101, *lv denied* 14 NY3d 707, *rearg denied* 15 NY3d 745). We have reviewed petitioner's contention in his pro se supplemental brief, and we conclude that it also could have been asserted on direct appeal or in a postconviction motion.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

416

CA 13-01153

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

PATRICIA KARAM, AS ADMINISTRATRIX OF THE ESTATE OF TONY KARAM, DECEASED, AND PATRICIA KARAM, INDIVIDUALLY, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

ADIRONDACK NEUROSURGICAL SPECIALISTS, P.C., ET AL., DEFENDANTS, ST. ELIZABETH MEDICAL CENTER, AND TIMOTHY EDWARD PAGE, DEFENDANTS-RESPONDENTS-APPELLANTS. (APPEAL NO. 1.)

JOEL M. KOTICK, NEW YORK CITY, POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (LAURENCE F. SOVIK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered November 19, 2012 in a medical malpractice and wrongful death action. The order, among other things, denied plaintiff's motion to set aside the jury verdict.

It is hereby ORDERED that said cross appeal is unanimously dismissed (*see Edgett v North Fork Bank*, 72 AD3d 1635, 1635), and the order is affirmed without costs.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

417

CA 13-01154

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

PATRICIA KARAM, AS ADMINISTRATRIX OF THE ESTATE OF TONY KARAM, DECEASED, AND PATRICIA KARAM, INDIVIDUALLY, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

ADIRONDACK NEUROSURGICAL SPECIALISTS, P.C., ET AL., DEFENDANTS, ST. ELIZABETH MEDICAL CENTER AND TIMOTHY EDWARD PAGE, DEFENDANTS-RESPONDENTS-APPELLANTS. (APPEAL NO. 2.)

JOEL M. KOTICK, NEW YORK CITY, POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (LAURENCE F. SOVIK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered May 21, 2013 in a medical malpractice and wrongful death action. The order, among other things, denied plaintiff’s motion to renew.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

421

TP 13-01828

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

IN THE MATTER OF ARRELLO BARNES, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered October 8, 2013) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

422

TP 13-01827

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

IN THE MATTER OF DAMIAN TRAPANI, PETITIONER,

V MEMORANDUM AND ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered October 8, 2013) to review determinations of respondent. The determinations found after tier II and tier III hearings that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination rendered February 13, 2013 is unanimously annulled on the law without costs, the petition is granted in part, respondent is directed to expunge from petitioner's institutional record all references to the violation of inmate rules 100.13 (7 NYCRR 270.2 [B] [1] [iv]), 104.11 (7 NYCRR 270.2 [B] [5] [ii]), 104.13 (7 NYCRR 270.2 [B] [5] [iv]), and 106.10 (7 NYCRR 270.2 [B] [7] [i]) and the recommended loss of good time is vacated, and the determination rendered February 6, 2013 is confirmed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul two determinations of respondent rendered after tier II and tier III hearings. We confirm the determination rendered following the tier II hearing. Contrary to petitioner's contention, the determination is supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139), and "the record does not establish 'that the Hearing Officer was biased or that the determination flowed from the alleged bias' " (*Matter of Colon v Fischer*, 83 AD3d 1500, 1501).

As respondent correctly concedes, however, the determination rendered following the tier III hearing must be annulled. We therefore grant the petition in part by annulling that determination, and we direct respondent to expunge from petitioner's institutional

record all references to the violation of the inmate rules therein and to vacate the recommended loss of good time. Petitioner requested the testimony of a nurse administrator and, although the Hearing Officer recorded her testimony, he did not have her testify in petitioner's presence. In the absence of any explanation as to why the testimony of that witness was taken outside of petitioner's presence (*cf. Matter of Janis v Prack*, 106 AD3d 1297, 1297, *lv denied* 21 NY3d 864), we agree with petitioner that the Hearing Officer failed to comply with 7 NYCRR 254.5 (b) (*see Matter of Jones v Smith*, 116 AD2d 993, 993).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

424

TP 13-01983

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

IN THE MATTER OF LORETTA JACOBI, PETITIONER,

V ORDER

CAROL DANKERT-MAURER, COMMISSIONER, ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, NIRAV R. SHAH, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, AND KRISTIN M. PROUD, ACTING COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, RESPONDENTS.

LEGAL SERVICES FOR THE ELDERLY, DISABLED OR DISADVANTAGED OF WESTERN NEW YORK, INC., BUFFALO (ANTHONY SZCZYGIEL OF COUNSEL), FOR PETITIONER.

HOWARD B. FRANK, BUFFALO, FOR RESPONDENT CAROL DANKERT-MAURER, COMMISSIONER, ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS NIRAV R. SHAH, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, AND KRISTIN M. PROUD, ACTING COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [John M. Curran, J.], entered October 24, 2013) to review a determination of New York State Office of Temporary and Disability Assistance. The determination, among other things, found that petitioner transferred assets for the purpose of qualifying for Medicaid and therefore is ineligible for payment of her nursing facility services for a period of 35.73 months.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 19, 20 and 25, 2014,

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

425

KA 12-02014

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WADE J. MURPHY, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA, LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (Robert C. Noonan, A.J.), rendered August 16, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

426

KA 12-00289

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FERNANDO RIVERA, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered December 23, 2011. The order denied the motion of defendant to vacate the judgment of conviction pursuant to CPL 440.10.

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

Memorandum: We granted defendant permission to appeal from an order denying his motion seeking to vacate the judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [2]), in connection with the attack of a fellow inmate in 1999. We reject defendant's contention that Supreme Court erred in denying his motion without conducting a hearing. Defendant asserted in support of his motion that he is actually innocent of the offense, and he submitted the affidavits of other inmates who witnessed the attack and an inmate who took responsibility for the attack. To the extent that defendant relies on those affidavits as newly discovered evidence that was not available at the time defendant pleaded guilty, we note that defendant pleaded guilty herein, and relief pursuant to CPL 440.10 (1) (g) based on newly discovered evidence is available only upon a verdict following a trial.

To the extent that defendant contends that he has a cognizable claim pursuant to CPL 440.10 (1) (h), i.e., he is entitled to a hearing to determine whether his constitutional rights have been violated, we note that, as a matter of first impression at the appellate level, the Second Department has recognized a "freestanding claim of actual innocence . . . rooted in . . . the constitutional rights to substantive and procedural due process, and the

constitutional right not to be subjected to cruel and unusual punishment" (*People v Hamilton*, 115 AD3d 12, 21). That Court explained that " 'actual innocence' means factual innocence, not mere legal insufficiency of evidence of guilt (*see Bousley v United States*, 523 US 614, 623-624), and must be based upon reliable evidence which was not presented *at trial* (*see Schlup v Delo*, 513 US [298,] 324)" (*id.* at 23 [emphasis added]). Without deciding whether a claim of actual innocence is cognizable under CPL 440.10 (1) (h), we conclude that, in any event, the claim is not available where, as here, defendant does not challenge the voluntariness of his plea. We note that defendant abandoned on appeal his contention that his plea was not voluntary because he was taking psychiatric medication. In any event, the record supports the conclusion that defendant's plea of guilty was knowing and voluntary. "The 'solemn act' of entering a plea . . . should not be permitted to be used as a device for a defendant to avoid a trial while maintaining a claim of factual innocence" (*People v Plunkett*, 19 NY3d 400, 406).

We reject defendant's contention that the court erred in refusing to conduct a hearing with respect to his contention that he was denied effective assistance of counsel based upon defense counsel's failure to interview civilian and inmate witnesses to the attack (*see* CPL 440.10 [1] [f], [h]). That contention is belied by the record, which establishes that defense counsel moved for an order of the court to transport three inmate witnesses from the prisons where they were incarcerated for the purpose of testifying at defendant's trial and that one of those witnesses was at the courthouse when defendant pleaded guilty.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

427

KA 12-00717

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHASITY L. WILSON, DEFENDANT-APPELLANT.

GERARD R. ROUX, II, EAST AMHERST, 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 (Matthew J. Murphy, III, J.), rendered February 2, 2012. The judgment convicted defendant, upon her plea of guilty, of attempted burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [2]). Defendant failed to preserve for our review her contention that the guilty plea was not knowingly, intelligently, and voluntarily entered inasmuch as she failed to move to withdraw the plea or vacate the judgment of conviction (*see People v Zulian*, 68 AD3d 1731, 1732, *lv denied* 14 NY3d 894). In any event, defendant's contention that she was not competent to enter both her guilty plea and the waiver of the right to appeal are without merit. Defendant stated during the plea colloquy that she was taking prescription medication for anxiety and depression, but "[t]here was not the slightest indication that defendant was uninformed, confused or incompetent" at the time she entered the plea and the waiver of the right to appeal (*People v Alexander*, 97 NY2d 482, 486; *see People v Sonberg*, 61 AD3d 1350, 1351, *lv denied* 13 NY3d 800). In response to County Court's inquiry, "defendant advised the court that [s]he was thinking clearly and understood the proceedings" (*Zulian*, 68 AD3d at 1732). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

432

KA 12-02226

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN GLOVER, DEFENDANT-APPELLANT.

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

SHAWN GLOVER, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM 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 (Frank P. Geraci, Jr., J.), entered October 14, 2012. The order denied defendant's motion seeking, inter alia, to vacate the judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant's motion in part and the judgment entered September 4, 1996 is modified by directing that the sentences imposed on counts four and five shall run concurrently with the sentence imposed on count one, and as modified the order is affirmed.

Memorandum: Defendant appeals, by permission of this Court, from an order denying his pro se motion pursuant to CPL article 440 seeking, inter alia, to vacate the judgment convicting him of murder in the second degree (Penal Law § 125.25 [3] [felony murder]) and four counts of robbery in the first degree (§ 160.15 [1], [4]) in connection with the robbery of two men, and the death of one of those victims. We previously affirmed that judgment of conviction (*People v Glover*, 266 AD2d 862, *lv denied* 94 NY2d 862). We note at the outset that the contentions raised by defendant in his pro se supplemental brief were not raised in his CPL article 440 motion and are therefore not properly before us (*see People v Pennington*, 107 AD3d 1602, 1604, *lv denied* 22 NY3d 958). In his main brief, defendant contends that the sentence imposed is illegal insofar as the judgment directs that the sentences imposed on the two counts of robbery with respect to the surviving victim shall run consecutively to, rather than concurrently with, the sentence imposed on the felony murder count. We agree that County Court erred in denying his motion to that extent, and we

therefore modify the order accordingly (*see* CPL 440.20 [1]). "[B]ecause the indictment did not specify which of the robbery counts served as the predicate for the felony murder count," the sentences imposed on counts four and five must run concurrently with the sentence imposed on the felony murder count (*People v Davis*, 68 AD3d 1653, 1655, *lv denied* 14 NY3d 839; *see People v Parks*, 95 NY2d 811, 814-815).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

433

OP 13-01643

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

IN THE MATTER OF MICHAEL D. SCHMITT, PETITIONER,

V MEMORANDUM AND ORDER

HONORABLE JAMES J. PIAMPIANO, RESPONDENT.

MICHAEL D. SCHMITT, ROCHESTER, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to annul and set aside the determination of respondent finding petitioner in contempt.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs and the petition is granted.

Memorandum: Petitioner commenced this original CPLR article 78 proceeding pursuant to CPLR 506 (b) (1) seeking to annul the determination finding petitioner in contempt of court and imposing a fine of $500. The conduct resulting in the order of contempt occurred while petitioner, an attorney appearing before respondent as defense counsel in a criminal case, cross-examined a prosecution witness regarding his criminal history.

Initially, we note that the order recites that it was a commitment for "[c]ivil [c]ontempt," but respondent contends that this was actually a summary criminal contempt adjudication pursuant to Judiciary Law § 750 (A) (3) based on petitioner's willful disobedience of a court ruling. We agree with respondent that this was an order of criminal contempt inasmuch as "the aim . . . [was] solely to punish [petitioner] for disobeying a court order" (*Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 239; *see Matter of McCormick v Axelrod*, 59 NY2d 574, 582-583, *order amended* 60 NY2d 652). We therefore disregard the mistaken reference to civil contempt in the order, as well as the reference to Judiciary Law § 774, which has no relevance to the finding of contempt inasmuch as respondent did not impose a period of imprisonment (*see generally* CPLR 2001, 5019 [a]).

We agree with petitioner that the record does not support a finding of contempt. A court may punish a person for criminal

contempt where, inter alia, the person is guilty of willful disobedience of a lawful mandate (Judiciary Law § 750 [A] [3]). To sustain the finding of criminal contempt, there must exist "an unequivocal mandate" (*Department of Envtl. Protection of City of N.Y.*, 70 NY2d at 240), and we conclude that there was no such mandate here (*see Matter of Dobozin v Tills*, 6 AD3d 1220, 1220). During the criminal trial, respondent noted that the prosecution witness had a youthful offender robbery adjudication that petitioner could question him about because the witness opened the door to such testimony. Respondent, however, did not unequivocally mandate that petitioner was precluded from asking the witness whether he was "convicted" of robbery. In light of our determination, we do not consider petitioner's remaining contention.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

435

CA 13-01795

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

SADE WATSON, PLAINTIFF-APPELLANT,

V ORDER

KIBLER ENTERPRISES, ARTHUR BECKER, JR., MICHAEL BECKER, MARK BECKER, JOSEPH SMIDT, PETER SOBEL, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

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

DAMON MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS KIBLER ENTERPRISES, ARTHUR BECKER, JR., MICHAEL BECKER AND MARK BECKER.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered April 17, 2013. The order, among other things, denied plaintiff's motion seeking, inter alia, to strike parts of a report.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Pagan v Rafter*, 107 AD3d 1505, 1507).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

438

CA 13-01624

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

LINDA HERBERT, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF DONALD J. HERBERT, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

EILEEN REILLY, M.D., ET AL., DEFENDANTS, ELIZABETH MARIE LOVE, M.D. AND GERIATRIC ASSOCIATES, LLP, DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MARK SPITLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., BUFFALO (BRIAN A. GOLDSTEIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

CONNORS & VILARDO, LLP, BUFFALO (VINCENT E. DOYLE, III, OF COUNSEL), FOR DEFENDANTS EILEEN REILLY, M.D. AND ELDER MEDICAL SERVICES.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered March 21, 2013. The order denied the motion of defendants Elizabeth Marie Love, M.D. and Geriatric Associates, LLP, for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 24, 2014,

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

440

CA 13-01985

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

IN THE MATTER OF ATLANTIC STATES LEGAL FOUNDATION, INC., PETITIONER-APPELLANT,

V ORDER

TOWN OF WEST MONROE AND TOWN OF HASTINGS, RESPONDENTS-RESPONDENTS.

NOLAN & HELLER, LLP, ALBANY (CARL G. DWORKIN OF COUNSEL), FOR PETITIONER-APPELLANT.

GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE (GARY T. KELDER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered July 2, 2013 in a CPLR article 78 proceeding. The judgment granted the motion of respondents to dismiss and dismissed the verified petition.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

441

CA 13-00404

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

IN THE MATTER OF LUIS VILLEGAS,
PETITIONER-APPELLANT,

V ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered January 23, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Robles v Evans*, 100 AD3d 1455, 1455).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

444

KA 12-01165

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS MCCULLARS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered November 30, 2010. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20). We agree with defendant that the waiver of the right to appeal is invalid because "the minimal inquiry made by County Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Box*, 96 AD3d 1570, 1571, *lv denied* 19 NY3d 1024 [internal quotation marks omitted]; *see People v Hamilton*, 49 AD3d 1163, 1164; *People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767). Indeed, on this record there is no basis upon which to conclude that the court ensured "that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

445

KA 12-01875

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHYTRECE BANKS, 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 (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered September 4, 2012. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the third degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of grand larceny in the third degree (Penal Law § 155.35) and criminal possession of a controlled substance in the third degree (§ 220.16 [12]). We agree with defendant that the waiver of the right to appeal does not encompass her challenge to the severity of the sentence inasmuch as " 'no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal' with respect to [her] conviction that [she] was also waiving [her] right to appeal any issue concerning the severity of the sentence" (*People v Peterson*, 111 AD3d 1412, 1412; *see People v Maracle*, 19 NY3d 925, 928). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

449

KA 12-00549

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK LANEY, DEFENDANT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Genesee County (Eric R. Adams, A.J.), rendered February 29, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the second degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed a sentence of incarceration is unanimously dismissed and the judgment is otherwise affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal contempt in the second degree (Penal Law § 215.50 [3]). Defendant's contention that his plea was not knowingly, voluntarily and intelligently entered is unpreserved for our review because defendant did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Davis*, 45 AD3d 1357, 1357-1358, *lv denied* 9 NY3d 1005). This case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666), "inasmuch as nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea" (*People v Lewandowski*, 82 AD3d 1602, 1602). In any event, there is no merit to defendant's contention.

We dismiss the appeal to the extent that defendant challenges the severity of the sentence inasmuch as he has completed serving his sentence, and that part of the appeal therefore is moot (*see People v Pratchett*, 90 AD3d 1678, 1679, *lv denied* 18 NY3d 997; *People v Mackey*, 79 AD3d 1680, 1681, *lv denied* 16 NY3d 860).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

451

KA 13-01329

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

NORRIS E. BEASLEY, JR., 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 Erie County Court (Thomas P. Franczyk, J.), rendered April 12, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed for reasons stated in the decision at suppression court, and the matter is remitted to Erie County Court for proceedings pursuant to CPL 460.50 (5).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

456

CAF 13-01032

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

IN THE MATTER OF CHRISTOPHER A. SHARP,
PETITIONER-APPELLANT,

V ORDER

RACHEL ALDRICH, RESPONDENT-RESPONDENT.

WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR PETITIONER-APPELLANT.

SOUTHERN TIER LEGAL SERVICES, A DIVISION OF LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., OLEAN (JEFFREY M. REED OF COUNSEL), FOR RESPONDENT-RESPONDENT.

RACHEL L. MITCHELL, ATTORNEY FOR THE CHILD, GOWANDA.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered May 22, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

464

TP 13-01967

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

IN THE MATTER OF RICHARD PEREZ, PETITIONER,

V ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered October 29, 2013) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

465

TP 13-01829

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

IN THE MATTER OF GREGORY WILLIAMS, PETITIONER,

V ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered October 8, 2013) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the amended petition is dismissed.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

466

KA 12-01524

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES A. WHITFIELD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered June 6, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree (four counts), unauthorized use of a motor vehicle in the first degree and reckless driving.

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, four counts of burglary in the third degree (Penal Law § 140.20). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

467

KA 13-00263

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL A. COOKHORNE, DEFENDANT-APPELLANT.

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered November 19, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [3]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the fine that was imposed as part of his sentence. Although the record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), we conclude that the valid waiver of the right to appeal does not encompass the challenge to the severity of the fine because County Court failed to advise defendant of the potential range of any fine that could be imposed as part of his sentence (*see generally People v Newman*, 21 AD3d 1343, 1343; *People v McLean*, 302 AD2d 934, 934), and there was no specific promise as to the amount of a fine at the time of the waiver (*cf. People v Semple*, 23 AD3d 1058, 1059, *lv denied* 6 NY3d 852). Nevertheless, on the merits, we reject defendant's challenge to the severity of the fine.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

468

KA 12-01732

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

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

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 Supreme Court, Erie County (M. William Boller, A.J.), rendered August 16, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree.

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

Memorandum: In each of these three appeals, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [1], [5]). Although we agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of the sentences imposed inasmuch as there is no indication in the record of the plea allocution that defendant was waiving his right to appeal the severity of the sentences (*see People v Maracle*, 19 NY3d 925, 928; *People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076), we nevertheless conclude that the sentences are not unduly harsh or severe.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

469

KA 12-01851

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

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

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 Supreme Court, Erie County (M. William Boller, A.J.), rendered August 16, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree.

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

Same Memorandum as in *People v Doblinger* ([appeal No. 1] ___ AD3d ___ [May 2, 2014]).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

470

KA 12-01852

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. DOBLINGER, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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 Supreme Court, Erie County (M. William Boller, A.J.), rendered August 16, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree.

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

Same Memorandum as in *People v Doblinger* ([appeal No. 1] ___ AD3d ___ [May 2, 2014]).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

473

KA 12-01250

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW CRAIG, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DANIELLE N. D'ABATE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered June 4, 2012. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, we conclude that the evidence, viewed in the light most favorable to the People, is legally sufficient to disprove his defense of temporary and lawful possession of the weapon (*see People v Bailey*, 111 AD3d 1310, 1311; *People v Lucas*, 94 AD3d 1441, 1441, *lv denied* 19 NY3d 964; *see generally People v Bleakley*, 69 NY2d 490, 495). Defendant found a loaded gun in a park and took the gun with him when his father drove him to his mother's house. A police officer found the gun concealed in a bag of clothing after initiating a traffic stop of the vehicle operated by defendant's father. Although defendant claimed that he intended to turn the gun in at a church's gun buy back program, defendant's retention of the gun beyond opportunities to hand it over to the police is " 'utterly at odds with any claim of innocent possession' " (*People v Griggs*, 108 AD3d 1062, 1063, *lv denied* 21 NY3d 1074; *see People v Ward*, 104 AD3d 1323, 1324-1325, *lv denied* 21 NY3d 1011; *People v Smith*, 63 AD3d 1655, 1655, *lv denied* 13 NY3d 839).

We further reject defendant's contention that the verdict is against the weight of the evidence. County Court could reasonably have found that defendant retained possession of the gun despite having the opportunity to turn it over to lawful authorities (*see People v Hicks*, 110 AD3d 1488, 1488; *Griggs*, 108 AD3d at 1063).

Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

474

KAH 12-01264

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
LEROY PEOPLES, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES, RESPONDENT-RESPONDENT.

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

LEROY PEOPLES, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered May 29, 2012 in a habeas corpus proceeding. The judgment denied the petition.

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

Memorandum: Petitioner commenced this habeas corpus proceeding, contending that the statute of limitations had expired on some of the crimes charged in the indictment, Supreme Court lacked jurisdiction because of his age at the time some of his crimes were committed, and he was illegally extradited from Connecticut to New York. We conclude that Supreme Court properly denied the petition. "Habeas corpus relief is unavailable because petitioner's contention in support of the petition 'could have been, or [was], raised on direct appeal or by a motion pursuant to CPL article 440' " (*People ex rel. Lewis v Graham*, 96 AD3d 1423, 1423, *lv denied* 19 NY3d 813). We note, in any event, contrary to petitioner's contention, that he "failed to 'present factual issues that would entitle [him] to an evidentiary hearing' " (*People ex rel. Mitchell v Cully*, 63 AD3d 1679, 1679, *lv denied* 13 NY3d 708; *see People ex rel. Jackson v New York State Dept. of Correctional Servs.*, 253 AD2d 919, 919). Petitioner's remaining contentions are not properly before us because they are raised for the first time on appeal (*see People ex rel. Victory v Travis*, 288 AD2d 932, 934, *lv denied* 97 NY2d 611).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

479

CAF 13-00315

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

IN THE MATTER OF CORNELIUS L.N., JR. AND
LOYATIE L.L.N.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CORNELIUS N., SR., RESPONDENT-APPELLANT.

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

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (PETER A. ESSLEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

STEVEN B. LEVITSKY, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered January 30, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: Respondent father appeals from an order that terminated his parental rights with respect to the subject children. The father does not dispute that he violated the terms and conditions of the suspended judgment, but he contends that Family Court should have extended the suspended judgment for another year. However, the father "failed to demonstrate that 'exceptional circumstances' required extension of the suspended judgment" (*Matter of Demario J.*, 61 AD3d 1437, 1438, quoting Family Ct Act § 633 [b]; *see Matter of Lestariyah A. [Demetrious L.]*, 89 AD3d 1420, 1420-1421). Thus, the court did not abuse its discretion in refusing to extend the suspended judgment (*see Lestariyah A.*, 89 AD3d at 1420-1421; *Matter of Jonathan J.*, 47 AD3d 992, 993, *lv denied* 10 NY3d 706).

The father's contention that petitioner did not make significant efforts to reunite him with the children is not properly before us inasmuch as "it was conclusively determined in the prior proceedings to terminate [the father's] parental rights" (*Matter of Ronald O.*, 43 AD3d 1351, 1351). We note in any event that the father admitted to the permanent neglect of the children and consented to the entry of the suspended judgment, "and thus no appeal would lie therefrom

because [the father was] not aggrieved, based on [his] consent" (*id.* at 1352; *see Matter of Moniea C.*, 9 AD3d 888, 888; *Matter of Cherilyn P.*, 192 AD2d 1084, 1084, *lv denied* 82 NY2d 652).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

480

CA 13-01415

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

IN RE: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION.

LARRY P. LANG AND BARBARA LANG,
PLAINTIFFS-RESPONDENTS,

V ORDER

CRANE CO., ROPER PUMP COMPANY,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

K&L GATES LLP, NEW YORK CITY (ANGELA DIGIGLIO OF COUNSEL), FOR DEFENDANT-APPELLANT CRANE CO.

MALABY & BRADLEY, LLC, NEW YORK CITY (DAVID P. SCHAFFER OF COUNSEL), FOR DEFENDANT-APPELLANT ROPER PUMP COMPANY.

WEITZ & LUXENBERG, PC, NEW YORK CITY (PIERRE RATZKI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (John P. Lane, J.H.O.), entered September 28, 2012. The order, among other things, denied the motions of defendants Roper Pump Company and Crane Co. to dismiss plaintiffs' complaint against them.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

482

CA 13-00573

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

IN THE MATTER OF DAVID ECHEVARRIA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered January 14, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the amended petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination after a tier III hearing that he violated certain inmate rules, arising from an incident in which he was charged with participating in a fight that took place in a prison exercise yard. He appeals from a judgment dismissing the petition. Contrary to petitioner's contention, the "fact that the Hearing Officer had been the officer of the day at the time of the incident in question [does not] require disqualification pursuant to regulations of the Department of [Corrections and Community Supervision]" (*Matter of Marquez v Mann*, 188 AD2d 956, 956; *see Matter of Parker v Fischer*, 70 AD3d 1086, 1087).

Petitioner further contends that the Hearing Officer erred in making a determination without reviewing certain evidence, and that petitioner was prejudiced by the deficient prehearing assistance provided by the correction officer assigned to assist him. Petitioner failed to exhaust his administrative remedies with respect to those contentions because he failed to raise them in his administrative appeal, and this Court "has no discretionary authority to reach [them]" (*Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071, *appeal*

dismissed 81 NY2d 834).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

484

CA 13-00391

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

PETER A. PRIOLA, III, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ATTORNEY SHEILA FALLON, MEGAN FALLON AND
FALLON, FALLON & BIGSBY, LLP,
DEFENDANTS-RESPONDENTS.

MORGAN LAW FIRM, P.C., SYRACUSE (WILLIAM R. MORGAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (PAUL G. FERRARA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered October 29, 2012. The order granted the motion of defendants for summary judgment dismissing the amended complaint.

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

Memorandum: In this legal malpractice action, plaintiff appeals from an order granting defendants' motion for summary judgment dismissing the amended complaint on the ground that, inter alia, the action was time-barred. Plaintiff contends that Supreme Court erred in granting the motion because the statute of limitations was tolled by the continuous representation doctrine. We reject that contention. "A cause of action for legal malpractice accrues when the malpractice is committed" (*Elstein v Phillips Lytle, LLP*, 108 AD3d 1073, 1073 [internal quotation marks omitted]). Here, defendants established that any malpractice occurred, at the latest, in 2003 and thus made a prima facie showing that the action was time-barred (*see International Electron Devices [USA] LLC v Menter, Rudin & Trivelpiece, P.C.*, 71 AD3d 1512, 1512). "The burden then shifted to plaintiff[] to raise a triable issue of fact whether the statute of limitations was tolled by the continuous representation doctrine" (*id.*; *see Macaluso v Del Col*, 95 AD3d 959, 960), and plaintiff failed to meet that burden inasmuch as he failed to present the requisite " 'clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney' " to toll the statute of limitations (*Kanter v Pieri*, 11 AD3d 912, 913; *see Guerra Press, Inc. v Campbell & Parlato, LLP*, 17 AD3d 1031, 1032-1033). In light of our determination, we do

not address plaintiff’s remaining contentions.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

485

CA 13-00387

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

SUSAN GATELY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES GATELY, DEFENDANT-APPELLANT.

THOMAS A. PALMER, RECEIVER, RESPONDENT.
(APPEAL NO. 1.)

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

DAMON MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), AND J. ADAMS & ASSOCIATES, PLLC, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

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

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered April 3, 2012. The order approved the sales contract for real property located at 8 Mountainview, Ellicottville.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from orders that, respectively, approved a contract to sell the parties' real property and vacated a notice of pendency filed by defendant against plaintiff and the receiver. Defendant contends in appeal No. 1 that Supreme Court abused its discretion in approving the sale of the parties' real property. We note, however, that the property in question was sold before defendant perfected his appeal, and he did not seek a stay of the order approving the sale (*see Gabriel v Prime*, 30 AD3d 955, 956). "[U]nder the well-established doctrine of merger, provisions in a contract for the sale of real estate merge into the deed and are thereby extinguished absent the parties' demonstrated intent that a provision shall survive transfer of title" (*Matter of Mattar v Heckl*, 77 AD3d 1390, 1391 [internal quotation marks omitted]). Thus, the contract of sale has merged into the deed, and the contract may not be rescinded (*see id.*). "Where, as here, 'the rights of the parties cannot be affected by the determination of [the] appeal,' the appeal must be dismissed as moot" (*id.*; *see generally Matter of Pray v Clinton County*, 101 AD3d 1567, 1567).

Defendant contends in appeal No. 2 that the court erred in vacating his notice of pendency. In view of our determination in appeal No. 1, we likewise dismiss the appeal from the order in appeal No. 2 (*see Mattar*, 77 AD3d at 1391). We note in any event that defendant's " 'claim that [the] real property is a marital asset subject to distribution does not, by itself, establish grounds for a [notice of pendency]' . . . , inasmuch as a claim for equitable distribution will not necessarily affect the title to, or possession, use or enjoyment of, the subject real property" (*Jolley v Lando*, 99 AD3d 1256, 1256; *see Fakiris v Fakiris*, 177 AD2d 540, 543).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

486

CA 13-00388

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

SUSAN GATELY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES GATELY, DEFENDANT-APPELLANT.

THOMAS A. PALMER, RECEIVER, RESPONDENT.
(APPEAL NO. 2.)

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

DAMON MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), AND J. ADAMS & ASSOCIATES, PLLC, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

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

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered May 3, 2012. The order vacated a notice of pendency filed by defendant against plaintiff and the receiver.

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

Same Memorandum as in *Gately v Gately* ([appeal No. 1] ___ AD3d ___ [May 2, 2014]).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

488

TP 13-01927

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

IN THE MATTER OF TYRONE HOUSTON, PETITIONER,

V ORDER

MICHAEL SHEAHAN, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT.

TYRONE HOUSTON, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered October 23, 2013) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

489

KA 12-01772

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN A. MCNEW, DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, 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 (Matthew J. Murphy, III, J.), rendered July 9, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sexual act in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal sexual act in the first degree (Penal Law §§ 110.00, 130.50 [2]). Contrary to defendant's contention, his waiver of the right to appeal was knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256; *People v Pratt*, 77 AD3d 1337, 1337, *lv denied* 15 NY3d 955). The valid waiver by defendant of the right to appeal encompasses his challenge to County Court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833; *People v Rodriguez*, 111 AD3d 1310, 1310), and the severity of the sentence (*see Lopez*, 6 NY3d at 255-256). Contrary to defendant's further contention, we conclude that his guilty plea was knowingly, voluntarily, and intelligently entered. Defendant's assertions that he did not have sufficient time to consider the plea offer and that he was coerced into taking the plea because he believed that the People would pursue charges against his son are belied by his statements during the plea colloquy (*see People v Allen*, 99 AD3d 1252, 1252). In addition, we note that " 'a plea agreement is not inherently coercive or invalid simply because it affords a benefit to a loved one, as long as the plea itself is knowingly, voluntarily and intelligently made' " (*People v Capoccetta*, 60 AD3d 1382, 1382, *lv denied* 13 NY3d 858). Finally, we note that the certificate of conviction incorrectly recites that defendant was convicted of attempted criminal sexual act under Penal Law §§ 110.00 and 130.50 (1), and it must therefore be amended to reflect that he was convicted under Penal Law §§ 110.00 and 130.50 (2) (*see generally People v*

Saxton, 32 AD3d 1286, 1286-1287).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

490

KA 12-01740

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TUN AUNG, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO 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 (Deborah A. Haendiges, J.), rendered May 31, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted strangulation in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, the superior court information is dismissed and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted strangulation in the second degree (Penal Law §§ 110.00, 121.12), defendant contends that the superior court information (SCI) was jurisdictionally defective. We agree. The two counts charged in the SCI were not offenses for which defendant was held for action of a grand jury (*see* CPL 195.20), i.e., those two counts were not included in the felony complaint, and they were not lesser included offenses of an offense charged in the felony complaint (*see People v Pierce*, 14 NY3d 564, 571; *People v Menchetti*, 76 NY2d 473, 477). "[T]he primary purpose of the proceedings upon such felony complaint is to determine whether the defendant is to be held for the action of a grand jury with respect to the charges contained therein" (CPL 180.10 [1]). Thus, " 'the waiver procedure is triggered by the defendant being held for [g]rand [j]ury action on charges contained in a felony complaint . . . and it is in reference to those charges that its availability must be measured' " (*Pierce*, 14 NY3d at 571, quoting *People v D'Amico*, 76 NY2d 877, 879). Inasmuch as the SCI to which defendant pleaded guilty did not "include at least one offense that was contained in the felony complaint," it was jurisdictionally defective (*People v Zanghi*, 79 NY2d 815, 818). That defect does not require preservation, and it survives defendant's waiver of the right to appeal and his guilty plea (*see id.* at 817; *People v Stevenson*, 107

AD3d 1576, 1576; *People v Cieslewicz*, 45 AD3d 1344, 1345).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

491

KA 12-01619

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER BOSWELL, SR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered July 5, 2011. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [3]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of promoting prison contraband in the first degree (§ 205.25 [1]). In appeal No. 3, defendant appeals from a judgment convicting him upon his plea of guilty of aggravated criminal contempt (§ 215.52 [1]). Defendant contends with respect to each appeal that he was denied effective assistance of counsel. That contention does not survive his guilty plea in any appeal inasmuch as "defendant failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance" (*People v Durodoye*, 113 AD3d 1130, 1131 [internal quotation marks omitted]; *see People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912). To the extent that defendant's contention involves matters outside the record on appeal, we note that it must be raised by way of a motion pursuant to CPL 440.10 (*see People v Russell*, 83 AD3d 1463, 1465, *lv denied* 17 NY3d 800).

We reject defendant's further contention in each appeal that the court's failure to address his request for substitution of counsel requires reversal. In support of his request, defendant made only conclusory assertions that "did not 'suggest a serious possibility of

good cause for substitution' " (*People v Thagard*, 28 AD3d 1097, 1098, *lv denied* 7 NY3d 795; *see People v Hyson*, 111 AD3d 1387, 1388). In any event, defendant abandoned his request when he " 'decid[ed] . . . to plead guilty while still being represented by the same attorney' " (*People v Guantero*, 100 AD3d 1386, 1387, *lv denied* 21 NY3d 1004; *see People v Morris*, 94 AD3d 1450, 1451, *lv denied* 19 NY3d 976; *People v Munzert*, 92 AD3d 1291, 1292-1293).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

492

KA 13-00049

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER BOSWELL, SR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered July 5, 2011. The judgment convicted defendant, upon his plea of guilty, of promoting prison contraband in the first degree.

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

Same Memorandum as in *People v Boswell* ([appeal No. 1] ___ AD3d ___ [May 2, 2014]).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

493

KA 13-00050

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER BOSWELL, SR., DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

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

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered July 5, 2011. The judgment convicted defendant, upon his plea of guilty, of aggravated criminal contempt.

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

Same Memorandum as in *People v Boswell* ([appeal No. 1] ___ AD3d ___ [May 2, 2014]).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

494

KA 12-00252

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CLAYMOND E. TYUS, 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 (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered December 15, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

497

KA 11-00482

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADRIAN RILEY, DEFENDANT-APPELLANT.

JOHN A. HERBOWY, ROME, FOR DEFENDANT-APPELLANT.

ADRIAN RILEY, DEFENDANT-APPELLANT PRO SE.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (JACQUELYN M. ASNOE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered January 28, 2009. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]). Contrary to defendant's contention, the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction. In addition, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Both the victim and defendant testified at trial, and we perceive no basis in the record for disturbing the jurors' credibility determinations (*see People v Ennis*, 107 AD3d 1617, 1618, *lv denied* 22 NY3d 1040; *People v Burgos*, 90 AD3d 1670, 1671, *lv denied* 19 NY3d 862).

By failing to object to County Court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his contention in his main and pro se supplemental briefs that he was denied a fair trial based on the ruling (*see People v Tolliver*, 93 AD3d 1150, 1151, *lv denied* 19 NY3d 968). In any event, we conclude that the court did not abuse its discretion in allowing the prosecutor to question defendant about his conviction of criminal possession of a weapon in the fourth degree even though he committed that crime after the incident herein (*see*

People v Pavao, 59 NY2d 282, 292 n 3; *People v Davis*, 243 AD2d 831, 833). That conviction demonstrated defendant's "willingness to place his own interests above those of society" (*People v Hammond*, 84 AD3d 1726, 1726-1727, *lv denied* 17 NY3d 816; *see People v Cosby*, 82 AD3d 63, 68, *lv denied* 16 NY3d 857).

Defendant's further contention in his main and pro se supplemental briefs that he was denied a fair trial by prosecutorial misconduct on summation is preserved for our review with respect to only one instance of alleged misconduct (*see* CPL 470.05 [2]). In any event, we conclude with respect to the unpreserved instances of alleged misconduct that the prosecutor's comments were fair response to defense counsel's summation (*see People v McIver*, 107 AD3d 1591, 1592, *lv denied* 22 NY3d 997; *People v Roman*, 85 AD3d 1630, 1632, *lv denied* 17 NY3d 821). With respect to the preserved instance of alleged misconduct, we agree with defendant that the prosecutor improperly appealed to the jurors' sympathies (*see People v Fisher*, 18 NY3d 964, 967; *People v Ballerstein*, 52 AD3d 1192, 1194), but we conclude that the court's prompt curative instruction was sufficient to alleviate any prejudice to defendant (*see People v Chatt*, 77 AD3d 1285, 1287, *lv denied* 17 NY3d 793; *People v Cooley*, 50 AD3d 1548, 1549, *lv denied* 10 NY3d 957).

Defendant contends in his main and pro se supplemental briefs that he was denied effective assistance of counsel. Defendant's contentions regarding defense counsel's failure to conduct a proper investigation are based on information outside the record on appeal and must be raised by way of a motion pursuant to CPL 440.10 (*see People v Russell*, 83 AD3d 1463, 1465, *lv denied* 17 NY3d 800). Contrary to defendant's contention, he was not denied effective assistance of counsel based on defense counsel's failure to request a bill of particulars (*see People v Brink*, 30 AD3d 1014, 1015, *lv denied* 7 NY3d 810), or failure to call an expert witness to testify (*see People v Aikey*, 94 AD3d 1485, 1487, *lv denied* 19 NY3d 956; *People v Nelson*, 94 AD3d 1426, 1426, *lv denied* 19 NY3d 999). We conclude on the record before us that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant contends in his pro se supplemental brief that the court erred in refusing to dismiss the indictment on the ground that the prosecutor allowed the victim to testify before the grand jury without determining her testimonial capacity. Inasmuch as "[d]efendant was convicted upon legally sufficient trial evidence, . . . his contention with respect to the competency of the evidence before the grand jury is not reviewable upon an appeal from the ensuing judgment of conviction" (*People v Pulvino*, 115 AD3d 1220, 1221 [internal quotation marks omitted]; *see People v Laws*, 41 AD3d 1205, 1206, *lv denied* 9 NY3d 991). We reject defendant's further contention in his pro se supplemental brief that the court abused its discretion in precluding defendant from cross-examining witnesses regarding other allegations of sexual abuse made by the victim (*see People v Lane*, 47 AD3d 1125, 1127-1128, *lv denied* 10 NY3d 866; *People v Smith*, 281 AD2d 957, 958, *lv denied* 96 NY2d 868). "The preclusion of such questioning

does not constitute an abuse of discretion where, as here, defendant made no showing that the prior allegation[s were] false" (*Smith*, 281 AD2d at 958).

Finally, contrary to defendant's contention in his main brief, the sentence is not unduly harsh and severe.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

499

KA 12-01267

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARMANDO R. TORRES, ALSO KNOWN AS “MONDO,”
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered June 28, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [3]). We reject defendant’s contention that County Court abused its discretion in denying his motion to withdraw his plea without a hearing (*see People v Merritt*, 115 AD3d 1250, 1250-1251; *see generally People v Mitchell*, 21 NY3d 964, 966). Defendant’s belated and unsupported claims of innocence and coercion were insufficient to justify a hearing (*see People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746). We reject defendant’s further contention that his plea was jurisdictionally defective. Defendant pleaded guilty to the crime charged in the indictment (*cf. People v Castillo*, 8 NY3d 959, 960-961) and, by his guilty plea, defendant forfeited any challenge to the alleged amendment of the indictment (*see People v Martinez*, 52 AD3d 68, 71, *lv denied* 11 NY3d 791). Defendant’s valid waiver of the right to appeal precludes review of the factual sufficiency of the plea allocution and forecloses defendant’s challenge to the severity of his sentence (*see People v Talley*, 112 AD3d 1347, 1347; *People v Nash*, 38 AD3d 684, 684, *lv denied* 9 NY3d 848). While defendant’s contention that his plea was not voluntary survives the waiver of the right to appeal and was preserved by his motion to withdraw his plea, we conclude that the contention is without merit inasmuch as it is belied by the record

(*see Merritt*, 115 AD3d at 1251).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

501

KAH 13-00585

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DWIGHT M. DILBERT, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARK BRADT, SUPERINTENDENT, ATTICA CORRECTIONAL
FACILITY, RESPONDENT-RESPONDENT.

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered January 2, 2013 in a habeas corpus proceeding. The judgment denied the petition.

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus on the ground that the evidence adduced at trial was legally insufficient to support the conviction of murder in the second degree (Penal Law § 125.25 [2] [depraved indifference]) inasmuch as the evidence established that his acts against the victim were intentional and manifested an intent to kill. We conclude that Supreme Court properly denied the petition. " 'Habeas corpus relief is not an appropriate remedy for asserting claims that were or could have been raised on direct appeal or in a CPL article 440 motion' " (*People ex rel. Martinez v Graham*, 98 AD3d 1312, 1312, *lv denied* 20 NY3d 853; *see People ex rel. Smith v Graham*, 109 AD3d 1113, 1113; *People ex rel. Lewis v Graham*, 96 AD3d 1423, 1423, *lv denied* 19 NY3d 813).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

507

CA 13-01513

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

GRAMERCY PARK LLC, PLAINTIFF-APPELLANT,

V ORDER

TOWN OF AMHERST, DEFENDANT-RESPONDENT.

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

DEMARIE & SCHOENBORN, P.C., BUFFALO (JOSEPH DEMARIE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered February 22, 2013. The judgment dismissed the complaint after a nonjury trial.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

510.1

KA 13-00253

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DANIEL JONES, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), dated January 9, 2013. The order denied the motion of defendant to vacate the judgment of conviction pursuant to CPL 440.10.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

511

KA 12-01817

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON PAUL, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered July 23, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted 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 attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that the order of protection is unduly harsh. We note at the outset that defendant's contention survives the valid waiver of the right to appeal because the order of protection was not a part of the plea agreement, and an order of protection is not a part of the sentence (*see People v Lilley*, 81 AD3d 1448, 1448, *lv denied* 17 NY3d 860). Nevertheless, we conclude that it lacks merit (*see People v Tate*, 83 AD3d 1467, 1467-1468). Defendant further contends that the order of protection should not have been issued because to his knowledge the victim did not request that it be issued. We reject that contention inasmuch as Supreme Court had the authority to issue the order even in the absence of the victim's consent (*see Lilley*, 81 AD3d at 1448).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

518

CAF 13-00003

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

IN THE MATTER OF TERRANCE MACK,
PETITIONER-APPELLANT,

V ORDER

KAYLA GRIFFIN, RESPONDENT-RESPONDENT.

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

SHIRLEY A. GORMAN, BROCKPORT, FOR RESPONDENT-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered December 13, 2012 in a proceeding pursuant to Family Court Act article 6. The order denied the petition for visitation.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

524

CA 13-01972

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

JAMES M. HELD, ET AL., PLAINTIFFS,

V ORDER

THE PIKE COMPANY, ET AL., DEFENDANTS.

THE PIKE COMPANY, AMTHOR STEEL, INC. AND CATHOLIC HEALTH SYSTEM, INC., THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

CME ASSOCIATES, INC., THIRD-PARTY DEFENDANT-APPELLANT.

GOERGEN, MANSON & MCCARTHY, BUFFALO (JOSEPH G. GOERGEN, II, OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

PILLINGER MILLER TARALLO, LLP, ELMSFORD (JEFFREY D. SCHULMAN OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered January 14, 2013. The order, among other things, denied the motion of third-party defendant for summary judgment dismissing the amended third-party complaint.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

531.1

TP 13-01602

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

IN THE MATTER OF RASHAD RUHANI, PETITIONER,

V ORDER

ALBERT PRACK, DEPUTY COMMISSIONER, INMATE DISCIPLINARY PROGRAM AND SPECIAL HOUSING UNIT, RESPONDENT.

RASHAD RUHANI, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered September 4, 2013) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

534

TP 13-01968

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF MARK ROBINSON, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered October 29, 2013) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

539

KA 13-00048

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GUNNER NORTHRUP, DEFENDANT-APPELLANT.

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

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (MARSHALL A. KELLY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered December 21, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]). We conclude that defendant's waiver of the right to appeal is valid (*see generally People v Bradshaw*, 18 NY3d 257, 264; *People v Lopez*, 6 NY3d 248, 256), and that it encompasses his challenge to the amount of restitution ordered because "the exact amount of restitution was included in the plea agreement" (*People v Thomas*, 77 AD3d 1325, 1326, *lv denied* 16 NY3d 800; *see People v Gordon*, 43 AD3d 1330, 1331, *lv denied* 9 NY3d 1006). In any event, defendant failed to preserve for our review his challenge to the amount of restitution inasmuch as he did not object to that amount at either the plea proceeding or at the time of sentencing, and he did not request a hearing on that issue (*see People v McCarthy*, 83 AD3d 1533, 1534, *lv denied* 17 NY3d 819; *People v Sweeney*, 79 AD3d 1789, 1789, *lv denied* 16 NY3d 900; *see also People v Horne*, 97 NY2d 404, 414 n 3).

The appeal waiver, however, does not encompass defendant's contention concerning the denial of his request for youthful offender status inasmuch as "[n]o mention of youthful offender status was made before defendant waived his right to appeal during the plea colloquy" (*People v Anderson*, 90 AD3d 1475, 1476, *lv denied* 18 NY3d 991; *see People v Jones*, 107 AD3d 1611, 1611, *lv denied* 21 NY3d 1043, *reconsideration denied* 22 NY3d 956). In any event, " '[h]aving considered the facts and circumstances of this case,' " we reject defendant's contention that County Court abused its discretion in

denying him youthful offender status (*People v Guppy*, 92 AD3d 1243, 1243, *lv denied* 19 NY3d 961; *see People v Potter*, 13 AD3d 1191, 1191, *lv denied* 4 NY3d 889; *see generally* CPL 720.20 [1] [a]), and we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see generally People v Shrubsall*, 167 AD2d 929, 930-931). Finally, the valid appeal waiver forecloses any challenge by defendant to the severity of the sentence (*see Lopez*, 6 NY3d at 255; *cf. People v Adams*, 94 AD3d 1428, 1429, *lv denied* 19 NY3d 970; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

544

CAF 13-00544

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF LUCILLE A. SOLDATO, COMMISSIONER
OF SOCIAL SERVICES, ASSIGNEE, ON BEHALF OF
CORRINE MURDOCK, PETITIONER-RESPONDENT,

V ORDER

KENNEDY HYDE, RESPONDENT-APPELLANT.

SCOTT T. GODKIN, UTICA, FOR RESPONDENT-APPELLANT.

RICHARD P. FERRIS, UTICA, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered March 14, 2013 in a proceeding pursuant to Family Court Act article 4. The order, among other things, found respondent to be in willful violation of an order of support.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

546

CAF 13-00825

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF AGNES SARAGO,
PETITIONER-RESPONDENT,

V ORDER

JOSEPH SARAGO, RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

LEGAL SERVICES FOR THE ELDERLY, DISABLED OR DISADVANTAGED OF WESTERN NEW YORK, INC., BUFFALO (DAVID A. SHAPIRO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered April 11, 2013 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

551

CA 13-01749

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, VALENTINO, AND WHALEN, JJ.

ROBBY M. ROBINSON, PLAINTIFF-RESPONDENT,

V ORDER

MEDART, INC., DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MICHAEL PAUL RINGWOOD OF COUNSEL), FOR DEFENDANT-APPELLANT.

COTE & VAN DYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered June 26, 2013. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 16, 2014,

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

554

TP 12-02003

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

IN THE MATTER OF RONNIE COVINGTON, PETITIONER,

V ORDER

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

RONNIE COVINGTON, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered October 23, 2012) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

559

KA 12-01078

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL F.-S., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 15, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

560

KA 12-01079

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL F., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an adjudication of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 15, 2012. The adjudication revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

561

KA 12-01080

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL F., DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an adjudication of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 15, 2012. The adjudication revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

563

CAF 12-01824

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

IN THE MATTER OF LEVON D. MASICH,
PETITIONER-APPELLANT,

V ORDER

ERICA PETERMAN, RESPONDENT-RESPONDENT.

SUSAN P. REINECKE, CLARENCE, FOR PETITIONER-APPELLANT.

DONNA L. HASLINGER, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Rosalie S. Bailey, J.), entered May 3, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner visitation with the subject child.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

565

CAF 13-01887

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

IN THE MATTER OF BRUCE J. SCROXTON,
PETITIONER-RESPONDENT,

V ORDER

KAREN SYKES, RESPONDENT-APPELLANT.

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

JOHN R. SAMUELSON, JAMESTOWN, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Chautauqua County (Paul G. Buchanan, A.J.), entered July 2, 2013 in a proceeding pursuant to Family Court Act article 6. The order granted the petition seeking a modification of visitation.

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

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

578

CA 13-01943

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

SEVEN CORNERS SHOPPING CENTER FALLS CHURCH, VA. LIMITED PARTNERSHIP, PLAINTIFF-RESPONDENT,

V ORDER

TRACEY LING, DEFENDANT-APPELLANT, ET AL., DEFENDANT.

FREEMAN LEWIS LLP, NEW YORK CITY (ROBERT Y. LEWIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (DALE A. WORRALL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered March 21, 2013 in a breach of contract action. The judgment awarded plaintiff money damages against defendant Tracey Ling.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on February 12 and 13, 2014,

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

Entered: May 2, 2014

Frances E. Cafarell
Clerk of the Court

MOTION NO. (484/97) KA 04-00304. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EARL STONE, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND VALENTINO, JJ. (Filed May 2, 2014.)

MOTION NO. (1806/98) KA 97-05046. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT C. HINTON, JR., DEFENDANT-APPELLANT. –- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed May 2, 2014.)

MOTION NO. (1991/00) KA 00-01659. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM CRENSHAW, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, SCONIERS, AND WHALEN, JJ. (Filed May 2, 2014.)

MOTION NO. (1541/02) KA 00-01679. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT HINTON, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed May 2, 2014.)

MOTION NO. (1542/02) KA 00-00528. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT HINTON, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed May 2, 2014.)

MOTION NO. (1203/08) KA 07-02291. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAVID C. WILLIAMS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed May 2, 2014.)

MOTION NO. (485/10) KA 08-01015. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LEE A. GLENN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed May 2, 2014.)

MOTION NO. (310/12) KA 08-00865. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LESLIE BLAIR, ALSO KNOWN AS JAHMAN, ALSO KNOWN AS DRED, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed May 2, 2014.)

MOTION NO. (727/12) KA 11-00376. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAY PECK, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed May 2, 2014.)

MOTION NO. (1327/12) KA 10-01107. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ISIAH WILLIAMS, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed May 2, 2014.)

MOTION NO. (1051/13) KA 12-02392. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TODD R. HEATLEY, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, SCONIERS, AND VALENTINO, JJ. (Filed May 2, 2014.)

MOTION NO. (1101/13) KAH 12-01071. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. KESTER SANDY, PETITIONER-APPELLANT, V HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed May 2, 2014.)

MOTION NOS. (1109-1110/13) CA 13-00340. -- BROWN & BROWN, INC. AND BROWN & BROWN OF NEW YORK, INC., PLAINTIFFS-RESPONDENTS-APPELLANTS, V THERESA A. JOHNSON AND LAWLEY BENEFITS GROUP, LLC, DEFENDANTS-APPELLANTS-RESPONDENTS. (APPEAL NO. 1.) CA 13-00341. -- BROWN & BROWN, INC. AND BROWN & BROWN OF NEW YORK, INC., PLAINTIFFS-RESPONDENTS, V THERESA A. JOHNSON AND LAWLEY BENEFITS GROUP, LLC, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.) -- Motion for reargument is denied. Motion for leave to appeal to the Court of Appeals is granted. Cross motion for leave to appeal to the Court of Appeals is denied. PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed May 2, 2014.)

MOTION NO. (1304/13) CA 13-00161. -- ERIC M. FISHER AND DENISE E. FISHER,

PLAINTIFFS-RESPONDENTS, V NATHANIEL C. HILL AND MELINDA J. HILL, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeal denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ. (Filed May 2, 2014.)

MOTION NO. (1325/13) CA 13-00358. -- PAUL FOTI, PLAINTIFF-APPELLANT, V GINA FOTI, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, VALENTINO, AND WHALEN, JJ. (Filed May 2, 2014.)

MOTION NO. (1358/13) CA 13-00923. -- QUINN HEYWARD, PLAINTIFF-APPELLANT, V BRUCE SHANNE AND VALERIE SHANNE, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed May 2, 2014.)

MOTION NO. (10/14) KA 10-01130. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JEFFREY THOMAS, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ. (Filed May 2, 2014.)

MOTION NO. (38/14) CA 12-02233. -- IN THE MATTER OF THE ESTATE OF STANLEY A. WAGNER, DECEASED. JAAN AARISMAA, IV, PETITIONER-APPELLANT; JOHN L. WAGNER, AS EXECUTOR OF THE ESTATE OF STANLEY A. WAGNER, DECEASED, RESPONDENT-RESPONDENT. -- Motion for reargument denied. PRESENT: SMITH,

J.P., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed May 2, 2014.)

MOTION NO. (79/14) CA 13-01333. -- MARK D. PLUMLEY AND TINA A. PLUMLEY, PLAINTIFFS-APPELLANTS, V ERIE BOULEVARD HYDROPOWER, L.P., DEFENDANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed May 2, 2014.)

MOTION NO. (80/14) CA 13-01158. -- DONALD E. KEINZ, PLAINTIFF-APPELLANT, V PETER M. HOBAICA, LLC, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed May 2, 2014.)

MOTION NO. (110/14) KA 11-02474. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL S. WHITE, ALSO KNOWN AS MICHAEL BREWER, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed May 2, 2014.)

MOTION NO. (135/14) CAF 12-01187. -- IN THE MATTER OF SABRINA CAMPBELL, PETITIONER-RESPONDENT, V MARGARET JANUARY, RESPONDENT-RESPONDENT, AND BENNIE CARTER, SR., RESPONDENT-APPELLANT. -- Motion for reargument dismissed. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ. (Filed May 2, 2014.)

MOTION NO. (144/14) KA 12-01041. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSEPH K. RANDLE, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ. (Filed May 2, 2014.)