



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

DECISIONS FILED

JANUARY 2, 2015

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*

897

**CA 13-02210**

PRESENT: SMITH, J.P., FAHEY, LINDLEY, WHALEN, AND DEJOSEPH, JJ.

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LUZ M. HOUSTON, AS ADMINISTRATRIX OF THE ESTATE  
OF ROBERT M. HOUSTON, SR., DECEASED,  
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MCNEILUS TRUCK AND MANUFACTURING, INC., ET AL.,  
DEFENDANTS,  
H LEASING COMPANY, LLC AND CLARENCE CENTER COFFEE  
COMPANY & CAFÉ CORP., DEFENDANTS-APPELLANTS.  
(APPEAL NO. 1.)

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MARCUS & CINELLI, LLP, WILLIAMSVILLE (DAVID P. MARCUS OF COUNSEL), FOR  
DEFENDANT-APPELLANT H LEASING COMPANY, LLC.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RICHARD T. SARAF OF  
COUNSEL), FOR DEFENDANT-APPELLANT CLARENCE CENTER COFFEE COMPANY &  
CAFÉ CORP.

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

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Appeals from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered April 18, 2013. The order, among other things, denied the motion of defendant Clarence Center Coffee Company & Café Corp. for summary judgment and denied in part the motion of defendant H Leasing Company, LLC for summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by granting that part of the motion of defendant H Leasing Company, LLC for summary judgment dismissing the strict products liability cause of action and all related cross claims against it, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action against various defendants, seeking damages arising from the death of decedent during a garbage truck accident. Insofar as relevant here, plaintiff sought damages from defendant Clarence Center Coffee Company & Café Corp. (Clarence Coffee), the lessee of the property where the accident occurred, for negligently permitting a dangerous condition to exist on the leased premises, and also sought damages for negligence against defendant H Leasing Company, LLC (H Leasing), which owned the truck and leased it to another defendant that was H Leasing's corporate sibling. Also insofar as relevant here, Clarence Coffee and H Leasing

moved for summary judgment dismissing the complaint and all cross claims against them. Plaintiff opposed the motions and cross-moved for leave to serve an amended complaint that would add a strict products liability cause of action against H Leasing. H Leasing opposed the cross motion, and also contended that, if the court were to permit the amendment of the complaint, summary judgment should also be granted in its favor on the new cause of action. Clarence Coffee and H Leasing appeal from an order in which Supreme Court, inter alia, denied Clarence Coffee's motion, granted plaintiff's cross motion and granted that part of H Leasing's motion with respect to the claim arising from Vehicle and Traffic Law § 388, reserved decision on that part of the motion with respect to the negligence claims against it, and denied the remainder of the motion.

Contrary to the contention of Clarence Coffee, the court properly denied its motion for summary judgment dismissing the complaint and cross claims against it. The complaint alleged that Clarence Coffee negligently permitted a dangerous condition to exist on the property by failing to provide safe and unobstructed access to the dumpster that decedent was attempting to empty into the garbage truck, and that decedent's injuries were the foreseeable result of that negligence. We reject Clarence Coffee's contentions that it established as a matter of law that there was no dangerous condition, that the accident was not the foreseeable result of any negligence on its part, and that decedent's negligence was the sole proximate cause of his injuries. The issue "whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally [one] of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [internal quotation marks omitted]; see *Bielicki v Excel Indus., Inc.*, 104 AD3d 1318, 1318), and "[q]uestions concerning what is foreseeable are generally left to a jury to determine" (*Baker v Sportservice Corp.*, 142 AD2d 991, 993). Here, Clarence Coffee failed to meet its initial burden on the motion with respect to all of those issues, and thus the court properly denied its motion (see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

We agree with H Leasing, however, that the court erred in denying that part of its motion for summary judgment dismissing the strict products liability cause of action and all related cross claims against it. We therefore modify the order accordingly. Initially, we note that H Leasing has not presented any argument in support of its contention that the court erred in granting plaintiff's cross motion for leave to serve an amended complaint containing that cause of action, and we thus assume, arguendo, that the court properly granted the cross motion. We also note that, contrary to the dissent's conclusion, the court denied that part of H Leasing's motion for summary judgment dismissing the strict products liability cause of action. H Leasing initially moved for summary judgment dismissing the complaint against it, when the complaint contained a single cause of action, for negligence, against H Leasing. In opposition to that motion, plaintiff alleged that recovery was also sought pursuant to Vehicle and Traffic Law § 388, and, in addition, plaintiff cross-moved for leave to amend the complaint to include a strict products

liability cause of action against H Leasing. In reply, H Leasing opposed the cross motion and contended that section 388 did not apply, so it should be awarded summary judgment on such a claim. In the alternative, H Leasing also asked the court to grant summary judgment in its favor on the strict products liability cause of action if the court permitted plaintiff to amend the complaint. In the order on appeal, the court granted summary judgment in favor of H Leasing with respect to the Vehicle and Traffic Law § 388 claim, reserved decision with respect to the negligence cause of action, and denied H Leasing's motion in all other respects. Consequently, the final denial could only have referred to that part of the motion for summary judgment dismissing the strict products liability cause of action because all of H Leasing's requests in the motion other than that had been resolved by the remaining clauses in the pertinent ordering paragraph.

We conclude that the court erred in denying that part of the motion. "It appears universally accepted as New York law that strict products liability will not apply to finance lessors which merely offer the use of money to acquire goods but otherwise neither market a product nor place it in the stream of commerce" (*Gonzalez v Rutherford Corp.*, 881 F Supp 829, 846 [ED NY]; see *Bickram v Case I.H.*, 712 F Supp 18, 22 [ED NY]). We reject plaintiff's contention that H Leasing is the owner and lessor of the truck, and it is therefore subject to strict products liability because it is in the business of leasing equipment. The cases permitting strict products liability actions against lessors involve leasing entities that either actually take possession of the equipment at issue and lease it to the public (see e.g. *Wengenroth v Formula Equip. Leasing, Inc.*, 11 AD3d 677, 680; see generally *Winckel v Atlantic Rentals & Sales*, 159 AD2d 124, 128-129), or are financing arms of the manufacturer (see e.g. *Motelson v Ford Motor Co.*, 101 AD3d 957, 959, *affd* \_\_\_ NY3d \_\_\_ [Nov. 18, 2014]). In those situations, the principles of strict products liability may properly be applied to such lenders in order to further the policy goals of such liability, i.e., ensuring that products are safe by permitting an action to go forward "when imposing liability would provide injured consumers with a greater opportunity to commence an action against the party responsible, fix liability on one who is in a position to exert pressure on the manufacturer to improve the safety of the product, or ensure that the burden of accidental injuries occasioned by products would be treated as a cost of production by placing liability upon those who market them" (*Brumbaugh v CEJJ, Inc.*, 152 AD2d 69, 71). Such goals would not be served by allowing a strict products liability cause of action against H Leasing, however, because it did not take possession of the truck, it is not in the business of leasing equipment to the general public, and it is a financial arm of the purchaser of the truck, not the manufacturer (*cf. id.* at 70-71). Consequently, we agree with H Leasing "that strict products liability should not be imposed upon [it], a finance lessor which merely offered the use of money and neither marketed the machine nor placed it in the stream of commerce" (*Starobin v Niagara Mach. & Tool Works Corp.*, 172 AD2d 64, 65-66, *lv denied* 80 NY2d 753).

Finally, we reject plaintiff's contention that H Leasing is judicially estopped from contending that it is not in the business of

leasing vehicles because it argued that it was in that business in support of its contention that Vehicle and Traffic Law § 388 did not apply due to the Graves Amendment (49 USC § 30106). "Judicial estoppel may be invoked to prevent a party from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding . . . , where the party had prevailed with respect to the earlier position" (*Lorenzo v Kahn*, 100 AD3d 1480, 1482-1483 [internal quotation marks omitted]; see *Zedner v United States*, 547 US 489, 504). Here, although H Leasing made that argument, there is no evidence in the record before us that the court accepted that contention in dismissing the section 388 claim, and we thus conclude on the record before us that the doctrine does not apply (see *Kolodin v Valenti*, 115 AD3d 197, 201-202; see also *Matter of Costantino*, 67 AD3d 1412, 1413).

All concur except WHALEN and DEJOSEPH, JJ., who dissent in part and vote to affirm in the following Memorandum: We must respectfully dissent in part, because we cannot agree with the majority that defendant H Leasing Company, LLC (H Leasing) is entitled to summary judgment dismissing plaintiff's cause of action for strict products liability. As the majority notes, subsequent to defendants' summary judgment motions, plaintiff cross-moved for leave to amend the complaint to include a strict products liability cause of action against H Leasing. In reply, H Leasing opposed the cross motion and asked Supreme Court to grant summary judgment in its favor on the strict products liability cause of action should the court permit plaintiff to amend the complaint. The majority concludes that the language in the court's order denying H Leasing's motion "in all other respects" shows that the court determined H Leasing's motion for summary judgment on the strict products liability cause of action. We disagree, and would affirm the order.

Initially, we note that there is no dispute that H Leasing's original summary judgment motion did not contemplate dismissal of the strict products liability cause of action because it had not been pled. Plaintiff sought to amend the complaint to allege a strict products liability cause of action, and the court granted that request. H Leasing did not make a separate motion for summary judgment with respect to that cause of action; instead, it merely asked for summary judgment in reply papers, which is improper (see *Azzopardi v American Blower Corp.*, 192 AD2d 453, 454). Further, summary judgment on strict products liability would also have been premature because H Leasing never submitted an answer with respect to that cause of action and thus never joined issue in that respect (see CPLR 3212 [a]). Strict adherence to the joinder requirement is required (see *City of Rochester v Chiarella*, 65 NY2d 92,101; *Park Ridge Hosp. v Richardson*, 175 AD2d 631, 631), and summary judgment is improper where plaintiff was allowed to amend the complaint but defendant had not yet served an answer to the amended complaint (see *Organek v Harris*, 90 AD3d 1512, 1513-1514).

We disagree with the majority's conclusion that the order's language denying the motion "in all other respects" could only have referred to the dismissal of the strict products liability cause of

action because all of H Leasing's requests in the motion other than that had been resolved by the remaining clauses in the pertinent ordering paragraphs. H Leasing's motion for summary judgment requested not only dismissal of plaintiff's causes of action, but also any and all cross claims against it. The ordering paragraphs did not specifically address the granting or denying of the cross claims against H Leasing, and thus in our view the language "in all other respects" related to the court's determination as to the cross claims, not as the majority concludes, the strict products liability cause of action.

Finally, summary judgment is also improper on the strict products liability cause of action because the court did not have a copy of all of the pleadings as required (see CPLR 3212 [b]), in the absence of an answer by H Leasing with respect to the strict products liability cause of action, and that failure warrants denial of the motion regardless of whether it has merit (see generally *Osgood v KDM Dev. Corp.*, 92 AD3d 1222, 1223-1224).

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

**898**

**CA 13-02211**

PRESENT: SMITH, J.P., FAHEY, LINDLEY, WHALEN, AND DEJOSEPH, JJ.

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LUZ M. HOUSTON, AS ADMINISTRATRIX OF THE ESTATE  
OF ROBERT M. HOUSTON, SR., DECEASED,  
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MCNEILUS TRUCK AND MANUFACTURING, INC., ET AL.,  
DEFENDANTS,  
AND H LEASING COMPANY, LLC, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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MARCUS & CINELLI, LLP, WILLIAMSVILLE (DAVID PAUL MARCUS OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered December 12, 2013. The order, insofar as appealed from, denied that part of the motion of defendant H Leasing Company, LLC, for summary judgment dismissing plaintiff's negligence cause of action against it.

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

Memorandum: Plaintiff commenced this action against various defendants, seeking damages arising from the death of decedent during a garbage truck accident. As relevant to this appeal, plaintiff sought damages for negligence against defendant H Leasing Company, LLC (H Leasing), which owned the truck and leased it to decedent's employer, which was H Leasing's corporate sibling. H Leasing moved for summary judgment dismissing the complaint and cross claims against it and, after initially reserving decision on that part of the motion with respect to the negligence cause of action, Supreme Court denied that part of the motion. We affirm.

As a general matter, a finance lessor such as H Leasing that never possesses a product due to its direct shipment to the lessee—and thus has no ability to inspect the product for defects—may not be liable in negligence for failure to inspect or warn of a dangerous condition (*see Pimm v Graybar Elec. Co.*, 27 AD2d 309, 311; *see also Gonzalez v Rutherford Corp.*, 881 F Supp 829, 847). Nevertheless, it is well settled that a party seeking summary judgment bears "the

initial burden 'to make a prima facie showing of entitlement to judgment as a matter of law by coming forward with competent proof refuting the allegations of the complaint as amplified by the bill of particulars' " (*Reisch v Amadori Constr. Co.*, 273 AD2d 855, 857; see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Here, in the amended complaint as amplified by the bill of particulars, plaintiff alleged that H Leasing, "by its agents, servants and/or employees," was negligent in, inter alia, failing to inspect the garbage truck for any defects before leasing it; failing to place a warning or notice of dangerous condition on the garbage truck; failing to inspect the garbage truck to determine if all mechanical equipment and devices were safe and functioning properly; and failing to inspect the garbage truck as to the proper method for using the cable winch (emphasis added). Thus, to meet its initial burden on the motion, H Leasing was required to refute, inter alia, the allegation that it was liable in negligence for its agents' failure to inspect and warn. We conclude that H Leasing did not meet that burden.

" 'When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination . . . and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact' " (*Esposito v Wright*, 28 AD3d 1142, 1143; see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941). Here, the lease for the garbage truck, which was submitted in support of H Leasing's motion for summary judgment, stated in relevant part that H Leasing appointed decedent's employer as its agent for purposes of inspection and acceptance of the garbage truck from the supplier. Moreover, a vice-president of H Leasing, who was decedent's employer, acknowledged at his deposition, that the lessees inspected the equipment upon delivery in their capacities as H Leasing's agents as "laid out in the lease agreement," and that deposition testimony was also submitted in support of H Leasing's motion. Viewing those submissions in the light most favorable to plaintiff and affording her the benefit of every reasonable inference, we conclude that H Leasing's own submissions raise a triable issue of fact whether it was liable in negligence for the failure of one of its agents, decedent's employer, to inspect and warn of a dangerous condition. Despite H Leasing's contentions that the lessee is appointed the lessor's agent solely for purposes of inspecting and accepting delivery of equipment in order to execute a Certificate of Acceptance and that nothing in the lease or the record suggests that the garbage truck was inspected or evaluated for design defects, we conclude that the language of the lease presents issues of fact with respect to the nature and extent of the principal-agent relationship regarding the duty to inspect and warn. Thus, the court properly denied that part of H Leasing's motion for summary judgment dismissing the negligence cause of action (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

All concur except SMITH, J.P., and LINDLEY, J., who dissent and vote to reverse the order insofar as appealed from in accordance with the following Memorandum: We respectfully dissent because we agree



with defendant H Leasing Company, LLC (H Leasing) that Supreme Court erred in denying that part of its motion seeking summary judgment dismissing the negligence cause of action and all related cross claims against it. We would therefore reverse the order insofar as appealed from. It is well settled that a defendant that has no ability to inspect an item for defects may not be held liable for negligently inspecting, or failing to inspect, the item (see *Peris v Western Regional Off-Track Betting Corp.*, 255 AD2d 899, 900; *Gonzalez v Rutherford Corp.*, 881 F Supp 829, 847; *Bickram v Case I.H.*, 712 F Supp 18, 22-23). In support of its motion for summary judgment on this issue, H Leasing submitted evidence establishing that another defendant arranged to purchase the item, a garbage truck, directly from the manufacturer, and that H Leasing never possessed the vehicle. "[W]e do not perceive how [H Leasing] could be held liable for the breach of such a duty when, by the purchaser's own specification, the . . . product was routed from a reputable manufacturer . . . directly to the buyer so as to preclude the opportunity for any inspection. By its selection of the [product, including specifying the manner of its construction,] and by its request for direct shipment, the purchaser took from [H Leasing] the power to make any choice in the item furnished and waived any inspection by it. In these circumstances, there could be no recovery against [H Leasing] for its failure to inspect the" truck (*Pimm v Graybar Elec. Co.*, 27 AD2d 309, 311; see *Peris*, 255 AD2d at 900; *Gonzalez*, 881 F Supp at 847). Inasmuch as H Leasing established as a matter of law that it had no duty or ability to inspect the truck or warn of any defects in the truck because it never had the ability to possess or inspect it, it may not be held liable in negligence.

Contrary to the majority's conclusion, the evidence submitted by H Leasing was sufficient to eliminate all questions of fact (see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Unlike the majority, we conclude that plaintiff failed to raise in the motion court her present contention that the truck's lessee was the agent of H Leasing and thus that H Leasing may be held liable in negligence because the contract provided for inspections by that lessee. Consequently, that contention is not before us on appeal (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Plaintiff's contention in this Court highlights the reason for the *Ciesinski* rule, to wit, "[i]t is well settled that '[a]n appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had those theories or questions been presented in the court of first instance' " (*id.*; see *Telaro v Telaro*, 25 NY2d 433, 439, *rearg denied* 26 NY2d 751; *Rew v County of Niagara*, 115 AD3d 1316, 1317; *Ring v Jones*, 13 AD3d 1078, 1079). Plaintiff contends for the first time on appeal that H Leasing failed to eliminate a triable issue of fact whether it had the ability to inspect the truck, and thus may be held liable under a negligence theory, because a boilerplate provision in the truck's lease appoints the lessee as the agent of H Leasing to inspect the subject truck, "to the extent [that the truck] has not been previously inspected pursuant to the Existing Agreement." By its terms, the lease upon which plaintiff relies became effective in 2007. Evidence submitted in support of H Leasing's motion, however, established that the truck was

purchased by invoice dated March 23, 2001, and delivery was confirmed as of May 24, 2001. There is no evidence establishing whether a similar provision may have existed when the truck was delivered. Thus, due to plaintiff's failure to raise her present contention in the motion court, H Leasing was deprived of the ability to submit " 'proof . . . to refute or overcome' " that contention (*Ciesinski*, 202 AD2d at 985).

More importantly, due to the date on which the truck was delivered and the date on which the lease became applicable, there is no issue of fact that would preclude summary judgment. H Leasing submitted evidence establishing that it had no ability to inspect the truck at any time, and there is no lease, purchase order, or other document indicating that it had designated any other corporate entity as its agent for inspection purposes at the time of the purchase. Consequently, the issue of fact upon which the majority relies does not exist.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

906

CA 14-00014

PRESENT: SMITH, J.P., FAHEY, LINDLEY, WHALEN, AND DEJOSEPH, JJ.

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LIBERTY AFFORDABLE HOUSING, INC.,  
PLAINTIFF-APPELLANT,

V

OPINION AND ORDER

MAPLE COURT APARTMENTS, DEFENDANT-RESPONDENT.

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BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (GREGORY P. BAZAN OF  
COUNSEL), FOR PLAINTIFF-APPELLANT.

SCOLARO FETTER GRIZANTI MCGOUGH & KING, P.C., SYRACUSE (CHAIM J. JAFFE  
OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an amended order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered March 13, 2013. The amended order, among other things, granted that part of the motion of defendant seeking to dismiss plaintiff's first cause of action for specific performance.

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

Opinion by WHALEN, J.:

In *Rovello v Orofino Realty Co.* (40 NY2d 633, 636), the Court of Appeals held that summary dismissal is appropriate under CPLR 3211 (a) (7) when the defendant's evidentiary submissions "establish conclusively that plaintiff has no cause of action." We now consider whether that holding remains viable in light of the Court's recent decision in *Miglino v Bally Total Fitness of Greater N.Y., Inc.* (20 NY3d 342).

I

The underlying facts are straightforward. In October 2006, plaintiff contracted to purchase from defendant an affordable-housing complex in the City of Watertown. Plaintiff was unable to secure adequate funding by the initial closing date, and the parties agreed to extend the closing date to December 31, 2007. On December 3, 2007, plaintiff sent defendant an email explaining that it was "unable to generate enough funds . . . to pay the . . . sales price in full" and that, "[g]iven its nonprofit status, [it] has no . . . private source of funding to cover any gap." It is undisputed that the closing did not occur as scheduled on December 31, 2007.

Over one year later, in an April 2009 letter, defendant informed plaintiff that, "because the closing . . . did not take place, [defendant] considers the Purchase Agreement with [plaintiff] terminated, and the . . . deposit forfeited." The April 2009 letter also advised plaintiff that defendant may "market the property to other parties," but that it would consider a "new" purchase offer from plaintiff.

Approximately two years later, plaintiff finally secured adequate funding to purchase the housing complex. Plaintiff wrote defendant in September 2011 to inform it of this development; in that letter, plaintiff indicated that "we need a signed purchase and sale agreement." Plaintiff thereafter submitted a new offer for the complex in April 2012, but defendant rejected it in favor of a higher offer.

Plaintiff subsequently commenced the instant action for, insofar as relevant on appeal, specific performance of the October 2006 contract. In lieu of answering, defendant moved to dismiss for facial insufficiency under CPLR 3211 (a) (7). In support of the motion, defendant submitted several documents, including the original purchase agreement, the closing-date extender, plaintiff's December 3, 2007 email, defendant's April 2009 letter, plaintiff's September 2011 letter, and plaintiff's subsequent purchase offer. These documents, according to defendant, conclusively demonstrated that plaintiff had no cause of action for specific performance.

In opposition, plaintiff argued that the evidence submitted by defendant "clearly illustrates issues of fact regarding the causes of action pled by [plaintiff] and does not establish the absence of any valid cause of action by [plaintiff] or that no significant dispute exists based on the evidence." Like defendant, plaintiff also submitted evidentiary materials to bolster its position. Specifically, plaintiff offered a July 2012 letter from defendant and a series of emails between plaintiff and defendant. Although the letter proposed to settle the matter, it also reiterated that the original October 2006 contract had been cancelled. The emails, for their part, date only to mid-2011 and reflect the parties' efforts to work out a new deal after plaintiff finally obtained funding.

Supreme Court granted defendant's motion in part and dismissed the cause of action for specific performance, stating in a bench decision that "[i]t is clear that the parties acknowledge that the purchase offer they were acting under was invalid. The exhibit[s] . . . indicated one side withdraws and the other side is acknowledging, . . . we withdraw, we need a new contract." Plaintiff appeals, and we conclude that the amended order should be affirmed.

## II

The issue for our determination is whether the court properly considered the documentary evidence that defendant claims is dispositive. Plaintiff concedes that, prior to the Court of Appeals' ruling in *Migliano*, the answer to that question was yes. Plaintiff

contends, however, that *Migliano* fundamentally changed the parameters of CPLR 3211 (a) (7) and effectively barred the consideration of any evidentiary submissions outside the four corners of the complaint. We reject that contention.

A

CPLR 3211 (a) (7) authorizes the summary dismissal of a complaint for failure to "state" a cause of action. Historically, "[a] motion to dismiss for failure to state a cause of action . . . was[] limited to the face of the complaint" (*Rovello*, 40 NY2d at 638 [Wachtler, J., dissenting]), but the Legislature enlarged the scope of facial sufficiency motions by enacting subdivision (c) of CPLR 3211, which permits "trial court[s] to use affidavits in its consideration of a pleading motion to dismiss" (*id.* at 635 [per curiam op]; see *Nonnon v City of New York*, 9 NY3d 825, 827). The Court in *Rovello* held that the plain text of CPLR 3211 (c) "leaves this question," i.e., the admissibility of affidavits on a motion pursuant to CPLR 3211 (a) (7), "free from doubt" (*id.* at 635). The First Department recently explained that *Rovello's* reference to "affidavits" is merely shorthand for "evidentiary submissions" (see *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 n 4).

As noted in *Rovello*, however, CPLR 3211 does not specify "what effect shall be given the contents of affidavits submitted on a motion to dismiss when the motion has not been converted to a motion for summary judgment" (*id.*). The Court noted that "[m]odern pleading rules are 'designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one' " and held that evidentiary submissions may only be considered for a "limited purpose" in assessing the facial sufficiency of a civil complaint (*id.* at 636). This "limited purpose," *Rovello* explained, is two-fold. On the one hand, "affidavits submitted by the defendant [as movant] will seldom if ever warrant the relief" sought under CPLR 3211 (a) (7) "unless too the affidavits establish conclusively that plaintiff has no cause of action" (*id.* [emphasis added]). On the other hand, the nonmoving party may "freely" submit evidentiary materials "to preserve inartfully pleaded, but potentially meritorious, claims" (*id.* at 635).

The "limited purpose" to be accorded evidentiary submissions on a motion to dismiss has been consistently reiterated by the Court of Appeals since *Rovello* (see e.g. *Godfrey v Spano*, 13 NY3d 358, 374; *Lawrence v Graubard Miller*, 11 NY3d 588, 595). Indeed, in *Guggenheimer v Ginzburg* (43 NY2d 268, 275), the Court of Appeals noted that "dismissal should . . . eventuate" only when the defendant's evidentiary affidavits "show[] that a material fact as claimed by the pleader to be one is not a fact at all and . . . that no significant dispute exists regarding it" (see *Wahl v Wahl*, 122 AD2d 564, 564-565).

Plainly, a "limited" role for evidentiary submissions on CPLR 3211 (a) (7) motions is to be distinguished from a nonexistent role. For example, as recently as 2012, the Court of Appeals summarily dismissed a complaint under, inter alia, CPLR 3211 (a) (7) because its

factual underpinnings were "belied" by the documentary evidence submitted in connection with the motion (*Simkin v Blank*, 19 NY3d 46, 54).

B

In *Miglino*, which was decided after Supreme Court's decision herein, the plaintiff's decedent suffered a heart attack while playing racquetball at the defendant health club. The plaintiff alleged that, inter alia, the health club's employees had "negligently failed to use an available [automatic defibrillator device], or failed to use it within sufficient time, to save [the decedent's] life" (20 NY3d at 345). The defendant moved to dismiss the complaint under CPLR 3211 (a) (7) and attached "affidavits . . . purporting to show that the minimal steps adequate to fulfill a health club's limited duty to a patron apparently suffering a coronary incident—i.e., calling 911, administering CPR and/or relying on medical professionals who are voluntarily furnishing emergency care—were, in fact, undertaken" (*id.* at 351). Supreme Court denied the motion, and the Second Department agreed with Supreme Court, except to the extent that a part of the motion was unopposed by the plaintiff (92 AD3d 148). The Court of Appeals affirmed, and in doing so addressed the facial sufficiency of the plaintiff's theory of common law liability (*id.* at 350-351). In that context, the Court cited *Rovello* for the proposition that "CPLR 3211 (a) (7) . . . limits [courts] to an examination of the pleadings to determine whether they state a cause of action" (*id.* at 351). Thus, the Court reasoned, "the case is not currently in a posture to be resolved as a matter of law on the basis of the parties' affidavits, and *Miglino* has at least pleaded a viable cause of action at common law" (*id.*). It is this language, according to plaintiff, that precludes any consideration of evidentiary submissions on a CPLR 3211 (a) (7) motion.

The First Department addressed this issue in *Basis Yield*, holding, in effect, that *Miglino* had not altered the longstanding practice by which dismissal might be obtained under CPLR 3211 (a) (7) with sufficiently "conclusive" evidentiary submissions (see *id.* at 133-135; see also *Loreley Fin. [Jersey] No. 3 Ltd. v Citigroup Global Mkts. Inc.*, 119 AD3d 136, 139 n 2).

Although the Second Department has not considered the issue as directly as the First Department did in *Basis Yield*, that Court has also continued to evaluate, post-*Miglino*, whether a defendant's evidentiary submissions were sufficiently conclusive to warrant summary dismissal under CPLR 3211 (a) (7) (see *Rosin v Weinberg*, 107 AD3d 682, 683-684; see also *QK Healthcare, Inc. v InSource, Inc.*, 108 AD3d 56, 64-65; *Nunez v Mohamed*, 104 AD3d 921, 922).

C

The interpretation of *Miglino* is an issue of first impression in this Department, and we decline to give *Miglino* the expansive reading urged by plaintiff. Instead, we agree with the *Basis Yield* majority

that *Miglino* did not, in effect, overrule *Rovello*.

Indeed, given its unqualified citation to *Rovello*, *Miglino* is properly understood as a straightforward application of *Rovello*'s longstanding framework. *Miglino* was "not currently in a posture to be resolved as a matter of law on the basis of the parties' affidavits" (20 NY3d at 351) because the evidentiary submissions were insufficiently conclusive, not because they were categorically inadmissible in the context of a CPLR 3211 (a) (7) motion. We therefore conclude that the court properly considered defendant's evidentiary submissions in evaluating the motion to dismiss at bar.

### III

The remaining question is whether the evidentiary submissions in this case were sufficiently "conclusive" to sustain the court's summary dismissal of plaintiff's cause of action for specific performance. Plaintiff argues that they were not; in its view, the evidentiary submissions "might bring into question the facts as alleged by [plaintiff], but said submissions fail to conclusively demonstrate that the material facts as claimed in the complaint are not facts at all and that no dispute exists as to those material facts." Specifically, plaintiff says that the evidentiary submissions demonstrate that the parties "had a continued course of dealing leading up to the instant lawsuit," and, thus, "directly contradict[] the trial court's assertion that [plaintiff] acknowledged that the Agreement was invalid."

Defendant disagrees. In its view, plaintiff "specifically acknowledged that [it] could neither close the transaction by the date set forth in the Agreement nor by the date set forth in the Amendment." "Furthermore," defendant continues, plaintiff "repeatedly acknowledged and admitted that the Agreement and Amendment were invalid." We agree with defendant and conclude that the first cause of action was properly dismissed.

"The elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law" (*EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51, *lv dismissed* 3 NY3d 656, *lv denied* 3 NY3d 607). A plaintiff is not "able to perform its remaining obligations" if it cannot do so within the timeframes set forth in the contract. Thus, "[b]efore specific performance of a contract for the sale of real property may be granted, a plaintiff must demonstrate that he was ready, willing, and able to perform on the original law day or, if time is not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter" (*Goller Place Corp. v Cacase*, 251 AD2d 287, 287-288).

Here, the documentary evidence attached to defendant's motion flatly contradicts plaintiff's allegation that it was ready, willing, and able to close by the December 31, 2007 closing date or within a

reasonable time thereafter. In the December 3, 2007 email, plaintiff specifically informed defendant that it lacked sufficient funding to close on the scheduled date. It is undisputed that the deal did not close on the appointed day, and, in its April 2009 letter, defendant terminated the contract "because the closing . . . did not take place." Furthermore, the April 2009 termination letter - which plaintiff ignores in its opposing papers and in its appellate brief - advised plaintiff that defendant might "market the property to other parties," but that it would consider a "new" purchase offer from plaintiff. We note that plaintiff acknowledged the original contract's cancellation by submitting a new purchase offer for the property in April 2012, and plaintiff explicitly admitted in September 2011 that "we need a signed purchase and sale agreement" in order to move forward with the new offer.

The foregoing documentary evidence, the authenticity of which is undisputed, conclusively establishes that plaintiff was unable to close the deal on the closing date, and that the contract was appropriately terminated as a result. Contrary to plaintiff's contention, the emails submitted in opposition to defendant's motion do not demonstrate a "continued course of dealings." The emails relate only to the parties' communications in 2011 - not 2007 or 2009 - and reflect the parties' efforts to work out a new deal following the cancellation of the 2007 agreement. Thus, as a matter of law, plaintiff has no cause of action for specific performance (see *id.* at 288; cf. *Zeld Assoc., Inc. v Marcario*, 57 AD3d 660, 660; see generally *Huntington Min. Holdings v Cottontail Plaza*, 60 NY2d 997, 998).

Finally, plaintiff's contention regarding defendant's alleged failure to make time of the essence is unpreserved for our review (see *Deputy Sheriff's Benevolent Assn. of Onondaga County v County of Onondaga*, 288 AD2d 953, 954). In any event, even assuming that defendant was required to formally make time of the essence before it was entitled to cancel the original contract, we conclude that specific performance is unwarranted unless plaintiff was, in fact, financially able to close the transaction on the closing date or within a reasonable period of time thereafter (see *Huntington Min. Holdings*, 60 NY2d at 998; *28 Props., Inc. v Akleh Realty Corp.*, 22 AD3d 432, 432, *lv denied* 6 NY3d 714). The documentary evidence establishes that a successful closing was not within plaintiff's reach in December 2007 or at any reasonable point thereafter. Indeed, "[p]laintiff failed to demonstrate until [almost] four years subsequent to the original closing date that it was financially able to close" (*28 Props., Inc.*, 22 AD3d at 432).

#### IV

Accordingly, we conclude that the court properly granted that part of defendant's motion seeking dismissal of the first cause of



action and that the amended order therefore should be affirmed.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**924**

**CA 13-01039**

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

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TAMAICA M. TAYLOR, PLAINTIFF-APPELLANT,

V

ORDER

MARCIA A. BIRDSONG, DEFENDANT-RESPONDENT.  
(ACTION NO. 1.)

-----  
TAMAICA M. TAYLOR, PLAINTIFF-APPELLANT,

V

DAVID VANGALIO, DEFENDANT-RESPONDENT.  
(ACTION NO. 2.)  
(APPEAL NO. 1.)

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FRANK S. FALZONE, BUFFALO (LOUIS ROSADO OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

BURGIO KITA CURVIN & BANKER, BUFFALO (HILARY C. BANKER OF COUNSEL),  
FOR DEFENDANT-RESPONDENT MARCIA A. BIRDSONG.

BARTH SULLIVAN BEHR, BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR  
DEFENDANT-RESPONDENT DAVID VANGALIO.

---

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered May 1, 2013. The order, insofar as appealed from, denied in part the motion of plaintiff for partial summary judgment.

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**929.1**

**CA 14-00646**

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

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IN THE MATTER OF THE APPLICATION FOR DISCHARGE  
OF KENNETH GROVES, CONSECUTIVE NO. 166237, FROM  
CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO  
MENTAL HYGIENE LAW § 10.09, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF  
MENTAL HEALTH AND NEW YORK STATE DEPARTMENT OF  
CORRECTIONS AND COMMUNITY SUPERVISION,  
RESPONDENTS-APPELLANTS.

---

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

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA  
(MICHAEL H. MCCORMICK OF COUNSEL), FOR PETITIONER-RESPONDENT.

---

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered March 28, 2014. The order determined that petitioner is currently not a sex offender requiring civil management pursuant to Mental Hygiene Law article 10 and directed the discharge of petitioner from the custody of the Office of Mental Health.

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

Memorandum: Respondents appeal from an order, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), that determined that petitioner does not currently suffer from a mental abnormality under Mental Hygiene Law § 10.03 (i) and directed his unconditional discharge from the custody of the Office of Mental Health (see § 10.09 [h]). We affirm.

We agree with petitioner that on this record Supreme Court properly determined that respondents failed to establish by clear and convincing evidence that petitioner currently suffers from a "mental abnormality" (see Mental Hygiene Law § 10.09 [h]). Moreover, although both experts diagnosed petitioner with antisocial personality disorder, that diagnosis is insufficient, as a matter of law, to support a "mental abnormality" finding (see *Matter of State of New York v Donald DD.*, 24 NY3d 174, 190). We reject respondents' contention that the jury determination that petitioner suffered from a

"mental abnormality" in 2008 precludes any subsequent review of that issue (see § 10.07 [d]; see generally *People ex rel. Leonard HH. v Nixon*, 148 AD2d 75, 79). The annual review proceeding conducted here specifically requires that every person civilly committed under Mental Hygiene Law article 10 "shall have an examination for evaluation of his or her mental condition made at least once every year" (§ 10.09 [b]). Indeed, as part of each annual review, a psychiatric examiner is required to report to the Commissioner of Mental Health whether such person "is *currently* a dangerous sex offender requiring confinement" (*id.* [emphasis added]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**929**

**CA 14-00299**

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

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TAMAICA M. TAYLOR, PLAINTIFF-APPELLANT,

V

ORDER

MARCIA A. BIRDSONG, DEFENDANT-RESPONDENT.  
(ACTION NO. 1.)

-----  
TAMAICA M. TAYLOR, PLAINTIFF-APPELLANT,

V

DAVID VANGALIO, DEFENDANT-RESPONDENT.  
(ACTION NO. 2.)  
(APPEAL NO. 2.)

---

FRANK S. FALZONE, BUFFALO (LOUIS ROSADO OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

BURGIO KITA CURVIN & BANKER, BUFFALO (HILARY C. BANKER OF COUNSEL),  
FOR DEFENDANT-RESPONDENT MARCIA A. BIRDSONG.

BARTH SULLIVAN BEHR, BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR  
DEFENDANT-RESPONDENT DAVID VANGALIO.

---

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered May 1, 2013. The order denied the motion of plaintiff for leave to renew her motion for partial summary judgment.

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1017

**CA 13-02050**

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

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LM BUSINESS ASSOCIATES, INC., NORTHEAST  
STAFFING GROUP, INC., TRIPLE COUNTY AGENCY, INC.,  
EXECUTIVE RESOURCES, INC., PRO TO CALL, INC.,  
AND 1649 MONROE ASSOCIATES, LLC,  
CLAIMANTS-RESPONDENTS,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.  
(CLAIM NO. 107559.)

---

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

FINUCANE AND HARTZELL, LLP, PITTSFORD (LEO G. FINUCANE OF COUNSEL),  
FOR CLAIMANTS-RESPONDENTS.

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Appeal from a judgment of the Court of Claims (Nicholas V. Midey, Jr., J.), entered August 12, 2013. The judgment, insofar as appealed from, determined that defendant was liable to claimants for conversion and negligent misrepresentation.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs and the amended claim is dismissed.

Memorandum: Defendant appeals from a judgment, entered following a nonjury trial on the issue of liability, in which the Court of Claims determined that defendant is liable to claimants for conversion and negligent misrepresentation. In 2000 and 2001, the State Insurance Fund, the State Police, and the Workers' Compensation Board conducted an investigation into suspected fraudulent activities by a group of affiliated businesses, including claimants, that were owned and operated in the Village of Palmyra, Wayne County, by, inter alia, nonparty Mark Boerman. As part of that investigation, a State Police investigator sought a warrant to search claimants' offices and to seize any relevant evidence found therein. Attached to the warrant application was an appendix that, inter alia, set forth certain general considerations for determining whether any particular computer within the purview of the warrant would be "remove[d] from the premises" for "process[ing] by a qualified computer specialist in a laboratory setting," or whether it would be analyzed on site without the need for removal therefrom.

County Court (Sirkin, J.) granted the application in full and issued the warrant on April 4, 2001, and the warrant was executed the next day. Insofar as relevant on appeal, a number of computers were seized from claimants' premises. It is undisputed that those computers were integral to the operation of claimants' businesses. Over one year later, in September 2002, Boerman was indicted on 19 counts of offering a false instrument for filing in the first degree (Penal Law § 175.35) and 19 counts of workers' compensation fraud (Workers' Compensation Law § 114). Boerman thereafter pleaded guilty in March 2003 to one count of offering a false instrument for filing in the first degree in full satisfaction of the indictment, and he was sentenced to probation. Claimants were never charged.

Following his sentencing, Boerman moved for an order in County Court for the return of the seized computers. The motion was granted in April 2003, and County Court directed that the computers be returned to Boerman "as soon as practicable." The computers were returned within several months. Notably, despite the allegation that claimants' businesses failed in 2001 because they did not have their necessary computers, neither Boerman nor claimants had previously filed an application seeking the return of the seized computers.

Claimants thereafter commenced the instant action seeking damages for, *inter alia*, conversion of the seized computers, negligent misrepresentation, and constitutional tort (*see generally Brown v State of New York*, 89 NY2d 172, 177-178). The cause of action for negligent misrepresentation stemmed from statements allegedly made by various State agents, at the time of the warrant's execution and in the days thereafter, in which they supposedly promised Boerman and his attorney that the computers would be returned expeditiously as soon as the necessary data was copied. Following a nonjury trial, the Court of Claims rendered an interlocutory judgment in claimants' favor on the issue of liability with respect to the causes of action for conversion and negligent misrepresentation, with damages to be determined following a trial. The court did not reach the cause of action for constitutional tort inasmuch as it held that claimants' injuries were adequately compensated by imposing liability for conversion and negligent misrepresentation. We now reverse the judgment insofar as appealed from and dismiss the amended claim.

The court erred in granting judgment to claimants on the issue of liability for conversion. An actionable "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 [emphasis added]; *see State of New York v Seventh Regiment Fund*, 98 NY2d 249, 259). Here, a search warrant specifically authorized law enforcement to "search for and seize" six categories of items, including "[a]ll computers and computer storage media and related peripherals, electronic or computer data." Claimants have never challenged the validity of the search warrant. Moreover, the unchallenged warrant placed no time limit on the retention of the items seized, and the authorization to "seize" the computers was not terminated until County Court ordered the

property returned following Boerman's guilty plea. We therefore conclude that defendant's exercise of control over the computers did not constitute conversion inasmuch as it had the proper authority to exercise such control (see *Matter of White v City of Mount Vernon*, 221 AD2d 345, 346-347). We note that *Della Pietra v State of New York* (125 AD2d 936, 937-938, *affd* 71 NY2d 792) is distinguishable from the instant case because, in that case, the State seized and held the claimant's property pursuant to an *invalid* warrant.

We reject claimants' contention that the warrant authorized only a "limited" detention of the computers until their contents could be copied by law enforcement. No such language is found in the warrant itself and, while the warrant incorporated the appendix, nothing in the appendix states or even implies that any seized computer would be returned expeditiously to its owner or that any forensic analysis of its contents would be conducted immediately following the execution of the warrant (see generally *People v Hanlon*, 36 NY2d 549, 557-559). We therefore further conclude that defendant cannot be held liable for conversion for holding the computers beyond the authority granted by the warrant.

We also reject claimants' alternative contention that, irrespective of the terms of the warrant itself, "the initial valid seizure of the computers turned into an unlawful conversion once the purpose for which the equipment was seized came to an end." It is well established that property seized pursuant to a court order is held "in the custody of the law, and [it] cannot be taken away until that custody is ended by a conviction or acquittal, or by an order of the magistrate permitting its surrender to the owner" (*Simpson v St. John*, 93 NY 363, 366). In other words, "property seized pursuant to a search warrant remains in the control of the issuing judge" (*Matter of Moss v Spitzer*, 19 AD3d 599, 600, *lv denied* 5 NY3d 714; see CPL 690.45 [8]; 690.50 [5]; 690.55 [1]). Therefore, even if the seized computers were retained without any legitimate law enforcement purpose, "it was beyond the power of [defendant] to take the property from the custody of the law" and return it to claimants without proper judicial authorization (*Meegan v Tracy*, 220 App Div 600, 602; see generally *DXB Video Tapes v Halay*, 239 AD2d 205, 206). Claimants therefore may not recover against defendant for conversion under the circumstances presented here (see *Simpson*, 93 NY at 366; *Siemiasz v Landau*, 224 App Div 284, 285).

The court also erred in granting judgment to claimants on the issue of liability for negligent misrepresentation. The tort of "negligent misrepresentation requires [a claimant] to demonstrate '(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information' " (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180). We agree with defendant that, as a matter of law, there can be no "privity-like relationship" between an investigator and the target of his or her investigation (*id.*). Indeed, the relationship between investigator and target is the opposite of a "special position of confidence and trust" in which one party might justifiably rely upon



the " 'unique or specialized expertise' " of the other party (*id.*; see *Kimmell v Schaefer*, 89 NY2d 257, 263). Thus, as defendant correctly contends, the negligent misrepresentation claim fails as a matter of law (see *Breen v Law Off. of Bruce A. Barket, P.C.*, 52 AD3d 635, 636-637; *Automatic Findings v Miller*, 232 AD2d 245, 246, *lv denied* 90 NY2d 804).

Finally, in light of its findings with respect to conversion and negligent misrepresentation, the court did not reach the cause of action for constitutional tort. "Upon our review of the record, however, and in the interest of judicial economy" (*Matter of McCloskey*, 307 AD2d 737, 738, *lv denied* 100 NY2d 516; see generally *Scally v Regional Indus. Partnership*, 9 AD3d 865, 868; *Matter of Verna HH.*, 302 AD2d 714, 715, *lv dismissed* 100 NY2d 535), we hold that this particular cause of action fails as a matter of law. Even assuming, arguendo, that the initial seizure or continued detention of claimants' computers violated the Search and Seizure Clause of the State Constitution (art I, § 12), we conclude that "no . . . claim [for constitutional tort] will lie where the claimant has an adequate remedy in an alternate forum" (*Shelton v New York State Liq. Auth.*, 61 AD3d 1145, 1150, citing *Martinez v City of Schenectady*, 97 NY2d 78, 83-84; see *Kashelkar v State of New York*, 30 AD3d 163, 164, *appeal dismissed* 7 NY3d 843; *Bullard v State of New York*, 307 AD2d 676, 678). Here, claimants could have raised their constitutional arguments in an application to County Court seeking the return of their computers (see *DXB Video Tapes*, 239 AD2d at 206) or, if such motion were denied, in a CPLR article 78 proceeding seeking relief in the nature of mandamus or prohibition (see *Moss*, 19 AD3d at 599-600).

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

1065

CA 13-02002

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

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DREW M. VEROST AND KIMBERLY VEROST,  
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

MITSUBISHI CATERPILLAR FORKLIFT AMERICA, INC.,  
NUTTALL GEAR, LLC, NUTTALL GEAR CORPORATION,  
DELROYD WORM GEAR, ALTRA HOLDINGS, INC., ALTRA  
INDUSTRIAL MOTION, INC., BUFFALO LIFT TRUCKS, INC.,  
MULLEN INDUSTRIAL HANDLING CORP.,  
DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANTS.

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THE CAREY FIRM, LLC, GRAND ISLAND, MAXWELL MURPHY, LLC, BUFFALO (ALAN  
D. VOOS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROBERT E. SCOTT OF COUNSEL),  
FOR DEFENDANTS-RESPONDENTS NUTTALL GEAR, LLC, NUTTALL GEAR  
CORPORATION, DELROYD WORM GEAR, ALTRA HOLDINGS, INC., AND ALTRA  
INDUSTRIAL MOTION, INC.

OSBORN, REED & BURKE, LLP, ROCHESTER (AIMEE LAFEVER KOCH OF COUNSEL),  
FOR DEFENDANT-RESPONDENT BUFFALO LIFT TRUCKS, INC.

GOLDBERG SEGALLA LLP, BUFFALO (DENNIS P. GLASCOTT OF COUNSEL), FOR  
DEFENDANT-RESPONDENT MULLEN INDUSTRIAL HANDLING CORP.

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (EDWARD P. PERLMAN OF  
COUNSEL), AND WHYTE HIRSCHBOECK DUDEK S.C., MILWAUKEE, WISCONSIN, FOR  
DEFENDANT-RESPONDENT MITSUBISHI CATERPILLAR FORKLIFT AMERICA, INC.

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Appeal from an order of the Supreme Court, Niagara County (Ralph  
A. Boniello, III, J.), entered August 13, 2013. The order granted the  
motions of defendants-respondents for summary judgment dismissing the  
complaint.

It is hereby ORDERED that the order so appealed from is  
unanimously modified on the law by denying the motion of defendants  
Nuttall Gear, LLC, Nuttall Gear Corporation, Delroyd Worm Gear, Altra  
Holdings, Inc., and Altra Industrial Motion, Inc. and reinstating the  
complaint against them, and as modified the order is affirmed without  
costs.

Memorandum: Drew M. VeRost (plaintiff) and his wife commenced

this action seeking damages for injuries he sustained while operating a forklift at a manufacturing facility owned by defendant Nuttall Gear, LLC (Nuttall Gear). Plaintiff had been assigned to work there by SPS Temporaries, Inc. (SPS), a temporary employment agency, and the accident occurred when plaintiff climbed out of the seat of the forklift and attempted to engage a lever on the mast of the forklift. While standing on the front of the forklift and reaching for the lever with his hand, plaintiff inadvertently stepped on a gear shift near the steering wheel. The activated gear shift caused the mast of the forklift to move backward, pinning plaintiff between the mast and the forklift's metal roll cage and injuring him in the process.

The forklift in question was manufactured by defendant Mitsubishi Caterpillar Forklift America, Inc. (MCFA), and sold new to Nuttall Gear by defendants Buffalo Lift Trucks, Inc. (Buffalo Lift) and Mullen Industrial Handling Corp. (Mullen). The forklift as manufactured was equipped with a seat safety switch that would render the forklift inoperable if the operator was not in the driver's seat. At the time of the accident, however, someone had intentionally disabled the safety switch by installing a "jumper wire" under the seat of the forklift. As a result, the forklift still had power when the operator was not in the driver's seat. Of the 10 forklifts owned by Nuttall Gear, seven had "jumper wires" installed that disabled the safety switches.

The complaint asserts causes of action against MCFA, Buffalo Lift and Mullen sounding in strict products liability, alleging, inter alia, that the forklift was defectively designed and that those defendants failed to provide adequate "warnings for the safe operation, maintenance repair and servicing of the forklift." The complaint also alleged that Nuttall Gear and its related entities, defendants Nuttall Gear Corporation, Delroyd Worm Gear, Altra Holdings, Inc., and Altra Industrial Motion, Inc. (collectively, Nuttall Gear defendants) were negligent in, among other things, failing to maintain the forklift in a safe condition. Following discovery, the strict products liability defendants (MCFA, Buffalo Lift and Mullen) each moved for summary judgment dismissing the complaint against them, contending that the forklift was safe when it was manufactured and delivered to Nuttall Gear, and that it was thereafter rendered unsafe by a third party who deactivated the safety switch. The Nuttall Gear defendants also moved for summary judgment, asserting that plaintiff was Nuttall Gear's special employee and is thus barred by Workers' Compensation Law § 11 from suing them. Supreme Court granted the motions and dismissed the complaint in its entirety, and this appeal ensued.

We conclude that the court properly granted the motions of the products liability defendants. As the Court of Appeals has recently made clear, " 'a manufacturer, who has designed and produced a safe product, will not be liable for injuries resulting from substantial alterations or modifications of the product by a third party which render the product defective or otherwise unsafe' " (*Hoover v New Holland N. Am., Inc.*, 23 NY3d 41, 54). Here, the products liability defendants established as a matter of law that the forklift was not

defectively designed by establishing that, when it was manufactured and delivered to Nuttall Gear, it had a safety switch that would have prevented plaintiff's accident, and a third party thereafter made a substantial modification to the forklift by disabling the safety switch. The burden thus shifted to plaintiffs to raise an issue of fact, and they failed to meet that burden (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to plaintiffs' contention, the affidavit of their expert, a professional engineer, does not raise a triable issue of fact.

We agree with plaintiffs, however, that the court erred in granting the motion of the Nuttall Gear defendants for summary judgment dismissing the complaint against them, and we therefore modify the order accordingly. It is well settled that "a general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits" (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557). "A special employee is described as one who is transferred for a limited time of whatever duration to the service of another . . . General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer" (*id.*; see *Abreu v Wel-Made Enters., Inc.*, 105 AD3d 878, 879). Although the determination of special employment status is "usually a question of fact," such a determination "may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact" (*Thompson*, 78 NY2d at 557-558; see *Bounds v State of New York*, 24 AD3d 1212, 1213-1214; *Short v Durez Div.-Hooker Chems. & Plastic Corp.*, 280 AD2d 972, 972).

Here, in support of their motion, the Nuttall Gear defendants relied on an affidavit from an accountant who works in Nuttall Gear's human resources department. Although the accountant stated that Nuttall Gear supervised plaintiff and controlled his work, she did not identify any specific Nuttall Gear employees who did so, nor did she state her basis of knowledge. In fact, there is no indication in the record that the accountant ever witnessed plaintiff working or observed anyone directing or supervising him, and it is well settled that an affidavit is without evidentiary value if the affiant has no personal knowledge of the facts asserted therein (see *King's Ct. Rest., Inc. v Hurondel I, Inc.*, 87 AD3d 1361, 1363).

In any event, even assuming, arguendo, that the Nuttall Gear defendants met their initial burden of establishing as a matter of law that plaintiff was a special employee, we conclude that plaintiffs raised an issue of fact by submitting an affidavit from SPS's president, who stated that SPS never relinquished control or supervision of plaintiff to Nuttall Gear or anyone else. According to SPS's president, its temporary employees are required to check in with SPS at least one hour before showing up for work, and SPS retains the exclusive authority to discipline those employees. Plaintiffs also submitted the deposition testimony of two Nuttall Gear supervisors who were working at the facility with plaintiff at the time of the

accident, both of whom testified that they had no contact with plaintiff. It appears from the record that the only person who had contact with plaintiff at Nuttall Gear was Mark Moscato, who himself was a general employee of SPS. The Nuttall Gear defendants have not identified a single person, other than Moscato, who told plaintiff what to do or how to do it.

The motion court's reliance on *Thompson* (78 NY2d 553) was misplaced. In *Thompson*, the plaintiff worked for the defendant for approximately one year, and reported daily to one of defendant's supervisors, "who assigned, supervised, instructed, oversaw, monitored and directed his work duties on a daily basis" (*id.* at 556). Here, in contrast, plaintiff worked at Nuttall Gear for only 9.5 hours, and there is no evidence that he had any contact with a Nuttall Gear supervisor. The other cases cited by the motion court – *Rucci v Cooper Indus.* (300 AD2d 1078) and *Davis v Butler* (262 AD2d 1039) – are similarly distinguishable. For example, in *Rucci*, the record on appeal shows that the plaintiff admitted that he reported daily to the superintendent of defendant Lehigh Construction Group, Inc. (Lehigh) and received his work assignments from the superintendent. The plaintiff also admitted that Lehigh controlled his work. There are no such admissions from plaintiff in this case. We thus conclude that an issue of fact exists whether plaintiff was a special employee of Nuttall Gear (see e.g. *Lee v ServiceMaster Co.*, 37 AD3d 1163, 1164-1165; *Evans v P.C.I. Paper Conversions, Inc.*, 32 AD3d 1310, 1310-1311; *Bounds*, 24 AD3d at 1213-1214; cf. *Majewicz v Malecki*, 9 AD3d 860, 861).

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

1072

**KA 13-02217**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HUDSON VIELE, JR., DEFENDANT-APPELLANT.

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MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered December 16, 2013. The judgment convicted defendant, upon his plea of guilty, of reckless endangerment in the second degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of reckless endangerment in the second degree (Penal Law § 120.20) and endangering the welfare of a child (§ 260.10 [1]). Pursuant to the plea agreement, County Court indicated that it was "inclined" to sentence defendant to a term of probation for each count but, at sentencing, imposed a period of imprisonment instead. Defendant contends that the court erred in imposing an "enhanced sentence" inasmuch as he abided by the conditions required for the imposition of probation, which the parties and the court had agreed upon at the time of the plea. Defendant also contends that, instead of imposing an "enhanced sentence," the court should have afforded him an opportunity to withdraw his plea. "Even assuming, arguendo, that the statement of the court that it was 'inclined' to sentence defendant to a period of probation [on each count] constituted a commitment to such sentence, we conclude that defendant failed to preserve his contention[s] [concerning the alleged enhanced sentence] for our review because he neither objected to the alleged enhanced sentence nor moved to withdraw his plea" (*People v Webb*, 299 AD2d 955, 955, lv denied 99 NY2d 565; see *People v Parks*, 309 AD2d 1172, 1173, lv denied 1 NY3d 577). We decline to exercise our power to review defendant's contentions as a matter of discretion in the interest of

justice (see CPL 470.15 [3] [c]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1083

CA 14-00133

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

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AMBER C. BLAIR AND MARK C. BLAIR,  
PLAINTIFFS-APPELLANTS,

V

ORDER

ALLSTATE INDEMNITY COMPANY, DEFENDANT-RESPONDENT.  
(APPEAL NO. 1.)

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DEMARIE & SCHOENBORN, P.C., BUFFALO (JOSEPH DEMARIE OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (BRIAN R. BIGGIE OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Chautauqua County  
(Deborah A. Chimes, J.), entered September 26, 2013. The order  
granted the motion of defendant for summary judgment and dismissed the  
amended complaint.

It is hereby ORDERED that said appeal is unanimously dismissed  
without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d  
985).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

1085

CA 13-01767

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

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BRIAN GOLEBIESKI, PLAINTIFF-APPELLANT,

V

ORDER

CITY OF BUFFALO, DEFENDANT.

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ESTATE OF DAVID G. JAY, ESQ., DECEASED,  
RESPONDENT.

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HOGAN WILLIG, PLLC, AMHERST (DIANE R. TIVERON OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

ARTHUR J. RUMIZEN, WILLIAMSVILLE, FOR RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered December 3, 2012. The order, among other things, determined that the Estate of David G. Jay, Esq. is entitled to one-third of the counsel fees received by the law firm of HoganWillig and/or Steven M. Cohen, Esq., in this action.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (see CPLR 5511; *Field v New York City Tr. Auth.*, 4 AD3d 389).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1093.1**

**CA 14-01165**

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

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AMBER C. BLAIR AND MARK C. BLAIR,  
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

ALLSTATE INDEMNITY COMPANY, DEFENDANT-RESPONDENT.  
(APPEAL NO. 2.)

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DEMARIE & SCHOENBORN, P.C., BUFFALO (JOSEPH DEMARIE OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (BRIAN R. BIGGIE OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered November 25, 2013. The order granted plaintiffs' motion for leave to reargue and, upon reargument, adhered to the original decision granting defendant's motion for summary judgment.

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

Memorandum: Plaintiffs appeal from an order granting their motion for leave to reargue and, upon reargument, adhering to the prior decision granting defendant's motion for summary judgment dismissing the amended complaint. Plaintiffs commenced this action for breach of contract, alleging that defendant breached its insurance contract with plaintiffs by failing to provide coverage for water and mold damage to the roof and interior of plaintiffs' home. Defendant denied coverage on the ground, inter alia, that the water intrusion was not a "sudden and accidental" occurrence.

Generally, an insured seeking to recover for a loss under an insurance policy has the burden of proving that a loss occurred and also that the loss was a covered event within the terms of the policy (see *Park Country Club of Buffalo, Inc. v Tower Ins. Co. of N.Y.*, 68 AD3d 1772, 1773). An insurer moving for summary judgment, however, has the initial burden of coming forward with admissible evidence establishing that the loss was not a covered loss or that the loss was excluded from coverage (see *Catalanotto v Commercial Mut. Ins. Co.*, 256 AD2d 883, 883-884; *Gongolewski v Travelers Ins. Co.*, 252 AD2d 569, 569, *lv denied* 92 NY2d 815). Contrary to plaintiffs' contention, defendant met its initial burden of establishing that the loss was not

a covered "sudden and accidental" occurrence, and plaintiffs failed to raise a triable issue of fact (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Thus, we conclude that, upon reargument, the court properly adhered to its original determination.

We do not reach plaintiffs' further contention, raised for the first time in their motion to reargue, that the water damage was the result of a "collapse" caused by the weight of ice and snow. It is well settled that a motion to reargue is not available to advance a new theory of liability (see *Sheldrake Riv. Realty, LLC v Village of Mamaroneck*, 106 AD3d 1075, 1076; *DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718), or to present arguments different from those originally asserted (see *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27, *lv dismissed in part and denied in part*, 80 NY2d 1005, *rearg denied* 81 NY2d 782; *Foley v Roche*, 68 AD2d 558, 567-568).

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

**1093**

**CA 14-00420**

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

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BAC HOME LOANS SERVICING LP, FORMERLY KNOWN AS  
COUNTRYWIDE HOME LOANS SERVICING LP,  
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JOHN FRANK AFFRONTI, DEFENDANT-RESPONDENT.

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FRENKEL LAMBERT WEISS WEISMAN & GORDON, LLP, BAY SHORE (MICHELLE  
MACCAGNANO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DONALD H. MICHALAK, FREDONIA, FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered May 22, 2013. The order, among other things, vacated a judgment of foreclosure and sale and dismissed the action.

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

Memorandum: In October 2005, defendant borrowed money from plaintiff's predecessor in interest and secured the loan with a mortgage on residential property. In September 2009, plaintiff commenced this action seeking foreclosure on the property. By order granted in August 2010, Supreme Court appointed a referee and, in October 2010, the court granted a judgment of foreclosure and sale. In January 2013, plaintiff moved for ratification of the judgment of foreclosure and sale and of the order appointing a referee, and defendant opposed that motion. By order entered May 22, 2013 (May order), the court vacated the judgment of foreclosure and sale, as well as the order appointing the referee, and dismissed the action, and plaintiff now appeals from that order. By order entered June 27, 2013 (June order), the court—apparently sua sponte, inasmuch as there is no motion for renewal or reargument in the record—granted plaintiff's motion for ratification of the judgment of foreclosure and sale, as well as the order appointing the referee. We conclude that this appeal from the May order has been rendered moot by the court's issuance of the June order and therefore must be dismissed (see *Deering v State of New York*, 111 AD3d 1368, 1368; *Matter of Dye v Bernier*, 104 AD3d 1102, 1102). We also note that no aggrieved party appealed from the June order (see CPLR 5511; *Field v New York City Tr.*

*Auth.*, 4 AD3d 389, 389).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1102**

**KA 13-00200**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID D. DUELL, JR., DEFENDANT-APPELLANT.

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DIMARTINO LAW OFFICE, OSWEGO (CARL L. SCHMIDT OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

DAVID D. DUELL, JR., DEFENDANT-APPELLANT PRO SE.

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

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Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered October 18, 2012. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree, sexual abuse in the second degree (seven counts), criminal sexual act in the first degree, course of sexual conduct against a child in the first degree and endangering the welfare of a child (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of sexual abuse in the first degree and sexual abuse in the second degree under the third and ninth counts of the indictment and dismissing counts two, three and nine of the indictment and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, criminal sexual act in the first degree (Penal Law § 130.50 [4]), course of sexual conduct against a child in the first degree (§ 130.75 [1] [b]), sexual abuse in the first degree (§ 130.65 [1]), and seven counts of sexual abuse in the second degree (§ 130.60 [2]), defendant contends in both the main brief and in the pro se supplemental brief that the conviction is not supported by legally sufficient evidence. Although defendant failed to preserve his contention for our review inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (see *People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678), we note that preservation is not required with respect to the sufficiency challenge raised in the main brief. The gravamen of defendant's contention is that the evidence at trial is legally insufficient to support the conviction because it varied from the limited theories of sexual contact alleged in the indictment. "Where the charge against a

defendant is limited either by a bill of particulars or the indictment itself, the defendant has a 'fundamental and nonwaivable' right to be tried only on the crimes charged" (*People v Hong Wu*, 81 AD3d 849, 849, *lv denied* 17 NY3d 796; *see generally People v Grega*, 72 NY2d 489, 495-496; *People v Greaves*, 1 AD3d 979, 980). We have thus held that, where, as here, a defendant contends that he or she has been convicted upon an uncharged theory of the crime, such a contention does not require preservation (*see People v Gunther*, 67 AD3d 1477, 1478; *see also Greaves*, 1 AD3d at 980). In any event, were preservation required, we would nevertheless exercise our discretion to address defendant's contention as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*).

A conviction is supported by legally sufficient evidence "when, viewing the facts in [the] light most favorable to the People, 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349; *see People v Bleakley*, 69 NY2d 490, 495). Here, because the People specifically narrowed the type of sexual contact alleged in counts two, three and nine of the indictment, County Court was "obliged to hold the prosecution to this narrower theory alone" (*People v Barnes*, 50 NY2d 375, 379 n 3; *see People v Smith*, 161 AD2d 1160, 1161, *lv denied* 76 NY2d 865). We agree with defendant that the People failed to present evidence concerning the specific type of sexual contact alleged in those counts of the indictment.

"Where there is a variance between the proof and the indictment, and where the proof is directed exclusively to a new theory rather than the theory charged in the indictment, the proof is deemed insufficient to support the conviction" (*Smith*, 161 AD2d at 1161; *see e.g. Gunther*, 67 AD3d at 1477-1478; *People v Jones*, 165 AD2d 103, 109-110, *lv denied* 77 NY2d 962). Counts two and three of the indictment alleged hand-to-vagina contact, but the victim testified that the only part of defendant's body that came into contact with her vagina was defendant's penis. Indeed, when asked specifically if any other part of defendant's body came into contact with her vagina during the incident encompassed by counts two and three, the victim responded, "No." Count nine of the indictment alleged penis-to-vagina contact, but the victim testified that defendant touched her vagina with his hand during that incident. Again, when asked specifically if any other part of defendant's body came into contact with her vagina during the incident encompassed by count nine, the victim responded, "No." We thus conclude that the evidence is legally insufficient to support the conviction with respect to counts two, three and nine and that defendant was denied his fundamental and nonwaivable right to be tried on only those crimes charged in the indictment. We therefore modify the judgment accordingly.

Viewing the evidence in light of the elements of the remaining crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we further conclude that the verdict on the remaining counts is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends in his main brief that he was denied a fair trial because certain spectators were mouthing words and otherwise gesturing to the victim while she was testifying. When the court brought the spectators' conduct to defense counsel's attention, defense counsel asked that those spectators be removed from the courtroom. The court denied that request but indicated that, if such conduct continued, the offending spectators would be removed. "[T]he decision to exclude a spectator from the courtroom rests in the discretion of the trial court" (*People v Stearns*, 72 AD3d 1214, 1218, *lv denied* 15 NY3d 778; *see generally People v Kin Kan*, 78 NY2d 54, 57-58, *rearg denied* 78 NY2d 1008). Ultimately, the question is whether the spectator's presence could "severely undermine[] the truth seeking function of the court" (*People v Ming Li*, 91 NY2d 913, 917). Defendant contends that the only evidence establishing the durational element of the course of sexual conduct count was elicited during the victim's first day of testimony, when the alleged interference occurred. While defendant's contention is correct, there is nothing to indicate that any actions by the spectators affected the victim's testimony. Indeed, the victim denied seeing any of the spectators' conduct, and there is nothing to establish that defendant was otherwise prejudiced by that conduct. We thus conclude that the court did not abuse its discretion in refusing to exclude the spectators from the courtroom.

In his pro se supplemental brief, defendant further contends that the court erred in failing, *sua sponte*, to order a mistrial as a result of the spectators' conduct and that the court improperly delegated its authority to control the courtroom to the prosecutor by allowing the prosecutor to admonish those spectators. We reject those contentions. " 'It is well settled that the decision to declare a mistrial rests within the sound discretion of the trial court, which is in the best position to determine if this drastic remedy is truly necessary to protect the defendant's right to a fair trial' " (*People v Lewis*, 247 AD2d 866, 866, *lv denied* 93 NY2d 1021; *see generally People v Michael*, 48 NY2d 1, 9). As noted above, there is nothing in the record to indicate that defendant was prejudiced by the spectators' conduct and, therefore, under these circumstances, we cannot say that the court abused its discretion in refusing, *sua sponte*, to order a mistrial. We further conclude that the court did not improperly delegate its authority to control the courtroom to the prosecutor. Indeed, the court, in recognition of its duties under 22 NYCRR 100.1 and 100.3 (B) (2), *sua sponte*, raised the issue of spectator interference. At that point, the prosecutor advised the court that he would admonish the spectators. In permitting the prosecutor to do so, the court did not improperly delegate a judicial function (*see e.g. People v Daughtry*, 242 AD2d 731, 732, *lv denied* 91 NY2d 871; *People v Gullledge*, 187 AD2d 1029, 1029, *lv denied* 81 NY2d 886; *cf. People v Bayes*, 78 NY2d 546, 551).

Although defendant contends that certain questions posed to the child sexual abuse accommodation syndrome expert were improper, he did not object to that testimony at trial and thus did not preserve his contention for our review (*see People v Spicola*, 16 NY3d 441, 465-466, *cert denied* \_\_\_ US \_\_\_, 132 S Ct 400; *People v Justice*, 99 AD3d 1213,



1214-1215, *lv denied* 20 NY3d 1012). In any event, we see no error in the challenged portion of the testimony (*see generally People v Keindl*, 68 NY2d 410, 422, *rearg denied* 69 NY2d 823). The expert never opined that defendant committed the crimes; that the victim was, in fact, sexually abused; or that the victim's behavior was consistent with such abuse (*see People v Carroll*, 95 NY2d 375, 387; *see also Spicola*, 16 NY3d at 465-466).

Defendant further contends that prosecutorial misconduct on summation deprived him of a fair trial. With respect to those instances of prosecutorial misconduct to which defendant objected, the court sustained the objections and issued curative instructions to the jury. Inasmuch as "[d]efendant did not request further curative instructions or move for a mistrial with respect to those objections[,] . . . the court 'must be deemed to have corrected the error[s] to the defendant's satisfaction' " (*People v White*, 291 AD2d 842, 842-843, *lv denied* 98 NY2d 656, quoting *People v Williams*, 46 NY2d 1070, 1071; *see People v Robinson*, 111 AD3d 1358, 1359, *lv denied* 22 NY3d 1141). Defendant failed to raise any objection at trial to the remainder of the comments he challenges on appeal and, therefore, defendant's contention insofar as it concerns those comments is not preserved for our review (*see People v Ortiz-Castro*, 12 AD3d 1071, 1071, *lv denied* 4 NY3d 766). In any event, we conclude that those comments now challenged by defendant were a fair response to defense counsel's summation (*see People v Cotto*, 106 AD3d 1534, 1534; *People v Williams*, 98 AD3d 1279, 1280, *lv denied* 20 NY3d 1066).

Contrary to defendant's remaining contentions in the main brief and in the pro se supplemental brief, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147), and that the sentence is not unduly harsh or severe.

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

1105

**KA 13-00035**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JORDAN J. ELLISON, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered January 7, 2013. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree (two counts) and criminal possession of stolen property in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentences imposed to concurrent indeterminate terms of incarceration of 15 years to life and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [1]) and two counts of burglary in the third degree (§ 140.20). One of the burglary counts arose from an incident that occurred at Marketplace Mall when defendant entered Macy's Department Store and filled two garbage bags with clothes before running out of the store without paying for the items. Although defendant jumped into a waiting vehicle that sped away, the theft was captured on the store's surveillance video, and store security officers recognized defendant from prior shoplifting arrests. Due to the prior thefts, defendant had been barred for life from entering Macy's and the mall itself.

Five days later, defendant entered the Gap store at Greece Ridge Mall and filled a large black garbage bag with clothes. A store security officer observed defendant on surveillance video. Upon checking the video of the parking lot area, the security officer determined that defendant had arrived at the mall in a gray Ford Taurus with the license plate number ELT 1037. As defendant approached the door without having paid for the items, the security

officer contacted a deputy sheriff who was on patrol outside the mall. Minutes later, the deputy sheriff, who had been apprised of the make, model and license plate number of the suspect's vehicle, observed defendant in the mall parking lot carrying a large black garbage bag and walking toward a parked gray Ford Taurus with the license plate number ELT 1037. The deputy sheriff approached defendant and, when he asked what was in the bag, which appeared to be filled, defendant responded, "Nothing." The deputy sheriff then asked defendant where he was going, whereupon defendant said "right here." The deputy sheriff ordered defendant to drop the bag, and defendant complied with that request. After frisking defendant for weapons, the officer looked inside the bag and observed 61 shirts on hangers. A Gap employee summoned to the scene informed the deputy sheriff that defendant had not purchased any of the shirts, the total value of which exceeded \$2,000.

Defendant was later indicted on two counts of burglary in the third degree, for unlawfully entering Macy's and Marketplace Mall with the intent to commit a crime therein, and criminal possession of stolen property in the fourth degree, for possessing the 61 stolen shirts from the Gap. In his omnibus motion, defendant sought suppression of the shirts he had stolen from the Gap, contending that the evidence was unlawfully seized by the police. Following a hearing, Supreme Court denied the omnibus motion insofar as it sought suppression of the stolen property. After defendant rejected a plea offer that would have resulted in an aggregate sentence of two to four years' imprisonment, the matter proceeded to trial before a jury, which found defendant guilty of all three counts of the indictment. The court thereafter adjudicated defendant to be a persistent felony offender and sentenced him to concurrent indeterminate terms of imprisonment of 20 years to life. This appeal ensued.

Defendant contends that he was unlawfully detained by the deputy sheriff in the parking lot at Greece Ridge Mall, and that the court therefore erred in refusing to suppress the stolen shirts found by the deputy sheriff during the subsequent search of the garbage bag defendant was carrying. We reject that contention. As noted, the deputy sheriff observed defendant carrying the bag while walking away from the scene of a recently reported larceny and in the direction of the suspected getaway vehicle. Although there were other people in the parking lot at the time, defendant was the only person walking toward that vehicle and the only person carrying a large garbage bag, which is unusual in that setting. Based on those observations, we conclude that the deputy sheriff had the requisite founded suspicion that criminal activity was afoot sufficient to justify the common-law right of inquiry (*see generally People v De Bour*, 40 NY2d 210, 223; *People v Carr*, 103 AD3d 1194, 1195; *People v McKinley*, 101 AD3d 1747, 1748, *lv denied* 21 NY3d 1017).

Moving to the next step of the *DeBour* analysis, we conclude that the deputy sheriff's questions of defendant were reasonably related to the scope of the circumstances that justified the interference (*see id.* at 215; *see also People v Torres*, 74 NY2d 224, 229-230; *People v Davis*, 81 AD3d 1321, 1321-1322, *lv denied* 16 NY3d 858). In response

to the deputy sheriff's first question, defendant offered the obviously false answer that there was nothing in the bag, which contained 61 shirts on hangers. That false answer, combined with the information already obtained by the deputy sheriff, gave rise to a reasonable suspicion that defendant had committed or was committing a crime (see *People v Ralston*, 303 AD2d 1014, 1014, lv denied 100 NY2d 565). It thus follows that the deputy sheriff acted lawfully in stopping and detaining defendant for investigative purposes.

Defendant further contends that the court erred in conducting a *Sandoval* conference outside his presence. We reject that contention as well. Although it is well settled that "a defendant has a right to be present during the substantive portion of the *Sandoval* hearing" (*People v Favor*, 82 NY2d 254, 265, rearg denied 83 NY2d 801), "a defendant's absence from the initial *Sandoval* conference does not require reversal where subsequent proceedings conducted on the record in defendant's presence constitute a de novo inquiry" (*People v Vargas*, 201 AD2d 963, 964, lv denied 83 NY2d 859). Here, although defendant was not present at a pretrial conference in chambers during which *Sandoval* matters were discussed, defendant was present during a subsequent court appearance during which the People stated their intention to cross-examine defendant with respect to all of his criminal convictions from the past 10 years. Notably, the court recited each of the 20 convictions and the dates they were entered and, after hearing arguments from defense counsel, rendered its *Sandoval* ruling. Under the circumstances, we conclude that the court conducted a de novo *Sandoval* hearing, and did not, as defendant contends, merely recite "in the defendant's presence . . . what has already been determined in his absence" (*People v Monclavo*, 87 NY2d 1029, 1031).

We agree with defendant, however, that his sentence should be modified in the interest of justice. Although defendant has an extensive criminal record and for decades has demonstrated a consistent disregard for the property rights of others, he is essentially a serial shoplifter who does not engage in acts of violence. We also note that the pretrial plea offer extended to defendant included a sentence promise of two to four years in prison. We thus conclude that the sentence of 20 years to life is unduly harsh and severe. Because defendant does not challenge the court's finding that he is a persistent felony offender, the minimum sentence permitted by law is 15 years to life (see Penal Law §§ 70.00 [3] [a] [i]; 70.10 [2]), and we exercise our discretion to modify the judgment accordingly (see generally CPL 470.15 [6] [b]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1106

**KA 12-00600**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GABRIEL DAVILA, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 3, 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 reversed as a matter of discretion in the interest of justice and on the law, the indictment is dismissed and the matter is remitted to Supreme Court, Onondaga County, for further proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals 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 failed to renew his motion to dismiss the indictment at the close of the People's proof on rebuttal and thus failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant is convicted of acting in concert with a codefendant, who was tried separately, in a sale of heroin. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is no valid line of reasoning or permissible inferences that "could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*People v Bleakley*, 69 NY2d 490, 495).

The evidence established that the police were conducting surveillance of a two-family residence, which was owned by the codefendant's mother-in-law; the codefendant resided in the first-

floor apartment and defendant's father resided in the second-floor apartment. Two police officers observed a woman approach a group of men standing in front of the residence and observed defendant walk with the woman partway up a long driveway that curved into a backyard. Those officers also saw defendant and the woman subsequently have a brief verbal exchange after walking back down the driveway, before the woman departed. Another officer, who could view the back of the house, observed defendant with the woman and the codefendant in the backyard, but defendant was not with them when the sale was conducted at the house and he did not see defendant again. The woman testified that she approached the group of men in the front of the house and asked for "montega," which is slang in Spanish for heroin, and that one of the men directed her toward the back of the house and walked with her partway up the driveway where she met the codefendant. The woman arranged the sale with the codefendant, and purchased the heroin that the codefendant retrieved from the house. The police officer viewing the back of the house observed the codefendant at the house and a hand-to-hand exchange between the codefendant and the woman. The woman was stopped by the police and packets containing a tan powder that tested positive for heroin were recovered from her, and the sum of \$490 was recovered from the codefendant. Following a search of the two-family home, the police recovered large quantities of heroin from the first-floor apartment and the basement, which could be accessed from the back porch or the second-floor apartment, as well as heroin that was hidden in the backyard. The codefendant had keys to both apartments. No drugs or money were recovered from defendant, which a police witness testified was consistent with the role of the "steerer," who directed customers to the sale but did not handle the drugs or money.

"To establish an acting-in-concert theory in the context of a drug sale, the People must prove not only that the defendant shared the requisite *mens rea* for the underlying crime but also that defendant, in furtherance of the crime, solicited, requested, commanded, importuned or intentionally aided the principal in the commission of the crime . . . The key to our analysis is whether a defendant intentionally and directly assisted in achieving the ultimate goal of the enterprise—the illegal sale of a narcotic drug" (*People v Bello*, 92 NY2d 523, 526; see Penal Law § 20.00).

We conclude that the evidence is legally insufficient to establish that defendant acted in concert with the codefendant to sell heroin to the buyer inasmuch as he did nothing "more than simply direct the [buyer] to a location where [she] could purchase [heroin]" (*People v Brown*, 50 AD3d 1596, 1597; see *People v Johnson*, 238 AD2d 267, 267, *lv denied* 90 NY2d 894; *cf. People v Ellerbe*, 228 AD2d 301, 302, *lv denied* 89 NY2d 921; *People v Fonseca*, 208 AD2d 399, 399; see generally *People v Herring*, 83 NY2d 780, 783). "While this evidence certainly demonstrated that the defendant was able to identify a local purveyor of narcotics, it did not show . . . that he shared the seller's intent to bring the transaction about . . . [Indeed], by merely responding to the [buyer's] inquiry as to who had drugs for sale, the defendant did nothing to solicit or request, much less demand[, ] importune[, or assist in] the illicit sale" (*People v*

*Rosario*, 193 AD2d 445, 446, *lv denied* 82 NY2d 708). We therefore reverse the judgment of conviction and dismiss the indictment.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1107**

**CA 13-01911**

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

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IN THE MATTER OF THE ESTATE OF ANTHONY J. THOMAS,  
DECEASED.

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IN THE MATTER OF THE ESTATE OF DOROTHY THOMAS,           MEMORANDUM AND ORDER  
DECEASED.

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JOSEPH M. THOMAS AND GLORIA M. BORRELLI,  
PETITIONERS-APPELLANTS;

TOM J. THOMAS, RESPONDENT-RESPONDENT.  
(APPEAL NO. 1.)

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BOND, SCHOENECK & KING, PLLC, ROCHESTER (JONATHAN B. FELLOWS OF  
COUNSEL), FOR PETITIONERS-APPELLANTS.

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

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Appeal from an order of the Surrogate's Court, Monroe County  
(Edmund A. Calvaruso, S.), entered July 22, 2013. The order granted  
respondent's motion to dismiss the petition in part.

It is hereby ORDERED that the order so appealed from is  
unanimously modified on the law by denying that part of respondent's  
motion to dismiss the claim for the imposition of a constructive trust  
with respect to stock in the New York State Fence Company and  
reinstating that claim and as modified the order is affirmed without  
costs.

Memorandum: Petitioners, nonparty Daniel J. Thomas (Daniel), and  
respondent are the four children of Anthony J. Thomas and Dorothy  
Thomas (collectively, decedents), who died in April 2012 and August  
2012, respectively. Petitioners, Daniel and respondent are named in  
decedents' wills as, inter alia, beneficiaries of either their  
residuary estates or a trust that is itself a beneficiary of the  
residuary estate. Respondent was the named executor under both wills,  
and he was also appointed as trustee to numerous trusts created by  
decedents' wills. The wills were admitted to probate and letters  
testamentary were issued to respondent.

In March 2013, petitioners commenced this proceeding challenging  
numerous real estate transactions between respondent and decedents.  
According to petitioners, respondent "exploited his close relationship  
with [decedents] by inducing them to transfer to him certain



properties they owned, with the promise of payment for, and/or reconveyance of, the parcels to [decedents] and/or his siblings." Inasmuch as respondent never paid for the parcels or reconveyed them to decedents or his siblings, petitioners sought to impose a constructive trust, inter alia, on monies received by respondent or entities controlled by him related to the sale of property on North Greece Road (NGR property), and on the Manitou Road property and any monies received by respondent or entities controlled by him related to a lease on that property.

Petitioners also challenged respondent's failure to identify any shares of New York State Fence Company (NYSFC) as being included within the assets of decedents' estates. According to respondent, he was the sole shareholder of NYSFC, a company founded by decedent Anthony J. Thomas in 1958 and incorporated in 1977. Due to the fact that respondent had failed to produce any records reflecting the transfer of NYSFC stock from Anthony to respondent or any records reflecting respondent's payments for the stock, petitioners contended that a constructive trust should be imposed on "all stock certificates in NYSFC owned by Anthony."

In addition to seeking the imposition of a constructive trust, petitioners also sought, inter alia, a partial distribution pursuant to SCPA 2102 (5), information pursuant to SCPA 2102 (1), an accounting pursuant to SCPA 2205 and revocation of letters granted to respondent pursuant to SCPA 711 (1) and (2). After filing his answer, respondent moved pursuant to CPLR 3211 (a) (5) and (7) to dismiss the petition insofar as it sought relief pertaining to the real property and respondent's ownership of stock in NYSFC. Respondent contended that any claims for relief pertaining to the real property and corporate stock of NYSFC were time-barred and that the petition failed to state a cause of action for relief related thereto.

In appeal No. 1, petitioners appeal from the order of Surrogate's Court (Calvaruso, S.) granting that motion. In appeal No. 2, petitioners appeal from a subsequent order of Surrogate's Court (Owens, A.S.) directing that they may not inquire of the executor or otherwise obtain disclosure concerning the NYSFC stock or the finances or affairs of that company. We now modify the order in appeal No. 1 by denying respondent's motion in part, and we reverse the order in appeal No. 2.

We agree with petitioners that the petition sufficiently states a cause of action for a constructive trust with respect to the NGR property, the Manitou Road property and NYSFC stock. "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction . . . We accept the facts as alleged in the [petition] as true, accord [the petitioners] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . In assessing a motion under CPLR 3211 (a) (7), . . . a court may freely consider affidavits submitted by the [petitioner] to remedy any defects in the [petition] . . . and 'the criterion is whether the proponent of the

pleading has a cause of action, not whether he has stated one' " (*Leon v Martinez*, 84 NY2d 83, 87-88; see *Lawrence v Graubard Miller*, 11 NY3d 588, 595).

"[I]t is well settled that [a] constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest . . . In order to invoke the court's equity powers, [a petitioner] must show a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, a breach of the promise, and [the respondent's] unjust enrichment . . . Inasmuch as a constructive trust is an equitable remedy, however, courts do not rigidly apply the elements but use them as flexible guidelines . . . In this flexible spirit, the promise need not be express, but may be implied based on the circumstances of the relationship and the nature of the transaction" (*Beason v Kleine*, 96 AD3d 1611, 1613 [internal quotation marks omitted]; see generally *Sharp v Kosmalski*, 40 NY2d 119, 121-122; *Moak v Raynor*, 28 AD3d 900, 902).

The facts as alleged in the petition and set forth in the corresponding affidavits establish the existence of a confidential and fiduciary relationship between respondent and decedents. The facts with respect to the NGR and Manitou Road properties establish that respondent promised to pay decedents for the NGR property and to reconvey the Manitou Road property to decedents after it was subdivided by respondent. The petition further alleges that the properties were transferred to respondent as a result of those promises, and that respondent breached those promises and was thereby unjustly enriched.

With respect to the NYSFC stock, the petition and corresponding affidavits allege that Anthony believed, until the day that he died, that he still owned the company and that respondent had made promises to "allow all of [decedents'] children to share in NYSFC." While the allegations of an express promise are lacking, "[e]ven without an express promise, . . . courts of equity have imposed a constructive trust upon property transferred in reliance upon a confidential relationship. In such a situation, a promise may be implied or inferred from the very transaction itself. As Judge Cardozo so eloquently observed: 'Though a promise in words was lacking, the whole transaction, it might be found, was "instinct with an obligation" imperfectly expressed' " (*Sharp*, 40 NY2d at 122). Based on the circumstances of the relationship between respondent and decedents and the nature of their multiple transactions, we conclude that there are sufficient facts from which we can conclude that there was an implied promise made by respondent to decedents; that the transfer of stock, if indeed there was a transfer, was made in reliance upon that promise; and that the promise was thereafter broken, resulting in an unjust enrichment to respondent.

We reject respondent's contentions that CPLR 4519 precludes us from considering the statements of Dorothy Thomas to her accountant and to Anthony's sisters, all of which lend support to the allegations that respondent made certain promises to decedents related to the

property and stock. That statute precludes a party, an interested person or a person "from, through or under whom" a party or an interested person derives his or her interest from being examined as a witness concerning personal transactions or communications between the witness and the deceased person (CPLR 4519). The accountant and Anthony's sisters are not parties, persons interested in the event or persons "from, through or under whom" petitioners derive their interest (*id.*). In any event, any issue concerning the admissibility of statements under CPLR 4519 "is premature at this time, as its bar is not operative until trial" (*Hagerman v Hagerman*, 21 Misc 3d 1142[A], 2008 NY Slip Op 52481[U] [Sup Ct, Nassau County 2008], \*3; see generally *Phillips v Kantor & Co.*, 31 NY2d 307, 313-315). That is the case because the issue whether petitioners "can ultimately establish [their] allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19; see *Cohn v Lionel Corp.*, 21 NY2d 559, 562).

Even if we were to assume, arguendo, that the petition fails to allege facts sufficient to support one of the elements of a constructive trust, we note that those elements " 'serve only as a guideline, [and] a constructive trust may still be imposed even if all of the elements are not established' " (*Quadrozzi v Estate of Quadrozzi*, 99 AD3d 688, 691). We thus conclude that the Surrogate in appeal No. 1 erred in concluding that the petition "fails to state a cause of action upon which the relief of the imposition of a constructive trust can be granted."

Petitioners further contend that the Surrogate in appeal No. 1 erred in concluding that their claims for a constructive trust were time-barred. We agree in part. Addressing first the claims related to the NYSFC stock, we conclude that the Surrogate erred in granting that part of respondent's motion to dismiss, as time-barred, the claim for a constructive trust related to the stock. We therefore modify the order in appeal No. 1 accordingly, and we reverse the order in appeal No. 2, which denied petitioners the right to any SCPA 2211 examination or disclosure concerning the NYSFC stock. "The equitable claim for the imposition of a constructive trust is governed by the six-year [s]tatute of [l]imitations of CPLR 213 (1) . . . , which begins to run at the time of the wrongful conduct or event giving rise to a duty of restitution . . . A determination of when the wrongful act triggering the running of the [s]tatute of [l]imitations occurs depends upon whether the constructive trustee acquired the property wrongfully, in which case the property would be held adversely from the date of acquisition . . . , or whether the constructive trustee wrongfully withholds property acquired lawfully from the beneficiary, in which case the property would be held adversely from the date the trustee breaches or repudiates the agreement to transfer the property" (*Maric Piping v Maric*, 271 AD2d 507, 508 [internal quotation marks omitted]; see *Tampa v Delacruz*, 77 AD3d 910, 911). Petitioners contend that, if respondent in fact owns all of the NYSFC stock as he claims, then he acquired it based on a promise, express or implied, that he would share that stock with his siblings upon the death of decedents. That promise was thus not breached until 2012, when decedents died and respondent failed to share that stock with his

siblings. Inasmuch as this proceeding was commenced in 2013, the claim for a constructive trust over the NYSFC stock therefore is not time-barred.

With respect to the NGR and Manitou Road properties, however, we conclude that the Surrogate in appeal No. 1 properly determined that the claims for the imposition of a constructive trust related to those properties are time-barred and thus properly granted respondent's motion to that extent. Affording the pleadings the most liberal construction, we conclude that the statute of limitations began to run with respect to the NGR property sometime between 1989 and 1992, which is when the promised payments for the property were due and owing. The six-year statute of limitations thus expired, at the latest, in 1998, which is 15 years before this proceeding was commenced. With respect to the Manitou Road property, petitioners alleged that respondent had promised to reconvey the property to decedents following the subdivision of the property, which occurred in 1994 and again in 1998. The six-year statute of limitations thus expired, at the latest, in 2004, which is nine years before this proceeding was commenced.

While petitioners contend that they may seek the imposition of a constructive trust with respect to the NGR and Manitou Road properties as an equitable remedy for other causes of action, that contention lacks merit. "[A]n equitable remedy, such as the imposition of a constructive trust sought by [petitioners], is not available to enforce a legal right that is itself barred by the statute of limitations" (*Benedict v Whitman Breed Abbott & Morgan*, 77 AD3d 867, 869, *lv denied* 16 NY3d 706; see *MRI Broadway Rental v United States Min. Prods. Co.*, 242 AD2d 440, 444, *affd* 92 NY2d 421). Here, the legal right to enforce the promises related to the real property is barred by the statute of limitations and, therefore, petitioners cannot seek the equitable remedy of a constructive trust to enforce that time-barred legal right.

Petitioners contend that respondent should be equitably estopped from asserting the statute of limitations as a defense. We reject that contention insofar as it applies to the NGR and Manitou Road properties. There are two distinct theories of equitable estoppel (*compare Matter of Gill v New York State Racing & Wagering Bd.*, 50 AD3d 494, 495, *with Matter of Watson*, 8 AD3d 1092, 1094). According to the first theory, equitable estoppel precludes a party from asserting the statute of limitations as a defense where the party commencing the action or proceeding was "induced by fraud, misrepresentations or deception to refrain from filing a timely [petition]" (*Gill*, 50 AD3d at 495; see *Mitchell v Nassau Community Coll.*, 265 AD2d 456, 457; see generally *Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552-553). The second theory of equitable estoppel provides that, "[w]here . . . a fiduciary relationship exists and there are colorable allegations of concealment, the doctrine of equitable estoppel may apply to toll the statute of limitations" (*Watson*, 8 AD3d at 1094; see *Matter of Piccillo*, 19 AD3d 1087, 1089).

In support of their contention that respondent should be

equitably estopped from asserting the statute of limitations as a defense to the claims concerning the NGR and Manitou Road properties, petitioners alleged that, when decedents reminded respondent of his obligations to repay them or to reconvey the property, respondent made oral promises to pay them or to reconvey the property to them in the future. Inasmuch as petitioners are the beneficiaries of decedents' estates, petitioners contend that those promises to decedents equitably estop respondent from asserting the statute of limitations defense against petitioners. Mere promises to pay in the future, however, are insufficient to support a theory of equitable estoppel where, as here, "[t]here is no evidence that the . . . promises to pay were intended to lull [decedents] into inactivity until after the expiration of the [s]tatute of [l]imitations" (*Erlichman v Ventura*, 271 AD2d 481, 481; see *Joseph Gaier, P.C. v Iveli*, 287 AD2d 375, 375; *Donahue-Halverson, Inc. v Wissing Constr. & Bldg. Servs. Corp.*, 95 AD2d 953, 954; see also *Baratta v Kozlowski*, 94 AD2d 454, 457). Petitioners made no allegations related to the second theory of estoppel insofar as it concerns the real properties.

In light of our determination that the statute of limitations has not expired with respect to the claim for a constructive trust on the NYSFC stock, we do not address petitioners' equitable estoppel claims related thereto.

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

**1113**

**CA 14-00018**

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

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MELISSA LAZAR, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BARRY D. LAZAR, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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SHELDON B. BENATOVICH, WILLIAMSVILLE (JAMES P. RENDA OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

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

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Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered March 30, 2012 in a divorce action. The order, among other things, awarded plaintiff a money judgment against defendant in the sum of \$98,966.91.

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

Same Memorandum as in *Lazar v Lazar* ([appeal No. 3] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1114**

**CA 14-00019**

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

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MELISSA LAZAR, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BARRY D. LAZAR, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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SHELDON B. BENATOVICH, WILLIAMSVILLE (JAMES P. RENDA OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

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

---

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered April 16, 2012 in a divorce action. The order and judgment awarded plaintiff a money judgment in the sum of \$98,966.91 against defendant.

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

Same Memorandum as in *Lazar v Lazar* ([appeal No. 3] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1115**

**CA 14-00020**

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

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MELISSA LAZAR, PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

BARRY D. LAZAR, DEFENDANT-APPELLANT-RESPONDENT.  
(APPEAL NO. 3.)

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SHELDON B. BENATOVICH, WILLIAMSVILLE (JAMES P. RENDA OF COUNSEL), FOR  
DEFENDANT-APPELLANT-RESPONDENT.

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

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Appeal and cross appeal from a judgment of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered June 10, 2013 in a divorce action. The judgment, among other things, ordered defendant to pay child support to plaintiff.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by striking from the 9<sup>th</sup> decretal paragraph the phrase "retroactive to December 10, 2012, with the first installment due on January 10, 2013" and substituting therefor the phrase "retroactive to June 3, 2009, the date of commencement of the action," and by increasing defendant's child support obligation in the 10<sup>th</sup> decretal paragraph to \$46,101.28 per year, or \$3,841.77 per month, and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: In appeal No. 1 in this divorce action, defendant appeals from a "temporary order" that, among other things, ordered that plaintiff is entitled to a money judgment in the amount of \$98,966.91, effective February 29, 2012, for arrears that accrued because defendant failed to pay temporary maintenance, child support and various carrying charges and expenses. In appeal No. 2, defendant appeals from an "order and money judgment" that awarded plaintiff judgment in the amount of \$98,966.91 based on the order in appeal No. 1. In appeal No. 3, defendant appeals and plaintiff cross-appeals from a judgment of divorce entered following a nonjury trial. As relevant to the parties' contentions in appeal No. 3, the judgment of divorce directed defendant to pay maintenance for five years retroactive to December 10, 2012, child support, and a portion of plaintiff's attorney fees and expert fees; awarded plaintiff judgment in the amount of \$167,425 for defendant's failure to pay court-ordered family support and household expenses not previously reduced to judgment; granted defendant a credit of \$138,000



for his separate property claim concerning a home he owned prior to the marriage; and equitably distributed a Swiss bank account and a limited liability company. In appeal No. 4, defendant appeals from an order that, among other things, granted plaintiff a judgment for maintenance arrears in the amount of \$70,000, for attorney fees and expert fees in the sum of \$42,176.50, and for a distributive award in the sum of \$658,381.50.

We note at the outset that the order in appeal No. 1 was subsumed in the order and judgment in appeal No. 2, and we thus dismiss the appeal from the order in appeal No. 1 (see *Hendryx v Johnson Boys Ford-Mercury*, 309 AD2d 1260, 1261; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567).

We address first defendant's appeal from the judgment of divorce in appeal No. 3. Defendant contends that Supreme Court erred both in ordering maintenance for a duration of five years and in ordering that the award of maintenance be effective as of December 10, 2012, which was the last day of trial testimony. "It is well established that, [a]s a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court" (*Myers v Myers*, 118 AD3d 1315, 1315 [internal quotation marks omitted]; see *McCarthy v McCarthy*, 57 AD3d 1481, 1481-1482). Although the authority of this Court in determining issues of maintenance is as broad as that of the trial court, we decline to substitute our discretion for that of the trial court insofar as it concerns the duration of defendant's maintenance obligation (see *Martin v Martin*, 115 AD3d 1315, 1315; cf. *Scala v Scala*, 59 AD3d 1042, 1043). We conclude that the court's determination to award maintenance for a period of five years was not an abuse of discretion "inasmuch as the court properly considered the factors set forth in Domestic Relations Law § 236 (B) (6) (a)" (*Scully v Scully*, 104 AD3d 1137, 1138; see *Schmitt v Schmitt*, 107 AD3d 1529, 1529; *McCarthy*, 57 AD3d at 1482; cf. *Perry v Perry*, 101 AD3d 1762, 1762-1763).

We further conclude, however, that the court erred in ordering that the award of maintenance be effective as of the last day of trial testimony. Domestic Relations Law § 236 (B) (6) (a) provides in relevant part that an order of maintenance "shall be effective as of the date of the application therefor." The divorce action was commenced on June 3, 2009, and there is no dispute that plaintiff requested an award of maintenance in her summons with notice on that date. Inasmuch as the statutory language is mandatory, the court erred in ordering the maintenance award to be retroactive to December 10, 2012 (see *Burns v Burns*, 84 NY2d 369, 377; *Jones v Jones*, 92 AD3d 845, 848, *lv denied* 19 NY3d 805). We thus modify the judgment in appeal No. 3 by directing that the effective date of the maintenance award is June 3, 2009 and, because the term of maintenance ended in 2014, we remit the matter to Supreme Court to determine whether further modification of the amount of the maintenance award is warranted and to recalculate any arrears owed by, or credits due to, defendant. In view of our decision in appeal No. 3, we also modify the order in appeal No. 4 by vacating the second ordering paragraph, which awarded maintenance arrears in the amount of \$70,000.

Defendant further contends with respect to his appeal from the judgment in appeal No. 3 that the court erred in determining that the Swiss bank account was marital property rather than his separate property or that of his parents and thus exempt from equitable distribution. We reject that contention inasmuch as defendant failed to rebut the statutory presumption that the account was marital property (see Domestic Relations Law § 236 [B] [1] [c]; *Swett v Swett*, 89 AD3d 1560, 1561-1562). The evidence at trial established that the account was opened, and substantial deposits were made, during the marriage. Furthermore, defendant's contention that the account was his parents' property is "contrary to a position taken [by him] in . . . [amended] income tax return[s]" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422). We likewise reject defendant's contention in appeal No. 3 that the court abused its discretion in awarding plaintiff a portion of her attorney fees and expenses, particularly in light of the disparity in the incomes of the parties and defendant's conduct in prolonging the litigation (see *Swett*, 89 AD3d at 1562; *McBride-Head v Head*, 23 AD3d 1010, 1011). Upon our review of the record, we perceive no error in the court's calculation of defendant's interim partial payment of such fees and expenses.

We next address plaintiff's cross appeal from the judgment in appeal No. 3 wherein she contends, inter alia, that the court erred in its calculation of child support. We agree with plaintiff that the court erred in its calculation of the combined parental income pursuant to Domestic Relations Law § 240 (1-b) (c) (1) by deducting the amount of maintenance from defendant's gross income without providing for an adjustment in child support upon the termination of maintenance (§ 240 [1-b] [b] [5] [vii] [C]; *Salvato v Salvato*, 89 AD3d 1509, 1509-1510, *lv denied* 18 NY3d 811), and by adding the amount of maintenance to plaintiff's income (see *Frost v Frost*, 49 AD3d 1150, 1152; see also *Huber v Huber*, 229 AD2d 904, 905). We conclude that plaintiff's imputed net income is \$6,000, defendant's imputed net income is \$2,000,000, the combined parental income is \$2,006,000 and the pro rata shares are 0.3% from plaintiff and 99.7% from defendant. We therefore further modify the judgment in appeal No. 3 by increasing defendant's child support obligation to \$46,101.28 per year, or \$3,841.77 per month.

Plaintiff's remaining contentions with respect to the judgment in appeal No. 3 are without merit. We reject plaintiff's contention that the court abused its discretion in not applying the Child Support Standards Act to the combined parental income in excess of the statutory cap up to \$350,000. The record establishes that the court considered the appropriate factors in applying an income cap of \$272,000, rather than \$350,000 (see Domestic Relations Law § 240 [1-b] [c] [2], [3]; [f]; *Martin*, 115 AD3d at 1315). Contrary to plaintiff's further contention, the court did not err in awarding defendant a credit of \$138,000 for his separate property claim related to his home that he owned prior to the marriage (see *Zanger v Zanger*, 1 AD3d 865, 867; cf. *Johnson v Johnson*, 277 AD2d 923, 925, *lv dismissed* 96 NY2d 792). Finally, also without merit is plaintiff's contention that the court erred in accepting the capitalization rate of defendant's expert over that of her expert in valuing a limited liability company owned

by the parties. "[T]here is no uniform rule for fixing the value of a going business for equitable distribution purposes" (*Burns v Burns*, 84 NY2d 369, 375) and, here, we conclude that the court's acceptance of the capitalization rate of defendant's expert to value that relatively new business as of the date of commencement of the action was not an abuse of discretion (see *Hiatt v Hiatt*, 6 AD3d 1014, 1015; see generally *Scala v Scala*, 59 AD3d 1042, 1043).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1116

CA 14-00300

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

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MELISSA LAZAR, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BARRY D. LAZAR, DEFENDANT-APPELLANT.  
(APPEAL NO. 4.)

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SHELDON B. BENATOVICH, WILLIAMSVILLE (JAMES P. RENDA OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

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

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Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered December 19, 2013 in a divorce action. The order, among other things, granted plaintiff's motion for a money judgment for maintenance arrears, child support arrears and a distributive award.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph and as modified the order is affirmed without costs.

Same Memorandum as in *Lazar v Lazar* ([appeal No. 3] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1117

**CA 14-00210**

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

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IN THE MATTER OF THE ESTATE OF ANTHONY J. THOMAS,  
DECEASED.

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IN THE MATTER OF THE ESTATE OF DOROTHY THOMAS,           MEMORANDUM AND ORDER  
DECEASED.

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JOSEPH M. THOMAS AND GLORIA M. BORRELLI,  
PETITIONERS-APPELLANTS;

TOM J. THOMAS, RESPONDENT-RESPONDENT.  
(APPEAL NO. 2.)

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BOND, SCHOENECK & KING, PLLC, ROCHESTER (JONATHAN B. FELLOWS OF  
COUNSEL), FOR PETITIONERS-APPELLANTS.

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

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Appeal from an order of the Surrogate's Court, Monroe County  
(John M. Owens, A.S.), entered December 10, 2013. The order directed  
that petitioners may not inquire of the executor, or otherwise obtain  
disclosure, concerning his ownership of the stock of New York State  
Fence Company or concerning the finances or affairs of that company.

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

Same Memorandum as in *Matter of Estate of Thomas* ([appeal No. 1]  
\_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1127

**KA 10-00817**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CARL WATERFORD, DEFENDANT-APPELLANT.

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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.

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Appeal from a judgment of the Monroe County Court (John Lewis DeMarco, J.), rendered February 3, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of stolen property in the fourth degree and unauthorized use of a vehicle 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 after a jury trial of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [5]) and unauthorized use of a vehicle in the second degree (§ 165.06). Viewing the evidence in light of the elements of the crime of criminal possession of stolen property in the fourth degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict with respect to that crime is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). " '[D]efendant's knowledge that property is stolen may be proven circumstantially, and the unexplained or falsely explained recent exclusive possession of the fruits of a crime allows a [trier of fact] to draw a permissible inference that defendant knew the property was stolen' " (*People v Jackson*, 66 AD3d 1415, 1416; *see People v Cintron*, 95 NY2d 329, 332). Here, the record establishes that defendant was found in possession of and the only occupant of the subject vehicle less than 12 hours from the time the vehicle was reported missing; that the vehicle was registered to persons other than defendant; that the vehicle contained personal effects of the registered owners; and that defendant abandoned the vehicle and fled from the police during a traffic stop. We conclude that the jury was entitled to infer from that circumstantial evidence that defendant knowingly possessed a stolen vehicle for his own benefit (*see* § 165.45; *Jackson*, 66 AD3d at

1416; see also *People v Kindler*, 83 AD3d 964, 964-965, lv denied 17 NY3d 797; *People v Pharr*, 288 AD2d 239, 239, lv denied 97 NY2d 759). Even assuming, arguendo, that a different verdict on that count would not have been unreasonable, we cannot conclude that the jurors failed to give the evidence the weight it should be accorded (see *People v Ohse*, 114 AD3d 1285, 1286-1287, lv denied 23 NY3d 1041; see generally *Bleakley*, 69 NY2d at 495).

We also reject defendant's contention that the jury charge with respect to the crime of unauthorized use of a vehicle in the second degree was ambiguous and a misstatement of the law that unconstitutionally required the jury to apply a statutory presumption. Penal Law § 165.05 (1), a prerequisite to the application of section 165.06, specifies that, where a defendant "takes, operates, exercises control over, rides in or otherwise uses a vehicle . . . without the consent of the owner[,] [the defendant] is presumed to know that he does not have such consent." Although a charge that requires a jury to apply a presumption that shifts the burden of proof to the defendant is unconstitutional (see *Sandstrom v Montana*, 442 US 510, 524), here the record reveals that the charge sufficiently conveyed to the jury that "it had a choice as to whether to apply the statutory presumption" (*People v Smith*, 23 AD3d 415, 416, lv denied 6 NY3d 781). Thus, we conclude that the charge was proper.

Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct during summation is not preserved for our review (see *People v Ross*, 118 AD3d 1413, 1416-1417, lv denied 24 NY3d 964; see also *People v Ettleman*, 109 AD3d 1126, 1126, lv denied 22 NY3d 1198; *People v Heck*, 103 AD3d 1140, 1143, lv denied 21 NY3d 1074). In any event, that contention is without merit, inasmuch as we conclude that County Court's jury charge cured any potential prejudice caused by statements of the prosecutor on summation that may have shifted the burden of proof or constituted a misstatement of law (see *People v Robinson*, 111 AD3d 1358, 1359, lv denied 22 NY3d 1141; see also *People v Copeland*, 30 AD3d 1022, 1023-1024, lv denied 7 NY3d 847).

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

1129

**KA 11-01031**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON LAWSON, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

---

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered October 5, 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.

Same Memorandum as in *People v Lawson* ([appeal No. 7] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

**1130**

**KA 11-01032**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON LAWSON, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered October 5, 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.

Same Memorandum as in *People v Lawson* ([appeal No. 7] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1131**

**KA 11-01033**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON LAWSON, DEFENDANT-APPELLANT.  
(APPEAL NO. 3.)

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LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered October 5, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the second degree.

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

Same Memorandum as in *People v Lawson* ([appeal No. 7] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1132**

**KA 11-01034**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON LAWSON, DEFENDANT-APPELLANT.  
(APPEAL NO. 4.)

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LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered October 5, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the second degree.

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

Same Memorandum as in *People v Lawson* ([appeal No. 7] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1133**

**KA 11-01035**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON LAWSON, DEFENDANT-APPELLANT.  
(APPEAL NO. 5.)

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LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered October 5, 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.

Same Memorandum as in *People v Lawson* ([appeal No. 7] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1134**

**KA 11-01036**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON LAWSON, DEFENDANT-APPELLANT.  
(APPEAL NO. 6.)

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LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered October 5, 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.

Same Memorandum as in *People v Lawson* ([appeal No. 7] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1135

**KA 11-01037**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON LAWSON, DEFENDANT-APPELLANT.  
(APPEAL NO. 7.)

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LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered October 5, 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 modified as a matter of discretion in the interest of justice and on the law by vacating the amount of restitution ordered and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: In these consolidated appeals, defendant appeals from judgments convicting him upon his pleas of guilty of eight counts of burglary in the third degree (Penal Law § 140.20) and two counts of criminal mischief in the second degree (§ 145.10).

We note as an initial matter that, contrary to the People's contention, defendant's "purported waiver of the right to appeal is not valid inasmuch as County Court failed to obtain a knowing and voluntary waiver of that right at the time of the plea, and instead obtained the purported waiver at sentencing" (*People v Pieper*, 104 AD3d 1225, 1225; see generally *People v Lopez*, 6 NY3d 248, 256).

Defendant contends in appeal No. 7, inter alia, that the restitution portion of the sentence is illegal because the named victim does not qualify under the statute (see Penal Law § 60.27 [4] [b]), and that such contention does not require preservation. We agree with defendant that preservation is not required with respect to that contention (see *People v McCarthy*, 83 AD3d 1533, 1534-1535, lv denied 17 NY3d 819), but we conclude that it lacks merit (see § 60.27 [4] [b]).

We conclude that, to the extent that defendant contends that the amount of restitution ordered by the court is not supported by the

record "[his] claim is not properly before this Court for review because [he] did not request a hearing to determine the [proper amount of restitution] or otherwise challenge the amount of the restitution order[] during the sentencing proceeding" (*People v Butler*, 70 AD3d 1509, 1510, *lv denied* 14 NY3d 886 [internal quotation marks omitted]; see *People v Horne*, 97 NY2d 404, 414 n 3; *People v Jones*, 108 AD3d 1206, 1207, *lv denied* 22 NY3d 997; *People v Kirkland*, 105 AD3d 1337, 1338, *lv denied* 21 NY3d 1043). We nevertheless exercise our power to review defendant's contention as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]). We agree with defendant that the record "does not contain sufficient evidence to establish the amount [of restitution to be imposed]," and that the court therefore "erred in determining the amount of restitution without holding a hearing" (*People v Wright*, 288 AD2d 899, 900, *lv denied* 97 NY2d 689). We therefore modify the judgment in appeal No. 7 by vacating the amount of restitution ordered, and we remit the matter to County Court for a hearing to determine the amount of restitution to be paid by defendant.

Finally, we note that the order of restitution was entered under the judgment in appeal No. 7 only, and that the uniform sentence and commitment sheets in each of the other appeals merely recite that restitution was ordered but "[n]ot [p]aid." The uniform sentence and commitment sheet in appeal No. 10, however, erroneously recites that restitution was ordered in connection with the judgment giving rise to that appeal. That uniform sentence and commitment sheet therefore must be amended by deleting the restitution amount therefrom, while retaining the "[n]ot [p]aid" designation (see *People v Deschaine*, 116 AD3d 1303, 1304, *lv denied* 23 NY3d 1019; see generally *People v Martinez*, 37 AD3d 1099, 1100, *lv denied* 8 NY3d 947). In light of our determination, we need not address defendant's remaining contentions.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1136**

**KA 11-01038**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON LAWSON, DEFENDANT-APPELLANT.  
(APPEAL NO. 8.)

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LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered October 5, 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.

Same Memorandum as in *People v Lawson* ([appeal No. 7] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

**1137**

**KA 11-01039**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON LAWSON, DEFENDANT-APPELLANT.  
(APPEAL NO. 9.)

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LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered October 5, 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.

Same Memorandum as in *People v Lawson* ([appeal No. 7] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1138**

**KA 11-01040**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON LAWSON, DEFENDANT-APPELLANT.  
(APPEAL NO. 10.)

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LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered October 5, 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.

Same Memorandum as in *People v Lawson* ([appeal No. 7] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1140**

**KA 12-01613**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAVELL FOX, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered May 21, 2012. The judgment convicted defendant, after a nonjury trial, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree, resisting arrest and harassment 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, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). The charges arose from an incident involving the traffic stop by a police officer of a vehicle in which defendant was a passenger. During the stop, defendant was instructed to exit the vehicle and, while being frisked by a police officer, defendant pushed him and fled. The police officer who stopped the vehicle and an assisting police officer captured defendant and arrested him. After the arrest, the police officers found drugs on the ground where defendant had been standing and under the backseat of the patrol car where defendant had been sitting.

Defendant contends that County Court erred in denying his motion to suppress the above physical evidence inasmuch as the initial frisk was unlawful, which renders the subsequent arrest unlawful and any evidence discovered thereafter by the police inadmissible. We reject that contention. Even assuming, arguendo, that the frisk was unlawful, we conclude that defendant's act of pushing the frisking officer was not "spontaneous and precipitated by the illegality . . . [but] was a calculated act not provoked by the unlawful police activity and thus attenuated from it" (*People v Wilkerson*, 64 NY2d 749, 750; see *People v Stone*, 197 AD2d 356, 356, lv denied 82 NY2d

904). We therefore conclude that there was probable cause for defendant's subsequent arrest for harassment of the frisking officer (*cf. People v Felton*, 78 NY2d 1063, 1064-1065). Consequently, the drugs seized from defendant's person and the backseat of the patrol car were discovered incident to a lawful arrest (*see People v Cooper*, 85 AD3d 1594, 1595, *affd* 19 NY3d 501).

We reject defendant's further contention that the evidence is legally insufficient to support the conviction for harassment and resisting arrest. Viewing the evidence in the light most favorable to the People (*see generally People v Khan*, 18 NY3d 535, 541), we conclude that there is a "valid line of reasoning and permissible inferences" that could rationally lead the court to determine that defendant harassed the arresting officer and resisted arrest (*People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's contention that he was denied effective assistance of counsel. Initially, we conclude that defendant is not entitled to a reconstruction hearing to determine the contents of a conversation between the court and defense counsel that allegedly concerned privileged attorney-client matters. The court placed a summary of the conversation on the record, and defense counsel agreed to that summary. We conclude that defense counsel was not ineffective for having such a conversation with the court inasmuch as the purpose of the conversation was to ensure that defense counsel did not "breach . . . any recognized professional duty" to either defendant or the court (*People v Andrades*, 4 NY3d 355, 362). With respect to the remaining grounds that defendant raises in support of his contention of ineffective assistance of counsel, we conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147; *see People v Hall*, 106 AD3d 1513, 1514, *lv denied* 22 NY3d 956). To the extent that defendant's claims of ineffective assistance of counsel "involve matters outside the record on appeal . . . [they] must be raised by way of a motion pursuant to CPL 440.10" (*People v Brown*, 120 AD3d 1545, 1546; *see People v Reed*, 115 AD3d 1334, 1337, *lv denied* 23 NY3d 1024).

Finally, defendant's sentence is not unduly harsh or severe.

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

**1144**

**CA 14-00590**

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

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MANUFACTURERS AND TRADERS TRUST COMPANY,  
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

NIAGARA FALLS MALL, INC.,  
DEFENDANT-APPELLANT-RESPONDENT.

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PHILLIPS LYTTLE LLP, BUFFALO (SEAN C. MCPHEE OF COUNSEL), FOR  
DEFENDANT-APPELLANT-RESPONDENT.

JAECKLE, FLEISCHMANN & MUGEL, LLP, BUFFALO (CHARLES C. SWANEKAMP OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

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Appeal and cross appeal from an amended order and judgment (one paper) of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered January 15, 2014. The amended order and judgment, among other things, granted in part and denied in part the motion of plaintiff for summary judgment and denied the motion of defendant for summary judgment.

It is hereby ORDERED that the amended order and judgment so appealed from is unanimously modified on the law by reducing the annual amount of rental arrears for the period from December 15, 1989 through December 14, 1999 set forth in the 9<sup>th</sup> ordering paragraph to \$10,800, and reducing the annual amount of rental arrears for the period from December 15, 1999 through December 14, 2007 set forth in the 10<sup>th</sup> ordering paragraph to \$39,096, and as modified the amended order and judgment is affirmed without costs.

Memorandum: In 1968, the parties entered into a commercial Lease Agreement for an office building used by plaintiff for a bank branch. The original lease term was 33 years, commencing December 15, 1969 and ending December 14, 2002, with an option for plaintiff to renew for two additional five-year periods. Plaintiff exercised its option to renew for one additional five-year period and its tenancy ended December 14, 2007. The Lease Agreement provided for an annual minimum guaranteed rental, and for adjustments of the rental amount during the 10<sup>th</sup>, 20<sup>th</sup> and 30<sup>th</sup> lease years pursuant to a formula based upon the appraised valuation of the property during the adjustment years. The first 10-year rental adjustment, however, was made pursuant to a separate agreement between the parties rather than the formula set forth in the Lease Agreement.

The 20<sup>th</sup>-year rental adjustment was not made pursuant to either the formula in the Lease Agreement or any separate agreement between the parties. Plaintiff commenced this action in 1993 seeking, inter alia, a judgment declaring the rights of the parties with respect to the rent to be charged under the Lease Agreement. The action was pending when the 30<sup>th</sup> year passed without a rental adjustment. The parties thereafter stipulated to have the value of the property determined by three appraisers, as contemplated by the Lease Agreement for the 20<sup>th</sup> and 30<sup>th</sup> lease years, which resulted in increased rental amounts pursuant to the formula.

We conclude that Supreme Court properly granted that part of plaintiff's motion seeking summary judgment dismissing the counterclaim alleging breach of the Lease Agreement. Plaintiff met its burden of establishing that it met its obligation to pay rent in accordance with the Lease Agreement, and defendant failed to raise a triable issue of fact (*see Hair Studio 441, Inc. v Boccone*, 104 AD3d 913, 914, *lv denied* 22 NY3d 856). Inasmuch as plaintiff did not breach the Lease Agreement, the court also properly declined to make an award of prejudgment interest to defendant (*cf. Village of Ilion v County of Herkimer*, 23 NY3d 812, 818; *Spodek v Park Prop. Dev. Assoc.*, 96 NY2d 577, 581).

Contrary to plaintiff's contention, the court properly declared that defendant is entitled to increased rent for the period from December 15, 1999 through December 14, 2007. Plaintiff's request for declaratory relief was broad enough to encompass that period and, moreover, plaintiff's conduct during the litigation reflects its acquiescence in a rental adjustment for that period. "[A]n action for a declaratory judgment is 'governed by equitable principles' " (*Ken-Vil Assoc. Ltd. Partnership v New York State Div. of Human Rights*, 100 AD3d 1390, 1393, quoting *Krieger v Krieger*, 25 NY2d 364, 370), and we conclude that the court's declaration that plaintiff owes increased rent for that period is consistent with equitable principles.

The court erred, however, in calculating the amount of the 20<sup>th</sup>- and 30<sup>th</sup>- year rental adjustments. In construing the provision in the Lease Agreement at issue, our objective is to give the language used by the parties a "fair and reasonable meaning" (*Abiele Contr. v New York City Sch. Constr. Auth.*, 91 NY2d 1, 9-10). We conclude that the construction urged by plaintiff gives the language of that provision such a meaning, while the construction urged by defendant renders meaningless the minimum guaranteed rental provision in the Lease Agreement (*see Matter of Drake v Drake*, 114 AD3d 1119, 1122). We therefore modify the amended order and judgment by reducing the annual amount of rental arrears for the period from December 15, 1989 through December 14, 1999 to \$10,800, and the annual amount of rental arrears for the period from December 15, 1999 through December 14, 2007 to \$39,096.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1149**

**CA 14-00571**

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

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NICOLE ABDULLA, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ARI GROSS, DEFENDANT-APPELLANT.

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GOLDBERG SEGALLA LLP, BUFFALO (PAUL D. MCCORMICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (JUSTIN HENDRICKS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered June 14, 2013. The order denied the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff commenced a personal injury action (hereafter, first action) seeking damages for injuries she allegedly sustained on June 3, 2009 in a slip and fall accident at her residence, which was owned by defendant. During discovery in the first action, plaintiff's attorney informed defendant's attorney that plaintiff had either exacerbated her injuries or refractured her leg on September 5, 2009 in a second slip and fall accident at her residence. Thereafter, the parties engaged in settlement negotiations and further discovery, which consisted primarily of the exchange of authorizations and medical records related to the alleged injuries arising from the September 2009 accident. A settlement conference was held in June 2011 and, within a couple of days, plaintiff accepted defendant's settlement offer.

For over a year thereafter, defendant's attorney sent correspondence to plaintiff's attorney requesting, inter alia, a release and stipulation of discontinuance. In the meantime, unbeknownst to defendant's attorney, plaintiff commenced the instant action on September 5, 2012, alleging that she sustained serious personal injuries in the second accident. On October 23, 2012, plaintiff's attorney sent correspondence to defendant's attorney enclosing, inter alia, a "General Release" that had been executed by plaintiff on December 15, 2011. In relevant part, the release stated that defendant, in exchange for providing plaintiff with the agreed-upon settlement amount, was "released and forever discharged . . .

from all manner of actions, causes of action, suits, . . . claims and demands whatsoever" that plaintiff "ever had, now has or which [her] successors and assigns, heirs, executors or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of those present . . . *More specifically, for injuries sustained in a slip and fall incident which occurred on June 3, 2009, in the City of Lackawanna, County of Erie and State of New York.*" Defendant made payment on the settlement and filed a copy of the stipulation of discontinuance in November 2012.

After learning of the instant action in January 2013, defendant's attorney requested that plaintiff discontinue the action on the ground that the previous settlement encompassed any injuries plaintiff allegedly sustained in the September 2009 accident. Defendant joined issue by service of an answer and, upon plaintiff's refusal to discontinue the instant action, defendant moved to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5) and (7). Supreme Court denied the motion, and defendant appeals.

We reject the contention of defendant that the instant action is barred by the release signed by plaintiff in the first action between the parties. "It is well settled that 'a general release is governed by principles of contract law' (*Mangini v McClurg*, 24 NY2d 556, 562 [1969]; see *Litvinov v Hodson*, 74 AD3d 1884, 1885 [2010]; *Kaminsky v Gamache*, 298 AD2d 361, 361 [2002]) and that, where 'a release is unambiguous, the intent of the parties must be ascertained from the plain language of the agreement' (*Kaminsky*, 298 AD2d at 361)" (*Dommer Constr. Corp. v Savarino Constr. Servs. Corp.*, 85 AD3d 1617, 1617-1618). Moreover, "[i]t has long been the law that 'where a release contains a recital of a particular claim, obligation or controversy and there is nothing on the face of the instrument other than general words of release to show that anything more than the matters particularly specified was intended to be discharged, the general words of release are deemed to be limited thereby' (*Mitchell v Mitchell*, 170 App Div 452, 456 [1915])" (*Morales v Solomon Mgt. Co., LLC*, 38 AD3d 381, 382). Thus, "[w]here, as here, [a] release . . . contain[s] specific recitals as to the claims being released, and yet [contains] . . . an omnibus clause to the effect that the releasor releases and discharges all claims and demands whatsoever which he [or she] . . . may have against the releasee . . . , the courts have often applied the rule of *ejusdem generis*[, i.e., "of the same kind or class" (Black's Law Dictionary 594 [9th ed 2009])], and held that the general words of a release are limited by the recital of a particular claim" (*Camperlino v Bargabos*, 96 AD3d 1582, 1583-1584 [internal quotation marks omitted]).

Here, we conclude that the language of the release is unambiguous in specifying that the only claims discharged thereby are those arising from the injuries plaintiff allegedly sustained in the first slip and fall accident (see *Morales*, 38 AD3d at 382; *Kaminsky*, 298 AD2d at 361). Contrary to defendant's further contention that we should consider extrinsic evidence purportedly demonstrating that the



parties intended the settlement to cover both matters, "[i]t is well settled that, where the language of a release is clear and unambiguous, effect will be given to the intention of the parties as indicated by the language employed and the fact that one of the parties may have intended something else is irrelevant" (*Booth v 3669 Del.*, 242 AD2d 921, 922, *affd* 92 NY2d 934 [internal quotation marks omitted]; see *Matter of Schaefer*, 18 NY2d 314, 317; *Dommer Constr. Corp.*, 85 AD3d at 1618).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1157

**KA 12-00437**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRYAN M. ASHLINE, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered December 21, 2011. The judgment convicted defendant, upon a jury verdict, of murder in the first degree (two counts), murder in the second degree (two counts), aggravated criminal contempt and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of two counts of murder in the second degree and dismissing counts three and four of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]) and two counts of murder in the second degree (§ 125.25 [1]). The charges arose from the brutal killing of defendant's ex-girlfriend and her infant son on Father's Day. Defendant admitted to the killings but asserted the affirmative defense of extreme emotional disturbance with respect to both murder in the first degree (§ 125.27 [2] [a]) and murder in the second degree (§ 125.25 [1] [a]).

We note at the outset that, as the People correctly concede, those parts of the judgment convicting defendant of murder in the second degree must be reversed and those counts dismissed because they are inclusory concurrent counts of the two counts of murder in the first degree (see CPL 300.40 [3] [b]; *People v Howard*, 92 AD3d 1219, 1220, *lv denied* 19 NY3d 864, *reconsideration denied* 19 NY3d 997). We therefore modify the judgment accordingly.

We reject defendant's contention that his statements to the police were not voluntarily made because he suffered from sleep

deprivation during the questioning and also was in pain due to his hand injury. The record of the suppression hearing establishes that defendant was asleep when he was apprehended and that he slept during the almost hour-long transport between police stations, and, indeed, he did not testify at the suppression hearing that he was tired at the time of questioning (see *People v Pearce*, 283 AD2d 1007, 1007, *lv denied* 96 NY2d 923; *People v Orso*, 270 AD2d 947, 947, *lv denied* 95 NY2d 856). The record also establishes that defendant was alert and made coherent decisions about the topics of discussion with the police. Furthermore, with respect to defendant's hand injury, "[t]he record establishes that defendant did not complain of or show outward signs that he was in pain while being questioned" (*Pearce*, 283 AD2d at 1007). Based on the totality of the circumstances, we conclude that defendant's statements to the police were voluntarily made (see *People v Young*, 303 AD2d 952, 953; *Pearce*, 283 AD2d at 1007; see generally *People v Anderson*, 42 NY2d 35, 38-39).

Defendant further contends that he was improperly restrained in handcuffs during the suppression hearing, which hindered his ability to participate meaningfully in his defense, and that the court committed reversible error in requiring him to wear a stun belt during the trial without setting forth a reason for the use of the stun belt. With respect to being restrained in handcuffs, the court denied defense counsel's request to remove defendant's handcuffs during the suppression hearing in accordance with the County Sheriff's policy. Although the court's response was error, inasmuch as a court "must state a particularized reason for [restraining defendant] on the record" even at a bench trial (*People v Best*, 19 NY3d 739, 743), we nevertheless conclude that the error is harmless beyond a reasonable doubt because the error "did not contribute to the [court's decision]" on the suppression issue (*People v Clyde*, 18 NY3d 145, 153, *cert denied* \_\_\_ US \_\_\_, 132 S Ct 1921 [internal quotation marks omitted]; see *People v Campbell*, 106 AD3d 1507, 1509, *lv denied* 21 NY3d 1002). With respect to the stun belt, we note that the requirement to wear the stun belt is not a mode of proceedings error and, therefore, such an error may be waived (see generally *People v Schrock*, 108 AD3d 1221, 1224-1225, *lv denied* 22 NY3d 998). Here, defendant waived his contention because he agreed to wear the stun belt, despite the court having informed defendant that he was entitled to a hearing to make findings as to the necessity of the belt (see generally *id.*; *People v Worth*, 233 AD2d 939, 940).

We also reject defendant's contention that the court abused its discretion by admitting in evidence certain photographs of the victims and crime scene (see generally *People v Poblner*, 32 NY2d 356, 369-370, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905). Here, the photographs were relevant to show defendant's intent to kill, to corroborate the Medical Examiner's testimony concerning the cause of death, and to aid the jury in determining whether the victims' wounds and crime scene provided evidence that defendant acted under the influence of extreme emotional disturbance (see *People v Stevens*, 76 NY2d 833, 836; *People v Camacho*, 70 AD3d 1393, 1394, *lv denied* 14 NY3d 886; *People v Jones*, 43 AD3d 1296, 1297-1298, *lv denied* 9 NY3d 991,

*reconsideration denied* 10 NY3d 812; *People v Giles*, 20 AD3d 863, 864, *lv denied* 5 NY3d 806).

We further reject defendant's contention that the evidence is legally insufficient to support the conviction of murder in the first degree inasmuch as he established the defense of extreme emotional disturbance by a preponderance of the evidence. As defendant correctly concedes, he failed to preserve that contention for our review because he made only a general motion for a trial order of dismissal (see *People v Gray*, 86 NY2d 10, 19). In any event, defendant's contention lacks merit (see generally *People v Bleakley*, 69 NY2d 490, 495). The defense of extreme emotional disturbance requires evidence " 'of a subjective element, that defendant acted under an extreme emotional disturbance, and an objective element, that there was a reasonable explanation or excuse for the emotional disturbance' " (*People v Diaz*, 15 NY3d 40, 44-45; see *People v Roche*, 98 NY2d 70, 75-76; *People v Dombrowski*, 238 AD2d 916, 916, *lv denied* 90 NY2d 904). Generally, a defendant receives the benefit of the defense "only when the trier of fact, after considering a broad range of mitigating circumstances, believes that such leniency is justified" (*People v Casassa*, 49 NY2d 668, 681, *cert denied* 449 US 842; see *Dombrowski*, 238 AD2d at 916). Here, the jury was entitled to consider defendant's conduct immediately before and after the killings (see *People v Jarvis*, 60 AD3d 1478, 1479, *lv denied* 12 NY3d 916; *People v McGrady*, 45 AD3d 1395, 1395, *lv denied* 10 NY3d 813; *Dombrowski*, 238 AD2d at 916), from which the jury could reasonably conclude that defendant failed to meet his burden of establishing the defense (see generally *Bleakley*, 69 NY2d at 495). Furthermore, viewing the evidence in the 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 *People v Sorrentino*, 12 AD3d 1197, 1197, *lv denied* 4 NY3d 748; *People v Burse*, 234 AD2d 950, 950, *lv denied* 89 NY2d 1033; see generally *Bleakley*, 69 NY2d at 495).

Defendant contends that he was deprived of effective assistance of counsel based on defense counsel's failure to object to the use of the stun belt and the failure to make a specific rather than a general motion for a trial order of dismissal. We reject that contention. Inasmuch as defendant waived his contention concerning the stun belt by consenting to wear it, defense counsel was not ineffective for failing to object to the use of the stun belt (see generally *Schrock*, 108 AD3d at 1225). Further, "[t]he failure to provide a specific basis for a trial order of dismissal that had no chance of success does not constitute ineffective assistance of counsel" (*People v Woodard*, 96 AD3d 1619, 1621, *lv denied* 19 NY3d 1030; see generally *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702).

Finally, defendant's sentence is not unduly harsh or severe.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1171**

**CA 14-00173**

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

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IN THE MATTER OF SYNERGY, LLC AND SYNERGY  
BIOGAS, LLC, PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

SUSAN KIBLER, ASSESSOR, TOWN OF COVINGTON,  
TOWN OF COVINGTON BOARD OF ASSESSMENT REVIEW,  
RESPONDENTS-RESPONDENTS,  
AND WYOMING CENTRAL SCHOOL DISTRICT,  
INTERVENOR-RESPONDENT.  
(APPEAL NO. 1.)

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BOND, SCHOENECK & KING, PLLC, ROCHESTER (KARL S. ESSLER OF COUNSEL),  
FOR PETITIONERS-APPELLANTS.

DIMATTEO LAW OFFICE, WARSAW (DAVID M. ROACH OF COUNSEL), FOR  
RESPONDENTS-RESPONDENTS.

HARRIS BEACH PLLC, PITTSFORD (J. RYAN WHITE OF COUNSEL), FOR  
INTERVENOR-RESPONDENT.

SUSAN G. ROSENTHAL, NEW YORK STATE DEPARTMENT OF AGRICULTURE AND  
MARKETS, ALBANY (JOHN F. RUSNICA OF COUNSEL), FOR COMMISSIONER OF THE  
NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS, AMICUS CURIAE.

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Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered June 24, 2013 in a proceeding pursuant to RPTL article 7. The judgment denied the petition.

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

Memorandum: Petitioners own and operate a facility that generates electricity from biogas produced by the anaerobic digestion of livestock manure. The manure used by the facility is obtained from a dairy farm owned and operated by petitioners, and the electricity produced by the facility is used for the operation of the dairy farm and is sold to the electrical grid. Petitioners commenced this proceeding pursuant to RPTL article 7 seeking, inter alia, review of respondents' determination that petitioners were not entitled to a tax exemption for the facility pursuant to RPTL 483-a (former [1]), the version of the statute in effect at the time the petition was filed. After Supreme Court denied the petition, petitioners moved pursuant to CPLR 2211 (d) and (e) for leave to renew and reargue the petition.

The court denied the motion.

In appeal No. 1, petitioners appeal from the judgment that denied the petition. In appeal No. 2, petitioners appeal from an order that denied their motion for leave to renew and reargue the petition. We note at the outset with respect to appeal No. 2 that the appeal from the order therein must be dismissed to the extent that Supreme Court denied leave to reargue (see *Empire Ins. Co. v Food City*, 167 AD2d 983, 984). We further note that a motion for leave to renew pursuant to CPLR 2221 is not the proper procedural vehicle to address a final judgment, but we conclude that petitioners' motion to renew should be treated as a motion pursuant to CPLR 5015 to vacate the judgment in the interest of justice (see *Maddux v Schur*, 53 AD3d 738, 739; see generally *Ruben v American & Foreign Ins. Co.*, 185 AD2d 63, 67).

In appeal No. 1, petitioners contend that the facility is entitled to a tax exemption pursuant to RPTL 483-a (former [1]) because it is a "manure storage and handling" facility as contemplated by that statute. We reject that contention. Inasmuch as petitioners' contention involves "a question of statutory interpretation, we turn first to the plain language of the statute[] as the best evidence of legislative intent" (*Matter of Malta Town Ctr. I, Ltd. v Town of Malta Bd. of Assessment Review*, 3 NY3d 563, 568). The former version of the statute provided that "[s]tructures permanently affixed to agricultural land for the purpose of preserving and storing forage in edible condition, farm feed grain storage bins, commodity sheds, manure storage and handling facilities, and bulk milk tanks and coolers used to hold milk awaiting shipment to market shall be exempt from taxation, special ad valorem levies and special assessments" (RPTL 483-a [former (1)]). We conclude that the anaerobic digester facility is not a "manure storage and handling" facility as contemplated by RPTL 483-a (former [1]) because the facility is not used simply to store and handle manure. Petitioners' facility uses an anaerobic digester to produce biogas from the manure, which is then used to generate electricity, and the statute does not provide a tax exemption for an anaerobic digester or an electrical generator. Notably, another provision of RPTL article 4 defines the term "farm waste generating equipment" as "equipment that generates electric energy from biogas produced by the anaerobic digestion of agricultural waste" (RPTL 487 [1] [e]), but such equipment was not included among the enumerated structures in RPTL 483-a (former [1]). Furthermore, "words employed in a statute are construed in connection with, and their meaning ascertained by reference to the words and phrases with which they are associated" (McKinney's Cons Laws of NY, Book 1, Statutes § 239 [a]), and the plain language of RPTL 483-a (former [1]) establishes that the tax exemption is applicable to structures used for the storage of agricultural materials, and not to structures used for the generation of energy.

In appeal No. 2, petitioners contend that the facility is entitled to a tax exemption pursuant to an amendment to RPTL 483-a that was adopted by the Legislature after the petition was filed (see L 2013, ch 272, § 1). Contrary to petitioners' contention, the amendment to RPTL 483-a cannot be applied retroactively because the

Legislature explicitly stated that the amendment "shall apply to taxable status dates occurring on or after such effective date," i.e., July 31, 2013 (L 2013, ch 272, § 3).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1172

CA 14-00175

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

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IN THE MATTER OF SYNERGY, LLC AND SYNERGY  
BIOGAS, LLC, PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

SUSAN KIBLER, ASSESSOR, TOWN OF COVINGTON,  
TOWN OF COVINGTON BOARD OF ASSESSMENT REVIEW,  
RESPONDENTS-RESPONDENTS,  
AND WYOMING CENTRAL SCHOOL DISTRICT,  
INTERVENOR-RESPONDENT.  
(APPEAL NO. 2.)

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BOND, SCHOENECK & KING, PLLC, ROCHESTER (KARL S. ESSLER OF COUNSEL),  
FOR PETITIONERS-APPELLANTS.

DIMATTEO LAW OFFICE, WARSAW (DAVID M. ROACH OF COUNSEL), FOR  
RESPONDENTS-RESPONDENTS.

HARRIS BEACH PLLC, PITTSFORD (J. RYAN WHITE OF COUNSEL), FOR  
INTERVENOR-RESPONDENT.

SUSAN G. ROSENTHAL, NEW YORK STATE DEPARTMENT OF AGRICULTURE AND  
MARKETS, ALBANY (JOHN F. RUSNICA OF COUNSEL), FOR COMMISSIONER OF THE  
NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS, AMICUS CURIAE.

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Appeal from an order of the Supreme Court, Wyoming County (Mark  
H. Dadd, A.J.), entered December 23, 2013. The order denied  
petitioners' motion for leave to reargue and/or renew.

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

Same Memorandum as in *Matter of Synergy, LLC v Kibler* ([appeal  
No. 1] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

1173

CA 14-00113

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

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JAMES G. BRYDEN, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

LEROY HANKINS, KATHRYN CAPELLA HANKINS AND  
J. SANDRA GOVERNANTI, DEFENDANTS-RESPONDENTS.

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HOFFMANN, HUBERT & HOFFMANN, LLP, SYRACUSE (TERRANCE J. HOFFMANN OF  
COUNSEL), FOR PLAINTIFF-APPELLANT.

DAVID C. KING, ROCHESTER, FOR DEFENDANTS-RESPONDENTS.

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Appeal from a judgment of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered April 8, 2013. The judgment, among other things, determined the boundary line between the parties' properties located in the Town of Fleming.

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

Memorandum: We affirm for reasons stated in the amended decision at Supreme Court. We write to note that, contrary to plaintiff's contention, the record fully supports the court's determination to rely on the Gleason (1998) survey over the Watkins (2005) survey. We also note that, in the absence of a cross appeal by defendants, their contention that the court erred in "not granting all lands north of the intersection of [defendants'] fence and the Gleason line to [defendants]" is not properly before us (*see Raab v Dumblewski*, 226 AD2d 1021, 1022).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1177**

**CA 14-00114**

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

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ARIANE CREWE, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TATJANA PISANOVA AND NIKOLAY PISANOV,  
DEFENDANTS-APPELLANTS.

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LAW OFFICES OF THERESA J. PULEO, SYRACUSE (MICHELLE M. DAVOLI OF  
COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICE OF MARC JONAS, UTICA (JASON D. FLEMMA OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from a revised order of the Supreme Court, Oneida County (David A. Murad, J.), entered October 23, 2013. The revised order denied in part the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained in a motor vehicle accident when the vehicle she was driving was rear-ended by a vehicle operated by defendant Tatjana Pisanova and owned by defendant Nikolay Pisanov. Defendants moved for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury within the meaning of the four categories of serious injury set forth in plaintiff's bill of particulars (see Insurance Law § 5102 [d]), and did not sustain economic loss in excess of the \$50,000 threshold for basic economic loss (§ 5102 [a]). Supreme Court granted the motion only with respect to the permanent loss of use category of serious injury, and defendants contend on appeal that the court should have granted their motion in its entirety. We affirm.

The court properly denied defendants' motion with respect to the remaining three categories of serious injury. With respect to two of those categories, i.e., permanent consequential limitation of use and significant limitation of use, we note that "[w]hether 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" (*Matte v Hall*, 20 AD3d 898, 899, quoting *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353; see *Dufel v Green*, 84 NY2d 795, 798). Objective proof is

required to prove such limitations (see *Matte*, 20 AD3d at 899; *Leahey v Fitzgerald*, 1 AD3d 924, 925). Here, defendants' own submissions raise triable issues of fact with respect to those categories (see *Thomas v Huh*, 115 AD3d 1225, 1225; *Summers v Spada*, 109 AD3d 1192, 1192).

Defendants' expert opined that plaintiff did not have a serious injury within the meaning of those two categories, based upon his examination of plaintiff and his review of plaintiff's medical records. The expert concluded, inter alia, that plaintiff did not sustain a serious injury because she did not have radicular pain. In addition, however, defendants submitted an electromyography study of plaintiff in support of their motion, indicating that plaintiff suffered from "moderate chronic left C5-6 radiculopathy." Further, when defendants' expert reviewed plaintiff's medical history, it was admittedly missing the first page of that electromyography study. That is the page containing the conclusion that plaintiff has "moderate . . . radiculopathy," and we thus conclude that the basis for the expert's conclusion was thereby undermined. Consequently, defendants failed to eliminate all triable issues of fact with respect to the permanent consequential limitation of use and significant limitation of use categories (see *Mugno v Juran*, 81 AD3d 908, 909; *Lesser v Smart Cab Corp.*, 283 AD2d 273, 273-274; see also *Little v Ajah*, 97 AD3d 801, 802). Even assuming, arguendo, that defendants met their initial burden with respect to those two categories, we conclude that plaintiff raised triable issues of fact. Plaintiff submitted the affidavit of her treating chiropractor and a report from her expert physician, which discussed plaintiff's inability to return to pre-loss activity levels, abnormalities she exhibited in her spine, and the likelihood that plaintiff will continue to experience physical problems even when the injuries heal.

Defendants also failed to meet their burden with respect to the 90/180-day category of serious injury, inasmuch as their own submissions again raise a triable issue of fact (see *Thomas*, 115 AD3d at 1225; *Summers*, 109 AD3d at 1192). "To qualify as a serious injury under the 90/180[-day] category, there must be objective evidence of a medically determined injury or impairment of a non-permanent nature . . . as well as evidence that plaintiff's activities were curtailed to a great extent" (*Zeigler v Ramadhan*, 5 AD3d 1080, 1081 [internal quotation marks omitted]; see *Licari v Elliott*, 57 NY2d 230, 236). Here, defendants rely on plaintiff's deposition testimony addressing how her activities were curtailed as of the time of the deposition, over a year after the accident, rather than how they were curtailed during the relevant statutory period, and the report of their expert physician, "who did not examine plaintiff during the relevant statutory period and did not address plaintiff's condition during the relevant period" (*Robinson v Joseph*, 99 AD3d 568, 569; see *Lowell v Peters*, 3 AD3d 778, 779-780).

Finally, we reject defendants' contention concerning plaintiff's alleged failure to sustain economic loss in excess of basic economic loss. "[P]laintiff[] correctly contend[s] that [she] need not await the full \$50,000 payout for basic economic losses . . . before making

a claim under Insurance Law § 5102 (a) for those additional economic losses that exceed the basic economic loss threshold" (*Wilson v Colosimo*, 101 AD3d 1765, 1767; see generally *Montgomery v Daniels*, 38 NY2d 41, 47-48; *Colvin v Slawoniewski*, 15 AD3d 900, 900; *Barnes v Kociszewski*, 4 AD3d 824, 825; *Watkins v Bank of Castile*, 172 AD2d 1061, 1062). Here, the three-year period in which plaintiff may accrue economic loss in excess of basic economic loss, as set forth in Insurance Law § 5102 (a) (2), commenced on the date of the accident and had not yet elapsed when the motion was decided. Therefore, summary judgment on this ground was premature.

Frances E. Cafarell

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

**1190**

**CA 14-00112**

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

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IN THE MATTER OF THE ESTATE OF DAVID C. PETERS,  
DECEASED.

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COREEN N. THOMPSON, ADMINISTRATRIX CTA,  
PETITIONER-RESPONDENT,

MEMORANDUM AND ORDER

V

JOAN PETERS, RESPONDENT-APPELLANT.

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COLUCCI & GALLAHER, P.C., BUFFALO (PAUL G. JOYCE OF COUNSEL), FOR  
RESPONDENT-APPELLANT.

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (JOHN P.  
BARTOLOMEI OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Surrogate's Court, Genesee County  
(Robert C. Noonan, S.), entered April 11, 2013. The order denied  
respondent's motion to disqualify petitioner's attorney and to stay  
all proceedings pending substitution.

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

Memorandum: Respondent appeals from an order denying her motion  
seeking, inter alia, to disqualify petitioner's attorney and his law  
firm from representing petitioner. We conclude that Surrogate's Court  
properly denied that motion.

In support of her motion, respondent contended that petitioner's  
attorney had once represented her and her son, David C. Peters  
(decedent), in an action related to ownership of one of the pieces of  
real property at issue in this proceeding. That real property is  
situated within the borders of the Tonawanda Seneca Nation Territory  
(Territory), and was purportedly owned by decedent when he died.  
Through his will, which was offered for probate in September 2011,  
decedent sought to devise and bequeath that same piece of real  
property, as well as businesses situated thereon, to his brother and  
petitioner, who is decedent's daughter. Respondent is decedent's  
mother, and she challenged various provisions of decedent's will,  
contending that she had a superior right of ownership over all of the  
real property situated on the Territory based on "matriarchal tribal  
law." Since decedent's death, there has been ongoing litigation  
related to decedent's estate and the Surrogate's authority to preside

over that litigation (see e.g. *Peters v Noonan*, 871 F Supp 2d 218; *Matter of Tonawanda Seneca Nation v Noonan*, 122 AD3d 1334), and we take judicial notice of the records submitted to this Court in related appeals (see *Edgewater Constr. Co., Inc. v 81 & 3 of Watertown, Inc.* [appeal No. 2], 24 AD3d 1229, 1231). In the midst of that litigation, respondent filed the instant motion to disqualify petitioner's attorney.

"The Code of Professional Responsibility does not in all circumstances bar attorneys from representing parties in litigation against former clients. Rather, DR 5-108 sets out two prohibitions on attorney conduct relating to former clients. First, an attorney may not represent 'another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client' . . . Second, an attorney may not use 'any confidences or secrets of the former client except as permitted by DR 4-101 (C) or when the confidence or secret has become generally known' " (*Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631, 636). "A party seeking disqualification of its adversary's lawyer pursuant to DR 5-108 (A) (1) must prove that there was an attorney-client relationship between the moving party and opposing counsel, that the matters involved in both representations are substantially related, and that the interests of the present client and former client are materially adverse. Only 'where the movant satisfies all three inquiries does the irrebuttable presumption of disqualification arise' " (*id.*).

Of particular concern to the courts, however, is the fact that "motions to disqualify are frequently used as an offensive tactic, inflicting hardship on the current client and delay upon the courts by forcing disqualification even though the client's attorney is ignorant of any confidences of the prior client. Such motions result in a loss of time and money, even if they are eventually denied. [The Court of Appeals] and others have expressed concern that such disqualification motions may be used frivolously as a litigation tactic when there is no real concern that a confidence has been abused" (*Solow v Grace & Co.*, 83 NY2d 303, 310). Inasmuch as the right to counsel of choice, while not absolute, "is a valued right[,] . . . any restrictions [thereon] must be carefully scrutinized" (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 443). We must therefore balance "the vital interest in avoiding even the appearance of impropriety [with] a party's right to representation by counsel of choice and [the] danger that such motions can become tactical 'derailment' weapons for strategic advantage in litigation" (*Jamaica Pub. Serv. Co.*, 92 NY2d at 638).

Contrary to petitioner's contention, respondent established that she had a prior attorney-client relationship with petitioner's attorney, that the issues in the two litigations are substantially related, each involving ownership of the same parcel of property, and that her interests are adverse to those of petitioner (see *id.* at 636; *Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 132, *rearg denied* 89 NY2d 917; *Solow*, 83 NY2d at 313). Usually, that would create an "irrebuttable presumption of disqualification" (*Tekni-Plex*, 89 NY2d at

132; see *Jamaica Pub. Serv. Co.*, 92 NY2d at 636), but many courts have nevertheless denied disqualification upon finding that a party has waived any objection to the purported conflict of interest (see e.g. *Hele Asset, LLC v S.E.E. Realty Assoc.*, 106 AD3d 692, 693-694; *Gustafson v Dippert*, 68 AD3d 1678, 1679; *Lake v Kaleida Health*, 60 AD3d 1469, 1470).

In determining whether a party has waived any objection to a conflict of interest, "courts consider when the challenged interests became materially adverse to determine if the party could have moved [for disqualification] at an earlier time . . . If a party moving for disqualification was aware or should have been aware of the facts underlying an alleged conflict of interest for an extended period of time before bringing the motion, that party may be found to have waived any objection to the other party's representation . . . Further, where a motion to disqualify is made in the midst of litigation where the moving party knew of the alleged conflict of interest well before making the motion, it can be inferred that the motion was made merely to secure a tactical advantage" (*Hele Asset, LLC*, 106 AD3d at 694; see *Gustafson*, 68 AD3d at 1679; *Lake*, 60 AD3d at 1470).

Under the circumstances of this case, we conclude that respondent waived her objection to the attorney's representation of petitioner. Respondent "was aware . . . of the facts underlying [the] alleged conflict of interest for an extended period of time before bringing the motion" (*Hele Asset, LLC*, 106 AD3d at 694). Decedent passed away in August 2011, and the will was offered for probate in September 2011. The executors appointed by the will refused to transfer to petitioner any of the real or personal property located within the Territory that was devised and bequeathed to her because respondent was asserting a superior right to all of the real property located within the Territory as well as the businesses situated thereon under the claimed authority of tribal law. In December 2011, petitioner sought, *inter alia*, a hearing to determine whether respondent had lost any bequests pursuant to the *in terrorem* clause of decedent's will.

Respondent "made a 'special appearance' " in the probate proceeding on January 17, 2012 to assert her claims that the real property and businesses located within the Territory were not decedent's property to distribute. She claimed title and ownership of the property and the business interests "pursuant to matriarchal tribal law and clan interests." The Surrogate noted, however, that despite her assertions, respondent was refusing to submit to the jurisdiction of Surrogate's Court.

On January 30, 2012, respondent's attorney again appeared in court, at which time he was advised that respondent needed to file an intervenor pleading and pay a filing fee. Respondent refused to do so and, in March 2012, the Surrogate warned that the continued failure to do so would result in the Surrogate finding her in default on her attempted intervention. "Rather than intervene, on March 22, 2012, [respondent] filed a Federal lawsuit against [the Surrogate]." In the context of that federal action, respondent moved for a temporary

restraining order prohibiting the Surrogate from probating decedent's will. That motion was denied on May 18, 2012 (see *Peters*, 871 F Supp 2d at 220).

In August 2012, the Surrogate removed the coexecutors based on their refusal to comply with orders issued by the Surrogate, and he appointed petitioner as administratrix C.T.A. In December 2012, petitioner filed a petition seeking disgorgement and forfeiture of any and all bequests, devised properties and gifts under the will received by respondent. One month later, in January 2013, respondent filed the instant motion to disqualify petitioner's attorney and his law firm from representing petitioner.

Petitioner's attorney has represented petitioner in this matter since November 2011. At all times, petitioner's interests have been materially adverse to respondent's interests inasmuch as respondent has consistently maintained that, pursuant to matriarchal tribal law, she is entitled to all of the real property and businesses located within the Territory that were to pass to petitioner under the will. Although respondent was technically not a named "party" in any proceeding, she and her attorney actively participated in the litigation for over one year with full knowledge of the identity of petitioner's attorney and the potential conflict of interest involving that attorney. Given the complexity of the litigation, the hardship that would be inflicted on petitioner and the estate, and the one-year delay in bringing the motion, we conclude that this motion was made "as an offensive tactic" (*Solow*, 83 NY2d at 310), i.e., for the purpose of "secur[ing] a tactical advantage" in the proceeding (*Hele Asset, LLC*, 106 AD3d at 694), and that "there is no real concern that a confidence has been abused" (*Solow*, 83 NY2d at 310).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

1191

CA 13-01135

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

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MITCHELL T. HALL, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

INTEGRITY REAL ESTATE PROPERTIES, INC., RJG  
HOLDINGS, LLC, AND THOMAS J. HARRINGTON,  
DEFENDANTS-RESPONDENTS.

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VAN HENRI WHITE, ROCHESTER, FOR PLAINTIFF-APPELLANT.

MARK C. RODGERS, BUFFALO, FOR DEFENDANTS-RESPONDENTS INTEGRITY REAL  
ESTATE PROPERTIES, INC. AND THOMAS J. HARRINGTON.

BURKE, ALBRIGHT, HARTER & REDDY, LLP, ROCHESTER (CASEY ACKER OF  
COUNSEL), FOR DEFENDANT-RESPONDENT RJG HOLDINGS, LLC.

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Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered April 2, 2013. The order, among other things, granted defendants' motions to dismiss the complaint.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for personal injuries that he sustained when he fell from a ladder. He now appeals from an order granting the motions of defendants seeking to dismiss the complaint on the ground that plaintiff failed to appear for a deposition ordered by Supreme Court, and denying his cross motion seeking to amend the caption. In support of their respective motions, defendants established that plaintiff commenced this action under the name Mitchell T. Hall and that he signed various court documents under that name. During the discovery process, however, the former attorneys for plaintiff moved to withdraw from representation of him and notified the court and counsel that plaintiff was incarcerated on unspecified charges arising from the use of that name. Plaintiff later submitted an affidavit stating that his real name is Danny Hall, but that he had been using the alias Mitchell T. Hall, the name of his brother. Plaintiff further stated that his brother died after giving plaintiff permission to use the brother's name, but plaintiff submitted no admissible evidence supporting those statements. The court permitted plaintiff's former attorneys to withdraw and, upon motions of defendants, ordered plaintiff to appear for a deposition. Pursuant to the court's order directing plaintiff to appear for the deposition,

notice was sent to "Mitchell T. Hall c/o Danny Hall," at the address that plaintiff previously provided to the court in a notarized statement. Plaintiff did not appear for the court-ordered deposition. Defendants moved separately to dismiss the complaint on the ground that plaintiff failed to appear for the court-ordered deposition, and plaintiff, represented by new counsel, cross-moved to amend the caption to reflect that his name is Danny Hall, a.k.a. Mitchell T. Hall.

We reject plaintiff's contention that the court erred in granting the motions. "Trial courts have broad discretion in supervising disclosure and, absent a clear abuse of that discretion, a trial court's exercise of such authority should not be disturbed" (*Gadley v U.S. Sugar Co.*, 259 AD2d 1041, 1042). The CPLR provides that, "[i]f any party . . . refuses to obey an order for disclosure . . . , the court may make such orders with regard to the . . . refusal as are just, among them: . . . an order . . . dismissing the action" (CPLR 3126 [3]). Thus, " 'when a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR,' the dismissal of a pleading is warranted" (*Kimmel v State of New York*, 286 AD2d 881, 882, quoting *Kihl v Pfeffer*, 94 NY2d 118, 122). Here, the court properly concluded that the failure to comply with the discovery order was " 'willful, contumacious or in bad faith' " (*Hill v Oberoi*, 13 AD3d 1095, 1096; see *Leone v Esposito*, 299 AD2d 930, 931, lv dismissed 99 NY2d 611), and that plaintiff had committed a fraud on the court that was "so serious that it undermines . . . the integrity of the proceeding" (*Baba-Ali v State of New York*, 19 NY3d 627, 634 [internal quotation marks omitted]; see *CDR Créances S.A.S. v Cohen*, 23 NY3d 307, 318). Contrary to plaintiff's further contention, he failed to provide a reasonable excuse for his failure to appear for the deposition (see *Hann v Black*, 96 AD3d 1503, 1504-1505; *Herrara v City of New York*, 238 AD2d 475, 476). Consequently, we conclude that the court did not abuse its discretion by dismissing the complaint (see generally *Kubacka v Town of N. Hempstead*, 240 AD2d 374, 375).

Contrary to plaintiff's further contention, we agree with defendants that the court properly denied the cross motion to amend the complaint to state plaintiff's purported legal name. In support of his cross motion, plaintiff relied entirely upon his affidavit, in which he explained that he had been using his dead brother's name since 1996. "[That] affidavit[], however, . . . was insufficient to establish that there was merely a misnomer in the description of the party [plaintiff]" requiring amendment (*Dabb v NYNEX Corp.*, 262 AD2d 1079, 1080).

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

1193

CA 13-01524

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

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GILBERT BAGLEY, INDIVIDUALLY AND ON BEHALF OF  
ASHLEY D. BAGLEY, A MINOR, ALTON BAGLEY AND THE  
ESTATE OF SANDRA BAGLEY, DECEASED,  
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ROCHESTER GENERAL HOSPITAL, EDWARD ZINKIN, M.D.,  
STEPHEN SILVER, M.D., PATRICK MARTIN, M.D., AND  
MARTINE BACKENSTOSS, M.D., DEFENDANTS-RESPONDENTS.

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BROWN & HUTCHINSON, ROCHESTER (MICHAEL COBBS OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

HIRSCH & TUBIOLO, P.C., ROCHESTER (BRYAN KORNFIELD OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS EDWARD ZINKIN, M.D. AND MARTINE BACKENSTOSS,  
M.D.

HARRIS BEACH PLLC, PITTSFORD (SVETLANA K. IVY OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS ROCHESTER GENERAL HOSPITAL, STEPHEN SILVER,  
M.D. AND PATRICK MARTIN M.D.

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Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered May 31, 2013. The order granted the motions of defendants for summary judgment and dismissed the complaint.

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

Memorandum: In this action alleging, inter alia, medical malpractice and wrongful death, plaintiff appeals from an order granting defendants' motions for summary judgment dismissing the complaint. We affirm. Plaintiff commenced this action seeking damages for the death of his wife (decedent) while she was a patient at defendant Rochester General Hospital (RGH). Decedent presented at RGH's renal dialysis unit with complaints of constipation, lower left quadrant abdominal pain, and difficulty related to her home dialysis treatment of her end-stage diabetic renal disease. Following laboratory tests and various imaging studies, decedent was admitted to the emergency department with a diagnosis of bacterial peritonitis related to her status as a peritoneal dialysis patient. The following day, decedent was evaluated as stable but her condition quickly worsened, she became abruptly hypotensive and unresponsive, and died

shortly thereafter. The immediate cause of death was cardiac arrest. Postmortem examination revealed that decedent's medical condition at the time of her death included, inter alia, ruptured acute appendicitis, pelvic abscesses, and diffuse mild acute peritonitis. Plaintiff contends that defendants failed to timely and adequately diagnose and treat decedent's ruptured acute appendicitis, and that defendants misdiagnosed decedent's condition as peritonitis.

Defendant Stephen Silver, M.D., was the physician primarily responsible for treating decedent's end-stage diabetic renal disease. Defendant Patrick Martin, M.D., was at all relevant times the attending emergency medicine physician involved in assessing and treating decedent's symptoms and complaints in the RGH emergency department. The involvement in decedent's care of defendant Edward Zinkin, M.D., was limited to reviewing a pelvic/abdominal CT scan in his capacity as an attending radiologist at RGH. The CT scan was ordered by Dr. Martin and originally interpreted and reported by a resident physician at RGH. The involvement in decedent's care of defendant Martine Backenstoss, M.D., was limited to reviewing certain X ray films of decedent's kidneys, ureter, and bladder in her capacity as an attending radiologist at RGH.

It is well settled that, on a motion for summary judgment, a defendant in a medical malpractice action bears the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries (see *Swanson v Raju*, 95 AD3d 1105, 1106). Importantly, not every instance of failed treatment or diagnosis may be attributed to a hospital or physician's failure to exercise due care (see *Nestorowich v Ricotta*, 97 NY2d 393, 398; *Schrempf v State of New York*, 66 NY2d 289, 295). Contrary to plaintiff's contention, the deposition testimony, affidavits, and expert affidavits submitted by the physicians in support of their motions "established that they exercised due care in treating plaintiff's decedent" (*Moticik v Sisters Healthcare*, 19 AD3d 1052, 1052-1053), and the physicians thus established their entitlement to judgment as a matter of law (see *Carthon v Buffalo Gen. Hosp. Deaconess Skilled Nursing Facility Div.*, 83 AD3d 1404, 1405; *Selmensberger v Kaleida Health*, 45 AD3d 1435, 1435-1436; see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). "The burden then shifted to plaintiff[] to raise triable issues of fact by submitting a physician's affidavit both attesting to a departure from accepted practice and containing the attesting [physician's] opinion that the defendant[s'] omissions or departures were a competent producing cause of the injury" (*O'Shea v Buffalo Med. Group, P.C.*, 64 AD3d 1140, 1141 [internal quotation marks omitted], *appeal dismissed* 13 NY3d 834). It is well settled that "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat [a] defendant physician's summary judgment motion" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325). Thus, "[w]here the [plaintiff's] expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, . . . [his or her] opinion should be given no probative force and is insufficient to withstand

summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544).

We agree with the physicians that the affidavit of plaintiff's expert in internal medicine and cardiology is insufficient to defeat their motions inasmuch as it is vague, conclusory, speculative, and unsupported by the medical evidence in the record before us (see *Wilk v James*, 108 AD3d 1140, 1143; *DiGeronimo v Fuchs*, 101 AD3d 933, 936-937). The affidavit of plaintiff's radiology expert was likewise "conclusory, speculative and without basis in the record" (*DiGeronimo*, 101 AD3d at 936). Thus, plaintiff failed to raise a triable issue of fact, and Supreme Court properly granted the physicians' motions seeking summary judgment dismissing the medical malpractice and wrongful death causes of action insofar as asserted against each of them.

In light of our determination, there is no viable cause of action against any individual physician to serve as a predicate for imposing vicarious liability on RGH under the theory of respondeat superior or ostensible agency (see *Magriz v St. Barnabas Hosp.*, 43 AD3d 331, 332-333, *lv denied* 10 NY3d 790; *Banks v United Hosp.*, 275 AD2d 623, 624), and thus the court also properly granted RGH's motion. Finally, we reject plaintiff's contention that the court erred in dismissing the cause of action for negligence. While the office practices of hospitals, physician medical groups, and their staff members may be embraced by the ordinary negligence standard (see *Yaniv v Taub*, 256 AD2d 273, 274), we conclude that the challenged conduct at issue, including the alleged lack of consultation between the medical providers about decedent's chronic underlying conditions, "bears a substantial relationship to the rendition of medical treatment by a licensed physician," and the court thus properly determined that the cause of action alleged medical malpractice, not ordinary negligence (*Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 788, quoting *Bleiler v Bodnar*, 65 NY2d 65, 72; see generally *Doe v Lai-Yet Lam*, 268 AD2d 206, 206).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1199

CA 14-00540

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

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MARIA REDD, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CHRISTINE V. JUARBE AND TRACY L. DARI,  
DEFENDANTS-RESPONDENTS.

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CAMPBELL & SHELTON LLP, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (DANIEL J. GUARASCI OF  
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered July 16, 2013. The order, insofar as appealed from, denied in part the motion of plaintiff for partial summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when, according to plaintiff, a vehicle owned by defendant Tracy L. Dari, and being operated by defendant Christine V. Juarbe, failed to yield the right-of-way at an intersection controlled by a stop sign. Insofar as relevant to this appeal, plaintiff moved, inter alia, for partial summary judgment dismissing the affirmative defense of comparative negligence and Supreme Court denied that part of the motion. We affirm.

A driver who has the right-of-way is entitled to anticipate that other motorists will obey the traffic laws and yield the right-of-way (see *Cox v Weil*, 66 AD3d 634, 634-635; *Parisi v Mitchell*, 280 AD2d 589, 590; *Cenovski v Lee*, 266 AD2d 424, 424). Nevertheless, "a driver who lawfully enters an intersection . . . may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection" (*Siegel v Sweeney*, 266 AD2d 200, 202; see *Sirot v Troiano*, 66 AD3d 763, 764). In support of her motion, plaintiff made a prima facie showing that she had the right-of-way, that she was entitled to anticipate that Juarbe would obey the traffic laws which required her to yield, and that, by failing to yield, Juarbe violated Vehicle and Traffic Law § 1142 (a), which constituted negligence as a matter of law (see *Thompson v Schmitt*, 74 AD3d 789, 789; *Yelder v Walters*, 64 AD3d 762,

764; *DeLuca v Cerda*, 60 AD3d 721, 722).

The court properly concluded, however, that defendants raised a triable issue of fact whether plaintiff was comparatively negligent in failing to use reasonable care to avoid the accident (see *Sirot*, 66 AD3d at 764). Defendants submitted the affidavit of an accident reconstruction expert who opined, contrary to plaintiff's deposition testimony that she was traveling "20 miles per hour or less," that plaintiff was traveling at a speed of at least 40 miles per hour in a 30 mile per hour zone. Thus, defendants raised a triable issue of fact whether plaintiff was driving at an excessive rate of speed and whether she could have avoided the accident through the exercise of reasonable care (see *Bonilla v Gutierrez*, 81 AD3d 581, 582; cf. *Kelsey v Degan*, 266 AD2d 843, 843).

We note that, by failing to address in her brief the other affirmative defenses contained in defendants' answer, plaintiff has abandoned any contentions concerning them (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

We reject plaintiff's further contention that the court erred in adjourning the return date of the motion to permit defendants to obtain an affidavit from their expert in order to place the expert's previously served report in admissible form. The grant or denial of a motion for "an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*Matter of Anthony M.*, 63 NY2d 270, 283). We thus conclude that the court did not abuse its discretion in adjourning the return date of the motion to allow defendants to supplement their expert's unsworn report with an affidavit (see *Mallards Dairy, LLC v E&M Engineers & Surveyors, P.C.*, 71 AD3d 1415, 1416).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1204

**KA 10-01363**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LEROY CARVER, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ERIN TUBBS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered April 22, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him following a jury trial of two counts of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that he was deprived of effective assistance of counsel. According to defendant, his attorney was ineffective because, among other reasons, he failed to move for suppression of evidence obtained by the police following an allegedly unlawful arrest. We reject that contention. "To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's failure to pursue 'colorable' claims" (*People v Garcia*, 75 NY2d 973, 974, quoting *People v Rivera*, 71 NY2d 705, 709; see *People v Willis*, 105 AD3d 1397, 1397, *lv denied* 22 NY3d 960; *People v Carnevale*, 101 AD3d 1375, 1378-1379). "A single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152; see *People v Atkins*, 107 AD3d 1465, 1465, *lv denied* 21 NY3d 1040).

Here, the evidence adduced at trial demonstrates that, at approximately 4:30 on the morning in question, defendant was the front seat passenger in a vehicle that was stopped in the Village of Fairport by a police officer who observed an object hanging from the vehicle's rear view mirror, in violation of the Vehicle and Traffic Law. The only other person in the vehicle with defendant was the



driver. Neither defendant nor his companion could produce any identification, and both gave the officer what turned out to be false names, dates of birth and addresses. The officer noticed that the two men appeared to be "very nervous and anxious," and he observed in the back seat several large duffel bags, black gloves and a laptop computer. When asked what they were doing in the area, the men said that they had been sitting in the parking lot of a nearby bar since it closed several hours earlier. The officer had been patrolling the village for hours, however, and knew that the parking lot had been empty since 2:30 a.m.

The officer told the men to remain in the vehicle while he returned to his patrol vehicle to run a records check. When the officer entered the police vehicle, the driver fled on foot. The officer then ran back to the vehicle, where he observed that defendant had removed his seat belt and was attempting to exit the vehicle. The officer detained defendant and conducted a pat frisk, during which the officer found a digital camera and a tube of lip balm in the coat defendant was wearing. Upon looking inside the vehicle, the officer observed a wallet, a second pair of black gloves and a long screwdriver, all of which were on the floor in front of where defendant had been seated. While defendant was detained, the police searched unsuccessfully for the driver, but learned that two houses in Fairport had recently been burglarized. It was later determined that the digital camera and lip balm found in defendant's coat were taken from the homes that had been burglarized, as was the wallet found in the vehicle. A search of the vehicle yielded numerous other items of stolen property. While at the police station, the police took defendant's DNA from a discarded cigarette, and then later compared his DNA to that on the gloves found in the front seat area of the vehicle. The tests showed that defendant could not be excluded as the person who wore the gloves, and that it was highly unlikely that someone other than defendant contributed to the DNA found on the gloves.

Defendant contends that his trial attorney was ineffective for failing to seek suppression of the digital camera, the lip balm and the DNA evidence. More specifically, defendant contends that he had a colorable claim that the officer unlawfully arrested him immediately after the driver fled, and that the evidence constitutes fruit of the poisonous tree. Defendant further contends that defense counsel had no strategic or legitimate reason for failing to pursue the suppression issue.

As a preliminary matter, we note that the record belies defendant's contention that the officer arrested him immediately after the driver fled; rather, the record establishes that the officer detained defendant for investigatory purposes (see *People v Roque*, 99 NY2d 50, 54; *People v Gonzalez*, 91 NY2d 909, 910). It is well settled that the police may forcibly stop and detain an individual based on reasonable suspicion that the individual has committed or is about to commit a crime (see *People v Moore*, 6 NY3d 496, 498-499). Here, when he detained defendant, the officer knew that the driver had fled, defendant and the driver had given a false answer when asked what they

were doing in the area, and neither could produce identification. The officer had also observed that defendant, like the driver, attempted to exit the vehicle despite having been directed to remain seated, and that there were several duffel bags, a laptop computer and a pair of black gloves in the back seat. The presence of gloves in the vehicle was unusual given that it was mid-summer. Under the circumstances, and considering the hour, it was entirely reasonable for the officer to suspect that defendant was involved in criminal activity, thereby justifying a detention of defendant for investigatory purposes (see *People v Bolden*, 109 AD3d 1170, 1172, lv denied 22 NY3d 1039). In fact, it would have been unreasonable for the officer to allow the defendant to walk away, particularly in view of the fact that he could produce no identification.

In any event, even assuming, arguendo, that defendant had a colorable basis to move for suppression of the camera, lip balm and DNA evidence, we cannot conclude on this record that defense counsel lacked a legitimate reason for failing to so move. The remaining evidence demonstrated that defendant was in a motor vehicle containing numerous items of property that had recently been stolen from nearby homes, and thus such a motion would not have been dispositive. One such item was a wallet that was found on the floor in front of where defendant had been seated, along with a second pair of black gloves and a long screwdriver. In addition, the evidence established that the only other person in the vehicle with defendant fled on foot, and that defendant was attempting to exit the vehicle as well contrary to the officer's directive.

Under the circumstances, defense counsel may legitimately have concluded that, for defendant to be acquitted, he had to testify at trial and offer an innocent explanation for his presence in a vehicle that was full of property that had recently been stolen from nearby homes. Defendant did in fact take the stand at trial, testifying that he was asleep in the vehicle while its occupants committed the burglaries without his knowledge, and that he woke up shortly before the vehicle was stopped by the police. Notably, a defendant who testifies at trial may be impeached with suppressed evidence (see *United States v Havens*, 446 US 620, 624, reh denied 448 US 911; *People v Haynes*, 235 AD2d 365, 365, lv denied 89 NY2d 1012; *People v Dash*, 126 AD2d 737, 737). Thus, because defendant testified, the jury would have learned about his possession of the camera and the lip balm even if defense counsel had successfully moved for suppression of that evidence. The same is true for the DNA evidence.

We respectfully disagree with our dissenting colleagues that the threshold standard to be applied in determining whether an attorney was ineffective for failing to file a particular motion is "whether the motion at issue had more than little or no chance of success." It is true, as the dissent points out, that the Court of Appeals has repeatedly stated that "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success'" (*Caban*, 5 NY3d at 152, quoting *People v Stultz*, 2 NY3d 277, 287, rearg denied 3 NY3d 702). By so stating, however, the Court was not articulating

the standard for what *does* constitute ineffective assistance of counsel; instead, the Court was explaining what *does not* constitute ineffective assistance of counsel. As noted, the Court has made clear in other cases that the standard to be applied is whether defense counsel failed to file a "colorable" motion and, if so, whether counsel had a strategic or legitimate reason for failing to do so (*Garcia*, 75 NY2d at 974; *Rivera*, 71 NY2d at 709). Although neither the Court of Appeals nor the Appellate Division has defined "colorable" in this context, the term is elsewhere defined as "appearing to be true, valid, or right" (Black's Law Dictionary 301 [9<sup>th</sup> ed 2009]). Federal courts have described a colorable claim as one that has " 'a fair probability or a likelihood, but not a certitude, of success on the merits' " (*San Jose Christian Coll. v City of Morgan Hill*, 360 F3d 1024, 1032; see *Axson-Flynn v Johnson*, 356 F3d 1277, 1295; see also *Combs v Homer-Ctr. Sch. Dist.*, 540 F3d 231, 246, *cert denied* 555 US 1138). Here, for the reasons previously stated, we do not believe that a motion to suppress evidence as the product of an unlawful arrest would likely have been granted.

Nor can we agree with the dissent that defendant on appeal contends that his trial attorney was also ineffective for failing to challenge the legality of the stop of the vehicle in which he was a passenger. Defendant's brief focuses on the legality of the arrest, not the stop, and it repeatedly states that defendant was the passenger of a vehicle that was stopped for a traffic infraction committed by its driver. Defendant never suggests that the driver did not in fact commit a traffic infraction. In any event, the arresting officer testified at trial without contradiction that he stopped the vehicle because he observed an item hanging from the rear-view mirror and a sticker on the front windshield, both of which constitute violations of the Vehicle and Traffic Law. If the officer's testimony in that regard is true, and there is no basis in the record for us to conclude otherwise, defendant had no grounds to challenge the legality of the stop. We note that the dissent also asserts that, rather than moving for suppression, defense counsel proceeded to trial "on the specious theory that defendant had passed out in the car and had no idea that the people he was with shortly before the traffic stop had committed the burglaries." That theory, however, was based on defendant's sworn trial testimony, and we cannot conclude that defense counsel was ineffective for allowing defendant to exercise his constitutional right to testify at trial.

We have considered the other alleged failings of defense counsel and conclude that they were not individually or collectively so significant as to deprive defendant of his right to effective assistance of counsel. For instance, although defense counsel understated the significance of the People's DNA evidence during his opening statement, we do not perceive how defendant was thereby significantly prejudiced. To the extent that defendant contends that defense counsel's apparent failure to understand the nature of the DNA evidence may have affected the advice counsel gave to defendant as to whether to accept the People's plea offer, such contention is based on "matters outside the record on appeal and thus is properly raised by

way of a motion pursuant to CPL article 440" (*People v Frazier*, 63 AD3d 1633, 1634, *lv denied* 12 NY3d 925). In sum, although defense counsel's performance at trial was by no means flawless, "[t]he test is reasonable competence, not perfect representation" (*People v Oathout*, 21 NY3d 127, 128 [internal quotation marks omitted]), and viewing the evidence, the law and the circumstances of the case as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, considering that defendant is a predicate felon and that Supreme Court could have but did not impose consecutive sentences on the two burglary counts, we perceive no basis upon which to exercise our power to modify the concurrent sentences as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

All concur except FAHEY and WHALEN, JJ., who dissent and vote to reverse in accordance with the following Memorandum: Inasmuch as defendant contends that he received ineffective assistance of counsel under both the federal and state standards, we apply the state standard for ineffective assistance of counsel (*cf. People v McDonald*, 1 NY3d 109, 114-115; *see generally People v Baldi*, 54 NY2d 137, 147). Applying that standard here, we conclude that defendant was deprived of his right to effective assistance of counsel, and we therefore respectfully dissent.

We first turn to the relevant facts of this case. The record establishes that defendant was the front seat passenger in a vehicle that was stopped by a police officer at approximately 4:30 a.m. for an alleged traffic infraction involving an obstructed windshield. That traffic stop eventually led to a pat frisk of defendant, which revealed a digital camera in the breast pocket of defendant's coat. The camera was the property of a Fairport resident whose home had just been burglarized, and a subsequent search of defendant's other pockets revealed many items of property stolen from two houses in Fairport that had been burglarized that morning. The police also found at defendant's feet on the floorboard of the vehicle, *inter alia*, a wallet belonging to a burglary victim, black leather gloves, and a long screwdriver.

Defendant was subsequently arrested and charged with both burglaries. While defendant was at the police station following his arrest, the police seized a cigarette butt that defendant had smoked and discarded, and the DNA on the cigarette matched the DNA on the gloves found at defendant's feet in the vehicle. Nevertheless, defendant's trial attorney did not seek suppression of the aforementioned physical evidence. Instead, defendant proceeded to trial with his trial attorney's inexplicable misunderstanding that there was a "one in 66,000 chance" that defendant's DNA was on the gloves—the evidence actually showed that the probability of randomly selecting an unrelated individual who could be a contributor to the DNA mixtures found on the gloves was less than one in 4,500 for the left glove and less than one in 6,090 for the right glove—and on the specious theory that defendant had passed out in the car and had no

idea that the people he was with shortly before the traffic stop had committed the burglaries.

We next turn to the breadth of defendant's primary contention on appeal. Defendant contends that he was denied effective assistance of trial counsel based on, *inter alia*, the failure of his trial counsel to raise a colorable suppression issue. To be sure, as the majority notes, the thrust of defendant's contention is that defense counsel was ineffective for failing to seek suppression of evidence obtained by the police following defendant's detention. However, as we read it, defendant's brief on appeal leaves open the possibility that his present contention with respect to ineffective assistance of counsel embraces the theory that defense counsel was ineffective in failing to seek suppression of *all* of the physical evidence against defendant on the ground that it was seized as a result of an unlawful traffic stop. In that vein, we respectfully disagree with the majority that defendant has conceded that the traffic stop at issue was lawful. Although defendant on appeal has acknowledged that a traffic stop based on the presence of an object obstructing or interfering with the view of the operator of the vehicle at issue through the windshield would be lawful (*see People v Robinson*, 97 NY2d 341, 349; *see also* Vehicle and Traffic Law § 375 [30]), in his appellate brief he was careful to question the impetus for the traffic stop, noting that such stop was occasioned by what, "according to the [subject] officer," were objects that appeared to obstruct the windshield of the vehicle at issue.

We now turn to the standard of review. The majority implicitly shuns the rule of this Court articulated in, *inter alia*, *People v Bassett* (55 AD3d 1434, 1437-1438, *lv denied* 11 NY3d 922) that, to prevail on a claim for ineffective assistance of counsel based on the failure to make a motion, a " 'defendant must show that the particular motion, if made, would have been successful and that defense counsel's failure to make that motion deprived him [or her] of meaningful representation.' " We explicitly reject it here. In our view, the rule articulated in *Bassett* and its antecedent and descendent cases is rooted in *People v Torrence* (135 AD2d 1075, 1076, *lv denied* 70 NY2d 1011), wherein we rejected the defendant's contention that he was denied effective assistance of counsel, reasoning that "a dismissal motion on speedy trial grounds, if made, would not have been successful." That conclusion—essentially that the defendant was not denied meaningful representation because the motion in question would have failed—is consistent with what is now the prevailing view that an attorney's "failure to 'make a motion or argument that has little or no chance of success' " does not amount to ineffective assistance (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702).

*Bassett*, however, stakes a more extreme position. The circumstances in which counsel will not be ineffective for failing make a motion have been set forth by the Court of Appeals, *i.e.*, where the motion has little or no chance of success (*see Caban*, 5 NY3d at 152), and where there is a "strategic or other legitimate explanation[]" for counsel's failure to [make] a particular [motion]"

(*People v Rivera*, 71 NY2d 705, 709). In our view, *Bassett* mandates that a showing of success is essential to succeed on a claim for ineffective assistance based on counsel's failure to make a motion. That analytical approach is incompatible with New York's existing jurisprudence, and we therefore would no longer follow those cases that adopt that approach. Rather, we conclude that the appropriate litmus test here is whether the motion at issue had more than little or no chance of success and, if so, whether there is no strategic or other legitimate explanation for the failure to bring that motion (see *Caban*, 5 NY3d at 152; *Rivera*, 71 NY2d at 709; cf. *People v Clermont*, 22 NY3d 931, 934; *People v McGee*, 20 NY3d 513, 520; see generally *People v Carnevale*, 101 AD3d 1375, 1380-1381).

Applying that standard here, we conclude that defendant was denied effective assistance of counsel based on his counsel's failure to seek suppression of the evidence seized as a result of the alleged traffic infraction. We note that the officer who effectuated the traffic stop allegedly observed the items giving rise to the alleged vehicle and traffic infractions while the vehicle in which defendant was a passenger was moving and under the cloak of darkness. Given the totality of the circumstances here, we conclude that the motion had more than little or no chance of success (cf. *Carnevale*, 101 AD3d at 1379 n 2).

We also conclude that there is no strategic reason or other legitimate explanation for the failure of defendant's trial attorney to seek suppression of the physical evidence seized from defendant's person and from the vehicle at issue. As a practical matter, under the circumstances of this case there was simply no reason to forego the suppression hearing inasmuch as it would have allowed defendant an opportunity to examine the officer who effectuated the traffic stop before trial and to bolt that officer to a narrative of the traffic stop and the police activity that ensued as a result of that stop. More importantly, a "suppression motion could have been dispositive of the entire proceeding" (*Clermont*, 22 NY3d at 934), because it is hard to conceive of how defendant would have been convicted of the burglaries had the physical evidence been suppressed. In that vein, we respectfully conclude that the majority's analysis of what may have happened at trial and the theories defense counsel may have held with respect to the path to an acquittal are immaterial inasmuch as the trial would not have occurred had defendant prevailed upon a motion to suppress evidence seized as a result of the traffic stop on the ground that such stop was unlawful. Consequently, under the circumstances of this case, the failure of defendant's trial attorney to challenge this evidence deprived defendant of meaningful representation, and we would therefore reverse the judgment and grant defendant a new trial.

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

1205

**KA 13-00071**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GRANT A. EASLEY, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered January 2, 2013. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]), defendant contends that there was no probable cause to compel his pre-indictment DNA buccal swab (*see generally Matter of Abe A.*, 56 NY2d 288, 291; *People v Smith*, 95 AD3d 21, 24). Defendant failed to preserve his contention for our review inasmuch as he did not move to suppress the DNA evidence obtained from the buccal swab (*see People v Brown*, 92 AD3d 1216, 1216, *lv denied* 18 NY3d 992; *People v Clark*, 15 AD3d 864, 865, *lv denied* 4 NY3d 885), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*).

We reject defendant's further contention that he did not have actual or constructive possession of the drugs and thus that the evidence is legally insufficient to support the conviction. Viewing the evidence in the light most favorable to the People (*see generally People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences that could lead the trier of fact to conclude that defendant constructively possessed the subject drugs (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, 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 Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his further contention that he was deprived of a fair trial by prosecutorial misconduct on summation (*see* CPL 470.05 [2]) and, in any event, that contention is without merit. The allegedly improper comments were "either a fair response to defense counsel's summation or fair comment on the evidence" (*People v Santiago*, 101 AD3d 1715, 1716, *lv denied* 21 NY3d 946 [internal quotation marks omitted]; *see generally People v Halm*, 81 NY2d 819, 821).

Finally, defendant's sentence is not unduly harsh or severe. We note, however, that the certificate of conviction incorrectly reflects that defendant was sentenced as a second felony offender, and it therefore must be amended to reflect that he was sentenced as a second felony drug offender (*see People v Vasavada*, 93 AD3d 893, 894, *lv denied* 19 NY3d 978; *see also People v Afrika*, 79 AD3d 1678, 1680, *lv denied* 17 NY3d 791).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

1208

**KA 13-00597**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JEROME WILLIAMS, DEFENDANT-APPELLANT.

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

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO FOR RESPONDENT.

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Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered December 20, 2010. The judgment convicted defendant, upon his plea of guilty, of aggravated harassment of an employee by an inmate.

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 aggravated harassment of an employee by an inmate (Penal Law § 240.32). As the People correctly concede, defendant's purported waiver of the right to appeal is invalid (see *People v Khan*, 291 AD2d 898, 898-899). By failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that, based on his alleged mental illness, his guilty plea was not voluntarily, knowingly and intelligently entered (see *People v Carpenter*, 13 AD3d 1193, 1194, lv denied 4 NY3d 797). This case does not fall within the rare exception to the preservation requirement because the plea colloquy did not "clearly cast[] significant doubt upon the defendant's guilt or otherwise call[] into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666; see *Carpenter*, 13 AD3d at 1194). Nor does the presentence report cast significant doubt on the voluntariness of the plea. "A history of prior mental illness or treatment does not itself call into question defendant's competence . . . [, and t]here is no indication in the record that defendant was unable to understand the proceedings or that he was mentally incompetent at the time he entered his guilty plea" (*People v Robinson*, 39 AD3d 1266, 1267, lv denied 9 NY3d 869 [internal quotation marks omitted]). "Defendant was asked a number of questions during the plea proceedings to which he responded coherently and rationally, and there is no indication that defendant was unable to understand the implications of his decision to accept the plea offer" (*People v Shackelford*, 100 AD3d 1527, 1528, lv denied 21 NY3d 1009).

Insofar as defendant contends that he was denied effective assistance of counsel based on defense counsel's failure to investigate his history of mental illness and potential defenses, that contention involves matters outside the record on appeal and therefore must be raised by way of a motion pursuant to CPL article 440 (see *People v Dizak*, 93 AD3d 1182, 1185, *lv denied* 19 NY3d 972, *reconsideration denied* 20 NY3d 932). Finally, we reject defendant's further contention that he was denied effective assistance of counsel because defense counsel failed to move to withdraw defendant's plea based on information regarding defendant's history of mental illness contained in the presentence report. There is no basis upon which to conclude that defendant did not enter the plea knowingly, voluntarily and intelligently, and it is well settled that "[t]here can be no denial of effective assistance of [defense] counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; see *People v Keith*, 26 AD3d 879, 880, *lv denied* 6 NY3d 835).

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

1209

**KA 12-01919**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

AMILCAR RAMOS, DEFENDANT-APPELLANT.

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

AMILCAR RAMOS, DEFENDANT-APPELLANT PRO SE.

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

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Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered July 26, 2012. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts) and 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 following a jury trial of robbery in the first degree (Penal Law § 160.15 [4]) and two counts of burglary in the first degree (§ 140.30 [2], [4]), defendant contends that Supreme Court did not follow the proper *Batson* procedures in denying his *Batson* challenge and that he was deprived of a fair trial by the prosecutor's allegedly race-based peremptory challenges to three African-American prospective jurors and one Hispanic prospective juror. We reject defendant's contention with respect to the *Batson* procedures. Although the court initially denied the *Batson* challenge before defense counsel had an opportunity to argue that the prosecutor's stated reasons were pretextual, defense counsel nevertheless placed on the record why he believed the reasons were pretextual, whereupon the court again denied the motion. In any event, the court, by initially rejecting the challenge prematurely, can be said to have implicitly determined that the prosecutor's proffered race-neutral reasons were not pretextual (see *People v Carmack*, 34 AD3d 1299, 1301, lv denied 8 NY3d 879). We likewise reject defendant's contention that he was denied a fair trial based on the prosecutor's use of peremptory challenges. In response to defense counsel's *Batson* challenge, the prosecutor stated that two of the African-American prospective jurors expressed dissatisfaction with the manner in which the police investigated crimes committed against them,

while the third answered "yes and no" when asked whether he was satisfied with the police handling of a crime reported by his girlfriend. With respect to the Hispanic prospective juror, the prosecutor stated that he indicated that he was inclined to "speculate" rather than base his decision on the facts presented. We note that the prosecutor also struck a Caucasian prospective juror who stated that a relative did not "get a fair shake" by the prosecution in a prior case, and we conclude that the court did not abuse its discretion in determining that the prosecutor's explanations for his peremptory challenges were not pretextual (see *People v Farrare*, 118 AD3d 1477, 1477-1478, *lv denied* 23 NY3d 1061).

Viewing the evidence in the light most favorable to the People (see *People v Williams*, 84 NY2d 925, 926), we reject defendant's further contention that the evidence is legally insufficient to support the conviction (see generally *People v Bleakley*, 69 NY2d 490, 495). Two of the victims identified defendant at trial as one of the two perpetrators and, although defendant challenged the credibility and reliability of those witnesses, we must assume the truth of their testimony in the context of a challenge to the sufficiency of the evidence. 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 likewise conclude that the verdict is not against the weight of the evidence (see *Bleakley*, 69 NY2d at 495). We note that "resolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]), and we perceive no reason to disturb the jury's resolution of those issues in this case.

We also note that defendant was stopped by the police while driving a vehicle matching the description of the getaway vehicle, i.e, a white Cadillac CTS with large chrome rims and a dark-colored roof. In addition, three calls were made to defendant's cell phone from the cell phone stolen from one of the victims. Those calls were made between 12:57 p.m. and 1:44 p.m. on the day in question, which is when the charged crimes were taking place, and the People presented evidence that defendant's cell phone was "pinging" a cell phone tower close to the crime scene at or about that same time. Under the circumstances, even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that it cannot be said that the jury failed to give the evidence the weight it should be accorded (see generally *Bleakley*, 69 NY2d at 495; *People v Gay*, 105 AD3d 1427, 1427-1428).

We agree with defendant that the court erred in allowing one of the victims to offer voice identification testimony at trial. Prior to trial, the prosecutor had the victim listen to recordings of telephone calls allegedly made by defendant from jail, and the victim identified the voice of the person making the calls as belonging to defendant. The victim offered similar testimony at trial over defendant's objection. Because the People failed to provide defendant with notice of the pretrial voice identification procedure as required by CPL 710.30 (1) (see generally *People v Muneton*, 302 AD2d 246, 246,

*lv denied* 100 NY2d 541), the voice identification testimony was admissible at trial only if the identification was merely confirmatory as a matter of law (see *People v Tas*, 51 NY2d 915, 916; *People v Brito*, 11 AD3d 933, 934, *appeal dismissed* 5 NY3d 825). Contrary to the People's contention, the victim's identification of defendant's voice was not merely confirmatory inasmuch as the victim acknowledged that, although he had heard defendant speak a number of times in the neighborhood, he and defendant had never actually spoken to each other. We thus conclude that the People did not establish as a matter of law that the victim was so familiar with defendant's voice that "the identification at issue could not be the product of undue suggestiveness" (*People v Boyer*, 6 NY3d 427, 431; see *People v Rodriguez*, 79 NY2d 445, 449-450).

We nevertheless conclude that the error is harmless. Defendant did not make any incriminating statements in the jail phone call, and, in any event, another trial witness, a deputy sheriff, identified without objection defendant's voice from the same recordings and thus the victim's improper voice identification testimony was cumulative. We conclude that there is "no reasonable possibility that the error might have contributed to defendant's conviction" (*People v Crimmins*, 36 NY2d 230, 237; see *People v Boop*, 118 AD3d 1273, 1273).

We have reviewed the remaining contentions in defendant's main and pro se supplemental briefs and conclude that they do not require modification or reversal of the judgment.

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

**1215**

**CA 14-00649**

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

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DOUGLAS F. BERNARD AND BARBARA BERNARD,  
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

TOWN OF LYSANDER, DEFENDANT-RESPONDENT.

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CANNON & VAN ALLEN, LLP, GENESEO (MARK J. VALERIO OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS.

SMITH SOVIK KENDRICK SUGNET, P.C., SYRACUSE (KAREN J. KROGMAN OF  
COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (Donald F. Cerio, Jr., A.J.), entered February 5, 2014. The order denied plaintiffs' motion for partial summary judgment on the issue of liability.

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

Memorandum: Douglas F. Bernard (plaintiff) and his wife commenced this action seeking damages for injuries plaintiff sustained when he fell from a collapsing scaffold while working at a construction site owned by defendant. The complaint asserts a single cause of action for violation of Labor Law § 240 (1). Following discovery, plaintiffs moved for partial summary judgment on the issue of liability, contending that defendant failed as a matter of law to afford plaintiff proper protection under the statute. In opposition to the motion, defendant argued that there is an issue of fact whether plaintiff's alleged negligence in improperly constructing the scaffold was the sole proximate cause of his injuries. We conclude that Supreme Court erred in denying plaintiffs' motion.

On the day of his accident, plaintiff and a fellow employee were installing exterior trim boards (Hardie boards) on the side of a newly constructed sewage treatment pump house. To install the Hardie boards, plaintiff or his coworker constructed a platform on which to stand by placing one end of a 14-foot-long aluminum scaffold plank (pick) into the bucket of a backhoe, and securing the other end of the pick with two pieces of wood that were nailed into the side of the building. It is undisputed that, other than the pick, defendant did not provide any scaffolding or other safety devices for plaintiff to

use to install the Hardie boards. While plaintiff was standing on the pick, the end of the pick secured by the wooden braces gave way, causing plaintiff to fall to the ground and sustain broken ribs, broken vertebrae and a perforated lung, among other injuries.

We conclude that "[t]he fact that the scaffold collapsed is sufficient to establish as a matter of law that the [scaffold] was not so placed . . . as to give proper protection to plaintiff pursuant to the statute" (*Mazurett v Rochester City Sch. Dist.*, 88 AD3d 1304, 1305 [internal quotation marks omitted]; see *Vasquez v C2 Dev. Corp.*, 105 AD3d 729, 730; *Kirbis v LPCiminelli, Inc.*, 90 AD3d 1581, 1582). Contrary to defendant's contention, there is no issue of fact whether the safety equipment provided to plaintiff was sufficient to afford him proper protection under Labor Law § 240 (1). The only safety device provided to plaintiff at the work site was a 14-foot-long pick. "There were no harnesses, lanyards, safety lines, or similar safety devices available for use to prevent [plaintiff's] fall" (*Aburto v City of New York*, 94 AD3d 640, 640). To perform the work of installing siding on the building, plaintiff therefore had to create what the court accurately referred to as a "makeshift" scaffold by placing one end of the pick in the shovel of a backhoe and the other end between two pieces of wood he or a coworker nailed into the side of the building. "[T]he onus [was not] on plaintiff to construct an adequate safety device, using assorted materials on site [that were] not themselves adequate safety devices but which may [have been] used to construct a safety device" (*Collins v West 13th St. Owners Corp.*, 63 AD3d 621, 622).

We reject defendant's further contention that there is an issue of fact whether plaintiff's alleged negligence in securing the wooden braces with only two nails or in otherwise improperly erecting the scaffold was the sole proximate cause of the accident. Because defendant violated Labor Law § 240 (1) by failing to provide plaintiff with proper protection, plaintiff's alleged negligence cannot be deemed the only cause of the accident (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286; *Miles v Great Lakes Cheese of N.Y., Inc.*, 103 AD3d 1165, 1167). Under the circumstances, plaintiff's actions with respect to the manner in which he constructed the "makeshift" scaffold " 'raise, at most, an issue of comparative negligence, which is not an available defense under section 240 (1)' " (*Signs v Crawford*, 109 AD3d 1169, 1170; see *Stolt v General Foods Corp.*, 81 NY2d 918, 920).

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

1216

CA 14-00589

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

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IN THE MATTER OF JEFFREY A. SHEARER,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

BARBARA J. FIALA, COMMISSIONER, NEW YORK STATE  
DEPARTMENT OF MOTOR VEHICLES,  
RESPONDENT-RESPONDENT.

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ARTHUR J. RUMIZEN, WILLIAMSVILLE, FOR PETITIONER-APPELLANT.

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

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Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 19, 2014 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Memorandum: Petitioner's New York State driver's license was revoked in June 2011, as part of the sentence imposed upon his conviction of driving while intoxicated under Vehicle and Traffic Law § 1192. In February 2013, he applied for relicensing pursuant to Vehicle and Traffic Law § 510 (5), and he appeals from a judgment denying his CPLR article 78 petition seeking to annul respondent's denial of that application.

Petitioner contends that the 25-year look-back period set forth in 15 NYCRR part 136 is unenforceable and that respondent therefore erred in applying it to his application. Specifically, petitioner contends that the look-back period is legislative in nature and is inconsistent with the Vehicle and Traffic Law, which contains look-back periods of 10 years or less. Thus, petitioner contends that he is entitled to be relicensed immediately. We reject those contentions.

We conclude that 15 NYCRR 136.5 is not legislative in nature, inasmuch as the Legislature delegated its authority to administer the relicensing process to the Commissioner of the Department of Motor Vehicles (see Vehicle and Traffic Law §§ 215 [a]; 510 [5], [6]; see generally *Boreali v Axelrod*, 71 NY2d 1, 8-11). Therefore, in



promulgating 15 NYCRR part 136, the Commissioner has not "act[ed] inconsistently with the Legislature, or usurp[ed] its prerogatives" (*Clark v Cuomo*, 66 NY2d 185, 189).

We further conclude that 15 NYCRR 136.5 is not in conflict with any look-back period in the Vehicle and Traffic Law (see *Matter of Acevedo v New York State Dept. of Motor Vehs.*, 2014 NY Slip Op 30422[U], \*13; see generally *Matter of Hauptman v New York State Dept. of Motor Vehs.*, 158 AD2d 600, 601, appeal dismissed 75 NY2d 1004, lv denied 76 NY2d 706). Indeed, the look-back periods in the Vehicle and Traffic Law to which petitioner refers do not control here, inasmuch as they are inapplicable, set only minimum revocation periods, or concern the enhancement of criminal charges and punishments (see *Acevedo*, 2014 NY Slip Op 30422[U], \*13; see generally *Matter of Barnes v Tofany*, 27 NY2d 74, 75-79).

Petitioner further contends that, even if 15 NYCRR part 136 applies, he cannot be considered a "persistently dangerous driver" under the 25-year look-back period because his prior offenses were not sufficiently egregious. We reject that contention. The regulation states in relevant part that the Commissioner "shall" deny a request for relicensing where, within the 25-year look-back period, "the person has three or four alcohol- . . . related driving convictions . . . in any combination . . . and, in addition, has one or more serious driving offenses" (15 NYCRR 136.5 [b] [2]). Here, within the 25 years preceding petitioner's most recent revocable offense (see 15 NYCRR 136.5 [a] [4]), i.e., driving while intoxicated, petitioner has two other alcohol-related driving convictions, i.e., driving while intoxicated and driving while ability impaired, both under Vehicle and Traffic Law § 1192 (see 15 NYCRR 136.5 [a] [1] [i]). Furthermore, respondent properly concluded that petitioner committed a serious driving offense within the meaning of the regulation because the regulation defines a serious driving offense as occurring where a driver has accumulated "20 or more points from any violations" (15 NYCRR 136.5 [a] [2] [iv]), and petitioner had accumulated 21 points from other traffic violations. Respondent was therefore required to deny petitioner's application for relicensing.

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

**1221**

**CA 14-00635**

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

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DONALD MAU AND DIANNE MAU,  
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V

MEMORANDUM AND ORDER

EDWARD SCHUSLER AND BARBARA SCHUSLER,  
DEFENDANTS-APPELLANTS-RESPONDENTS.

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HISCOCK & BARCLAY, LLP, ELMIRA (BRYAN J. MAGGS OF COUNSEL), FOR  
DEFENDANTS-APPELLANTS-RESPONDENTS.

FRANK A. ALOI, ROCHESTER, AND ROBERT J. LUNN, FOR  
PLAINTIFFS-RESPONDENTS-APPELLANTS.

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Appeal and cross appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered June 19, 2013. The order denied the motion of defendants for summary judgment.

It is hereby ORDERED that the cross appeal is dismissed and the order is modified on the law by granting defendants' motion in part and dismissing the first, second and third causes of action in the amended complaint and the fifth cause of action to the extent it seeks injunctive relief with respect to the first, second and third causes of action and as modified the order is affirmed without costs in accordance with the following Memorandum: Plaintiffs and defendants have adjoining properties on Keuka Lake that were formerly commonly owned and now share a common driveway, which is located entirely on plaintiffs' property. Defendants have an access easement for the driveway. Plaintiffs commenced this action pursuant to RPAPL article 15 seeking, inter alia, an order determining that they have an easement with respect to an approximately 195-square-foot parking and turnaround space (hereafter, turnaround) located on defendants' property, adjacent to the driveway on plaintiffs' property. In the amended complaint, plaintiffs asserted five causes of action, the first four of which allege, respectively, that plaintiffs have an easement by implication, an express easement, an easement by necessity, and an easement by prescription with respect to the turnaround. The fifth cause of action seeks an order, inter alia, enjoining defendants from interfering with those easements. Defendants subsequently moved for summary judgment dismissing the amended complaint, and Supreme Court denied the motion. We modify the order by granting those parts of the motion with respect to the first, second, and third causes of action, as well as the fifth cause of action to the extent it seeks injunctive relief with respect to the

first, second, and third causes of action.

With respect to the first cause of action, for an implied easement, "a grantee claiming an easement implied by existing use must establish: (1) a unity and subsequent severance of title with respect to the relevant parcels; (2) that during the period of unity of title, the owner established a use in which one part of the land was subordinated to another; (3) that such use established by the owner was so continuous, obvious, and manifest that it indicated that it was meant to be permanent; and (4) that such use affects the value of the estate conveyed and that its continuation is necessary to the reasonable beneficial enjoyment of the estate conveyed" (*Monte v Di Marco*, 192 AD2d 1111, 1112, lv denied 82 NY2d 653). "Stated another way, '[a]n implied easement will arise "upon severance of ownership when, during the unity of title, an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another part, which servitude at the time of severance is in use and is reasonably necessary for the fair enjoyment of the other part of the estate" ' " (*Freeman v Walther*, 110 AD3d 1312, 1315). "Implied easements are not favored by the law and the burden of proof rests with [plaintiffs] to prove such entitlement by clear and convincing evidence" (*Hedden v Bohling*, 112 AD2d 23, 24, appeal dismissed 67 NY2d 758).

Defendants met their initial burden by establishing that, when the properties were commonly owned, the owner of the properties did not establish a use of the turnaround that "was so continuous, obvious, and manifest that it indicated that it was meant to be permanent" (*Monte*, 192 AD2d at 1112; see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Defendants also demonstrated that the turnaround was used primarily to facilitate plaintiffs' access to off-street parking, and "mere convenience is not sufficient to establish reasonable necessity" (*Freeman*, 110 AD3d at 1316; see *Simone v Heidelberg*, 9 NY3d 177, 182). Plaintiffs failed to raise a triable issue of fact in opposition to that part of the motion (see *Abbott v Herring*, 97 AD2d 870, 870-871, *affd* 62 NY2d 1028; see generally *Zuckerman*, 49 NY2d at 562). We therefore modify the order accordingly.

With respect to the second cause of action, for an express easement, we note that Real Property Law § 240 (3) provides in relevant part that "[e]very instrument creating [or] transferring . . . an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law." "The 'intent' to which the statute refers is the objective intent of the parties as manifested by the language of the deed; unless the deed is ambiguous, evidence of unexpressed, subjective intentions of the parties is irrelevant" (*Margetin v Jewett*, 78 AD3d 1486, 1488). We conclude that defendants met their burden of establishing that the access easement in the deed to defendants—from the owner of what was formerly the common properties did not grant to that owner express permission to use the turnaround (see generally *Perry v Edwards*, 79

AD3d 1629, 1630). Plaintiffs failed to raise a triable issue of fact in opposition thereto (see generally *Zuckerman*, 49 NY2d at 562). We therefore further modify the order accordingly.

With respect to the third cause of action, seeking an order determining that plaintiffs have an easement by necessity with respect to the turnaround, we note that "[t]he party asserting an easement by necessity bears the burden of establishing by clear and convincing evidence . . . 'that there was a unity and subsequent separation of title, and [ ] that at the time of severance an easement over [the servient estate's] property was *absolutely necessary*' . . . . Significantly, 'the necessity must exist in fact and not as a mere convenience' . . . and must be indispensable to the reasonable use for the adjacent property" (*Simone*, 9 NY3d at 182; see *Shute v McLusky* [appeal No. 2], 96 AD3d 1360, 1361). As noted, defendants demonstrated that the primary use of the turnaround was to ease plaintiffs' access to off-street parking; here, we conclude that defendants met their initial burden by submitting evidence that plaintiffs had on-street parking at their disposal in addition to the ability to use the driveway and the parking spot on their property even without access to the turnaround. Put differently, plaintiffs are not entitled to an easement by necessity because access for off-street parking is "nothing more than a mere convenience" (*Simone*, 9 NY3d at 182), and plaintiffs' assertion that it is too expensive for them to build a turnaround on their property is insufficient to raise a triable issue of fact in opposition to that part of the motion (see generally *Zuckerman*, 49 NY2d at 562). We therefore further modify the order accordingly.

With respect to the fourth cause of action, for an easement by prescription, we conclude that there is a triable issue of fact whether plaintiffs had a claim of right to the use of the turnaround. To establish a prescriptive easement, plaintiffs must establish by clear and convincing evidence that the use of the turnaround was " 'adverse, open and notorious, continuous and uninterrupted for the prescriptive period' " of 10 years (*Beutler v Maynard*, 80 AD2d 982, 982, *affd* 56 NY2d 538, quoting *Di Leo v Pecksto Holding Corp.*, 304 NY 505, 512). The elements of a claim for an easement by prescription are similar to those of a claim for adverse possession, except that demonstration of exclusivity is not essential to a claim for easement by prescription (see *King's Ct. Rest., Inc. v Hurondel I, Inc.*, 87 AD3d 1361, 1362). Thus, to establish an easement by prescription, plaintiffs must establish by clear and convincing evidence possession that was hostile and under a claim of right; actual; open and notorious; and continuous for the required period (see *Walling v Przybylo*, 7 NY3d 228, 232). It is undisputed that the 2008 amendments to RPAPL 501 providing, inter alia, that "[a] claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor" (RPAPL 501 [3]), do not apply here (see *Franza v Olin*, 73 AD3d 44, 47). Thus, plaintiffs' "actual knowledge of the true owner is not fatal" to their claim for an easement by prescription (*Walling*, 7 NY3d at 233).

Inasmuch as their submissions are replete with evidence of

cooperation and neighborly accommodation between the parties, we conclude that defendants met their initial burden of demonstrating that plaintiffs cannot establish their claim for an easement by prescription (*see generally Zuckerman*, 49 NY2d at 562). We further conclude, however, that plaintiffs' submissions in opposition were sufficient to raise a triable issue of fact (*see generally id.*). Plaintiffs tendered, inter alia, an affidavit of plaintiff Dianne Mau (Mau), who stated that at the time they purchased their property plaintiffs were advised by their then-attorney that the owners of what is now defendants' property could not interfere with plaintiffs' use of the turnaround, and that the access easement for the driveway was granted on the condition that the owners of what is now defendants' property would not interfere with the use of the turnaround by the owners of what is now plaintiffs' property. Contrary to the conclusion of the dissent, those averments are not contradicted by Mau's prior deposition testimony, and we thus conclude that plaintiffs raised a triable issue of fact whether their use of the turnaround was hostile and under a claim of right (*see Walling*, 7 NY3d at 232), i.e., whether that use was adverse to defendants (*see Dermody v Tilton*, 85 AD3d 1682, 1682).

In view of our determination with respect to the fourth cause of action, we further conclude that the court should have granted that part of defendants' motion for summary judgment dismissing the fifth cause of action to the extent that it seeks injunctive relief with respect to the first three causes of action, i.e., an order enjoining defendants from interfering with plaintiffs' use of the turnaround and directing defendants to remove any barriers erected for the purpose of denying plaintiffs access to the turnaround. We therefore further modify the order accordingly. Finally, plaintiffs are not aggrieved by the order denying defendants' motion, and thus their cross appeal must be dismissed (*see Rifenburg Const., Inc. v State of New York*, 90 AD3d 1498, 1500; *see generally CPLR 5511*). To the extent that plaintiffs' request for reverse summary judgment pursuant to CPLR 3212 (b) is properly before us (*cf. Hecht v City of New York*, 60 NY2d 57, 63; *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-545; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985), we conclude that it lacks merit for the reasons set forth above.

All concur except SMITH, J.P., and LINDLEY, J., who dissent in part and vote to reverse in accordance with the following Memorandum: We respectfully dissent in part. Although we agree with the majority that Supreme Court erred in denying defendants' motion insofar as it sought summary judgment dismissing the causes of action for an express easement, an easement by necessity and an easement by implication, we, unlike the majority, conclude that the court also erred in denying the motion with respect to the cause of action seeking a prescriptive easement. We would therefore reverse the order and grant defendants' motion in its entirety.

"A party asserting the existence of a prescriptive easement must prove, by clear and convincing evidence, that the use of the subject property was open, notorious, continuous, hostile and under a claim of right for the requisite 10-year period" (*Cole v Rothe*, 18 AD3d 1058,

1059; see *Zutt v State of New York*, 50 AD3d 1133, 1133). We agree with the majority that defendants met their initial burden of establishing as a matter of law that plaintiffs' use of the turnaround area on defendants' property was permissive, thus shifting the burden to plaintiffs to raise an issue of fact. We cannot agree with the majority, however, that plaintiffs met that burden.

In opposition to the motion, plaintiffs submitted, inter alia, an affidavit from plaintiff Dianne Mau (Mau), who asserted that, when she and her husband purchased their property in 1995, they were advised by their attorney that the driveway easement granted them the right to use the turnaround area. That assertion, however, is contradicted by Mau's deposition testimony. When asked whether anyone told her prior to purchase that she could use the turnaround area, Mau responded, "No, nothing was said one way or the other." When asked whether she believed prior to 2008 that she had a right to turn around on defendants' property, Mau answered, "We had no reason to think it was an issue . . . [b]ecause nothing was ever said to us about it one way or another about whether we could or could not." In our view, Mau's affidavit "presented apparent feigned issues of fact designed to avoid the consequences of [her] earlier deposition testimony and, thus, was insufficient to defeat [defendants'] motion" for summary judgment dismissing that cause of action (*Carriero v Nazario*, 116 AD3d 818, 819; see *Taillie v Rochester Gas & Elec. Corp.*, 68 AD3d 1808, 1809; *Richter v Collier*, 5 AD3d 1003, 1004).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1233

CA 13-02122

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO,

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HERKIMER COUNTY INDUSTRIAL DEVELOPMENT AGENCY,  
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

VILLAGE OF HERKIMER, DEFENDANT-APPELLANT,  
AND COUNTY OF HERKIMER, DEFENDANT-RESPONDENT.

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LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL J. LONGSTREET OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

KERNAN AND KERNAN, P.C., UTICA (MICHAEL H. STEPHENS OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

ROBERT J. MALONE, COUNTY ATTORNEY, HERKIMER (LORRAINE H. LEWANDROWSKI  
OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Herkimer County (Erin P. Gall, J.), entered June 17, 2013 in a declaratory judgment action. The judgment granted the motion of defendant County of Herkimer for summary judgment against defendant Village of Herkimer and denied the cross motion of defendant Village of Herkimer for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the second counterclaim in the amended answer of defendant Village of Herkimer, and by granting judgment in favor of plaintiff and defendant County of Herkimer as follows:

It is ADJUDGED and DECLARED that the assessment of real property taxes against plaintiff by defendant Village of Herkimer was unlawful based upon plaintiff's tax exempt status, and that defendant County of Herkimer properly cancelled the tax lien against properties owned by plaintiff,

and as modified, the judgment is affirmed without costs.

Memorandum: In this declaratory judgment action, defendant Village of Herkimer (Village) appeals from a judgment granting the motion of defendant County of Herkimer (County) seeking summary judgment on its cross claims against the Village and dismissing the Village's cross claims. The judgment also denied the Village's cross

motion seeking summary judgment on its counterclaim against plaintiff and dismissed the counterclaim. This matter was previously before us (*Herkimer County Indus. Dev. Agency v Village of Herkimer*, 84 AD3d 1707), and we modified the judgment by denying the Village's motion for summary judgment on its cross claims against the County and permitting the County to amend its answer to allege a third cross claim against the Village.

As we explained on the prior appeal, plaintiff commenced this action seeking a declaration that the real property taxes levied against it by the Village are void inasmuch as plaintiff is exempt from the payment of real property taxes. Pursuant to Village Law § 11-1118, the Village added unpaid water rents owed by plaintiff's tenant to the annual tax levies in 2004 and 2005 and, when plaintiff failed to pay those taxes, it turned the unpaid tax levies over to the County pursuant to RPTL 1436. The affected properties were thereafter included in an in rem foreclosure proceeding commenced by the County. The County, however, withdrew those properties from the in rem foreclosure proceeding based upon an automatic stay of the proceeding pursuant to 11 USC § 362 (a) (4) and RPTL 1140 (1) following the filing of a chapter 13 bankruptcy petition by plaintiff's tenant. Pursuant to RPTL 1138 (6) (a), the County Legislature determined that there was no practical method to enforce the collection of the delinquent tax liens on the two parcels, and the tax liens were cancelled. In its amended answer, the Village asserted cross claims against the County challenging the propriety of its actions in cancelling the tax lien. We conclude that Supreme Court properly determined that the actions of the County were lawful and granted the County's motion for summary judgment on its cross claims against the Village. The court erred, however, in failing to declare the rights of the parties (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954; *Haines v New York Mut. Underwriters*, 30 AD3d 1030, 1030), and we modify the judgment accordingly.

We note, as an initial matter, that the Village has abandoned its contentions on appeal that the court erred in granting those parts of the County's motion for summary judgment on its first and second cross claims and limits its contention to the County's third cross claim (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

The Village contends that the County used an improper basis for its determination to withdraw the properties from the in rem foreclosure proceeding and to cancel the tax liens, i.e., the bankruptcy proceeding filed by plaintiff's tenant. Although the County does not explicitly respond to the Village's contention that the bankruptcy petition of plaintiff's tenant did not operate to stay the in rem proceeding because plaintiff is the property owner, we nevertheless reject that contention. "[A] leasehold, like all other interests of the debtor, immediately becomes property of the [debtor's] estate whenever bankruptcy relief is sought" (*Matter of Sturgis Iron & Metal Co., Inc.*, 420 BR 716, 721 [Bankr WD.Mich]; *see Matter of Ames Dept. Stores, Inc.*, 287 BR 112, 122 [Bankr SDNY]; *see also Alternate Energy Mgt. Corp. v Goodman*, 151 AD2d 453, 453; *see generally Matter of Prudential Lines, Inc.*, 928 F2d 565, 573 [2d



Cir)). Thus, the tenant's petition operated as a stay to "enforce any lien against property of the estate" (11 USC § 362 [a] [4]). We therefore conclude that the County properly determined that the in rem foreclosure proceeding with respect to the subject parcels was stayed pursuant to RPTL 1140 (1), and properly withdrew those parcels from the proceeding. As noted above, the Village abandoned its contention that the court erred in granting that part of the County's summary judgment motion on its cross claim alleging that plaintiff is a tax exempt entity and thus that the assessment of a levy of real property taxes against it is in violation of New York law. We therefore further conclude that the County had a proper basis to cancel the tax lien based upon its determination that "there is no practical method to enforce the collection of the delinquent tax lien and that a supplementary proceeding to enforce collection of the tax would not be effective" (RPTL 1138 [6] [a]). Thus, we conclude that the County established its entitlement to judgment on its third cross claim and that the Village failed to raise an issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We further conclude, however, that the court erred in dismissing the Village's counterclaim against plaintiff, alleging that plaintiff is responsible for the unpaid water rents as the owner of the property, and we therefore further modify the judgment accordingly. We note that the court dismissed the counterclaim as barred by the statute of limitations (*see UCC 2-725 [1]; Matter of Village of Scarsdale v New York City Water Bd.*, 33 AD3d 1011, 1013), and that it did so in the absence of a cross motion from plaintiff seeking that relief. In any event, we agree with the Village that the claim it asserted in the second counterclaim of its amended answer "is deemed to have been interposed at the time the claims in the original [answer] were interposed" (CPLR 203 [f]). We reject plaintiff's contention that it did not have notice of the transactions or occurrences giving rise to the claim (*see id.*). Although the original answer is not included in the record before us, the failure to include the original pleading is not fatal to the Village's claim in the second counterclaim (*see generally Holst v Liberatore*, 105 AD3d 1374, 1375). Where, as here, the amended answer "merely adds a new theory of recovery arising out of transactions already at issue in this litigation" (*Presutti v Suss*, 254 AD2d 785, 786; *see Boxhorn v Alliance Imaging Inc.*, 74 AD3d 1735, 1736), the counterclaim contained in the amended answer is not time-barred (*see C-Kitchens Assocs. Inc. v Travelers Ins. Cos. [Travelers Ins. Co.]*, 15 AD3d 905, 906).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1234**

**CA 14-00743**

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO,

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HENRY SICIGNANO, III, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

LARAMIE N. DIXEY AND CELESTE M. HOLLANDS,  
DEFENDANTS-RESPONDENTS.

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DUKE, HOLZMAN, PHOTIADIS & GRESENS, LLP, BUFFALO (CHARLES C. RITTER,  
JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HOGAN WILLIG, PLLC, AMHERST (DIANE R. TIVERON OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 26, 2013. The order, insofar as appealed from, granted defendants' cross motion for summary judgment, dismissed plaintiff's amended complaint and granted defendants judgment against plaintiff for their reasonable attorneys' fees and costs.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the cross motion is denied, the amended complaint is reinstated, and the award of attorneys' fees and costs to defendants is vacated.

Memorandum: In June 2009, plaintiff executed a contract to purchase a home owned by defendants. On the property condition disclosure statement, which was attached to the contract, defendants answered "no" to question No. 30 ("Are there any flooding, drainage or grading problems that resulted in standing water on any portion of the Property?") and question No. 31 ("Does the basement have seepage that results in standing water?"). Several months after plaintiff took possession of the property, he allegedly began to experience "huge water problems," including "severe flooding, standing water, [and sump] pumps that r[a]n for five or six days" at a time. Plaintiff thereafter commenced this action seeking damages for violation of article 14 of the Real Property Law, fraud, and breach of contract in connection with the transaction. We agree with plaintiff that Supreme Court erred in granting defendants' cross motion for summary judgment dismissing the amended complaint and, thus, in awarding them attorneys' fees and costs.

Real Property Law § 462 (1) requires sellers of residential real property to "complete and sign a property condition disclosure statement" and to provide such statement to a prospective buyer "prior

to the signing by the buyer of a binding contract of sale." Real Property Law § 462 sets forth the disclosure form, which instructs the seller to complete the form based upon his or her "ACTUAL KNOWLEDGE," and contains the seller's certification that "THE INFORMATION IN THIS PROPERTY CONDITION DISCLOSURE STATEMENT IS TRUE AND COMPLETE TO THE SELLER'S ACTUAL KNOWLEDGE AS OF THE DATE SIGNED BY THE SELLER." Where a seller provides a property condition disclosure statement and "willful[ly] fail[s] to perform the requirements" set forth in article 14 of the Real Property Law "[such] seller shall be liable for the actual damages suffered by the buyer in addition to any other existing equitable or statutory remedy" (Real Property Law § 465 [2]).

Here, even assuming, *arguendo*, that defendants met their initial burden on that part of the cross motion with respect to the cause of action asserted pursuant to the Real Property Law by denying actual knowledge of any flooding or seepage resulting in standing water, we conclude that plaintiff raised an issue of fact in opposition (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff submitted, *inter alia*, defendants' responses to his interrogatories and their deposition testimony, and defendants admitted therein that the basement had flooded on two occasions during their ownership of the property. Although defendants blamed those two incidents on power failures rather than a property defect, the fact remains that they experienced at least two instances of standing water in the basement despite their representations to the contrary (see *Meyers v Rosen*, 69 AD3d 1095, 1099; *Calvente v Levy*, 12 Misc 3d 38, 39-40). Plaintiff also submitted affidavits from 13 neighbors, all of whom averred that there were "chronic drainage problems and flooding" at the property and that, at times, the flooding was so severe that water pumped from the property's basement flooded the adjacent roadway. The neighbors specifically averred that they had "observed such flooding at the [p]roperty when it was owned by [defendants]." Although defendants speculated that the neighbors were confusing defendants with the prior owners of the property, there is no evidence to support that assertion and, in any event, issues of credibility may not be resolved upon summary judgment (see *Rew v County of Niagara*, 115 AD3d 1316, 1318). We therefore conclude that plaintiff raised an issue of fact with respect to defendants' actual knowledge of flooding on the property (see *Pettis v Haag*, 84 AD3d 1553, 1555; *Meyers*, 69 AD3d at 1097).

With respect to the fraud cause of action, it is well settled that, "[t]o establish a cause of action for fraud, plaintiff must demonstrate that defendants knowingly misrepresented a material fact upon which plaintiff justifiably relied and which caused plaintiff to sustain damages" (*Klafehn v Morrison*, 75 AD3d 808, 810; see *Mikulski v Battaglia*, 112 AD3d 1355, 1356; *Pettis*, 84 AD3d at 1554). "[F]alse representation in a [property condition] disclosure statement may constitute active concealment in the context of fraudulent nondisclosure" (*Klafehn*, 75 AD3d at 810; see *Sample v Yokel*, 94 AD3d 1413, 1415; *Pettis*, 84 AD3d at 1554-1555). For the reasons set forth above, we conclude that plaintiff raised an issue of fact with respect to whether defendants knowingly misrepresented a material fact, *i.e.*, the property's history of flooding and standing water, on the property condition disclosure statement (see *Mikulski*, 112 AD3d at 1356-1357;

*Pettis*, 84 AD3d at 1555; *Jablonski v Rapalje*, 14 AD3d 484, 486). We likewise conclude that plaintiff raised an issue of fact with respect to whether he justifiably relied on defendants' alleged misrepresentations (see *Jablonski*, 14 AD3d at 487-488; *Bethka v Jensen*, 250 AD2d 887, 888). Plaintiff testified that he toured the property, including the basement, on two separate occasions, and that he saw no evidence of water infiltration or water damage. Plaintiff hired a home inspector, who noted a "grading issue" on the property, but did not identify any water issues in the basement or drainage issues on the property (see *Pettis*, 84 AD3d at 1555; *Jablonski*, 14 AD3d at 488; cf. *Klafehn*, 75 AD3d at 809-811; *Daly v Kochanowicz*, 67 AD3d 78, 84). Although defendants assert that the dry wells on the property were "readily observable" and thus should have placed plaintiff on notice of water issues, defendant Laramie N. Dixey testified that he learned about the dry wells only because the prior owner took him around the property and showed him the location of the wells. Plaintiff testified that he first learned of the dry wells from a plumber he hired to address the flooding on the property, and that "[u]nless you're looking for [the dry wells], you would never find them." Further, the fact that plaintiff previously lived in the general vicinity of the property does not establish as a matter of law that he knew or should have known of the property's history of flooding.

Finally, we agree with plaintiff that the court erred in dismissing his cause of action for breach of contract. Although the provisions of a contract for the sale of real property are generally merged in the deed and therefore extinguished upon the closing of title (see *Franklin Park Plaza, LLC v V & J Natl. Enters., LLC*, 57 AD3d 1450, 1451-1452; *Goldsmith v Knapp*, 223 AD2d 671, 673), that rule does not apply " 'where the parties have expressed their intention that [a] provision shall survive delivery of the deed' " (*NVR, Inc. v Edwards*, 21 AD3d 1309, 1310; see *Matter of Mattar v Heckl*, 77 AD3d 1390, 1391; *Franklin Park Plaza, LLC*, 57 AD3d at 1452). Here, the contract provides that "[a]ny claim arising from failure to comply with Paragraph[] 5 [of the contract]," which encompasses defendants' representations in the property condition disclosure statement, "shall survive for 2 years after the Closing or cancellation of this Contract" (see generally *Bibbo v 31-30, LLC*, 105 AD3d 791, 792; *Franklin Park Plaza, LLC*, 57 AD3d at 1452). In any event, we note that "the merger doctrine [is] inapplicable where, as here, there exists a cause of action based upon fraud" (*Berger-Vespa v Rondack Bldg. Inspectors*, 293 AD2d 838, 840; see *Gilpin v Oswego Bldrs., Inc.*, 87 AD3d 1396, 1399; *Woodworth v Delgrand*, 174 AD2d 1011, 1011).

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

**1236**

**CA 13-02090**

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

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SUSAN CAPRETTO, PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF BUFFALO, SENECA ONE REALTY LLC, ALLPRO  
PARKING, LLC, DEFENDANTS-RESPONDENTS,  
SKYDECK CORPORATION, BISON BASEBALL, INC., RICH  
PRODUCTS CORPORATION AND RICH ENTERTAINMENT GROUP,  
DEFENDANTS-APPELLANTS-RESPONDENTS.

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FELDMAN KIEFFER, LLP, BUFFALO (CHRISTOPHER E. WILKINS OF COUNSEL), FOR  
DEFENDANTS-APPELLANTS-RESPONDENTS.

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

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF  
COUNSEL), FOR DEFENDANT-RESPONDENT CITY OF BUFFALO.

WALSH, ROBERTS & GRACE, BUFFALO (ROBERT P. GOODWIN OF COUNSEL), FOR  
DEFENDANT-RESPONDENT SENECA ONE REALTY LLC.

LAW OFFICE OF JOHN WALLACE, ROCHESTER (GARY J. O'DONNELL OF COUNSEL),  
FOR DEFENDANT-RESPONDENT ALLPRO PARKING, LLC.

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Appeals from an order of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered August 22, 2013. The order granted the motion of defendant Seneca One Realty LLC, and the cross motions of defendants Allpro Parking and City of Buffalo for summary judgment dismissing the amended complaint and cross claims against them, and granted in part the motion of defendants-appellants-respondents for summary judgment.

It is hereby ORDERED that said appeal by defendants Skydeck Corporation, Bison Baseball, Inc., Rich Products Corporation and Rich Entertainment Group from the order insofar as it granted the motion and cross motion of defendants Seneca One Realty LLC and Allpro Parking, LLC is unanimously dismissed, and the order is modified on the law by denying those parts of that motion and cross motion to the extent that they sought dismissal of plaintiff's claims based on The Charter of the City of Buffalo § 413-50 (A) and reinstating those claims, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for

injuries she sustained when she tripped and fell as a result of broken concrete located in the driveway portion of a sidewalk. For purposes of this appeal, no one has disputed that the large area of broken concrete constituted a dangerous and "long-standing condition." The issue on this appeal is which party had a duty to correct that condition.

Defendant Seneca One Realty LLC (Seneca One) owned the property abutting the sidewalk, and contracted with defendant Allpro Parking, LLC (Allpro) to "service and operate" the parking garage located on Seneca One's property. Immediately adjacent to Seneca One's property is property owned by defendant City of Buffalo (City), which the City leased to defendant Bison Baseball, Inc. (Bison Baseball). Situated on the property leased to Bison Baseball is, inter alia, the driveway at issue on this appeal, a baseball stadium and an outdoor, surface parking lot. Bison Baseball and defendant Rich Entertainment Group contracted with defendant Skydeck Corporation (Skydeck) to manage and operate that surface parking lot. Rich Entertainment Group is an assumed name used by defendant Rich Products Corporation to conduct business in New York.

Following discovery, Seneca One moved and Allpro cross-moved for summary judgment dismissing the amended complaint and all cross claims against them. Bison Baseball, Skydeck, Rich Entertainment Group and Rich Products Corporation (collectively, Bison defendants) moved and the City cross-moved for summary judgment dismissing the amended complaint and all cross claims against them. Plaintiff opposed the motions of Seneca One and the Bison defendants, as well as the cross motion of Allpro. The Bison defendants opposed the cross motion of the City. Supreme Court granted the motion of Seneca One and the cross motions of Allpro and the City in their entirety, and granted, in part, the motion of the Bison defendants. The Bison defendants and plaintiff appeal from that order.

As a preliminary matter we note that, inasmuch as the Bison defendants did not oppose the motion of Seneca One or the cross motion of Allpro, "they do not have standing as aggrieved parties to appeal" that part of the order granting that motion and cross motion (*Whiteman v Yeshiva & Mesivta Torah Temimah*, 255 AD2d 378, 379; see CPLR 5511; *Darras v Romans*, 85 AD3d 710, 711). We thus dismiss that part of the Bison defendants' appeal seeking to appeal from so much of the order as granted the motion of Seneca One and the cross motion of Allpro, and we do not address on the merits the Bison defendants' contention that the court erred in granting summary judgment to those parties.

The Bison defendants contend that the court erred in denying their motion for summary judgment with respect to the negligence claims asserted against them. We reject that contention. "Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner . . . There are, however, circumstances under which this general rule is inapplicable and the abutting landowner will be held liable. Liability to abutting landowners will generally be imposed where the

sidewalk was constructed in a special manner for the benefit of the abutting owner . . . , where the abutting owner affirmatively caused the defect . . . , where the abutting landowner negligently constructed or repaired the sidewalk . . . and where a local ordinance or statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalks and imposes liability for injuries resulting from the breach of that duty" (*Hausser v Giunta*, 88 NY2d 449, 452-453; see *Guadagno v City of Niagara Falls*, 38 AD3d 1310, 1311; *Rader v Walton*, 21 AD3d 1409, 1410). Photographs in the record establish that the dangerous condition is in that portion of the sidewalk that abuts property owned by Seneca One, but it is also located in the apron of the driveway that provides access to the property leased by the Bison defendants.

"Where a sidewalk is adjacent to but not part of the area used as a driveway, the plaintiff bears the burden of proof on a motion for summary judgment of showing that the special use of the sidewalk contributed to the defect . . . . However, if the defect is in the portion of the sidewalk used as a driveway, the abutting landowner, on a motion for summary judgment, bears the burden of establishing that he or she did nothing to either create the defective condition or cause the condition through the special use of the property as a driveway" (*Adorno v Carty*, 23 AD3d 590, 591 [internal quotation marks omitted]; see *Campos v Midway Cabinets, Inc.*, 51 AD3d 843, 844; *Murnan v Town of Tonawanda*, 34 AD3d 1296, 1296-1297). The same principle applies to a commercial tenant of property where the driveway constitutes a special use by the tenant (see *Tedeschi v KMK Realty Corp.*, 8 AD3d 658, 659; *Pantaleon v Lorimer Mgt. Corp.*, 270 AD2d 324, 324; *Infante v City of New York*, 258 AD2d 333, 334).

While the area of the dangerous condition is in a City right-of-way that falls within the extended lot line boundaries of the property owned by Seneca One, we conclude that the Bison defendants, as lessors of the "adjacent property," may nevertheless still be liable if there is evidence that they had "access to and ability to exercise control over the special use [driveway]" (*Kaufman v Silver*, 90 NY2d 204, 207). We conclude that the Bison defendants failed to establish as a matter of law that they lacked access to and the ability to control that special use driveway (*cf. id.* at 208) and, further, failed to establish as a matter of law "that they did not affirmatively create the defect by any alleged special use of the sidewalk as a driveway" (*Schroeck v Gies*, 110 AD3d 1497, 1498). Indeed, based on the evidence submitted by the Bison defendants in support of their motion, it is reasonable to conclude that the "driveway apron was constructed and exclusively used for the benefit of [the Bison defendants' leased] property" (*Keenan v Munday*, 79 AD3d 1415, 1418; *cf. Guadagno*, 38 AD3d at 1311). The only places that could be accessed by the driveway were the stadium and the surface parking lot, both of which were located on the property leased by Bison Baseball. We thus conclude that the court properly denied their motion seeking to dismiss the negligence claims asserted against the Bison defendants insofar as those claims were based on their special use of the driveway (see *e.g. Campos*, 51 AD3d at 844; *Adorno*, 23 AD3d at 591; *Katz v City of New York*, 18 AD3d 818, 819; *cf. Schroeck*, 110 AD3d at 1498).

Even assuming, *arguendo*, that the Bison defendants met their initial burden, we conclude that plaintiff raised triable issues of fact whether the Bison defendants created or caused the dangerous condition through their special use of the driveway portion of the sidewalk (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to the Bison defendants' contention, the affidavit from plaintiff's expert was neither conclusory nor speculative. We address that contention on the merits even though it was raised for the first time on appeal because it involves "question[s] of law appearing on the face of the record . . . [that] could not have been avoided by [plaintiff] if brought to [her] attention in a timely manner" (*Oram v Capone*, 206 AD2d 839, 840; *see Rew v County of Niagara*, 115 AD3d 1316, 1317). In our view, the plaintiff's expert affidavit establishes that "the weight of traffic on the driveway could have been a concurrent cause of the defect, [and thus] the motion for summary judgment [was properly] denied" (*Adorno*, 23 AD3d at 591; *see Tate v Freeport Union Sch. Dist.*, 7 AD3d 695, 695-696; *see also Keenan*, 79 AD3d at 1418).

The Bison defendants contend that plaintiff improperly raised the theory of special use for the first time in opposition to their motion for summary judgment (*see generally DiFabio v Jordan*, 113 AD3d 1109, 1110-1111; *McGrath v Bruce Bldrs., Inc.*, 38 AD3d 1278, 1279). We reject that contention. Plaintiff specifically alleged that the Bison defendants owned, used or possessed the real property upon which the dangerous condition was located. She also alleged, *inter alia*, that the Bison defendants caused or created the dangerous condition. While there is a legal distinction between normal use and special use (*see Minott v City of New York*, 230 AD2d 719, 720; *see also Loiaconi v Village of Tarrytown*, 36 AD3d 864, 865), plaintiff's allegations that defendants created the defect through their use of the driveway portion of the sidewalk area are sufficient, "under the liberal pleading requirements of the CPLR," to support plaintiff's theory of recovery against the Bison defendants (*Cole v City of Albany*, 80 AD2d 656, 656).

With respect to Seneca One and Allpro, however, we conclude that the court properly dismissed the common-law negligence claims against them but erred in dismissing those claims against them that were based on The Charter of the City of Buffalo (Charter) § 413-50 (A). We therefore modify the order by denying those parts of the motion of Seneca One and cross motion of Allpro that sought dismissal of plaintiff's claims based on Charter § 413-50 (A) and reinstating those claims.

As noted above, abutting landowners, such as Seneca One, are not liable "for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks" unless they had a special use of the sidewalk, they affirmatively caused the defect, they negligently constructed or repaired the sidewalk, or "a local ordinance or statute specifically charges [them] with a duty to maintain and repair the sidewalks and imposes liability for injuries resulting from the breach of that duty" (*Hausser*, 88 NY2d at 452-453; *see Guadagno*, 38 AD3d at 1311; *Rader*, 21



AD3d at 1410). Contrary to plaintiff's contention, Seneca One and Allpro established that they did not have any special use of the driveway portion of the sidewalk, did not create the dangerous condition, and did not negligently construct or repair the sidewalk, and plaintiff failed to raise a triable issue of fact in opposition thereto (*see generally Minott*, 230 AD2d at 720). The mere fact that Allpro employees may, on prior occasions, have barricaded the area of the dangerous condition did not create a duty of care. "[G]ratuitous conduct may give rise to liability only when the defendant's affirmative action adversely affected the plaintiff and the defendant failed to act reasonably" (*Gordon v Muchnick*, 180 AD2d 715, 715). That requires a showing that the plaintiff "relied to his [or her] detriment upon the defendant's gratuitous conduct" (*McIntosh v Moscrip*, 138 AD2d 781, 783). Here, Allpro established that the barricades were not up on the day of plaintiff's fall and that plaintiff did not rely to her detriment on Allpro's past voluntary act of sectioning off the area, and plaintiff failed to raise a triable issue of fact (*Zuckerman*, 49 NY2d at 562). Inasmuch as we have concluded that Seneca One and Allpro did not have a common-law duty to maintain the sidewalk, we do not address their remaining contentions supporting the dismissal of plaintiff's common-law negligence claims.

Seneca One and Allpro failed, however, to establish their entitlement to summary judgment on the plaintiff's claims based on Charter § 413-50 (A). That ordinance specifically charges "every owner or occupant of any premises abutting any public street" with the duty to maintain and repair the sidewalk, and it imposes liability for injuries resulting from any breach of that duty (*id.*; *see Smalley v Bemben*, 12 NY3d 751, 752). The Charter defines a sidewalk as both "[t]hat portion of a street outside of the roadway used or set aside for the use of pedestrians" (*id.* § 137-1) and "a public paved pathway at grade, for pedestrians which extends all along block frontage" (*id.* § 103-2). Inasmuch as block frontage is defined as "[a]ll the property fronting on one side of a street between intersecting or intercepting streets or between a street and right-of-way, waterway, end of dead-end street or City boundary, measured along the street line" (*id.* § 511-4), we conclude that the driveway apron where plaintiff fell was on a sidewalk as that term is defined by the Charter.

We further conclude that the area of plaintiff's fall was within the extended real property boundary line or lot line of the property owned by Seneca One (*see* Charter § 293-2; § 511-4). The Charter defines an occupant as "[a]ny person who owns, controls, resides, rents or otherwise occupies real property or premises" (*id.* § 216-66). Inasmuch as Allpro, pursuant to its maintenance agreement with Seneca One, controls the real property, Allpro may be deemed an occupier of that property. We thus conclude that both Seneca One and Allpro, as the abutting owner and occupant, respectively, had a duty under the Charter to maintain and repair the area where the dangerous condition was located, even though the dangerous condition is situated on the driveway portion of the sidewalk.

We reject the contentions of Seneca One and Allpro that the Bison

defendants were required to maintain the area under Charter § 307-39. That section requires operators of parking lots to keep the sidewalks surrounding the premises in a safe condition, and it includes "proper maintenance of that portion of the sidewalk fronting the public way between the curblin and the property line" (*id.*). Reliance on that section presupposes, however, that the area of plaintiff's fall was within the "property line" of the property leased by the Bison defendants. It was not.

We agree with the Bison defendants, however, that the court properly dismissed the plaintiff's claims based on the Charter insofar as they were asserted against the Bison defendants. The property leased by them did not "abut[ ]" the sidewalk where the dangerous condition was located (*id.* § 413-50 [A]). While the property leased by the Bison defendants was adjacent to or adjoined the property owned by Seneca One, liability under section 413-50 (A) is limited to owners and occupiers of the property that abuts the public sidewalk.

The Bison defendants finally contend that the court erred in dismissing their cross claims for contribution and indemnification against the City. We reject that contention. Plaintiff did not oppose the City's motion for summary judgment, and the court dismissed the amended complaint insofar as it was asserted against the City. It is well settled "that the existence of some form of tort liability is a prerequisite to application of [CPLR 1401]" (*Board of Educ. of Hudson City Sch. Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 28; see *Arell's Fine Jewelers v Honeywell, Inc.*, 170 AD2d 1013, 1014). Inasmuch as the amended complaint against the City was dismissed, the Bison defendants "may not properly seek contribution from the [City]" (*Aziz v Village of Great Neck Plaza*, 239 AD2d 452, 452; see *Barry v Niagara Frontier Tr. Sys.*, 35 NY2d 629, 633-634; *Powell v Gates-Chili Cent. Sch. Dist.*, 50 AD2d 1079, 1080).

With respect to the Bison defendants' cross claim for contractual indemnification, we agree with the City that the cross claim was properly dismissed. It is well established that, "[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed . . . The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492). The only provision in the contract documents, i.e., the Prime Lease between the City and Bison Baseball, their second sublease and their amendment to the sublease, that would arguably apply is the section requiring the City to indemnify Bison Baseball from "any act or omission by the indemnifying party or its employees, agents or other persons under the indemnifying party's control or supervision." In our view, the acts or omissions at issue are acts or omissions regarding the property covered by the lease. It is undisputed that the area of the dangerous condition was within a right-of-way excepted from the lease definition of "demised premises." The Bison defendants contend, however, that if they are deemed to have a special use of that area, then that area was "subject to" the Prime Lease and thus encompassed by the maintenance

and repair provisions of the lease. We reject that strained interpretation of the contract documents (*see generally Village of Hamburg v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 88, *lv denied* 97 NY2d 603). Inasmuch as the City was already required to maintain the driveway portion of the sidewalk as part of "its continuing duty to maintain its public rights-of-way in a reasonably safe condition" (*Sniper v City of Syracuse*, 139 AD2d 93, 96), we conclude the only areas "subject to" the Prime Lease were those areas specifically leased to the Bison defendants in the Prime Lease and the subsequent subleases.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1245**

**KA 11-01266**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CATHY T. HARRISON, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered May 12, 2011. 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.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]). We reject defendant's contention that County Court's instruction on the statutory presumption of unlawful intent (see § 265.15 [4]), combined with the trial testimony concerning her intent to use the weapon unlawfully against a specific victim, rendered that charge duplicitous. The count charging defendant with criminal possession of a weapon in the second degree alleged a single offense, and "there was no danger of a nonunanimous verdict with respect to" the element of intent (*People v Watson*, 115 AD3d 687, 689, lv denied 23 NY3d 1069; see *People v Lora [Jesus]*, 176 AD2d 273, 273, lv denied 79 NY2d 829).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1250

**KA 12-01947**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RONALD WOODS, DEFENDANT-APPELLANT.

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MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered September 6, 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 reversed on the law, the plea is vacated and the matter is remitted to Supreme Court, Erie County, for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]). We agree with defendant that the plea is invalid based upon the factual insufficiency of the plea allocution. We note at the outset that defendant did not preserve for our review his challenge to the factual sufficiency of the plea allocution by moving to withdraw the plea or to vacate the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665). We conclude, however, that this case falls within the narrow exception to the preservation requirement inasmuch as defendant's response to Supreme Court's question concerning his guilt "clearly cast[] significant doubt upon his guilt or otherwise call[ed] into question the voluntariness of the plea," and the court failed to conduct the requisite further inquiry to ensure that the plea was knowingly and voluntarily entered (*id.* at 666; *see People v Morehouse*, 109 AD3d 1022, 1022-1023; *People v Roy*, 77 AD3d 1310, 1310-1311). Defendant, moreover, never affirmatively pleaded guilty to attempted assault (*see People v Nieves*, 72 AD2d 609, 610), nor did he admit to any conduct underlying the crime (*see People v Bellis*, 78 AD2d 1014, 1014). We therefore reverse the conviction, vacate the plea and remit the matter

to Supreme Court for further proceedings on the indictment.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1251**

**KA 10-01192**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARKUS J. BARBER, DEFENDANT-APPELLANT.

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CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered October 26, 2009. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, the motion to suppress defendant's statements to the police is granted and the matter is remitted to Monroe County Court for further proceedings on the indictment in accordance with the following Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]). We note at the outset that, as the People correctly concede, defendant did not waive his right to appeal.

We agree with defendant that County Court erred in denying his motion to suppress the statements he made to the police after he had invoked his right to counsel. "Whether a particular request [for counsel] is or is not unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request including the defendant's demeanor [and] manner of expression[,] and the particular words found to have been used by the defendant" (*People v Glover*, 87 NY2d 838, 839). Here, the testimony at the suppression hearing established that, before defendant was informed of his *Miranda* rights at the police station, defendant asked a police officer to retrieve the telephone number of defendant's attorney from defendant's wallet. The hearing testimony further established that an investigator acknowledged defendant's request but asked defendant to continue speaking with the police. That testimony was confirmed by a videotaped interview submitted at the hearing as an exhibit. "[V]iewed in context of the totality of

circumstances, particularly with respect to events following [defendant's request for his attorney's phone number]' " (*People v Twillie*, 28 AD3d 1236, 1237, *lv denied* 7 NY3d 795), we conclude that defendant unequivocally invoked his right to counsel and that his statements should have been suppressed (see *People v Porter*, 9 NY3d 966, 967; *People v Esposito*, 68 NY2d 961, 962). We therefore reverse the judgment of conviction, vacate the plea and grant defendant's suppression motion, and we remit the matter to County Court for further proceedings on the indictment.

Defendant further contends that the court should have suppressed the gun found on his person at the time of his arrest because it was obtained as the product of an unlawful detention. That contention is not preserved for our review because defendant failed to move to suppress such evidence (see *People v Price*, 112 AD3d 1345, 1345-1346; *People v Watson*, 90 AD3d 1666, 1667, *lv denied* 19 NY3d 868). We agree with defendant, however, that he was denied effective assistance of counsel based on defense counsel's errors with respect to suppression (see generally *People v Hobot*, 84 NY2d 1021, 1022). We note that defense counsel moved to suppress evidence seized from defendant's residence although there was no indication that any evidence was seized therefrom but failed to move to suppress the gun found on defendant's person. The record establishes that defendant was arrested after a police officer observed defendant and three other individuals standing "approximately 8-10 houses away" from the location of reported gunfire. According to a police report, "[f]or officer safety purposes, [the officer] ordered [defendant and the other three individuals] to the ground and they were taken into custody," and a police officer found defendant in possession of a loaded weapon. There is no indication in the record on appeal that the police had a founded suspicion that defendant and his companions were the source of the gunfire or were involved in any other criminal activity (*cf. People v Hightower*, 261 AD2d 871, 871, *lv denied* 93 NY2d 971). On the record before us, we conclude that there are no strategic reasons for moving to suppress evidence that did not exist while failing to move to suppress a gun that was seized from defendant's person and that was the factual basis for the charges in the indictment (see generally *People v Benevento*, 91 NY2d 708, 712-714). We further conclude that defense counsel's errors prejudiced defendant and deprived him of the right to effective assistance of counsel (see generally *Hobot*, 84 NY2d at 1022). We therefore direct that the further proceedings on remittal should include a motion to suppress physical evidence if appropriate (see generally *People v Mezon*, 80 NY2d 155, 160). In light of our determination, we do not address defendant's remaining contentions.



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

1258

CA 13-00812

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

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KAREN M. MARSHALL, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

DANIEL R. MARSHALL, DEFENDANT-APPELLANT.

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COHEN & LOMBARDO, P.C., BUFFALO (MICHELLE SCHWACH MIECZNIKOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES P. RENDA, BUFFALO, FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered April 3, 2013 in a divorce action. The order, inter alia, denied the motion of defendant to vacate a judgment of divorce.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant's motion in part and vacating those parts of the judgment of divorce that distributed the parties' assets and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Defendant appeals from an order that, inter alia, denied his motion to vacate the parties' judgment of divorce. After plaintiff commenced this action for divorce, plaintiff's attorney placed an oral stipulation of settlement on the record before the Matrimonial Referee regarding, inter alia, distribution of the parties' marital assets. According to plaintiff's attorney, the parties were awaiting a report from an individual whom the parties had agreed upon to propose a resolution for valuing and distributing the parties' various retirement accounts. If the parties agreed with the proposed resolution, they would submit an addendum to the stipulation. Plaintiff's attorney further stated that, in exchange for plaintiff's agreement to waive her interest in defendant's enhanced earning capacity (*see generally O'Brien v O'Brien*, 66 NY2d 576, 584), the parties had agreed that defendant would transfer his title and interest in the marital residence to plaintiff. In addition, plaintiff's attorney stated that defendant would continue to make payments on a home equity loan.

Defendant's attorney agreed with the stipulation as recited by plaintiff's attorney, but defendant's attorney noted that there were "three issues" that remained to be resolved, the resolution of which were dependent upon the recommended valuation and distribution of the

parties' retirement accounts in the forthcoming report. First, although defendant agreed to the valuation and allocation of the marital residence, defendant did not "fully" agree with the offset due to plaintiff's waiver of her interest in his enhanced earning capacity. Second, defendant's attorney stated that, although defendant would continue to make payments on the home equity loan, that loan was "tied into the value of the house," which the parties agreed upon "in theory" but were waiting to finalize until they saw the report's recommendation. Third, the parties had to come to an agreement regarding the allocation of their pension and retirement accounts after reviewing the report. Plaintiff's attorney agreed that, if the parties were unable to reach an agreement on those issues after reviewing the report, they would return to the Matrimonial Referee, who would hear and determine those issues. The parties executed a written ratification and adoption of the oral stipulation in accordance with Domestic Relations Law § 236 (B) (3).

With that understanding, defendant withdrew his appearance on the record and allowed plaintiff to proceed in the divorce action in a default posture. The attorneys for the parties received the report with a proposal for a distribution of the parties' retirement accounts in January 2011, and a judgment of divorce was entered on June 29, 2011. The judgment noted that defendant had "waived his right to [a]nswer" and had allowed plaintiff "to proceed with her cause of action for divorce by Default." The parties' stipulation was incorporated but not merged into the judgment of divorce. In addition, the judgment required that a separate Qualified Domestic Relations Order distributing the parties' retirement accounts be submitted to the court. The judgment made no mention of the issues of the home equity loan or defendant's enhanced earning capacity.

Within a year of the entry of the judgment, defendant moved to vacate the judgment of divorce pursuant to CPLR 5015 (a) (1). Defendant averred that he told his attorney that he adamantly disagreed with the report's proposed distribution of the parties' retirement accounts and that he did not wish to finalize the proceedings on those terms. He further averred that he was unable to contact his former attorney after that meeting, and that, once he learned that a judgment of divorce had been filed, he hired new counsel. Defendant contended that the distribution of his enhanced earning capacity, the home equity loan, and the parties' retirement accounts remained unresolved. Plaintiff opposed defendant's motion and cross-moved for an order directing, inter alia, that defendant transfer title of the marital residence to her and contribute financially to their child's college education pursuant to the terms of the stipulation. Supreme Court denied defendant's motion to vacate the judgment of divorce and granted plaintiff's cross motion in part.

We note at the outset that defendant has not contended in his brief that the court erred in granting plaintiff's cross motion in part, and we therefore deem that issue abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We reject plaintiff's contention that defendant could not move to vacate the judgment based on excusable default pursuant to CPLR 5015 (a) (1) because he appeared and then

withdrew his appearance on the record. Regardless of the fact that defendant appeared initially, the judgment was entered upon defendant's default. Defendant therefore could not appeal from the judgment of divorce (see CPLR 5511) and, indeed, his only remedy was to move to vacate the judgment of divorce pursuant to CPLR 5015 (a) (1) (see *Tongue v Tongue*, 97 AD2d 638, 638-639, *affd* 61 NY2d 809; see also *Higgins v Higgins*, 158 AD2d 782, 782-783).

We conclude that defendant demonstrated both a reasonable excuse for the default and a meritorious defense (see *Bird v Bird*, 77 AD3d 1382, 1382-1383), and that he is entitled to vacatur of those parts of the judgment of divorce distributing the parties' assets (see *Gorzalkowski v Gorzalkowski*, 190 AD2d 1067, 1067; *Diachuk v Diachuk*, 117 AD2d 985, 985-986), the only parts of the judgment challenged by defendant on appeal (see *Ciesinksi*, 202 AD2d at 984). Defendant averred that he informed his attorney that he disagreed with the proposed resolution of the parties' retirement accounts and did not want to finalize the judgment on those terms, but that he was subsequently unable to contact his attorney, and a default judgment of divorce was entered without his knowledge. Furthermore, the judgment of divorce failed to resolve the outstanding issues regarding distribution of the retirement accounts, the home equity loan, and defendant's enhanced earning capacity, which issues the parties expressly acknowledged remained to be resolved and were dependent upon, at least in part, the forthcoming report.

We therefore modify the order accordingly, and we remit the matter to Supreme Court for a hearing to resolve the disputed issues regarding distribution of the parties' retirement accounts, the home equity loan and defendant's enhanced earning capacity (see *Gorzalkowski*, 190 AD2d at 1067). We do not address the merits of defendant's further contentions that the stipulation itself is unenforceable. Inasmuch as the stipulation was incorporated but not merged into the judgment of divorce, defendant cannot challenge the stipulation by way of motion but, rather, must do so by commencement of a plenary action (see *Brody v Brody*, 82 AD3d 812, 812; *Zavaglia v Zavaglia*, 234 AD2d 1010, 1010; *Kellman v Kellman*, 162 AD2d 958, 958). Thus, our decision does not modify or vacate the parties' oral stipulation but, rather, enforces the terms of the stipulation.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1262**

**TP 14-00878**

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND DEJOSEPH, JJ.

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IN THE MATTER OF NATHANIEL JAY, PETITIONER,

V

ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AND JOSEPH L. VASILE, LIEUTENANT, AUBURN CORRECTIONAL FACILITY, RESPONDENTS.

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NATHANIEL JAY, PETITIONER PRO SE.

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

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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 May 13, 2014) to review a determination of respondents. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (see *Matter of Free v Coombe*, 234 AD2d 996).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1263**

**TP 14-00890**

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND DEJOSEPH, JJ.

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IN THE MATTER OF KEITH ADAMS, PETITIONER,

V

ORDER

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

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

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

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered May 13, 2014) 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 said proceeding is unanimously dismissed without costs as moot (see *Matter of Free v Coombe*, 234 AD2d 996).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1264**

**KA 14-00036**

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANDREW J. JOHNSON, DEFENDANT-APPELLANT.

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

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered September 5, 2013. 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 modified on the law by vacating the sentence and as modified the judgment is affirmed and the matter is remitted to Niagara County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20). Defendant's sole contention on appeal is that the sentence is unduly harsh and severe, and that contention is encompassed by defendant's valid waiver of the right to appeal (*see People v Lopez*, 6 NY3d 248, 256). We note, however, that the proper sentencing procedures pursuant to CPL 400.21 were not followed and thus that the sentence may be illegal. County Court sentenced defendant as a first felony offender, but, "[w]hen it became apparent at sentencing that defendant had a prior felony conviction, the People were required to file a second felony offender statement in accordance with CPL 400.21 and, if appropriate, the court was then required to sentence defendant as a second felony offender" (*People v Stubbs*, 96 AD3d 1448, 1450, *lv denied* 19 NY3d 1001). "[I]t is illegal to sentence a known predicate felon as a first offender" (*id.* [internal quotation marks omitted]) and, inasmuch as we cannot allow an illegal sentence to stand, we modify the judgment by vacating the sentence imposed and we remit the matter to County Court for the filing of a predicate felony offender statement and resentencing in accordance with the law (*see id.*).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1265**

**KA 10-02032**

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

VIDAL M. WHITLEY, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered August 23, 2010. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1266

**KA 13-00802**

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

VINCENT D. CARPER, DEFENDANT-APPELLANT.

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

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (ANDREW M. MOLITOR OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered March 4, 2013. The judgment convicted defendant, upon his 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.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Contrary to defendant's contention, County Court did not err in summarily denying his application for judicial diversion pursuant to CPL 216.05. "Courts are afforded great deference in making judicial diversion determinations" (*People v Williams*, 105 AD3d 1428, 1428, lv denied 21 NY3d 1021), and we perceive no abuse of discretion here. Also contrary to defendant's contention, the court did not err in failing to order an alcohol and substance abuse evaluation before denying his application. According to the plain language of CPL 216.05 (1), "[s]uch an evaluation is permissive" (*People v O'Keefe*, 112 AD3d 524, 524, lv denied 23 NY3d 1023), and the determination whether to order such an evaluation "clearly lies within the discretion of the court" (*Matter of Carty v Hall*, 92 AD3d 1191, 1192). Here, we perceive no abuse of discretion. Furthermore, "the court was not required to make explicit findings as to why it summarily denied" defendant's application (*O'Keefe*, 112 AD3d at 525). We note in any event that the court's decision denying the application is supported by defendant's "extensive criminal history and threat to public safety" (*People v Powell*, 110 AD3d 1383, 1384).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

**1267**

**KA 13-02072**

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

REGINALD PRESSEY, DEFENDANT-APPELLANT.

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

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

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Appeal from an order of the Monroe County Court (James J. Piampiano, J.), entered October 10, 2013. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court did not deny him due process of law by relying solely on the case summary for its determination to assess 20 points for category 13, conduct while confined. The case summary stated that defendant had 38 "more serious Tier III" infractions, which included assault, weapon possession, arson and lewd conduct, a sex offense. Defendant failed to contest the underlying facts contained in the report, and thus his contention that the court violated his due process rights by relying solely upon the case summary is without merit (*see People v Okafor*, 117 AD3d 1579, 1580, *lv denied* 24 NY3d 902; *People v Vaillancourt*, 112 AD3d 1375, 1375-1376, *lv denied* 22 NY3d 864; *cf. People v Judson*, 50 AD3d 1242, 1243).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1268

**KA 12-00762**

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROY BRIGGS, 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 June 17, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that Supreme Court erred in refusing to suppress a statement he made to the police because he invoked his right to counsel before the statement was made and because the statement was obtained through threats and coercion. We reject that contention. The police officer who questioned defendant testified that defendant waived his *Miranda* rights and agreed to speak with him; he did not recall defendant requesting an attorney; and he did not threaten or coerce defendant. The court did not credit defendant's testimony to the contrary at the suppression hearing. We accord great weight to the determination of the suppression court " 'because of its ability to observe and assess the credibility of the witnesses,' " and we perceive no basis to disturb its determination (*People v McConnell*, 233 AD2d 867, 867, *lv denied* 89 NY2d 987; *see People v Mateo*, 2 NY3d 383, 414, *cert denied* 542 US 946; *People v Coleman*, 306 AD2d 941, 941, *lv denied* 1 NY3d 596).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We likewise reject defendant's further contention that he was denied effective assistance of counsel. Defendant failed to demonstrate the

absence of a strategic or other legitimate explanation for defense counsel's failure to object to certain evidence (see *People v Dombrowski*, 94 AD3d 1416, 1417, lv denied 19 NY3d 959; see generally *People v Benevento*, 91 NY2d 708, 712-713), and defense counsel's failure to move for a mistrial does not constitute ineffective assistance because the motion would have had little to no chance of success (see *People v Stultz*, 2 NY3d 277, 287, rearg denied 3 NY3d 702). Finally, the sentence is not unduly harsh or severe.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1270

**KA 11-02370**

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TIMOTHY N. WALTERS, DEFENDANT-APPELLANT.

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CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Monroe County Court (John Lewis DeMarco, J.), rendered July 29, 2011. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree, criminally using drug paraphernalia in the second degree and unlawful possession of marihuana.

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 controlled substance in the third degree (Penal Law § 220.16 [1]), criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]), criminally using drug paraphernalia in the second degree (§ 220.50 [2]), and unlawful possession of marihuana (§ 221.05). Defendant failed to preserve for our review his contention that a certain individual at the house where defendant and the contraband were found did not have authority to consent to the warrantless search there (*see generally People v Price*, 112 AD3d 1345, 1345-1346; *People v Caballero*, 23 AD3d 1031, 1032, *lv denied* 6 NY3d 846), and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*). Contrary to defendant's further contention, County Court (DeMarco, J.) properly concluded that the individual voluntarily consented to the police entry into the house (*see People v Gonzalez*, 39 NY2d 122, 127-128; *People v McCray*, 96 AD3d 1480, 1481, *lv denied* 19 NY3d 1104). Defendant's contention that the evidence subsequently obtained pursuant to the search warrant should be suppressed as fruit of the poisonous tree thus lacks merit (*see generally Wong Sun v United States*, 371 US 471, 484-485).

Contrary to defendant's further contention, the court properly considered the "drug factory" presumption (Penal Law § 220.25 [2]) with respect to the counts of criminal possession of a controlled substance in the third and fourth degrees (see e.g. *People v Pressley*, 294 AD2d 886, 887, lv denied 98 NY2d 712; *People v Riddick*, 159 AD2d 596, 597, lv denied 76 NY2d 741; cf. *People v Kims*, \_\_\_ NY3d \_\_\_, \_\_\_ [Oct. 23, 2014]). Viewing the evidence in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621), we conclude that it is legally sufficient to support the conviction (see generally *People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes in this nonjury trial (see *People v Danielson*, 9 NY3d 342, 349), we also conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495).

We reject defendant's further contention that the *Molineux* court (Castro, A.J.) abused its discretion in permitting the People to present evidence that defendant was present at a location where the police previously made an undercover purchase of narcotics (see *People v Whitfield*, 115 AD3d 1181, 1182, lv denied 23 NY3d 1044; *People v Ray*, 63 AD3d 1705, 1706, lv denied 13 NY3d 838; *People v Lowman*, 49 AD3d 1262, 1263, lv denied 10 NY3d 936). Defendant's contention that reversal is required based upon a *Rosario* violation is also meritless. "Reversal based upon a *Rosario* violation is necessary only when a defendant demonstrates that he has been substantially prejudiced" (*People v Turner*, 216 AD2d 931, 932, lv denied 86 NY2d 804; see *People v Comfort*, 60 AD3d 1298, 1300, lv denied 12 NY3d 924) and, here, defendant has not made the necessary showing of substantial prejudice (see *People v Gardner*, 26 AD3d 741, 741, lv denied 6 NY3d 848; *People v Goston*, 9 AD3d 905, 906-907, lv denied 3 NY3d 706).

Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of representation, we conclude that defendant received meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147). Finally, the sentence is not unduly harsh or severe.

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

**1271**

**KA 13-01589**

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRENDA CARTER-DOUCETTE, DEFENDANT-APPELLANT.

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

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (JOSEPH M. CALIMERI OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered August 12, 2013. The judgment convicted defendant, upon her plea of guilty, of criminal sale 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 her upon her plea of guilty of criminal sale of a controlled substance in the fifth degree (Penal Law § 220.31), defendant contends that County Court erred in summarily denying her motion to withdraw her plea and in failing to assign her new counsel before making that determination. With respect to defendant's motion to withdraw her plea, we note that defendant indicated at sentencing that she was not ready to proceed and was seeking "a lesser plea." Defendant asserted that she was not able to review the People's discovery until after she had pleaded guilty and that she had therefore accepted a greater sentence than was warranted by the evidence in the People's case. The court responded that defendant would not receive a reduced plea and, if she moved to withdraw her plea in order to preserve the issue for appeal, the motion would be denied. Defendant subsequently moved to withdraw her plea, and the court denied the motion. We conclude that the court thereby afforded defendant the requisite "reasonable opportunity to present [her] contentions" (*People v Tinsley*, 35 NY2d 926, 927; see *People v Walker*, 114 AD3d 1257, 1258, lv denied 23 NY3d 1044; *People v Rossborough*, 105 AD3d 1332, 1333, lv denied 21 NY3d 1045). Furthermore, " 'a guilty plea may not be withdrawn absent some evidence or claim of innocence, fraud or mistake in its inducement' " (*People v Nichols*, 302 AD2d 954, 954, lv denied 99 NY2d 657), and defendant made no such showing here. Indeed, defendant is not entitled to withdraw her plea "merely because [she] discovers . . .

that [her] calculus misapprehended the quality of the [People's] case" (*People v Jones*, 44 NY2d 76, 81, *cert denied* 439 US 846, quoting *Brady v United States*, 397 US 742, 757; see *People v Murdock*, 27 AD3d 1170, 1171).

With respect to defendant's contention that the court should have assigned new counsel before denying her motion to withdraw her plea, we note that defendant never sought new counsel, but contends for the first time on appeal that she was entitled to new counsel because she and her lawyer disagreed about her access to discovery materials in open court such that her lawyer took a position that was adverse to her interests. Defendant's contention that she was denied access to discovery materials is "belied by [her] statements during the plea colloquy," however, wherein she agreed that she had sufficient opportunity to review the plea with defense counsel (*People v Farley*, 34 AD3d 1229, 1230, *lv denied* 8 NY3d 880). Moreover, we note in any event that the record demonstrates that the court's " 'rejection of [the] motion was not influenced by' [any] statements" made by defense counsel (*People v Wester*, 82 AD3d 1677, 1678, *lv denied* 17 NY3d 803; see *People v Thaxton*, 309 AD2d 1255, 1256, *lv denied* 1 NY3d 581; *People v Coleman*, 294 AD2d 843, 843).

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

1272

**KA 11-02028**

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHARLES MIKE, DEFENDANT-APPELLANT.

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

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

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Appeal from a resentence of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered July 12, 2011. Defendant was resentenced upon his conviction of assault in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant was convicted in 1999 upon a jury verdict of, inter alia, assault in the second degree (Penal Law § 120.05) and criminal possession of a weapon in the second degree (§ 265.03), and Supreme Court failed to impose a period of postrelease supervision with respect to those counts as required by Penal Law § 70.45 (1). Pursuant to Correction Law § 601-d, the same court resentenced defendant to add the requisite period of PRS while he was serving his sentence. Contrary to defendant's contention, the resentence does not violate the Double Jeopardy Clause of the US Constitution or his due process rights (see *People v Lingle*, 16 NY3d 621, 630-633). The Court of Appeals in *Lingle* explicitly rejected defendant's present contention that he had served a significant portion of his sentence and thus had a reasonable expectation of the finality of his sentence (see *id.* at 630-631; *People v Faeth*, 107 AD3d 1426, 1428, lv denied 21 NY3d 1073). The Court also explicitly rejected defendant's instant contention that the resentence to correct a *Sparber* error violates his due process rights (see *Lingle*, 16 NY3d at 632-633). Indeed, the court was bound to impose "statutorily-required sentences" (*id.* at 633; see *People v Quinney*, 104 AD3d 1161, 1162, lv denied 21 NY3d 1008).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

1273

**KA 09-00951**

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CORNELLIUS L. NESMITH, DEFENDANT-APPELLANT.

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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.

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Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered April 30, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a guilty plea of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that the police conducted an illegal inventory search of the vehicle and thus that Supreme Court erred in refusing to suppress the weapon found during that search. We reject defendant's contention. "Following a lawful arrest of the driver of an automobile that must then be impounded, the police may conduct an inventory search of the vehicle" pursuant to established police policy (*People v Johnson*, 1 NY3d 252, 255). Here, the People met their burden of establishing that the police followed the procedure set forth in the applicable order of the Rochester Police Department in conducting the inventory search (*see People v Wilburn*, 50 AD3d 1617, 1618, *lv denied* 11 NY3d 742; *People v Cooper*, 48 AD3d 1055, 1056, *lv denied* 10 NY3d 861). Also contrary to defendant's contention, the officers followed the standard procedure in the applicable order in impounding the vehicle upon determining that there was no one available who could legally drive it. We reject defendant's contention that the applicable order required the officers to locate the registered owner of the vehicle. Contrary to defendant's further contention, the record establishes that the police prepared a "meaningful inventory list" (*Johnson*, 1 NY3d at 256; *see Wilburn*, 50 AD3d at 1618). We have considered defendant's remaining

contention and conclude that it is without merit.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1274**

**CA 14-01026**

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND DEJOSEPH, JJ.

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RENEE L. GILBERT AND CHUCK GILBERT,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

TONAWANDA CITY SCHOOL DISTRICT AND MULLEN  
ELEMENTARY SCHOOL, DEFENDANTS-APPELLANTS.

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HURWITZ & FINE, P.C., BUFFALO (JODY E. BRIANDI OF COUNSEL), FOR  
DEFENDANTS-APPELLANTS.

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

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Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered February 3, 2014. The order denied defendants' motion for summary judgment.

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

Memorandum: Renee L. Gilbert (plaintiff) and her husband commenced this action seeking damages for injuries plaintiff allegedly sustained when she slipped and fell on a snowy and icy stairway located on defendants' premises. Defendants moved for summary judgment dismissing the complaint, contending that they had no duty to correct the hazardous condition because there was a storm in progress at the time plaintiff fell, and Supreme Court denied the motion. We reverse. Defendants met their initial burden by establishing that a storm was in progress at the time of the accident and, thus, that they "had no duty to remove the snow and ice until a reasonable time ha[d] elapsed after cessation of the storm" (*Glover v Botsford*, 109 AD3d 1182, 1183 [internal quotation marks omitted]). The accident occurred shortly before noon on January 21, 2011, when plaintiff exited the elementary school. According to defendants' meteorologist and the weather reports upon which he relied, there was an ongoing storm that lasted from 5:00 p.m. on January 20, 2011 through late afternoon on January 21, 2011 involving high wind gusts, as well as blowing, drifting and falling snow. Furthermore, two school employees testified that there was a storm occurring both before and at the time plaintiff fell, which included sideways-blowing snow, significant wind and extremely cold temperatures. "[E]ven if there was a lull or break in the storm around the time of plaintiff's accident, this does not

establish that defendant[s] had a reasonable time after the cessation of the storm to correct hazardous snow or ice-related conditions" (*Mann v Wegmans Food Mkts., Inc.*, 115 AD3d 1249, 1250 [internal quotation marks omitted]). Contrary to plaintiffs' contention, they failed to raise a triable issue of fact " 'whether the accident was caused by a slippery condition at the location where the plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant[s] had actual or constructive notice of the preexisting condition' " (*Quill v Churchville-Chili Cent. Sch. Dist.*, 114 AD3d 1211, 1212; see *Rand v Cornell Univ.*, 91 AD3d 542, 542-543; cf. *Hayes v Norstar Apts., LLC*, 77 AD3d 1329, 1330).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1275**

**CA 14-00902**

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND DEJOSEPH, JJ.

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SADE WATSON, PLAINTIFF-APPELLANT,

V

ORDER

KIBLER ENTERPRISES, ARTHUR BECKER, JR., MICHAEL  
BECKER, MARK BECKER, DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANTS.

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

DAMON MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

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Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Jeremiah J. Moriarty, III, J.), entered February 4, 2014. The order and judgment, among other things, granted the cross motion of defendants Kibler Enterprises, Arthur Becker, Jr., Michael Becker and Mark Becker for summary judgment, dismissed the complaint against those defendants, and denied the motion of plaintiff for summary judgment.

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1276

CA 14-00290

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

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JANICE MAZELLA, AS ADMINISTRATRIX OF THE  
ESTATE OF JOSEPH MAZELLA, DECEASED,  
PLAINTIFF-APPELLANT,

V

ORDER

WILLIAM BEALS, M.D., DEFENDANT,  
AND ELISABETH MASHINIC, M.D.,  
DEFENDANT-RESPONDENT.  
(APPEAL NO. 1.)

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DELDUCHETTO & POTTER, SYRACUSE (ERNEST A. DELDUCHETTO OF COUNSEL),  
ALESSANDRA DEBLASIO, NEW YORK CITY, FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ANTHONY R. BRIGHTON  
OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Onondaga County  
(John C. Cherundolo, A.J.), entered April 29, 2013. The judgment,  
insofar as appealed from, dismissed the complaint against defendant  
Elisabeth Mashinic, M.D., upon a jury verdict.

It is hereby ORDERED that said appeal is unanimously dismissed  
without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1277

CA 14-00291

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

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JANICE MAZELLA, AS ADMINISTRATRIX OF THE  
ESTATE OF JOSEPH MAZELLA, DECEASED,  
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

WILLIAM BEALS, M.D., DEFENDANT,  
AND ELISABETH MASHINIC, M.D.,  
DEFENDANT-RESPONDENT.  
(APPEAL NO. 2.)

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DELDUCHETTO & POTTER, SYRACUSE (ERNEST A. DELDUCHETTO OF COUNSEL),  
ALESSANDRA DEBLASIO, NEW YORK CITY, FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK SUGNET, P.C., SYRACUSE (ANTHONY R. BRIGHTON OF  
COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an amended judgment of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered May 21, 2013. The amended judgment, insofar as appealed from, dismissed the complaint against defendant Elisabeth Mashinic, M.D., upon a jury verdict.

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

Memorandum: Plaintiff commenced this medical malpractice and wrongful death action alleging that Elisabeth Mashinic, M.D. (defendant) was negligent in her treatment of plaintiff's decedent and that her negligence was a substantial factor contributing to the death of plaintiff's decedent by suicide. Plaintiff appeals from an amended judgment entered upon a jury verdict determining that, although defendant was negligent, her negligence was not a proximate cause of the death of plaintiff's decedent. Plaintiff failed to preserve for our review her contention that the verdict with respect to defendant was inconsistent with the verdict finding the codefendant liable, inasmuch as she failed to raise that contention before the jury was discharged (*see Barry v Manglass*, 55 NY2d 803, 806, *rearg denied* 55 NY2d 1039; *Schley v Steffans*, 79 AD3d 1753, 1753). In any event, that contention is without merit. The claims of negligence with respect to the respective defendants were distinct and the treatment of plaintiff's decedent by the respective defendants was not dependent upon the actions of the other (*cf. Midler v Crane*, 14 NY3d 877, 879, *rearg denied* 15 NY3d 821; *see generally Ledogar v Giordano*, 122 AD3d 834, 836-837).

Plaintiff also failed to preserve for our review her contention that the verdict is against the weight of the evidence by filing a motion pursuant to CPLR 4404 (a) to set aside the verdict on that ground. In any event, that contention also is without merit. "A jury verdict will be set aside as against the weight of the evidence only when the evidence at trial 'so preponderated in favor of the [losing party] that the verdict could not have been reached on any fair interpretation of the evidence' . . . 'A verdict finding that a defendant was negligent but that such negligence was not a proximate cause of [decedent's death] is against the weight of the evidence only when [those] issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause' " (*Schreiber v University of Rochester Med. Ctr.*, 88 AD3d 1262, 1263; see *Lesio v Attardi*, 121 AD3d 1527, 1529). That is not the case here. Plaintiff's decedent died 16 days after his discharge from inpatient care, where he was treated by defendant. The parties each presented expert testimony with respect to whether defendant's treatment of plaintiff's decedent and her follow-up plan for his care met the standard of care and whether any of the alleged claims of negligence was a substantial factor in decedent's death. "Where, as here, conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion and reject that of another expert" (*Taylor v Haque*, 94 AD3d 978, 979; see *Sisson v Alexander*, 57 AD3d 1483, 1483-1484, *lv denied* 12 NY3d 709). As we noted in the appeal of the codefendant, this "trial was a prototypical battle of the experts" (*Mazella v Beals* [appeal No. 3], 122 AD3d 1358, \_\_\_ [internal quotation marks omitted]), and we conclude that the jury's finding that decedent's death was not caused by defendant's negligence "was a rational and fair interpretation of the evidence" (*id.* at \_\_\_ [internal quotation marks omitted]).



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

1279

CA 14-00913

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND DEJOSEPH, JJ.

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IN THE MATTER OF MICHAEL J. MIMASSI,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

TOWN OF WHITESTOWN ZONING BOARD OF APPEALS,  
RESPONDENT-RESPONDENT.

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DOUGLAS H. ZAMELIS, COOPERSTOWN, FOR PETITIONER-APPELLANT.

WILLIAM P. SCHMITT, TOWN ATTORNEY, UTICA, FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered April 18, 2014 in a CPLR article 78 proceeding. The judgment denied the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is granted in part, the determination is vacated, and the matter is remitted to respondent for a de novo determination of the application.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination of respondent denying his application for an area variance. We reject petitioner's contention that the determination was arbitrary and capricious because respondent failed to adhere to its precedent. Petitioner failed to establish that respondent's determination on another application was based on essentially the same facts as petitioner's present application (see *Matter of 194 Main, Inc. v Board of Zoning Appeals for Town of N. Hempstead*, 71 AD3d 1028, 1030; see generally *Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 93; *Knight v Amelkin*, 68 NY2d 975, 977).

We agree with petitioner, however, that Supreme Court erred in denying the petition. Respondent "was required to weigh the benefit to [petitioner] of granting the variance[] against any detriment to the health, safety and welfare of the neighborhood or community affected thereby, taking into account the five factors set forth in Town Law § 267-b (3) (b)" (*Matter of Conway v Town of Irondequoit Zoning Bd. of Appeals*, 38 AD3d 1279, 1279-1280; see *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 612-613; *Matter of Ifrah v Utschig*, 98 NY2d 304, 307-308). Here, respondent based its determination upon factors and other criteria relevant to the former "practical difficulty" test, which is no longer followed, rather than

on the factors set forth in Town Law § 267-b (3) (b) (see *Matter of Cohen v Board of Appeals of Vil. of Saddle Rock*, 100 NY2d 395, 402; *Matter of Sasso v Osgood*, 86 NY2d 374, 384). Inasmuch as respondent failed to engage in the necessary balancing test, we vacate the determination, and we remit the matter to respondent for a de novo determination (see *Matter of Nye v Zoning Bd. of Appeals of Town of Grand Is.*, 81 AD3d 1455, 1456; *Matter of Fusco v Russell*, 283 AD2d 936, 936). We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1282

CA 14-01027

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND DEJOSEPH, JJ.

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IN THE MATTER OF THE FORECLOSURE OF TAX LIENS  
BY PROCEEDING IN REM PURSUANT TO ARTICLE 11 OF  
THE REAL PROPERTY TAX LAW BY COUNTY OF GENESEE  
RELATING TO THE 2011 TOWN AND COUNTY TAX.

MEMORANDUM AND ORDER

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COUNTY OF GENESEE, PETITIONER-APPELLANT;

TIMOTHY D. BUTLAK, RESPONDENT-RESPONDENT.

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PHILLIPS LYTLE LLP, ROCHESTER (MARK J. MORETTI OF COUNSEL), FOR  
PETITIONER-APPELLANT.

COOKE & STEFFAN, ALDEN (THOMAS A. STEFFAN OF COUNSEL), FOR  
RESPONDENT-RESPONDENT.

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Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered March 14, 2014. The order granted the motion of respondent and vacated a judgment of tax foreclosure.

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

Memorandum: Supreme Court did not abuse its discretion in granting respondent's motion pursuant to CPLR 5015 (a) (1) seeking to vacate the underlying judgment of foreclosure (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68). Although respondent did not establish either a reasonable excuse for the default or a meritorious defense to the foreclosure proceeding, the court did not abuse its discretion in granting the motion "for sufficient reason and in the interests of substantial justice" (*id.*). Petitioner obtained the default judgment on February 24, 2014, and respondent moved to vacate it shortly thereafter, on March 4, 2014. In addition, respondent established both his ability to pay the taxes after the redemption period had ended and the lack of any prejudice to petitioner (*see id.*; *Matter of County of Ontario [Middlebrook]*, 59 AD3d 1065, 1065).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1283**

**TP 14-00891**

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

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IN THE MATTER OF DARIUS GUILLEBEAUX, PETITIONER,

V

ORDER

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

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

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

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered May 13, 2014) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (see *Matter of Free v Coombe*, 234 AD2d 996).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1284**

**TP 14-00901**

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

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IN THE MATTER OF PHILLIP CAMPBELL, PETITIONER

V

ORDER

MARK BRADT, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, AND NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS.

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JILLIAN S. HARRINGTON, MONROE TOWNSHIP, NEW JERSEY, FOR PETITIONER.

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

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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 May 15, 2014) to review a determination of respondents. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1285**

**KA 13-01732**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ERIC A. EASTON, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 8, 2013. The judgment convicted defendant, upon his plea of guilty, of reckless endangerment in the first degree (three counts).

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1286

**KA 13-01188**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SALVATORE A. PIERRE, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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

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

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Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered April 18, 2013. 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: In appeal Nos. 1 and 2, defendant appeals from separate judgments convicting him upon his pleas of guilty of burglary in the third degree (Penal Law § 140.20). Both pleas were entered during a single plea proceeding during which defendant waived his right to appeal. Defendant contends in each appeal that the waiver of the right to appeal does not bar his challenge to the sentence. We conclude that the record establishes that defendant 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 in each appeal to the severity of the sentence (see generally *People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1287**

**KA 13-01189**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SALVATORE A. PIERRE, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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

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

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Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered April 18, 2013. 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 Pierre* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

**1288**

**KA 12-02155**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MURIDI MOHAMED, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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

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

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Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered October 4, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Erie County Court for further proceedings in accordance with the following Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]) and, in appeal No. 2, defendant appeals from a judgment convicting him upon a nonjury verdict of manslaughter in the first degree (§ 125.20 [1]).

With respect to appeal No. 2, 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 People v Goley*, 113 AD3d 1083, 1084; *see generally People v Bleakley*, 69 NY2d 490, 495). " 'In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference' " (*People v McCoy*, 100 AD3d 1422, 1422), and we perceive no reason to disturb County Court's credibility determinations.

Defendant contends in appeal No. 2 that the court erred in refusing to suppress his statements to the police on the ground that he did not voluntarily waive his *Miranda* rights because he was unable to understand the *Miranda* warnings recited to him in English. We reject that contention. The record of the *Huntley* hearing " 'supports [the court's] determination that defendant understood the meaning of the *Miranda* warnings prior to waiving his rights' " (*People v Valle*,

70 AD3d 1386, 1387, *lv denied* 15 NY3d 758; *see People v Gerena*, 49 AD3d 1204, 1205, *lv denied* 10 NY3d 958). We further conclude in appeal No. 2 that defendant was not denied effective assistance of counsel (*see generally People v Stultz*, 2 NY3d 277, 282, *rearg denied* 3 NY3d 702; *People v Baldi*, 54 NY2d 137, 147).

In both appeals, defendant contends that the court erred in failing to determine whether he was eligible for youthful offender status. As the People correctly concede, defendant is an eligible youth, and the sentencing court must make "a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it" (*People v Rudolph*, 21 NY3d 497, 501; *see People v Scott*, 115 AD3d 1342, 1343; *People v Smith*, 112 AD3d 1334, 1334). We therefore hold the case in each appeal, reserve decision, and remit the matter to County Court to make and state for the record a determination in each appeal whether defendant should be afforded youthful offender status (*see Rudolph*, 21 NY3d at 503; *People v Hall*, 119 AD3d 1349, 1350).

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

**1294**

**KA 12-02156**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MURIDI MOHAMED, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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

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

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Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered October 4, 2012. The judgment convicted defendant, upon a nonjury verdict, of manslaughter in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Erie County Court for further proceedings in accordance with the same Memorandum as in *People v Mohamed* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1297**

**CA 14-01043**

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

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MARK BRADSTREET, AS PARENT AND NATURAL GUARDIAN  
OF MARK WESLEY BRADSTREET, PLAINTIFF-RESPONDENT,

V

ORDER

HONEOYE FALLS LIMA CENTRAL SCHOOL DISTRICT,  
DEFENDANT-APPELLANT.

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PETRONE & PETRONE, P.C., WILLIAMSVILLE, CONGDON, FLAHERTY,  
O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (CHRISTINE  
GASSER OF COUNSEL), FOR DEFENDANT-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (MICHAEL F. GERACI  
OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered January 23, 2014. 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.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1300

CA 14-00357

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

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IN THE MATTER OF THE NONHUMAN RIGHTS  
PROJECT, INC., ON BEHALF OF KIKO,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

CARMEN PRESTI, INDIVIDUALLY AND AS AN  
OFFICER AND DIRECTOR OF THE PRIMATE  
SANCTUARY, INC., CHRISTIE E. PRESTI,  
INDIVIDUALLY AND AS AN OFFICER AND  
DIRECTOR OF THE PRIMATE SANCTUARY, INC.  
AND THE PRIMATE SANCTUARY, INC.,  
RESPONDENTS-RESPONDENTS.

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STEVEN M. WISE, CORAL SPRINGS, FLORIDA, OF THE MASSACHUSETTS BAR,  
ADMITTED PRO HAC VICE, AND ELIZABETH STEIN, NEW HYDE PARK, FOR  
PETITIONER-APPELLANT.

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Appeal from a judgment (denominated order) of the Supreme Court,  
Niagara County (Ralph A. Boniello, III, J.), entered December 11, 2013  
in a proceeding pursuant to CPLR article 70. The judgment dismissed  
the petition.

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

Memorandum: Petitioner, an organization seeking better treatment  
and housing of, inter alia, nonhuman primates, commenced this  
proceeding seeking a writ of habeas corpus on behalf of Kiko, a  
chimpanzee. Rather than seeking Kiko's immediate release, however,  
the petition alleges that Kiko is illegally confined because he is  
kept in unsuitable conditions, and it seeks to have Kiko's confinement  
transferred to a different facility selected by The North American  
Primate Sanctuary Alliance. On appeal from a judgment dismissing the  
petition, petitioner contends that Kiko is entitled to the relief  
sought. Contrary to petitioner's contention, we conclude that Supreme  
Court properly dismissed the petition.

Regardless of whether we agree with petitioner's claim that Kiko  
is a person within the statutory and common-law definition of the  
writ, " 'habeas corpus relief nonetheless is unavailable as [that]  
claim[], even if meritorious, would not entitle [Kiko] to immediate  
release' " (*People ex rel. Gonzalez v Wayne County Sheriff*, 96 AD3d  
1698, 1699, lv denied 21 NY3d 852; see *People ex rel. Shannon v*

*Khahaifa*, 74 AD3d 1867, 1867, *lv dismissed* 15 NY3d 868; *People ex rel. Hall v Rock*, 71 AD3d 1303, 1304, *appeal dismissed* 14 NY3d 882, *lv denied* 15 NY3d 703). It is well settled that a habeas corpus proceeding must be dismissed where the subject of the petition is not entitled to immediate release from custody (see *People ex rel. Kaplan v Commissioner of Correction of City of N.Y.*, 60 NY2d 648, 649; *People ex rel. Douglas v Vincent*, 50 NY2d 901, 903). Here, petitioner does not seek Kiko's immediate release, nor does petitioner allege that Kiko's continued detention is unlawful. Rather, petitioner seeks to have Kiko placed in a different facility that petitioner deems more appropriate. Consequently, even assuming, arguendo, that we agreed with petitioner that Kiko should be deemed a person for the purpose of this application, and further assuming, arguendo, that petitioner has standing to commence this proceeding on behalf of Kiko, this matter is governed by the line of cases standing for the proposition that habeas corpus does not lie where a petitioner seeks only to change the conditions of confinement rather than the confinement itself (see generally *People ex rel. Dawson v Smith*, 69 NY2d 689, 690-691; *Matter of Berrian v Duncan*, 289 AD2d 655, 655; *People ex rel. McCallister v McGinnis*, 251 AD2d 835, 835). We therefore conclude that habeas corpus does not lie herein.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1304.1**

**CAF 13-02031**

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

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IN THE MATTER OF TERIZA SHEHATOU,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

EMAD LOUKA, RESPONDENT-APPELLANT.

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

ALDERMAN AND ALDERMAN, SYRACUSE (EDWARD B. ALDERMAN OF COUNSEL), FOR  
PETITIONER-RESPONDENT.

SUSAN BASILE JANOWSKI, ATTORNEY FOR THE CHILDREN, LIVERPOOL.

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Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered February 14, 2013 in a proceeding pursuant to Family Court Act article 4. The order, insofar as appealed from, applied the fugitive disentitlement doctrine to respondent.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following Memorandum: We previously dismissed respondent's appeal from an "order of dismissal" entered by Family Court upon declining to sign an order to show cause seeking to vacate two orders entered on respondent's default. One of the orders determined that respondent was in willful violation of a child support order, and the other order committed him to a term of six months of incarceration (*Matter of Shehatou v Louka*, 118 AD3d 1357). The court also issued a warrant for respondent's arrest (*id.*). We determined that the fugitive disentitlement theory applied both to respondent's order to show cause to vacate the default orders and to the subsequent appeal (*id.* at 1358). We nevertheless granted respondent leave to move to reinstate his appeal upon the posting of an undertaking in the amount of \$25,000 with the court within 60 days of service of our order with notice of entry (*id.*). Respondent timely posted the undertaking and his motion to reinstate the appeal was granted by this Court.

"The principal rationales for the doctrine [of fugitive disentitlement] include: (1) assuring the enforceability of any decision that may be rendered against the fugitive; (2) imposing a

penalty for flouting the judicial process; (3) discouraging flights from justice and promoting the efficient operation of the courts; and (4) avoiding prejudice to the nonfugitive party" (*Wechsler v Wechsler*, 45 AD3d 470, 472). By posting an undertaking in the amount of the child support arrears, we conclude that respondent has demonstrated that he is not flouting the judicial process and has provided a means of enforcement of the court's order determining the amount of child support arrears in the event that the court's determination is unchanged (see Family Ct Act § 471; CPLR 2502 [c]). We conclude that the fugitive disentitlement theory no longer applies to respondent (see generally *Wechsler v Wechsler*, 58 AD3d 62, 65, *appeal dismissed* 12 NY3d 883, *reconsideration denied* 13 NY3d 810), and thus we reverse the order insofar as appealed from and remit the matter to Family Court to determine respondent's application to vacate the orders entered on his default and the warrant for his arrest.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

**1305**

**TP 14-00849**

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

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IN THE MATTER OF MARVIN DENNARD, PETITIONER,

V

MEMORANDUM AND ORDER

CITY OF BUFFALO EXAMINING BOARD OF PLUMBERS,  
RESPONDENT.

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AMIL SARFRAZ, PLLC, WILLIAMSVILLE (PETER MCGRATH OF COUNSEL), FOR  
PETITIONER.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF  
COUNSEL), FOR RESPONDENT.

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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 [Tracey A. Bannister, J.], entered February 21, 2014) to review a determination of respondent. The determination revoked petitioner's master plumber's license.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination revoking his master plumber's license. Contrary to petitioner's contention, the determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181). Although the determination is based in part on hearsay evidence, it is well settled that "[h]earsay is admissible in administrative proceedings, 'and if sufficiently relevant and probative may constitute substantial evidence' " (*Matter of Szczepaniak v City of Rochester*, 101 AD3d 1620, 1621, quoting *People ex rel. Vega v Smith*, 66 NY2d 130, 139; *see Matter of Gray v Adduci*, 73 NY2d 741, 742). We likewise reject petitioner's further contention that he was denied a fair hearing based on the use of hearsay evidence at the hearing (*see Matter of Bauer v New York State Off. of Children & Family Servs., Bur. of Early Childhood Servs.*, 55 AD3d 421, 422; *Matter of Murphy v New York Racing Assn.*, 146 AD2d 778, 778-779, *lv dismissed* 74 NY2d 715; *cf. Matter of Scarpitta v Glen Cove Hous. Auth.*, 48 AD2d 657, 658).

Finally, we conclude that petitioner received timely notice of the charges against him and was thus not denied a fair hearing based on untimely notice (*see Matter of Block v Ambach*, 73 NY2d 323, 332;

*Matter of Oznor Corp. v County of Monroe*, 60 AD3d 1492, 1493; see generally *Matter of Tax Foreclosure No. 35*, 127 AD2d 220, 223, *affd* 71 NY2d 863). Petitioner was notified of the charges against him more than one year before the instant hearing. Although a prior determination on those charges was annulled and a new hearing ordered, the nature of the charges remained the same and petitioner was not denied the ability to "prepare and present an adequate defense and thereby have an opportunity to be heard" (*Block*, 73 NY2d at 332).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1306

**TP 14-00907**

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

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IN THE MATTER OF SHAWN GREEN, PETITIONER,

V

MEMORANDUM AND ORDER

THOMAS J. STICHT, ACTING SUPERINTENDENT, WENDE  
CORRECTIONAL FACILITY, RESPONDENT.

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SHAWN GREEN, PETITIONER PRO SE.

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

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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 [Christopher J. Burns, J.], entered May 21, 2014) to review determinations of respondent. The determinations, among other things, found after a tier III hearing that petitioner had violated two inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination following a tier III hearing that he violated two inmate rules, and also seeking to annul the determinations of the Central Office Review Committee of the Department of Correctional Services denying four separate grievances. Contrary to the contention of petitioner, we conclude that Supreme Court properly transferred the entire proceeding to this Court inasmuch as the "petition raises a substantial evidence question, and the remaining points made by petitioner are not objections that could have terminated the proceeding within the meaning of CPLR 7804 (g)" (*Matter of Quintana v City of Buffalo*, 114 AD3d 1222, 1223, lv denied 23 NY3d 902).

Contrary to petitioner's further contention, we conclude that the inmate misbehavior report "provided him with adequate notice of the charges as required by 7 NYCRR 251-3.1 (c)" (*Matter of Jones v Fischer*, 111 AD3d 1362, 1363; see *Matter of Quintana v Selsky*, 268 AD2d 624, 625; *Matter of Couch v Goord*, 255 AD2d 720, 721-722). We reject the contention of petitioner that his employee assistant was ineffective because he failed to obtain certain documentary evidence. The employee assistant "cannot be faulted for . . . failing to provide petitioner with documentary evidence that did not exist" (*Matter of*

*Melluzzo v Selsky*, 287 AD2d 850, 851), and the record establishes that petitioner was provided with all relevant documentation except that containing confidential information (see *Matter of Lebron v McGinnis*, 26 AD3d 658, 658-659, *lv denied* 7 NY3d 704).

We reject petitioner's contention that the record lacks substantial evidence to support the determination that he violated the two inmate rules as charged in the misbehavior report. Substantial evidence "means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 180). We conclude that the misbehavior report, the testimony of two correction officers, and information received from a confidential informant constitute substantial evidence that petitioner violated the charged inmate rules (see *Matter of Stewart v Fischer*, 109 AD3d 1122, 1123, *lv denied* 22 NY3d 858; *Matter of Cookhorne v Fischer*, 104 AD3d 1197, 1198; *Matter of Britt v Evans*, 100 AD3d 1408, 1408-1409). Petitioner's contention that the charges were brought against him in retaliation for grievances he filed merely presented an issue of credibility that the Hearing Officer was entitled to resolve against him (see *Britt*, 100 AD3d at 1409; *Matter of Bramble v Mead*, 242 AD2d 858, 858-859, *lv denied* 91 NY2d 803), and the record does not support petitioner's contention that the Hearing Officer was biased against him (see *Matter of Sabino v Hulihan*, 105 AD3d 1426, 1426). Contrary to petitioner's further contention, the Hearing Officer properly refused petitioner's request to call witnesses who lacked firsthand knowledge of the incident in question and who would have provided testimony concerning any alleged retaliation that was redundant at best (see 7 NYCRR 254.5 [a]; *Matter of Huggins v Noeth*, 106 AD3d 1351, 1352; *Matter of Encarnacion v Goord*, 286 AD2d 828, 829, *lv denied* 97 NY2d 606).

With respect to the determinations denying petitioner's grievances, it is well established that "[j]udicial review of the denial of an inmate grievance is limited to whether such determination was arbitrary and capricious, irrational or affected by an error of law" (*Matter of Hutchinson v Fischer*, 112 AD3d 1245, 1245, *lv denied* 23 NY3d 903; see *Matter of Wooley v New York State Dept. of Corr. Servs.*, 15 NY3d 275, 280, *rearg denied* 15 NY3d 841; *Matter of Soto v Central Off. Review Comm. of the Dept. of Corr. & Community Supervision*, 118 AD3d 1229, 1231). Here, we conclude that there is a rational basis for the denial of each of petitioner's grievances, and that the denials were not arbitrary or capricious (see *Matter of Jones v Fischer*, 110 AD3d 1295, 1296, *lv denied* 23 NY3d 955; *Matter of Ramsey v Fischer*, 93 AD3d 1000, 1001, *lv dismissed* 19 NY3d 955; *Matter of Cliff v Brady*, 290 AD2d 895, 896, *lv dismissed in part and denied in part* 98 NY2d 642).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1307

**KA 13-01570**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ORLANDO COLON, JR., DEFENDANT-APPELLANT.

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

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

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Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), dated July 23, 2013. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that Supreme Court abused its discretion in refusing to grant a downward departure from his presumptive risk level based upon his successful use of medication. We reject that contention. Defendant failed to adduce any evidence that established his compliance with treatment and thus failed to meet his burden of "prov[ing] the existence of the alleged mitigating factor[] underlying his departure request by a preponderance of the evidence" (*People v Gillotti*, 23 NY3d 841, 861).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1308

**KA 12-01677**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL CROCKETT, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN C. RUSSO-MCLAUGHLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered July 26, 2012 pursuant to the 2005 Drug Law Reform Act. The order denied the application of defendant for resentencing upon his conviction of criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree, criminal possession of a weapon in the third degree, criminal use of drug paraphernalia in the second degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from an order denying his application for resentencing under the 2005 Drug Law Reform Act ([2005 DLRA] L 2005, ch 643, § 1), which authorizes the discretionary resentencing of certain class A-II drug offenders. We reject defendant's contention that he was deprived of effective assistance of counsel because his attorney failed to notify the Attorney General of his challenge to the constitutionality of the 2005 DLRA. It is well established that the right to effective assistance of counsel in New York is "violated if a defendant's counsel fails to meet a minimum standard of effectiveness, and defendant suffers prejudice from that failure" (*People v Turner*, 5 NY3d 476, 479 [emphasis added]). Here, although defense counsel should have notified the Attorney General of defendant's challenge to the constitutionality of a state statute (see Executive Law § 71), Supreme Court did not deny defendant's motion on that basis. Instead, the court ruled on the merits of defendant's contention, determining that the statute is constitutional. Thus, defendant was not prejudiced by his attorney's failure to notify the Attorney General, and defense counsel was not ineffective as a result of that single error (see generally *People v Rogers*, 277 AD2d 876,

877, *lv denied* 96 NY2d 834). Because defendant does not contend on appeal that the court erred in determining that the statute is constitutional, we do not address that issue.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1310

**KA 13-00123**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LAMAR O. BROWN, DEFENDANT-APPELLANT.

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

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

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Appeal from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered December 19, 2012 pursuant to the 2005 Drug Law Reform Act. The order denied the application of defendant for resentencing upon his conviction of criminal possession of a controlled substance in the second degree.

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

Memorandum: Defendant appeals from an order denying his application for resentencing upon his 2004 conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [former (1)]) pursuant to the 2005 Drug Law Reform Act (L 2005, ch 643, § 1). We conclude that Supreme Court properly denied the application for resentencing because defendant, at the time of his application, was eligible for parole and thus was ineligible for resentencing (*see People v Mills*, 11 NY3d 527, 534; *People v Smith*, 45 AD3d 1478, 1479). In any event, we further conclude that the court providently exercised its discretion in determining that substantial justice would have dictated denial of the application had defendant been eligible for resentencing (*see People v Dominguez*, 88 AD3d 901, 901, *lv denied* 18 NY3d 882; *People v Savinan*, 59 AD3d 247, 247, *lv dismissed* 12 NY3d 787; *People v Flores*, 50 AD3d 1156, 1156, *lv dismissed* 10 NY3d 934).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

**1311**

**KA 12-00280**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALLEMAH FORBES-HAAS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MISHA A. COULSON OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered August 10, 2011. The judgment convicted defendant, upon a jury verdict, of grand larceny in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of grand larceny in the third degree (Penal Law § 155.35 [1]). Contrary to defendant's contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that it is legally sufficient to support the conviction. Further, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We agree with defendant, however, that County Court's claim of right charge improperly shifted the burden of proof to defendant, and we therefore reverse the judgment and grant a new trial. Penal Law § 155.15 (1) provides that, "[i]n any prosecution for larceny committed by trespassory taking or embezzlement, it is an affirmative defense that the property was appropriated under a claim of right made in good faith." As noted in *People v Green* (5 NY3d 538, 542), however, the Court of Appeals in *People v Chesler* (50 NY2d 203, 209-210) "held that section 155.15 was unconstitutional insofar as it made a good-faith claim of right an affirmative defense because to do so impermissibly shifted the burden onto the defendant to disprove the element of intent." Rather, "a good faith claim of right is properly a defense—not an affirmative defense—and thus, 'the [P]eople have the burden of disproving such defense beyond a reasonable doubt' " (*People*

*v Zona*, 14 NY3d 488, 492-493, quoting § 25.00 [1]; see *People v Hurst*, 113 AD3d 1119, 1120, *lv denied* 22 NY3d 1199, *reconsideration denied* 23 NY3d 1021). Here, however, the court instructed the jury that "defendant has the burden of proving that she took, withheld or obtained the property under a claim of right made in good faith by a preponderance of the evidence." We conclude that the court committed a mode of proceedings error when it shifted the burden onto defendant to disprove the element of intent (see *Green*, 5 NY3d at 542), thereby requiring reversal of the judgment and a new trial even in the absence of preservation (see generally *People v Becoats*, 17 NY3d 643, 651, *cert denied* \_\_\_ US \_\_\_, 132 S Ct 1970; *People v Patterson*, 39 NY2d 288, 295-296, *affd* 432 US 197).

In light of our determination that defendant is entitled to a new trial, we do not reach defendant's remaining contentions.

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

**1312**

**KA 10-02076**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HARASHA L. PURYEAR, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered July 7, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We reject defendant's contention that defense counsel was ineffective in failing to argue in support of the motion to suppress the shotgun that the officer lacked probable cause to search the vehicle in which it was found or that it was improperly discovered and seized as a result of the officer's use of a flashlight. It is well settled that the "failure to make . . . [an] argument that has little or no chance of success" does not constitute ineffective assistance (*People v Dashnaw*, 37 AD3d 860, 863, lv denied 8 NY3d 945 [internal quotation marks omitted]).

We also reject defendant's contention that his conviction of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]) should be reversed and that count dismissed on the ground that it is a lesser inclusory concurrent count of criminal possession of a weapon in the second degree (§ 265.03 [3]). "[A] comparative examination of the statutes defining the two crimes, in the abstract" (*People v Glover*, 57 NY2d 61, 64), demonstrates that it is possible to commit criminal possession of a weapon in the second degree without by the same conduct committing criminal possession of a weapon in the third degree (*compare* § 265.02 [1] *with* § 265.03 [3]). For example, a defendant in possession of a loaded gun outside of his or her home or

business who had not previously been convicted of any crime would be committing only the second-degree but not the third-degree offense. Because it is possible to commit the greater offense without committing the lesser one, the two counts are " 'non-inclusory concurrent counts' " (*People v Leon*, 7 NY3d 109, 112, quoting CPL 300.30 [4]; see CPL 300.30 [3]). To the extent that the prior decision of this Court in *People v Wilkins* (104 AD3d 1156, *lv denied* 21 NY3d 1011) was based on an incorrect concession by the People and suggests a rule to the contrary, we conclude that *Wilkins* should no longer be followed.

Finally, 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).

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

**1313**

**KA 13-00951**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ARCIDES DIEGUEZ-CASTILLO, ALSO KNOWN AS ARCIDES  
CASTILLO DIEGUEZ, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered March 18, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted 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 his plea of guilty, of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]), defendant contends that his waiver of the right to appeal is unenforceable, and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant did not voluntarily waive his right to appeal, we perceive no basis to modify the sentence, which was consistent with County Court's sentence promise. We note that defendant has four felony drug convictions and is an admitted gang member who refused to cooperate with the authorities upon arrest. We also note that defendant was sentenced to far less than the maximum sentence permitted by law, notwithstanding the strength of the People's evidence against him. We reject defendant's further contention that the court erred in ordering him to pay \$280 in restitution without conducting a hearing inasmuch as defendant "expressly waived his right to a hearing and agreed to the amount of restitution at sentencing" (*People v Farewell*, 90 AD3d 1502, 1503, lv denied 18 NY3d 957).

Finally, defendant contends that his plea was involuntarily entered because the court did not clearly explain to him during the plea colloquy that he could be sentenced consecutively on drug charges that were then pending in Monroe County. Although defendant's

contention that his plea was involuntary would survive even a valid waiver of the right to appeal (see *People v Jackson*, 85 AD3d 1697, 1698, lv denied 17 NY3d 817; *People v Dunham*, 83 AD3d 1423, 1424, lv denied 17 NY3d 794), he failed to preserve that contention for our review by failing to move to withdraw the plea or to vacate the judgment of conviction (see *People v Cubi*, 104 AD3d 1225, 1226, lv denied 21 NY3d 1003; *People v Sherman*, 8 AD3d 1026, 1026, lv denied 3 NY3d 681). Moreover, the "narrow" exception to the preservation requirement recognized in *People v Lopez* (71 NY2d 662, 666) does not apply because "defendant's recitation of the facts underlying the crime pleaded to [did not] clearly cast[] significant doubt upon the defendant's guilt or otherwise call[] into question the voluntariness of the plea." We note in any event that defendant does not assert that he was in fact sentenced consecutively on the Monroe County charges.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1315

**CAF 13-01202**

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

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IN THE MATTER OF MARILYN CAUGHILL,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JEFF CAUGHILL, RESPONDENT-APPELLANT.

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LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR  
RESPONDENT-APPELLANT.

MICHELLE SCHWACH MIECZNIKOWSKI, ATTORNEY FOR THE CHILDREN, BUFFALO.

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Appeal from an order of the Family Court, Erie County (Marjorie C. Mix, J.H.O.), entered May 15, 2013 in a proceeding pursuant to Family Court Act article 6. The order granted petitioner sole custody of the parties' children.

It is hereby ORDERED that said appeal insofar as it concerns the parties' older daughter is unanimously dismissed and the order is affirmed without costs.

Memorandum: Respondent father contends that Family Court erred in modifying a prior custody order by awarding custody of the parties' two children to petitioner mother. We note at the outset that the parties' older daughter "has attained the age of 18, and we therefore dismiss as moot the appeal from the . . . order insofar as it concerned that child" (*Matter of Graham v Thering*, 55 AD3d 1319, 1320, *lv denied* 11 NY3d 714). We thus do not address the father's contentions related to that child.

With respect to the issue of custody of the younger child, the father contends that the Judicial Hearing Officer (JHO) improperly prejudged the issue of custody, thereby denying him a fair hearing. Even assuming, arguendo, that the JHO's prehearing statement, i.e., that she saw no other outcome for the case than to award custody to the mother, was improper, we note that "[o]ur authority in determinations of custody is as broad as that of Family Court . . . and where, as here, the record is sufficient for this Court to make a best interests determination . . . , we will do so in the interests of judicial economy and the well-being of the child" (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1450; see *Matter of Howell v Lovell*, 103 AD3d 1229, 1231).

In making a custody determination, " `numerous factors are to be

considered, including the continuity and stability of the existing custodial arrangement, the quality of the child's home environment and that of the parent seeking custody, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, and the individual needs and expressed desires of the child' " (*Bryan K.B.*, 43 AD3d at 1450; see generally *Eschbach v Eschbach*, 56 NY2d 167, 171-173; *Fox v Fox*, 177 AD2d 209, 210). After reviewing those factors, we conclude that it is in the child's best interests to award custody to the mother. The mother established that she was more likely to provide stability and continuity for the child and was better able to provide financially for the child. The mother also established that she was more supportive of a relationship between the child and the noncustodial parent and was better able to provide for the child's emotional and intellectual development. In addition, the mother presented evidence of domestic violence committed by the father, and the Attorney for the Child indicated that the younger daughter, who is now 16 years of age, wished to live with her mother. We thus conclude that it is in the child's best interests for the mother to have sole custody.

The father contends that the JHO erred in refusing to admit in evidence records from the Hillside Children's Center that the father contends were properly certified as business records. Inasmuch as neither the certification nor the records are contained in the record on appeal, the record before us is inadequate to allow review of that contention. The father must suffer the consequences of submitting an incomplete or inadequate record (see e.g. *DiMarco v Bombard*, 66 AD3d 1344, 1344, amended on rearg 67 AD3d 1459; *Matter of Santoshia L.*, 202 AD2d 1027, 1028). Although the record was compiled pursuant to an order settling the record, the father failed to appeal from that order, and we are thus unable to address any issue related to the propriety of that order (see *Matter of Haley M.T.*, 96 AD3d 1549, 1550).



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

**1316**

**CAF 13-00901**

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

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IN THE MATTER OF JEREMY D. WHITE, SR.,  
PETITIONER-APPELLANT,

V

ORDER

AMANDA LANDO, RESPONDENT-RESPONDENT.

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LINDA M. CAMPBELL, SYRACUSE, FOR PETITIONER-APPELLANT.

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

TIMOTHY J. KIRWAN, ATTORNEY FOR THE CHILD, OSWEGO.

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Appeal from an order of the Family Court, Oswego County (Donald E. Todd, A.J.), entered April 18, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, denied the enforcement petition filed by Jeremy D. White, Sr.

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1319**

**CA 14-01042**

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

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IN THE MATTER OF ALBERTA MACIEJEWSKI AND HENRY  
MACIEJEWSKI, AS PARENTS AND NATURAL GUARDIANS  
OF SELENA MACIEJEWSKI, AN INFANT UNDER THE AGE  
OF 14 YEARS, CLAIMANTS-RESPONDENTS,

V

MEMORANDUM AND ORDER

NORTH COLLINS CENTRAL SCHOOL DISTRICT,  
RESPONDENT-APPELLANT.

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HURWITZ & FINE, P.C., BUFFALO, CONGDON, FLAHERTY, O'CALLAGHAN, REID,  
DONLON, TRAVIS & FISHLINGER, UNIONDALE (CHRISTINE GASSER OF COUNSEL),  
FOR RESPONDENT-APPELLANT.

FARRELL & FARRELL, HAMBURG (KENNETH J. FARRELL OF COUNSEL), FOR  
CLAIMANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered February 24, 2014. The order granted the application of claimants for leave to serve a late notice of claim.

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

Memorandum: Supreme Court did not abuse its discretion in granting claimants' application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5). "[C]laimant[s] made a persuasive showing that [respondent] . . . acquired actual knowledge of the essential facts constituting the claim . . . [and respondent has] made no particularized or persuasive showing that the delay caused [it] substantial prejudice" (*Matter of Hall v Madison-Oneida County Bd. of Coop. Educ. Servs.*, 66 AD3d 1434, 1435 [internal quotation marks omitted]). Further, inasmuch as "actual notice was had and there is no compelling showing of prejudice to respondent[]," claimants' failure to offer a reasonable excuse for the delay is not fatal to their application (*Matter of Drozdal v Rensselaer City Sch. Dist.*, 277 AD2d 645, 646; see *Hall*, 66 AD3d at 1435).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1321**

**CA 14-00904**

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

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NEIL LOVELESS AND PAULA MANNING,  
PLAINTIFFS-APPELLANTS,

V

ORDER

PAUL KOENIG, DEFENDANT-RESPONDENT.

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ROBERT J. LUNN, ROCHESTER, AND FRANK A. ALOI, FOR  
PLAINTIFFS-APPELLANTS.

TADROS LAW OFFICE, P.C., SYRACUSE (SHADIA TADROS OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Wayne County (Dennis M. Kehoe, A.J.), entered August 19, 2013. The interlocutory judgment declared the rights of the parties with respect to certain real property.

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1325**

**CA 14-00950**

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

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IN THE MATTER OF THE ESTATE OF PAUL S.  
VIRGINIA, DECEASED.

MEMORANDUM AND ORDER

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WESTERN NEW YORK CHECK SERVICES LLC,  
PETITIONER-APPELLANT,  
AND PAULETTE GORDON, PETITIONER;

THE ESTATE OF PAUL S. VIRGINIA, THOMAS  
VIRGINIA, JR., AND MARIANA G. VIRGINIA,  
RESPONDENTS-RESPONDENTS.

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HARTER SECREST & EMERY LLP, BUFFALO (RAYMOND L. FINK OF COUNSEL), FOR  
PETITIONER-APPELLANT.

JASON R. DIPASQUALE, BUFFALO, FOR RESPONDENTS-RESPONDENTS.

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Appeal from an order and decree of the Surrogate's Court, Erie County (Barbara Howe, S.), entered March 4, 2014. The order and decree dismissed without prejudice the petition to, inter alia, transfer to petitioners the membership interest of decedent in petitioner Western New York Check Services LLC.

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

Memorandum: Petitioners commenced this proceeding seeking, inter alia, an order pursuant to SCPA 2105 directing respondents to transfer to petitioners decedent's membership interest in petitioner Western New York Check Services LLC. Surrogate's Court properly dismissed the petition on the ground that petitioners failed to demonstrate that they are "unquestionably and unconditionally entitled to [the] immediate" transfer of decedent's membership interest (*Matter of Mittleman*, 35 Misc 2d 848, 848; see *Matter of Yaremo*, 2013 NY Slip Op 30717[U], \*3 [Sur Ct, Nassau County 2013]). Inasmuch as petitioners are not entitled to relief under SCPA 2105, there was no need for the Surrogate to consider the contentions concerning the requirements of Banking Law article 9-A.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1326**

**KA 12-01721**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JOHN S., DEFENDANT-APPELLANT.

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

JOHN S., DEFENDANT-APPELLANT PRO SE.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (JACQUELINE MCCORMICK OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered June 7, 2011. The appeal was held by this Court by order entered December 27, 2013, decision was reserved and the matter was remitted to Wayne County Court for further proceedings. The proceedings were held and completed and defendant was adjudicated a youthful offender.

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1327**

**TP 14-01062**

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

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IN THE MATTER OF DAVID TURCK, PETITIONER,

V

ORDER

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

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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.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered June 11, 2014) 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: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1328

**KA 13-01145**

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT LEISER, JR., ALSO KNOWN AS ROBERT P. LEISER, JR., ALSO KNOWN AS ROBERT P. LEISER, II, ALSO KNOWN AS ROBERT P. LEISER, ALSO KNOWN AS ROBERT LEISER, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered June 12, 2013. 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 [2]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the 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 sentence because County Court did not advise defendant, at the time of his plea, of the potential term of incarceration that he would face if he violated the terms of his release under supervision (*see People v Eron*, 79 AD3d 1774, 1775). Nevertheless, on the merits, we conclude that the sentence is not unduly harsh or severe.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1329**

**KA 13-00719**

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KAREEM HOWARD, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN RUSSO-MCLAUGHLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 13, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal sale of a firearm 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 criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal sale of a firearm in the second degree (§ 265.12 [2]). We agree with defendant that the waiver of the right to appeal does not encompass his challenge to the severity of the sentence. During the plea colloquy, Supreme Court advised him that he was waiving his right to appeal from the conviction only and failed to make any reference to the effect that the waiver would have on any challenge to the severity of his sentence (*see People v Maracle*, 19 NY3d 925, 928; *People v Peterson*, 111 AD3d 1412, 1412). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

As the People correctly concede, the presentence report has not been redacted as the court ordered at sentencing, and therefore it must be redacted to correct the oversight (*see generally People v Abuhamra*, 107 AD3d 1630, 1631-1632, *lv denied* 22 NY3d 1038).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

**1332**

**KA 12-02286**

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARK A. ROUNDS, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, HARTER SECREST & EMERY LLP (MAURA MCGUIRE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered June 20, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that the weapon seized from his residence was the product of an illegal search and that Supreme Court therefore erred in refusing to suppress it. We reject that contention. The search was conducted by parole officers "in furtherance of parole purposes and related to [their] dut[ies] as . . . parole officer[s]" (*People v Johnson*, 63 NY2d 888, 890 [internal quotation marks omitted], *rearg denied* 64 NY2d 647; *see People v Davis*, 101 AD3d 1778, 1779, *lv denied* 20 NY3d 1060; *People v Scott*, 93 AD3d 1193, 1194, *lv denied* 19 NY3d 967, *reconsideration denied* 19 NY3d 1001). The parole officers had a reasonable basis to believe that a gun would be located in the residence based on the suspicious nature of defendant's statement that he had been shot in the foot by an unknown assailant at his residence, and based on the fact that no evidence of a third-party shooter was uncovered during the police investigation (*see People v Nappi*, 83 AD3d 1592, 1594, *lv denied* 17 NY3d 820; *see generally People v Huntley*, 43 NY2d 175, 181). Contrary to defendant's contention, the fact that the parole officers received assistance from a police officer at the scene did not render the search a police operation requiring a search warrant (*see Davis*, 101 AD3d at 1779; *Nappi*, 83 AD3d at 1594; *People v Johnson*, 54 AD3d 969, 970).

We reject defendant's further contention that the court erred in failing to suppress the statements he made to a police officer at the hospital, prior to receiving *Miranda* warnings. Under the circumstances, we conclude that defendant was not in custody when he made those statements (see *People v Drouin*, 115 AD3d 1153, 1155-1156, *lv denied* 23 NY3d 1019; see generally *People v Forbes*, 182 AD2d 829, 829-830, *lv denied* 80 NY2d 895). We therefore reject defendant's further contention that the post-*Miranda* statements should be suppressed as fruit of the unlawful pre-*Miranda* questioning (see *People v Adelman*, 1 AD3d 1029, 1030).

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

1333

**KA 13-01064**

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS C. RICKS, DEFENDANT-APPELLANT.

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

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

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Appeal from an order of the Erie County Court (Kenneth F. Case, J.), entered April 16, 2013. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court did not abuse its discretion in refusing to grant him a downward departure from his presumptive risk level (*see People v Johnson*, 120 AD3d 1542, 1542, *lv denied* \_\_\_ NY3d \_\_\_ [Nov. 24, 2014]; *see generally People v Gillotti*, 23 NY3d 841, 861, 864). Defendant's further contention that the court erred in designating him a sexually violent offender is not preserved for our review (*see* § 168-a [7] [b]; *see generally People v Young*, 108 AD3d 1232, 1232, *lv denied* 22 NY3d 853, *rearg denied* 22 NY3d 1036) and, in any event, we conclude that it lacks merit (*see People v Ayala*, 72 AD3d 1577, 1578, *lv denied* 15 NY3d 816).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1334**

**KA 13-02120**

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LANCE E. VIVENZIO, DEFENDANT-APPELLANT.

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ADAM H. VAN BUSKIRK, MORAVIA, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered October 1, 2013. The judgment convicted defendant, upon his plea of guilty, of vehicular assault in the second degree, driving while intoxicated, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of vehicular assault in the second degree (Penal Law § 120.03 [1]), driving while intoxicated (Vehicle and Traffic Law § 1192 [2]), and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3]).

Defendant contends that County Court erred in imposing as a condition of his probation the installation of an ignition interlock device (IID) on the vehicle he was driving because that vehicle is owned by his wife and was rendered unusable at the time the above offenses occurred. We reject that contention. Vehicle and Traffic Law § 1193 (1) (c) (iii) explicitly requires that the court "shall order [a] person [convicted pursuant to section 1192 (2)] to install and maintain . . . an [IID] in any motor vehicle owned or operated by such person" (emphasis added). Here, the evidence in the record does not support defendant's assertion that the subject vehicle was rendered unusable, and defense counsel's unsworn statement at sentencing in support of the assertion does not remedy that evidentiary deficiency. Inasmuch as defendant operated the vehicle at the time of the offenses, and in light of the fact that there is no evidence in the record that the vehicle has been rendered unusable, we see no reason to disturb the court's imposition of the IID requirement with respect to the vehicle as a condition of defendant's probation (see § 1193 [1] [c] [iii]; Penal Law § 65.10 [2] [k-1]).

As the People concede, the certificate of conviction incorrectly recites that defendant was convicted of a class D felony, rather than a class E felony, under the second count of the superior court information (see Vehicle and Traffic Law § 1193 [1] [c] [i]). The certificate of conviction therefore must be amended to reflect that fact (see *People v Young*, 74 AD3d 1864, 1865, *lv denied* 15 NY3d 811).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1337

**CAF 13-00611**

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

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IN THE MATTER OF CLEOPHUS B.

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ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

ORDER

TORRENCE B., RESPONDENT-APPELLANT.

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

LISA P. DENMAN, UTICA, FOR PETITIONER-RESPONDENT.

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

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Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered February 27, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondent and transferred guardianship and custody of the subject child to petitioner.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 16 and 22, 2014,

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1338

**CAF 13-00935**

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

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IN THE MATTER OF WANDA R. THOMPSON,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

WARD A. THOMPSON, RESPONDENT-RESPONDENT.

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THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF  
COUNSEL), FOR PETITIONER-APPELLANT.

SETH B. BUCHMAN, ATTORNEY FOR THE CHILD, THREE MILE BAY.

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Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered May 7, 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.

Memorandum: Petitioner mother appeals from an order that dismissed her petition seeking modification of a prior custody order awarding sole custody of the subject child to respondent father. Contrary to the mother's contention, there is a sound and substantial basis in the record for Family Court's determination that the mother failed to make the requisite evidentiary showing of a change in circumstances to warrant an inquiry into whether the best interests of the child would be served by modifying the existing custody arrangement (*see Matter of Wawrzynski v Goodman*, 100 AD3d 1559, 1559).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1340**

**CAF 13-01090**

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

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IN THE MATTER OF JOHNATHAN CRAIG,  
PETITIONER-RESPONDENT,

V

ORDER

AMBER M. YAKYMOVITCH, RESPONDENT-APPELLANT.

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CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF  
COUNSEL), FOR RESPONDENT-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Family Court, Monroe County (John B. Gallagher, Jr., J.), entered May 10, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject children.

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

**1342**

**CA 14-00617**

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

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MARY AMOROSI, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

SARAH HUBBARD, DEFENDANT-APPELLANT.

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MCCABE, COLLINS, MCGEOUGH & FOWLER, LLP, BUFFALO (TAMARA M. HARBOLD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LOTEMPPIO & BROWN, P.C., BUFFALO (BRIAN J. BOGNER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered January 9, 2014. The order granted plaintiff's motion to set aside the jury verdict and ordered a new trial.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she walked across a street and was struck by a vehicle operated by defendant. At trial, the jury rendered a verdict finding that defendant was negligent but that such negligence was not a proximate cause of the accident. Plaintiff thereafter moved to set aside the verdict as against the weight of the evidence or as the result of substantial jury confusion, and Supreme Court granted the motion on both grounds.

As a preliminary matter, we agree with the court that the bifurcated trial stipulation entered into by the parties did not preclude plaintiff from bringing the posttrial motion. The stipulation precluded the parties from bringing pretrial motions on liability and motions for a directed verdict, but it was silent with respect to posttrial motions (*see Matamoros v Tovbin*, 82 AD3d 941, 942).

We agree with defendant, however, that the court erred in granting the motion on either asserted ground. "A verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence" (*Krieger v McDonald's Rest. of N.Y.*,

*Inc.*, 79 AD3d 1827, 1828, *lv dismissed* 17 NY3d 734 [internal quotation marks omitted]; see *Lolik v Big V Supermarkets*, 86 NY2d 744, 746). "A jury finding that a party was negligent but that such negligence was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are 'so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause' " (*Cona v Dwyer*, 292 AD2d 562, 563, quoting *Rubin v Pecoraro*, 141 AD2d 525, 527; see *Santillo v Thompson*, 71 AD3d 1587, 1588-1589). Where, however, "a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*Schreiber v University of Rochester Med. Ctr.*, 88 AD3d 1262, 1263 [internal quotation marks omitted]; see *Hollamon v Vinson*, 38 AD3d 1159, 1160).

Here, the jury could have reasonably found from the evidence that plaintiff was not crossing the street in the crosswalk; that it was a dark, rainy evening; and that plaintiff emerged in defendant's lane of travel from between stopped vehicles. The jury could also reasonably have found that, although defendant was negligent in, for example, the manner in which she approached the intersection before turning left, such negligence was not a proximate cause of the collision with plaintiff after she made the turn. Thus, "the finding of proximate cause did not inevitably flow from the finding of culpable conduct," and the verdict therefore is not against the weight of the evidence (*Hernandez v Baron*, 248 AD2d 440, 440; see *Nath v Brown*, 48 AD3d 1166, 1167; *Loder v Greco*, 5 AD3d 978, 979; *Rubin*, 141 AD2d at 526-527).

We conclude that there was no basis for the court to grant the motion on the ground of substantial juror confusion (see *Kelly v Greitzer*, 83 AD3d 901, 902-903; *Nath*, 48 AD3d at 1167). On its initial verdict sheet, the jury mistakenly apportioned a percentage of fault to defendant despite its finding that defendant's negligence was not a substantial factor in causing the accident, but the jury requested a new verdict sheet before rendering its verdict. On the new verdict sheet, the jury followed the instructions thereon and reported its verdict after finding that defendant's negligence was not a substantial factor in causing the accident, without apportioning any percentage of fault to defendant. The jury therefore "rectified the inconsistency in its initial verdict" sheet (*Mendez v Rochester Gen. Hosp.*, 31 AD3d 1160, 1161, *lv denied* 7 NY3d 713).

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

**1343**

**CA 14-00375**

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

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TERENCE WINTERS AND MAUREEN WINTERS,  
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

UNILAND DEVELOPMENT CORPORATION, UNILAND  
CONSTRUCTION CORPORATION, DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANTS.

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PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS.

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

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Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered April 24, 2013 in a personal injury action. The order denied plaintiffs' motion to enter a judgment against defendants Uniland Development Corporation and Uniland Construction Corporation and to set a damages inquest.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the matter is remitted to Supreme Court, Erie County, for an inquest on damages.

Memorandum: In this personal injury action, plaintiffs appeal from an order that denied their motion seeking a default judgment on the issue of liability against Uniland Development Corporation and Uniland Construction Corporation (defendants) and a damages inquest. Supreme Court had previously issued a conditional order providing that defendants' answer and affirmative defenses would be stricken if defendants failed to provide full and complete responses to plaintiffs' discovery demands by a certain date. Defendants failed to comply with that order and, because it was self-executing, it became absolute and binding upon defendants' failure to comply with it (see *Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 78; *Wilson v Galacia Contr. & Restoration Corp.*, 10 NY3d 827, 830). Consequently, "it was error, as a matter of law, not to grant [plaintiffs'] motion" (*Fiore v Galang*, 64 NY2d 999, 1000; see *Gibbs*, 16 NY3d at 80), and we therefore reverse the order, grant plaintiffs' motion, and remit the matter to Supreme Court for an inquest on damages (see e.g. *Hogan v Vandewater*, 104 AD3d 1164, 1165; *Burton v Matteliano*, 98 AD3d 1248, 1250). We note that our result herein does not preclude defendants from seeking vacatur of

the conditional order pursuant to the procedure outlined in *Lauer v City of Buffalo* (53 AD3d 213, 214), and under the principles of such cases as *Woodson v Mendon Leasing Corp.* (100 NY2d 62, 68) and *Matter of County of Ontario (Middlebrook)* (59 AD3d 1065, 1065).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1345**

**CA 13-01853**

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

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IN THE MATTER OF THE APPLICATION FOR DISCHARGE  
OF AMIYN ABDULLAH, CONSECUTIVE NO. 21951, FROM  
CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO  
MENTAL HYGIENE LAW SECTION 10.09,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF  
MENTAL HEALTH AND NEW YORK STATE DEPARTMENT OF  
CORRECTIONS AND COMMUNITY SUPERVISION,  
RESPONDENTS-RESPONDENTS.

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EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA  
(MICHAEL H. MCCORMICK OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF  
COUNSEL), FOR RESPONDENTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Oneida County (Joseph E. Fahey, A.J.), entered August 23, 2013 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, directed that petitioner shall continue to be committed to a secure treatment facility.

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

Memorandum: Petitioner was previously determined to be a dangerous sex offender requiring civil confinement and was committed to a secure treatment facility (see Mental Hygiene Law § 10.01 et seq.). Petitioner now appeals from an order, entered after an evidentiary hearing, continuing his confinement in a secure treatment facility (see § 10.09 [h]). We affirm. As a preliminary matter, we reject petitioner's contention that respondents failed to prove by clear and convincing evidence that he is a dangerous sex offender requiring continued confinement (see generally *Matter of State of New York v High*, 83 AD3d 1403, 1403, lv denied 17 NY3d 704). Supreme Court was in the best position to evaluate the weight and credibility of the conflicting expert testimony, and the record supports the court's determination to credit the opinion of respondents' expert over that of petitioner's expert (see *Matter of Skinner v State of New York*, 108 AD3d 1134, 1135).

We reject petitioner's contention that the court failed to state the facts it deemed essential in making its determination (*see id.* at 1134; *see also* CPLR 4213 [b]). Although we agree with petitioner that more detailed decisions are warranted in order to facilitate appellate review, we conclude that the court's decision here, despite its brevity, complies with section 4213 (b) (*see Skinner*, 108 AD3d at 1134).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1347**

**CA 14-00238**

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

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BOARD OF TRUSTEES OF IBEW LOCAL 43 ELECTRICAL  
CONTRACTORS HEALTH AND WELFARE, ANNUITY AND  
PENSION FUNDS, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

D'ARCANGELO & CO., LLP, DEFENDANT-RESPONDENT.

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SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (STEVEN WARD WILLIAMS  
OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (ANDREA SCHILLACI OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County  
(Deborah H. Karalunas, J.), entered October 2, 2013. The order  
granted the motion of defendant to dismiss the amended complaint and  
dismissed the amended complaint.

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

Memorandum: Plaintiff commenced this action against defendant  
accounting firm seeking damages for money lost in investments  
maintained directly or indirectly by Bernard Madoff and/or Bernard L.  
Madoff Investment Securities, LLC. Plaintiff hired defendant to audit  
plaintiff's investment funds in 2007 and 2008. Supreme Court granted  
defendant's motion to dismiss the amended complaint on the ground  
that, inter alia, plaintiff could not sufficiently plead the existence  
of proximate cause because plaintiff's harm was too attenuated from  
defendant's actions.

We agree with plaintiff that the court erred in dismissing the  
first cause of action alleging professional malpractice, and we  
therefore modify the order accordingly. On a motion to dismiss a  
complaint for failure to state a cause of action, we must "accept the  
facts as alleged in the complaint as true, accord plaintiff[] the  
benefit of every possible favorable inference, and determine only  
whether the facts as alleged fit within any cognizable legal theory"  
(*Leon v Martinez*, 84 NY2d 83, 87-88; see *511 W. 232nd Owners Corp. v  
Jennifer Realty Co.*, 98 NY2d 144, 152). In making that determination,  
a court may consider affidavits submitted by the parties (see *Leon*, 84

NY2d at 88; *Chaikovska v Ernst & Young, LLP*, 21 AD3d 1324, 1325), such as the expert affidavit that was submitted by plaintiff in this case.

"Accounting malpractice or professional negligence contemplates a failure to exercise due care and proof of a material deviation from the recognized and accepted professional standards for accountants and auditors, generally measured by [generally accepted accounting principles] and [generally accepted auditing standards (GAAS)] promulgated by the American Institute of Certified Public Accountants, which proximately causes damage to plaintiff" (*Cumis Ins. Socy. v Tooke*, 293 AD2d 794, 797-798; see *Berg v Eisner LLP*, 94 AD3d 496, 496). Here, plaintiff sufficiently alleged that defendant committed malpractice in not adhering to GAAS by, inter alia, failing to obtain a SAS 70 report, and that defendant's negligence proximately caused plaintiff to sustain damages (see *Sacher v Beacon Assoc. Mgt. Corp.*, 114 AD3d 655, 657). Although defendant contends that GAAS did not require it to obtain a SAS 70 report, it did not submit any evidence establishing that fact in support of its motion (see generally *C.P. Ward, Inc. v Deloitte & Touche LLP*, 74 AD3d 1828, 1829-1830; *Cumis Ins. Socy.*, 293 AD2d at 798), and we disagree with the court that such a determination could be made as a matter of law in the absence of such evidence (see *Berg*, 94 AD3d at 496). With respect to proximate cause, "[a]s a general rule, issues of proximate cause[, including superceding cause,] are for the trier of fact" (*Hahn v Tops Mkts., LLC*, 94 AD3d 1546, 1548 [internal quotation marks omitted], citing *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 312, rearg denied 52 NY2d 784; see *Bachmann, Schwartz & Abramson v Advance Intl.*, 251 AD2d 252, 253), and we see no basis to depart from that general rule in this case (see *Sacher*, 114 AD3d at 657). Plaintiff alleged that defendant should have obtained the SAS 70 report to confirm the existence and valuation of the funds' investments. Plaintiff further alleged that, had defendant done so, it would have discovered that it could not confirm the existence of those securities, and plaintiff could have redeemed its investments.

As an alternative ground for affirmance (see generally *Parochial Bus. Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546; *Hyatt v Young*, 117 AD3d 1420, 1421; *Summers v City of Rochester*, 60 AD3d 1271, 1273), we agree with defendant that the third through sixth causes of action should be dismissed as duplicative of the professional malpractice cause of action, including the causes of action for fraud (see *Long v Cellino & Barnes, P.C.*, 59 AD3d 1062, 1062), and breach of fiduciary duty (see *Matter of HSBC Bank U.S.A. [Littleton]*, 70 AD3d 1324, 1325, lv denied 14 NY3d 710; *Dischiavi v Calli* [appeal No. 2], 68 AD3d 1691, 1693). Those causes of action make the same allegations of wrongdoing as the professional malpractice cause of action and do not seek any different damages. The second cause of action for breach of contract was already dismissed by a federal court as duplicative of the professional malpractice cause of action, and plaintiff does not dispute that collateral estoppel bars that cause of action. We reject defendant's contention, however, that the professional malpractice cause of action, to the extent that it relies on the 2007 audit report, should



be dismissed as time-barred. We conclude that plaintiff sufficiently pleaded that the continuous representation doctrine applies to toll the statute of limitations with respect to the 2007 audit report (see *Symbol Tech., Inc. v Deloitte & Touche, LLP*, 69 AD3d 191, 195-196).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1348**

**CA 14-00964**

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

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ALBERT G. FRACCOLA, JR., INDIVIDUALLY AND AS  
50% SHAREHOLDER, OFFICER AND DIRECTOR OF 1ST  
CHOICE REALTY, INC., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

1ST CHOICE REALTY, INC., PHYLLIS FRACCOLA,  
INDIVIDUALLY AND AS 50% SHAREHOLDER, OFFICER  
AND DIRECTOR OF 1ST CHOICE REALTY, INC.,  
PHYLLIS FRACCOLA AS SHAREHOLDER OF HYDRANIA,  
INC., DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANTS.

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ALBERT G. FRACCOLA, JR., PLAINTIFF-APPELLANT PRO SE.

FELT EVANS, LLP, CLINTON (JAY G. WILLIAMS, III, OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

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Appeal from an order and judgment (denominated order) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered February 25, 2014. The order and judgment denied the motion of plaintiff to vacate an order dated July 28, 2005, and sanctioned plaintiff for frivolous conduct.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by vacating the second, third and fourth ordering paragraphs, and as modified the order and judgment is affirmed without costs, and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following Memorandum: Plaintiff appeals from an order and judgment that, inter alia, denied his motion pursuant to CPLR 5015 (a) (4) to vacate a prior order and imposed sanctions in the form of costs and attorney's fees. We conclude that plaintiff's challenge to the validity of the prior order on the ground that Supreme Court lacked subject matter jurisdiction is barred by the doctrines of collateral estoppel and res judicata because that issue has previously been fully litigated and determined to be without merit (*see generally Zayatz v Collins*, 48 AD3d 1287, 1289-1290; *Tuper v Tuper*, 34 AD3d 1280, 1282). We further conclude, however, that the court erred in failing to comply with 22 NYCRR 130-1.2 inasmuch as it failed to set forth in a written decision "the conduct on which . . . the imposition [of sanctions] is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount . . . imposed to be appropriate" (*see Ikeda v Tedesco*, 70 AD3d 1498, 1499).

We therefore modify the order and judgment by vacating the award of costs and attorney's fees, and we remit the matter to Supreme Court for compliance with 22 NYCRR 130-1.2.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1349**

**KA 13-01210**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

CEDRIC JUDGE, DEFENDANT-APPELLANT.

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LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered January 14, 2013. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree, burglary in the first degree, burglary in the second degree, criminal possession of a weapon in the second degree (two counts) and conspiracy in the fourth degree.

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1350

**KA 13-00859**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CLIFFORD EDMONDS, DEFENDANT-APPELLANT.

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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.

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Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered April 15, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal obstruction of breathing or blood circulation.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal obstruction of breathing or blood circulation (Penal Law § 121.11 [a]). 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: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1351

**KA 13-01466**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JACOB J. TAGGART, DEFENDANT-APPELLANT.

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YVONNE A. VERTLIEB, LANCASTER, FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered March 21, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted gang 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 his plea of guilty of attempted gang assault in the second degree (Penal Law §§ 110.00, 120.06). 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: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1352**

**KA 12-01886**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TAMELL MACK, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIC T. GLYNN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 22, 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.

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 his waiver of the right to appeal does not encompass his challenge to the severity of the sentence (*see People v Maracle*, 19 NY3d 925, 928). Although defendant executed a written waiver of the right to appeal, there was no colloquy between Supreme Court and defendant regarding the written waiver to ensure that defendant read and understood it and that he was waiving his right to challenge the length of the sentence (*see generally People v Carno*, 101 AD3d 1663, 1663-1664, *lv denied* 20 NY3d 1060). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1353

**KA 14-00412**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTHONY BOGAN, SR., DEFENDANT-APPELLANT.

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

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered February 5, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the 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 waiver does not encompass defendant's challenge to the severity of the sentence because County Court failed to explain the sentencing parameters to defendant prior to obtaining the waiver (*see People v Kemp*, 112 AD3d 1376, 1377). Nevertheless, on the merits, we conclude that the sentence is not unduly harsh or severe.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

**1354**

**KA 11-02610**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES E. HIGHSMITH, ALSO KNOWN AS JAMES E.  
HIGHSMITH, III, DEFENDANT-APPELLANT.

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LAW OFFICES OF JOSEPH D. WALDORF, P.C., ROCHESTER (JOSEPH D. WALDORF  
OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered October 28, 2011. The judgment convicted defendant, after a nonjury trial, of burglary in the first degree and 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, after a nonjury trial, of burglary in the first degree (Penal Law § 140.30 [2]) and burglary in the second degree (§ 140.25), defendant contends that the People did not sufficiently corroborate the testimony of the accomplices, as required by CPL 60.22 (1). We reject that contention. It is well settled that "[t]he corroborative evidence need not show the commission of the crime . . . It is enough if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth" (*People v Reome*, 15 NY3d 188, 192-193, quoting *People v Dixon*, 231 NY 111, 116). "[E]vidence that defendant was present at the scene of the crime or was with the accomplices shortly before or after the crime can, under certain circumstances, provide the necessary corroboration of the accomplices' testimony" (*People v Bolden*, 161 AD2d 1126, 1126-1127, lv denied 76 NY2d 853). Here, three accomplices testified that defendant planned the crime along with them, accompanied them to the crime, acted as a lookout during the crime, accompanied them to a motel room immediately after the crime, and accepted his share of the proceeds of the crime, including cash and drugs. An employee of the motel testified that defendant paid for that motel room in cash, and defendant gave a statement to the police admitting that he accompanied the codefendants to that room and paid for the room. The employee's testimony and defendant's statement

" 'harmonized' " with the accomplice testimony (*People v McRae*, 15 NY3d 761, 762, *rearg denied* 15 NY3d 902). Furthermore, mail addressed to defendant was recovered from one of the vehicles used in the commission of the crime (*see generally People v Rodriguez*, 22 NY3d 917, 918).

Contrary to defendant's contention, viewing the evidence in the light most favorable to the People (*see People v Williams*, 84 NY2d 925, 926), we conclude that it is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes 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).

Defendant's contentions with respect to the sufficiency of the evidence submitted to the grand jury are "not reviewable on appeal because the grand jury minutes are not included in the record on appeal" (*People v Dilbert*, 1 AD3d 967, 967-968, *lv denied* 1 NY3d 626; *see generally People v Lane*, 47 AD3d 1125, 1127 n 3, *lv denied* 10 NY3d 866). In any event, "[i]t is well established that '[t]he validity of an order denying any motion [to dismiss an indictment for legal insufficiency of the grand jury evidence] is not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence' " (*People v Afrika*, 79 AD3d 1678, 1679, *lv denied* 17 NY3d 791, quoting CPL 210.30 [6]) and, as we concluded herein, the trial evidence is legally sufficient. Finally, inasmuch as the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defense counsel provided meaningful representation, we reject defendant's contention that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

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

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

1355

**KA 12-01369**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN M. BLACK, DEFENDANT-APPELLANT.

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THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered July 10, 2012. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child (two counts), incest in the first degree (two counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of predatory sexual assault against a child (Penal Law § 130.96). Defendant contends that the verdict is against the weight of the evidence because neither the victim's testimony nor defendant's admissions to the police were credible. We reject that contention. Even assuming, arguendo, that a different verdict would not have been unreasonable, we note that "the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Orta*, 12 AD3d 1147, 1147, *lv denied* 4 NY3d 801; *see People v McCray*, 121 AD3d 1549, 1552). 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).

Defendant further contends that Supreme Court erred in admitting in evidence the victim's sexual assault examination report because defendant was unable to confront the nurse examiner who prepared the report. That contention is unpreserved for our review, however, inasmuch as defendant failed to object to the report at trial (*see CPL 470.05 [2]; People v Snyder*, 100 AD3d 1367, 1369, *lv denied* 21 NY3d 1010), and we decline to exercise our power to review that contention

as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Contrary to the further contention of defendant, we conclude that defense counsel was not ineffective in failing to object to the report because, under the circumstances of this case, the decision not to object was consistent with a legitimate trial strategy (see generally *People v Benevento*, 91 NY3d 708, 712-713).

We agree with defendant that certain comments made by the prosecutor during summation were improper, including an impermissible "safe streets" argument (see *People v Scott*, 60 AD3d 1483, 1484, lv denied 12 NY3d 859; *People v Nevedo*, 202 AD2d 183, 185; *People v Hanright*, 187 AD2d 1021, 1021, lv denied 81 NY2d 840). We conclude, however, that the prosecutor's comments "were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Jones*, 114 AD3d 1239, 1241, lv denied 23 NY3d 1038 [internal quotation marks omitted]; see *Hanright*, 187 AD2d at 1021). Thus, contrary to the further contention of defendant, the "failure to object to those comments does not constitute ineffective assistance of counsel" (*People v Nicholson*, 118 AD3d 1423, 1425).

Finally, defendant contends that the People's expert was improperly allowed to testify that the victim made a credible complaint of sexual abuse. We reject that contention, inasmuch as the testimony of the expert, who had never met defendant or the victim, was "general in nature and d[id] not attempt to impermissibly prove that the charged crimes occurred" (*People v Gayden*, 107 AD3d 1428, 1428, lv denied 22 NY3d 1138 [internal quotation marks omitted]; see *People v Williams*, 20 NY3d 579, 584; *People v Olson*, 110 AD3d 1373, 1376, lv denied 23 NY3d 1023).

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

1356

**CAF 13-00852**

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

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IN THE MATTER OF DAVID M. MORRISSEY, SR.,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

DEBRA A. MORRISSEY, RESPONDENT-APPELLANT.

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PAUL M. DEEP, UTICA, FOR RESPONDENT-APPELLANT.

SUSAN B. MARRIS, ATTORNEY FOR THE CHILDREN, MANLIUS.

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Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered September 20, 2012 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, modified a prior custody order entered on the consent of the parties by awarding sole custody of the children to petitioner, with visitation to respondent.

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

Memorandum: Respondent mother appeals from an order that modified a prior custody order entered on the consent of the parties by awarding sole custody of the parties' children to petitioner father, with visitation to the mother, in this proceeding pursuant to Family Court Act article 6. We reject the mother's contention that the father failed to establish a significant change in circumstances. Although Family Court did not expressly identify such a change in circumstances, "our review of the record reveals extensive findings of fact, placed on the record by Family Court, which demonstrate unequivocally that a significant change in circumstances occurred since the entry of the consent custody order" (*Matter of Drew v Gillin*, 17 AD3d 719, 720; see *Matter of Pauline E. v Renelder P.*, 37 AD3d 1145, 1146).

Contrary to the mother's further contention, there is a sound and substantial basis in the record to support the court's determination that it was in the children's best interests to award sole custody to the father (see *Matter of Tisdale v Anderson*, 100 AD3d 1517, 1517-1518; see generally *Capodiferro v Capodiferro*, 77 AD3d 1449, 1450). We reject the mother's further contention that the court, in making its custody determination, placed undue emphasis on her failure to comply with discovery orders. It is well settled that the failure to comply with a court order is a factor " 'to be considered when determining the relative fitness of the parties and what custody

arrangement is in the child[ren]'s best interests' " (*Barnes v Barnes*, 234 AD2d 959, 959), and the court "is entitled to impose appropriate sanctions for uncooperative parents" (*Matter of Stukes v Ryan*, 289 AD2d 623, 624). Here, we conclude that the court did not abuse its discretion with respect to the emphasis placed on the mother's noncompliance as a factor in the best interests analysis (see *Barnes*, 234 AD2d at 959), and the discovery sanction imposed did not adversely affect the children's right to have issues affecting their best interests fully explored (see *Stukes*, 289 AD2d at 624; *Matter of Landrigen v Landrigen*, 173 AD2d 1011, 1011-1012).

Finally, we conclude that the court properly transferred temporary custody of the parties' children to the father before conducting the custody hearing "inasmuch as the father demonstrated the necessary exigent circumstances warranting the temporary transfer" (*Matter of Ward v Ward*, 89 AD3d 1518, 1519; see *Matter of Acquard v Acquard*, 244 AD2d 1010, 1010). In any event, even assuming, arguendo, that the court erred in transferring temporary custody to the father, we conclude that reversal is not required because the court "subsequently conducted the requisite evidentiary hearing, and the record of that hearing fully supports the court's determination following the hearing" (*Matter of Humberstone v Wheaton*, 21 AD3d 1416, 1418; see *Matter of Ward v Ward*, 89 AD3d at 1519).

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

1359

**CAF 14-00047**

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

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IN THE MATTER OF JAMIE LYNN BIAGINI,  
PETITIONER-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

WALTER J. PARENT, JR.,  
RESPONDENT-RESPONDENT-APPELLANT.

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IN THE MATTER OF WALTER J. PARENT, JR.,  
PETITIONER-RESPONDENT-APPELLANT,

V

JAMIE LYNN BIAGINI,  
RESPONDENT-APPELLANT-RESPONDENT.

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

LAW OFFICES OF MARC JONAS, UTICA (JASON D. FLEMMA OF COUNSEL), FOR  
RESPONDENT-RESPONDENT-APPELLANT AND PETITIONER-RESPONDENT-APPELLANT.

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

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Appeal and cross appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered August 30, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, modified a prior custody order by awarding respondent-petitioner primary physical custody of the parties' child, with visitation to petitioner-respondent.

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

Memorandum: Petitioner-respondent mother appeals and respondent-petitioner father cross-appeals from an order that, inter alia, granted the father's cross petition seeking to modify a prior custody order entered upon the consent of the parties by awarding him primary physical custody of the parties' child, with visitation to the mother. Initially, we note that the parties correctly agree that the evidence at the hearing established " 'a change in circumstances [that] reflects a real need for change to ensure the best interest[s] of the child' " (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417; see *Matter of Carey v Windover*, 85 AD3d 1574, 1574, lv denied 17 NY3d

710). Under the prior order, the parties shared residential custody of the child, with the child moving from one parent to the other on Wednesdays. That schedule was no longer practical upon the child's attainment of school age (see *Matter of Dickerson v Robenstein*, 68 AD3d 1179, 1179-1180; see also *Matter of Claflin v Giamporcaro*, 75 AD3d 778, 779-780, lv denied 15 NY3d 710).

Contrary to the mother's contention on appeal, Family Court did not abuse its discretion in awarding the father custody of the child during those days of the week when school is in session. "Generally, a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Krug v Krug*, 55 AD3d 1373, 1374 [internal quotation marks omitted]). We see no basis to disturb the court's determination inasmuch as it was based on the court's credibility assessments of the witnesses and "is supported by a sound and substantial basis in the record" (*Matter of Angel M.S. v Thomas J.S.*, 41 AD3d 1227, 1228). Contrary to the mother's further contention, she failed to submit any expert testimony or evidence establishing that it was in the child's best interests to attend school in the Town of Clinton and, instead, presented only her own speculative testimony with respect thereto (*cf. Matter of Crudele v Wells* [appeal No. 2], 99 AD3d 1227, 1228).

Contrary to the father's contention on his cross appeal, the visitation schedule set by the court does not grant excessive visitation to the mother (*cf. Cesario v Cesario*, 168 AD2d 911, 911). "Indeed, we note that the visitation schedule ordered by the court was in large part proposed by the father during his testimony" (*Matter of Abbott v Merritt*, 118 AD3d 1309, 1310).



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

**1360**

**CAF 13-01321**

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

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IN THE MATTER OF LISA A. BRETSCHER,  
PETITIONER-RESPONDENT,

V

ORDER

DARREN A. BRETSCHER, RESPONDENT-APPELLANT.

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

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

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

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Appeal from an order of the Family Court, Oneida County (Frank Steele Cook, J.H.O.), entered March 27, 2013 in a proceeding pursuant to Family Court Act article 8. The order denied the motion of respondent to modify an order of protection.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Romeo M. [Nicole R.]*, 94 AD3d 1464, 1465, *lv denied* 19 NY3d 810).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1365**

**CA 14-00893**

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

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IN THE MATTER OF ARBITRATION BETWEEN COUNTY  
OF HERKIMER, PETITIONER-RESPONDENT,

AND

MEMORANDUM AND ORDER

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL  
1000, AFSCME, AFL-CIO, JOANNE LECLAIR, AS CSEA  
HERKIMER COUNTY UNIT PRESIDENT AND JOHN HIGHT,  
RESPONDENTS-APPELLANTS.

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STEVEN A. CRAIN AND DAREN J. RYLEWICZ, CIVIL SERVICE EMPLOYEES  
ASSOCIATION, INC., ALBANY (CONSTANCE R. BROWN OF COUNSEL), FOR  
RESPONDENTS-APPELLANTS.

ROBERT J. MALONE, COUNTY ATTORNEY, HERKIMER (THADDEUS J. LUKE OF  
COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order and judgment (one paper) of the Supreme  
Court, Herkimer County (Norman I. Siegel, J.), entered February 20,  
2014 in a proceeding pursuant to CPLR article 75. The order and  
judgment, among other things, granted the petition to stay  
arbitration.

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

Memorandum: Respondent John Hight, a probation officer employed  
by petitioner, applied for a promotion to the position of probation  
supervisor. The collective bargaining agreement (CBA) at issue in  
this litigation included the position of probation officer, but  
excluded the position of probation supervisor. Petitioner promoted  
another, less senior, employee, although Hight scored higher on the  
promotional examination than that employee. After following the  
procedures set forth in the CBA governing disputes, respondents filed  
a grievance regarding the promotion. When petitioner denied the  
grievance on the ground that the position to which Hight sought to be  
promoted was not encompassed by the CBA, respondents sought  
arbitration. Petitioner commenced this proceeding pursuant to CPLR  
article 75 seeking an order staying arbitration, and respondents  
appeal from an order and judgment that granted the petition and denied  
their cross motion to compel arbitration.

The issue is governed by the Court of Appeals' two-prong test to

determine "whether a grievance is arbitrable" (*Matter of City of Johnstown [Johnstown Police Benevolent Assn.]*, 99 NY2d 273, 278 [*Johnstown*]), originally enunciated in *Matter of Acting Supt. of Schs. of Liverpool Cent. Sch. Dist. (United Liverpool Faculty Assn.)* (42 NY2d 509, 513 [*Liverpool*]) and *Matter of Board of Educ. of Watertown City Sch. Dist. (Watertown Educ. Assn.)* (93 NY2d 132, 143 [*Watertown*]). In the first prong of the test, known as "the 'may-they-arbitrate' prong," we "ask whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance" (*Johnstown*, 99 NY2d at 278, citing *Liverpool*, 42 NY2d at 513). If arbitration is not prohibited, we then in the second prong "examine the CBA to determine if the parties have agreed to arbitrate the dispute at issue," which is known as "the 'did-they-agree-to-arbitrate' prong" (*id.*).

Here, petitioner does not contend that there is any prohibition against arbitration of the grievance at issue, and thus we are concerned only with the second prong of the *Johnstown* test. We agree with respondents that Supreme Court erred in concluding that the parties did not agree to arbitrate this issue. "It is well settled that, in deciding an application to stay or compel arbitration under CPLR 7503, the court is concerned only with the threshold determination of arbitrability, and not with the merits of the underlying claim" (*Matter of Alden Cent. Sch. Dist. [Alden Cent. Schs. Administrators' Assn.]*, 115 AD3d 1340, 1340). We therefore reject petitioner's contention that the matter is not arbitrable because the position to which Hight seeks a promotion is excluded from representation by the union in the CBA. "Where, as here, there is a broad arbitration clause and a 'reasonable relationship' between the subject matter of the dispute and the general subject matter of the parties' collective bargaining agreement, the court 'should rule the matter arbitrable, and the arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the [collective bargaining agreement], and whether the subject matter of the dispute fits within them' " (*Matter of Van Scoy [Holder]*, 265 AD2d 806, 807-808, quoting *Watertown*, 93 NY2d at 143; see *Matter of Ontario County [Ontario County Sheriff's Unit 7850-01, CSEA, Local 1000, AFSCME, AFL-CIO]*, 106 AD3d 1463, 1464-1465; *Matter of Niagara Frontier Transp. Auth. v Niagara Frontier Transp. Auth. Superior Officers Assn.*, 71 AD3d 1389, 1390, lv denied 14 NY3d 712). Inasmuch as such a reasonable relationship exists between the subject matter of the grievance, i.e., promotion procedures, and the general subject matter of the CBA, "it is for the arbitrator to determine whether the subject matter of the dispute falls within the scope of the arbitration provisions of the [CBA]" (*Matter of City of Watertown v Watertown Firefighters, Local 191*, 6 AD3d 1095, 1096).

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

**1369**

**CA 14-00461**

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

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THIRTY ONE DEVELOPMENT, LLC,  
PLAINTIFF-RESPONDENT,

V

ORDER

JEFFREY COHEN, INDIVIDUALLY, DEFENDANT,  
THE GILL HOUSE AND CHARTER HOUSE INN, LLC,  
DEFENDANT-APPELLANT.

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

MCMAHON, KUBLICK & SMITH, P.C., SYRACUSE (JAN S. KUBLICK OF COUNSEL),  
FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered June 4, 2013. The order denied the motion of defendant The Gill House and Charter House Inn, LLC, for, inter alia, a declaration that a purchase and sale contract was null and void and granted the cross motion of plaintiff for summary judgment seeking specific performance.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 4 and 5, 2014,

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1375**

**KA 13-01473**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RICHARD A. SCHILLAWSKI, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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CURRIER LAW FIRM, P.C., AUBURN (REBECCA CURRIER OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (NATHAN J. GARLAND OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered July 18, 2013. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment, entered upon his admission to violating the terms of his probation, revoking a previously imposed sentence of probation and sentencing him to a term of incarceration on the underlying conviction of grand larceny in the fourth degree (Penal Law § 155.30 [1]). In appeal No. 2, defendant appeals from a judgment convicting him, upon his plea of guilty, of an additional charge of grand larceny in the fourth degree (§ 155.30 [7]).

Defendant did not move to withdraw his admission or plea or to vacate the judgment of conviction in either appeal and thus failed to preserve for our review his contention in either appeal that his admission or plea of guilty was not voluntarily entered (*see People v Boyden*, 112 AD3d 1372, 1372-1373, *lv denied* 23 NY3d 960; *People v Ruffins*, 78 AD3d 1627, 1628; *People v Diaz*, 62 AD3d 1252, 1252, *lv denied* 12 NY3d 924). This case does not fall within the narrow exception to the preservation requirement (*see generally People v Lopez*, 71 NY2d 662, 666). Insofar as defendant contends in appeal No. 2 that County Court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds, we note that, "[w]hen defendant entered a plea of guilty[,] he forfeited his right to claim that he was deprived of a speedy trial under CPL 30.30" (*People v O'Brien*, 56 NY2d 1009, 1010; *see People v Paduano*, 84 AD3d 1730, 1730; *People v Faro*, 83 AD3d 1569, 1569, *lv denied* 17 NY3d 858). Although

defendant's contention that he was deprived of his constitutional right to a speedy trial survives his plea of guilty (see *People v Romeo*, 47 AD3d 954, 957, *affd* 12 NY3d 51, *cert denied* 558 US 817), "defendant moved to dismiss the indictment on statutory speedy trial grounds only and thus failed to preserve for our review his present contention that he was denied his constitutional right to a speedy trial" (*People v Weeks*, 272 AD2d 983, 983, *lv denied* 95 NY2d 872; see *People v Chinn*, 104 AD3d 1167, 1169, *lv denied* 21 NY3d 1014; *People v Bradberry*, 68 AD3d 1688, 1690, *lv denied* 14 NY3d 838). In any event, that contention is without merit. Upon our review of the record in light of the factors relevant to such a challenge (see *People v Taranovich*, 37 NY2d 442, 445), we conclude that those factors would have compelled denial of such a motion, and we note in particular that "there [was] a complete lack of any evidence that the defense was impaired by reason of the delay" (*People v Benjamin*, 296 AD2d 666, 667; see *People v Pulvino*, 115 AD3d 1220, 1222-1223, *lv denied* 23 NY3d 1024; *People v Doyle*, 50 AD3d 1546, 1546).

Finally, the sentence is not unduly harsh or severe.

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

**1376**

**KA 13-01476**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RICHARD A. SCHILLAWSKI, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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CURRIER LAW FIRM, P.C., AUBURN (REBECCA CURRIER OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (NATHAN J. GARLAND OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered July 18, 2013. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Same Memorandum as in *People v Schillawski* ([appeal No. 1] \_\_\_\_ AD3d \_\_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1377

**KA 13-00460**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HORACE HARPER, JR., DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 7, 2012. The judgment convicted defendant, upon his 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.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]). We agree with defendant that the waiver of the right to appeal does not encompass his challenge to the severity of the sentence because no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction that he was also waiving his right to appeal any issue concerning the severity of the sentence (*see People v Peterson*, 111 AD3d 1412, 1412; *People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

**1378**

**KA 13-01935**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

BRETT D. WHITNEY, DEFENDANT-APPELLANT.

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BRENNA J. RYAN, OSWEGO, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered September 5, 2013. 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: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1379**

**KA 12-01598**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL ROSEBORO, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered June 26, 2012. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts), robbery in the first degree (two counts) and sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of burglary in the first degree (Penal Law § 140.30 [1], [4]) and two counts of robbery in the first degree (§ 160.15 [2], [4]) arising from his participation in a home invasion robbery. We reject defendant's contention that Supreme Court erred in refusing to suppress physical evidence, his statements to the police, and identification testimony as the fruits of an illegal stop. The record of the suppression hearing supports the court's determination that the police officers' pursuit, stop, and detention of defendant were supported by a reasonable suspicion that defendant had committed a crime (*see People v Martinez*, 80 NY2d 444, 446; *People v Bolden*, 109 AD3d 1170, 1172, *lv denied* 22 NY3d 1039). The officers' questions following the stop, concerning the location of the gun and the presence of sharp objects in defendant's pockets, did not constitute interrogation (*see People v Chestnut*, 51 NY2d 14, 22-23, *cert denied* 449 US 1018), and thus the court properly refused to suppress defendant's responses to those questions. The court also properly refused to suppress defendant's statement to a police officer at the jail, which was spontaneous and not the product of interrogation (*see People v Lynes*, 49 NY2d 286, 294-295). The court also properly determined that the showup, conducted in temporal and geographic proximity to the crime, was reasonable under the circumstances (*see People v Woodard*, 83 AD3d 1440, 1441, *lv denied* 17

NY3d 803; *People v Delarosa*, 28 AD3d 1186, 1186-1187, *lv denied* 7 NY3d 811). The composition of the photo array was not unduly suggestive, inasmuch as it did not "create a substantial likelihood that . . . defendant would be singled out for identification" (*People v Chipp*, 75 NY2d 327, 336, *cert denied* 498 US 833), nor was the photo array unduly suggestive by reason of the fact that it was viewed by the same witness who identified defendant in the showup (*see People v Brown*, 254 AD2d 781, 782, *lv denied* 92 NY2d 1029).

We reject defendant's further contention that he was denied due process as a result of the court's rulings. The court properly denied defendant's challenge for cause to a prospective juror whose parents had been victims of a home invasion robbery, inasmuch as that prospective juror "never expressed any doubt concerning [her] ability to be fair and impartial" (*People v Odum*, 67 AD3d 1465, 1465, *lv denied* 14 NY3d 804, *reconsideration denied* 15 NY3d 755, *cert denied* \_\_\_ US \_\_\_, 131 S Ct 326). The court's *Sandoval* ruling did not constitute an abuse of discretion (*see People v Hawkins*, 48 AD3d 1279, 1281, *affd* 11 NY3d 484), nor did the court abuse its discretion in directing the readback of testimony by two court reporters in the format of a role play, with one court reporter reading back questions and the second reading back answers (*see generally People v Smith*, 21 AD3d 1277, 1277-1278, *lv denied* 7 NY3d 763). That format did not create the risk of conveying to the jury that the court favored either party (*see People v Alcide*, 21 NY3d 687, 695).

Defendant failed to preserve for review his challenge to the sufficiency of the evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). 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). Defendant also failed to preserve his contention that he was denied a fair trial by prosecutorial misconduct (*see People v Ross*, 118 AD3d 1413, 1416-1417, *lv denied* 24 NY3d 964), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*). Finally, the sentence is not unduly harsh or severe.

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

**1380**

**KA 09-00741**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JACINTO CEDENO, ALSO KNOWN AS THE GENERAL,  
DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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

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

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Appeal from a new sentence of the Supreme Court, Monroe County (Harold L. Galloway, J.), rendered February 9, 2009 imposed upon defendant's conviction of criminal sale of a controlled substance in the first degree (two counts), and criminal possession of a controlled substance in the first degree (two counts). Defendant was resentenced pursuant to the 2004 Drug Law Reform Act.

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1381**

**KA 14-00079**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HERMAN BANK, DEFENDANT-APPELLANT.

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ROBERT N. ISSEKS, MIDDLETOWN, FOR DEFENDANT-APPELLANT.

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

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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 (Douglas A. Randall, J.), entered December 17, 2013. The order denied defendant's motion 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 appeals from an order denying his motion pursuant to CPL article 440 seeking to vacate the judgment convicting him of, inter alia, manslaughter in the second degree (Penal Law § 125.15 [1]) and vehicular manslaughter in the second degree (§ 125.12 [1]), on the ground that he was denied effective assistance of counsel at trial. We conclude that County Court (Randall, J.) properly denied the motion after a hearing.

Defendant contends that he was denied effective assistance of counsel by defense counsel's misunderstanding of the law and incorrect advice to defendant regarding consecutive sentencing, and that defense counsel's errors deprived him of the opportunity to plead guilty in return for a lesser sentence. Defendant thus had the burden of establishing that "it [was] reasonably probable that a plea bargain acceptable to defendant would have been reached but for counsel's failure" (*People v Garcia*, 19 AD3d 17, 22). We conclude that defendant failed to meet that burden. The court properly concluded that, based on the circumstances of the crime and the strength of the People's case, the prosecutor would not have offered a plea bargain acceptable to defendant, and that County Court (Connell, J.) would not have agreed to such a plea bargain in any event. Although defendant established at the hearing that defense counsel incorrectly advised him during plea negotiations that he was facing consecutive sentences after conviction, defendant failed to establish that he was deprived

of the possibility of a plea bargain acceptable to him as the result of defense counsel's error (*cf. People v Perron*, 287 AD2d 808, 808-809, *lv denied* 97 NY2d 686). "Thus, we cannot find that counsel's misconception during plea negotiations caused defendant any prejudice" (*People v Thompson*, 46 AD3d 939, 941, *lv denied* 9 NY3d 1039)

With respect to defendant's contention that defense counsel adopted an improper trial strategy because of defense counsel's misunderstanding regarding consecutive sentencing, there is no evidence that any other trial strategy was available and, thus, defendant failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's allegedly deficient conduct" in that respect (*People v Cotton*, 120 AD3d 1564, 1566 [internal quotation marks omitted]; see *People v Caban*, 5 NY3d 143, 152; *People v Coleman*, 37 AD3d 489, 490, *lv denied* 9 NY3d 864).

We have considered defendant's remaining contention and conclude that it is without merit.

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

**1383**

**KA 12-02255**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVON GRIFFIN, DEFENDANT-APPELLANT.

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LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MISHA A. COULSON OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (Donald E. Todd, A.J.), rendered August 31, 2012. The judgment convicted defendant, upon his 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.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that County Court erred in denying his motion to suppress cocaine and marijuana he possessed at the time of his arrest. We reject that contention. The evidence adduced at the suppression hearing showed that the police in Syracuse arrested a person for illegally possessing hydrocodone pills, and that person thereafter became a confidential source (CS). Upon arrest, the CS offered to cooperate with the police by arranging a drug transaction with a dealer who previously sold crack cocaine to him. The police agreed to work with the CS, who, in the presence of the officers, called the dealer on his cell phone to arrange a drug transaction. Specifically, the dealer agreed to sell one ounce of crack cocaine to the CS for \$1,400 in front of Dully's Market on the north side of the city.

Shortly after that call was made, defendant, riding as a passenger in a black Jeep, pulled into the parking lot at Dreams Market, which was around the corner from Dully's Market. Staked out in the area, a detective observed defendant exit the vehicle and make a phone call. At that time, the CS received a phone call from the dealer. The detective testified that he could hear defendant speaking on the phone from approximately 30 feet away, and concluded that he was speaking to the CS, whose end of the conversation he was hearing via the speaker phone of a fellow officer who was with the CS. At the

prompting of the police, the CS told the dealer to drive over to Dully's Market. Moments later, the black Jeep arrived at Dully's Market with defendant in the front passenger's seat. The police converged on the vehicle, removed defendant therefrom, and placed him in handcuffs. In response to questions posed by the officers, defendant admitted that he possessed cocaine, which he said was for his personal use, and a search of his person yielded cocaine and marihuana. The police also found cocaine on the floor in the front seat of the Jeep.

After defendant was arrested and placed in the backseat of a patrol vehicle, an officer observed him reaching into the back of his pants. Defendant was therefore removed from the vehicle to be searched more thoroughly, but he broke away and fled on foot. Defendant was apprehended after he tripped and fell, whereupon the officers observed several bags of cocaine on the ground where defendant had been prone. After he was indicted, defendant moved to suppress the drugs seized by the police, but the court denied the motion. The court thereafter appointed new counsel for defendant, who moved to suppress statements that defendant made to the police. The court granted that motion in part. Defendant nevertheless elected to plead guilty to criminal possession of a controlled substance in the third degree in exchange for a sentence promise from the court of seven years in prison plus a period of postrelease supervision. We now affirm.

Defendant contends that the court erred in denying his motion to suppress the cocaine seized by the police because the detective's testimony that he overheard defendant speaking on his cell phone from a distance of 30 feet is incredible as a matter of law. As a preliminary matter, we note that defendant did not advance that particular contention at the suppression hearing, and it is therefore unpreserved for our review (see CPL 470.05 [2]). In any event, in reviewing a determination of a suppression court, "great weight must be accorded its decision because of its ability to observe and assess the credibility of the witnesses, and its findings should not be disturbed unless clearly erroneous" (*People v Mejia*, 64 AD3d 1144, 1145, *lv denied* 13 NY3d 861 [internal quotation marks omitted]). Here, the court expressly credited that portion of the detective's testimony, and we perceive no basis in the record for us to set aside the court's credibility determination in that regard. Unlike defendant, we do not find it impossible to believe that the detective was able to hear defendant speaking from a distance of 30 feet. Moreover, the mere fact that the court did not credit another portion of the detective's testimony did not compel the court to disregard his entire testimony.

In any event, even if the detective did not hear what defendant said on his cell phone while defendant was engaged in a conversation in the parking lot at Dreams Market, the police nevertheless had probable cause to arrest defendant when he arrived moments later at Dully's Market. We conclude that it was more probable than not that defendant was the person speaking on the phone to the CS and making arrangements for the sale of crack cocaine in his possession and,



thus, the "facts and circumstances [were] sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense" (*Fitzpatrick v Rosenthal*, 29 AD3d 24, 28, lv denied 6 NY3d 715 [internal quotation marks omitted]).

Defendant further contends that the court erred in refusing to conduct a *Huntley* hearing with respect to the admissibility of statements he made to the police that were referenced in the People's CPL 710.30 notice. We reject that contention. There were four sets of statements referenced in the CPL 710.30 notice. Defendant conceded that the first set of statements—those he made on the phone to the CS in arranging the drug transaction—were not subject to suppression because defendant was not in custody at the time and thus the statements were voluntary in nature. Based on evidence adduced at the *Mapp* hearing, the court suppressed the second and third sets of statements, i.e., those statements defendant made after he was arrested but before he fled. Although the court refused to suppress the fourth set of statements, it nevertheless ruled that those statements would be inadmissible at trial because they were more prejudicial than probative. Consequently, the only statements that the People were allowed to use at trial were those that defendant correctly conceded were voluntary. Thus, there was no need for a *Huntley* hearing.

We have reviewed defendant's remaining contention and conclude that it does not warrant reversal.

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

**1384**

**KA 12-02110**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EARNEST HUGHES, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered October 31, 2012. 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.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, we conclude that County Court properly refused to suppress tangible evidence and identification testimony. Defendant lacked standing to challenge the search of his codefendant's residence or the seizure of tangible evidence therefrom (*see People v Sommerville*, 6 AD3d 1232, 1232, lv denied 3 NY3d 648; *People v Christian*, 248 AD2d 960, 960, lv denied 91 NY2d 1006). The evidence at the suppression hearing established that the police had reasonable suspicion to detain defendant to conduct the showup identification procedure (*see People v Evans*, 34 AD3d 1301, 1302, lv denied 8 NY3d 845). In addition, the procedure was conducted in temporal and geographic proximity to the crime (*see People v Brisco*, 99 NY2d 596, 597), and it was not unduly suggestive, despite the fact that two witnesses viewed defendant at the same time (*see People v Woodard*, 83 AD3d 1440, 1441, lv denied 17 NY3d 803; *People v Delarosa*, 28 AD3d 1186, 1187, lv denied 7 NY3d 811).

Defendant failed to preserve for our review his contention that the People committed a *Brady* violation by failing to produce the recording of the victim's 911 call prior to the suppression hearing, inasmuch as he failed to move to reopen the suppression hearing when the recording was produced (*see People v Whitted*, 117 AD3d 1179, 1182,

*lv denied* 23 NY3d 1026). Defendant's contention that the People committed a *Rosario* violation by failing to preserve a police officer's notes is also unpreserved because defendant did not object to the destruction of the notes or seek a sanction (see *People v Rogelio*, 79 NY2d 843, 844; *People v Sanzotta*, 191 AD2d 1032, 1032-1033). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

The court properly denied defendant's request to instruct the jury with respect to the defense of temporary innocent possession of a firearm. Even viewing the evidence in the light most favorable to defendant, we conclude that no reasonable view of the evidence supports that defense (see *People v McCoy*, 46 AD3d 1348, 1349-1350, *lv denied* 10 NY3d 813). The court also properly refused to charge the defense of justification inasmuch as that defense does not apply to criminal possession of a weapon (see *People v Bailey*, 111 AD3d 1310, 1311-1312, *lv denied* 23 NY3d 1018).

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. 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). Defendant failed to establish that the prosecutor's alleged misconduct "caused such substantial prejudice to [him] that he has been denied due process of law" (*People v Mott*, 94 AD2d 415, 419; see *People v Jacobson*, 60 AD3d 1326, 1328, *lv denied* 12 NY3d 916). Defendant received the minimum term of incarceration authorized by law for a class C violent felony and, thus, that part of his sentence cannot be considered unduly harsh or severe (see *People v Barlow*, 8 AD3d 1027, 1028, *lv denied* 3 NY3d 657). To the extent that defendant contends that the period of postrelease supervision is unduly harsh and severe, we decline to exercise our power to modify that part of the sentence as a matter of discretion in the interest of justice (see CPL 470.15 [6] [b]).

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

**1385**

**KA 09-00742**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JACINTO CEDENO, ALSO KNOWN AS JACINTO CADENO,  
DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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

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

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Appeal from a new sentence of the Supreme Court, Monroe County (Harold L. Galloway, J.), rendered February 9, 2009 imposed upon defendant's conviction of criminal sale of a controlled substance in the first degree, and criminal possession of a controlled substance in the second degree. Defendant was resentenced pursuant to the 2004 Drug Law Reform Act.

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1386

**KAH 14-00402**

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

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
MALCOLM BROWN, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MARK L. BRADT, SUPERINTENDENT, ATTICA CORRECTIONAL  
FACILITY, RESPONDENT-RESPONDENT.

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

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

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Appeal from a judgment of the Supreme Court, Wyoming County  
(Michael M. Mohun, A.J.), entered January 30, 2014 in a habeas corpus  
proceeding. The judgment dismissed the petition.

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

Memorandum: On appeal from a judgment dismissing his petition  
for a writ of habeas corpus, petitioner contends that he was denied  
due process because he did not receive a final notice of revocation  
after a parole revocation hearing. Petitioner asserts that, as a  
consequence, he was deprived of the ability to pursue an  
administrative appeal inasmuch as he did not know the grounds upon  
which the parole violation was sustained and therefore could not  
challenge them. We conclude that Supreme Court properly dismissed the  
petition.

"As a matter of fundamental due process, petitioner was entitled  
to the prompt receipt of [the Parole Board's final notice of  
revocation] so that he might have an informed basis upon which to seek  
review [and, thus,] neither the failure to pursue an administrative  
appeal nor the absence of prejudice will foreclose our review" of his  
contention (*People ex rel. Sumter v O'Connell*, 10 AD3d 823, 825). We  
nevertheless reject petitioner's contention on the merits. The record  
establishes that a parole revocation decision notice, i.e., the  
disputed final notice of revocation (hereafter, decision notice), was  
sent to petitioner at the Downstate Correctional Facility, and that he  
was incarcerated at that facility at the time that the decision notice  
was sent. The record further establishes that the decision notice was  
sent with a notice of appeal for petitioner to file if he wished to

contest the Hearing Officer's decision to revoke his parole, and that petitioner in fact sent the notice of appeal from the Downstate Correctional Facility to the Parole Board's Appeals Unit within six weeks after the decision notice was sent to him. It is therefore clear that petitioner received the decision notice within the time parameters set forth in the applicable regulation (*see generally* 9 NYCRR 8005.20 [f]), and prior to preparing his administrative appeal. Furthermore, "the general rule is that when a litigant appears by an attorney, notice to the attorney will serve as notice to the client" (*People ex rel. Knowles v Smith*, 54 NY2d 259, 266; *see People ex rel. Aikens v Brown*, 103 AD3d 1212, 1213). Here, the record establishes that petitioner was represented by an attorney, and he failed to establish that his attorney did not receive the decision notice.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1387**

**CA 14-00945**

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

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IN THE MATTER OF ARBITRATION BETWEEN USAA  
INSURANCE COMPANY, PETITIONER-RESPONDENT,

AND

MEMORANDUM AND ORDER

DANIEL B. ARMSTRONG AND MANDY M. ARMSTRONG,  
RESPONDENTS-APPELLANTS.

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GREENE & REID, PLLC, SYRACUSE (EUGENE W. LANE OF COUNSEL), FOR  
RESPONDENTS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (KEVIN R. VAN DUSER OF COUNSEL), FOR  
PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered December 24, 2013 in a proceeding pursuant to CPLR article 75. The order granted the petition for a temporary stay of arbitration.

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

Memorandum: In this proceeding pursuant to CPLR 7503 (b), respondents appeal from an order granting the petition of USAA Insurance Company (USAA) for a temporary stay of arbitration. Supreme Court granted the petition on the ground that respondents' demand for arbitration was premature inasmuch as respondents had not complied with the terms of the endorsement for supplementary uninsured/underinsured motorist (SUM) coverage by submitting to an examination under oath and providing other discovery. Respondents contend that the default judgment they obtained against the underinsured tortfeasor is conclusive on the issue of damages under the terms of the SUM endorsement, thereby precluding USAA from challenging the amount of damages at arbitration; as a consequence, respondents assert that discovery is irrelevant with respect to the issue of damages. We reject that contention. We conclude that, "the terms of the SUM endorsement clearly provide that any sum [USAA] was obligated to pay [respondents] . . . was subject to arbitration" (*Matter of Aftor v Geico Ins. Co.*, 110 AD3d 1062, 1064; see 11 NYCRR 60-2.3 [f] [condition 12]). We further conclude that, while the SUM endorsement requires USAA to pay respondents any amount to which respondents are "legally entitled," such payment is contingent upon the satisfaction of the "Exclusions, Conditions, Limits and other provisions of [the] SUM endorsement" (11 NYCRR 60-2.3 [f]). The

conditions to be satisfied include the discovery provisions set forth in the SUM endorsement (see 11 NYCRR 60-2.3 [f]; see generally *Matter of AIG Claims Servs., Inc. v Bobak*, 39 AD3d 1178, 1179). The court therefore properly granted the temporary stay of arbitration "to permit [r]espondents to comply with" such terms.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

1388

CA 13-01695

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

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IN THE MATTER OF JUNIOR WILSON,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

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

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

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

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Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered August 15, 2013 in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the amended petition.

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

Memorandum: In this CPLR article 78 proceeding, petitioner appeals from a judgment denying his amended petition seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules. Petitioner contends that he was deprived of due process at the disciplinary hearing for a variety of reasons. Because petitioner did not object at the hearing to any of the alleged due process violations, his contention is unpreserved for our review (*see generally Matter of Taylor v Fischer*, 89 AD3d 1298, 1298; *Matter of Morales v Fischer*, 89 AD3d 1346, 1346). In any event, based on our review of the record, including the confidential portion thereof, we conclude that defendant's contention lacks merit.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1389**

**CA 14-00539**

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

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ALEXANDRA GOMEZ-BROCK, PLAINTIFF-RESPONDENT,

V

ORDER

STEVEN KUBIAK AND RACHEL M. KUBIAK,  
DEFENDANTS-APPELLANTS.

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RUPP BAASE PFALZGRAF CUNNINGHAM & COPPOLA LLC, BUFFALO (JOHN R.  
CONDREN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GROSS SHUMAN BRIZDLE & GILFILLAN, P.C., BUFFALO (SARAH P. RERA OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered December 13, 2013. The order, among other things, granted in part plaintiff's motion to set aside the jury verdict.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 22, 2014,

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1390

**CA 13-01946**

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

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FREDERICK NEVILLE AND LUCY NEVILLE,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

CHAUTAUQUA LAKE CENTRAL SCHOOL DISTRICT,  
LPCIMINELLI, INC., DEFENDANTS-APPELLANTS,  
ET AL., DEFENDANTS.

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

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (CHARLES H. COBB OF  
COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Chautauqua County  
(Deborah A. Chimes, J.), entered February 28, 2013. The order, among  
other things, denied in part the motion of defendants Chautauqua Lake  
Central School District and LPCiminelli, Inc., for summary judgment.

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

Memorandum: Plaintiffs commenced this action alleging that  
defendants violated Labor Law § 241 (6) insofar as they failed to  
comply with 12 NYCRR 23-1.7 (h), requiring that protective equipment  
be provided to employees using corrosive substances, and regulation  
23-1.8 (c) (4), requiring that employees using corrosive substances  
shall be required to wear appropriate protective apparel. Supreme  
Court denied that part of the motion of defendants-appellants  
(defendants) seeking summary judgment dismissing the claim that they  
violated those regulations. Frederick Neville (plaintiff) was injured  
when his neck and face were splashed by hot tar while he was placing a  
100-pound "keg" of asphalt into the "kettle" (see *Lee v Lewiston  
Constr. Corp.*, 23 AD3d 1002, 1003; cf. *Flores v Infrastructure Repair  
Serv. LLC*, 115 AD3d 543, 543-544). At the time he was injured,  
plaintiff was wearing a plastic face mask connected to a hard hat that  
covered his face to the chin, two long-sleeved cotton sweatshirts, two  
pairs of gloves, long pants, and work boots.

We agree with defendants that the court erred in determining  
that the affidavit of plaintiffs' expert was sufficient to raise an  
issue of fact to defeat the motion with respect to the above  
regulations. The expert stated in conclusory terms, without evidence

of a deviation from industry standards (*see Diaz v Downtown Hosp.*, 99 NY2d 542, 544), that the safety equipment and apparel were not appropriate because the face mask was not long enough to prevent hot tar from splashing underneath it and plaintiff was not provided with a fire-proof hood to protect his neck and head. We nevertheless conclude that plaintiffs raised an issue of fact sufficient to defeat the motion by submitting the deposition testimony of two coworkers (*see generally Zuckerman v City of New York*, 49 NY2d 557, 561). One coworker explained that he had also worked for other companies and had seen longer face masks used as protection for the task in which plaintiff was engaged. The other coworker stated that he ordered safety equipment for plaintiff's employer and that he had ordered "hoodies" for employees to wear to cover the head and neck. It is undisputed that the face mask provided to plaintiff did not prevent the tar from splashing onto plaintiff's face under the mask and that plaintiff was not wearing any protective equipment or protective apparel to protect his neck.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1399**

**KA 12-00900**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KURT MOORE, DEFENDANT-APPELLANT.

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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.

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Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered July 6, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant challenges County Court's imposition of restitution. Initially, we note that, although an order of restitution is not as a general rule appealable (*see* CPL 450.10; *People v Fricchione*, 43 AD3d 410, 411), "we deem the postsentence restitution order[] here to be [an] amendment[] to the judgment of conviction, [and thus] our review of such order[] is appropriate" upon defendant's appeal from the judgment of conviction (*People v Naumowicz*, 76 AD3d 747, 749 n 1). Furthermore, as the People correctly concede, defendant's contention that the court had no authority to impose restitution under these circumstances is a challenge to the legality of the sentence, and thus survives his waiver of the right to appeal (*see People v Taylor*, 242 AD2d 925, 926).

With respect to the merits, as the People again correctly concede, the court erred in imposing restitution arising from a charge of criminal possession of a forged instrument because that charge was not contained in the indictment, nor was it related to an offense that was "part of the same criminal transaction or . . . contained in any other accusatory instrument disposed of by" defendant's plea of guilty to the offense on appeal (Penal Law § 60.27 [4] [a]; *see People v*

*Diola*, 299 AD2d 962, 962, *lv denied* 99 NY2d 581; *cf. People v Brady*, 59 AD3d 748, 749). We therefore modify the judgment by vacating the order of restitution.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1400**

**KA 13-01548**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMAHL A. THOMAS, II, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered June 25, 2013. 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 [1]). Although defendant knowingly, intelligently, and voluntarily waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256), that waiver does not encompass the denial of his request for youthful offender status because no mention of youthful offender status was made before defendant waived his right to appeal (*see People v Anderson*, 90 AD3d 1475, 1476, *lv denied* 18 NY3d 991). We conclude, however, that County Court did not abuse its discretion in refusing to grant defendant youthful offender status (*see People v Johnson*, 109 AD3d 1191, 1191-1192, *lv denied* 22 NY3d 997; *People v Davis*, 84 AD3d 1710, 1710, *lv denied* 17 NY3d 815), and we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*cf. People v Noel*, 106 AD2d 854, 854-855).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1401**

**KA 12-01164**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

VERNON WASHINGTON, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MISHA A. COULSON OF COUNSEL), FOR RESPONDENT.

---

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered July 22, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court abused its discretion in directing that the sentence run consecutively to, rather than concurrently with, a prior undischarged sentence for an unrelated conviction. We reject that contention. The court did not abuse its discretion in determining that no mitigating circumstances were present to warrant the imposition of a concurrent sentence in the interest of justice (*see* Penal Law § 70.25 [2-b]; *see generally* *People v Garcia*, 84 NY2d 336, 341-343; *People v Elder*, 71 AD3d 1483, 1484, lv denied 16 NY3d 743, *reconsideration denied* 16 NY3d 858).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

**1403**

**KA 13-00714**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EMANUEL D. RODRIGUEZ, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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THE LEGAL AID SOCIETY OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Sheila A. DiTullio, A.J.), rendered March 26, 2013. The judgment convicted defendant, upon his plea of guilty, of petit larceny.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from judgments convicting him upon his pleas of guilty of petit larceny (Penal Law § 155.25) and attempted burglary in the second degree (§§ 110.00, 140.25 [2]), respectively. 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 id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1404**

**KA 13-00715**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EMANUEL D. RODRIGUEZ, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

---

Appeal from a judgment of the Supreme Court, Erie County (Sheila A. DiTullio, A.J.), rendered March 26, 2013. 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.

Same Memorandum as in *People v Rodriguez* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1406**

**KA 13-00528**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHEVELLE LEWIS, DEFENDANT-APPELLANT.

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

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

---

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered February 8, 2013. The judgment convicted defendant, upon a nonjury verdict, of driving while intoxicated, driving while ability impaired and failure to stay within a single lane.

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

Memorandum: Defendant appeals from a judgment convicting her upon a nonjury verdict of driving while intoxicated as a felony (Vehicle and Traffic Law §§ 1192 [2]; 1193 [1] [c] [i]), driving while ability impaired (§ 1192 [1]), and failure to stay within a single lane (§ 1128 [a]). We reject defendant's contention that Supreme Court erred in admitting in evidence breath test calibration and simulator solution certificates used in verifying the accuracy of the breathalyzer test. According to defendant, the admission of those records in evidence violated her rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution because the records were testimonial in nature (*see generally Crawford v Washington*, 541 US 36, 50-54). We reject defendant's contention, inasmuch as the Court of Appeals has determined "that documents pertaining to the routine inspection, maintenance and calibration of breathalyzer machines are nontestimonial under *Crawford* and its progeny" (*People v Pealer*, 20 NY3d 447, 456, cert denied \_\_\_ US \_\_\_, 134 S Ct 105; *see People v Cook*, 111 AD3d 1169, 1169-1170, lv denied 22 NY3d 1155).

Defendant further contends that the police did not have probable cause to believe that she was operating her vehicle while intoxicated at the time that she was arrested and thus that her statements and any other evidence seized as a result of the arrest, including the results

of the breathalyzer test, should have been suppressed. Defendant moved only to suppress her statements on the ground that they were a product of an unlawful arrest, and thus her contention is unpreserved for our review insofar as it concerns evidence other than her statements (see *People v Price*, 112 AD3d 1345, 1345-1346; *People v Fuentes*, 52 AD3d 1297, 1298, *lv denied* 11 NY3d 736). We decline to exercise our power to review that part of defendant's contention concerning evidence other than her statements as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). We conclude that the court properly refused to suppress defendant's statements. The record establishes that the officer who took defendant into custody testified that defendant hit a curb with her vehicle while she was exiting a gas station, and that she also failed to stay within her lane while driving. That officer thus attempted to effectuate a traffic stop of defendant's vehicle, whereupon defendant stopped her vehicle in the middle of the street. The officer directed her to pull into a nearby parking lot. The officer subsequently smelled the odor of alcohol emanating from defendant, and he observed that her eyes were glassy and bloodshot. Even crediting defendant's contention that there was contradictory evidence regarding whether a field sobriety test was conducted at the scene, we nevertheless conclude from the totality of the circumstances, including defendant's erratic driving, defendant's appearance, and the odor of alcohol detected by the officer, that there was probable cause to believe that defendant was driving in violation of Vehicle and Traffic Law § 1192 (see *People v LeRow*, 70 AD3d 66, 71; *People v Mojica*, 62 AD3d 100, 114, *lv denied* 12 NY3d 856; *People v Scalzo*, 176 AD2d 363, 364).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1409**

**CAF 13-01705**

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

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IN THE MATTER OF AMIR S., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

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MONROE COUNTY ATTORNEY, PETITIONER-RESPONDENT.

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ROBERT A. DINIERI, ATTORNEY FOR THE CHILD, CLYDE, FOR  
RESPONDENT-APPELLANT.

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (BRETT GRANVILLE OF  
COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an amended order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered September 6, 2012 in a proceeding pursuant to Family Court Act article 3. The amended order, among other things, adjudged that respondent is a juvenile delinquent and placed him in the custody of the New York State Office of Children and Family Services for a period of three years.

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

Memorandum: Respondent appeals from an amended order adjudicating him to be a juvenile delinquent based upon the finding that he committed acts that, if committed by an adult, would constitute the crimes of rape in the first degree (Penal Law § 130.35 [3]), criminal sexual act in the first degree (§ 130.50 [3]), and sexual abuse in the first degree (§ 130.65 [3]). Contrary to respondent's contention, Family Court properly determined that he required a restrictive placement (see Family Ct Act § 353.5 [1]). In making that determination, the court properly considered the seriousness of the crime, respondent's need for therapy in conjunction with his failure to admit to his actions in the instant case, respondent's lack of support and adequate supervision at home, the need to protect the community in light of respondent's aggressive and inappropriate sexual behavior toward others at school, and his series of mental hygiene arrests (see § 353.5 [2]; *Matter of Joseph G.*, 78 AD3d 1700, 1700-1701; *Matter of Lamar J.F.*, 8 AD3d 1091, 1092; see also *Matter of Christopher Q.Q.*, 40 AD3d 1183, 1184). We conclude that "[t]he order of disposition 'reflects an appropriate balancing of the needs of [respondent] and the safety of the community' " (*Matter of Noel M.*, 240 AD2d 231, 231).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1411**

**CAF 13-01604**

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

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IN THE MATTER OF PHILIP MARACLE,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JESSICA R. DESCHAMPS, RESPONDENT-APPELLANT.

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

TRONOLONE & SURGALLA, P.C., BUFFALO (DAVID C. CROWTHER OF COUNSEL),  
FOR PETITIONER-RESPONDENT.

CHRISTOPHER J. BRECHTEL, ATTORNEY FOR THE CHILDREN, BUFFALO.

---

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered August 7, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner primary physical custody of the subject children.

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

Memorandum: In this custody proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that modified a prior order entered on stipulation of the parties by awarding petitioner father primary physical custody of the parties' children. Although the mother is correct that, in seeking to change an existing custody arrangement that is based upon a stipulation, the father was required to show a change in circumstances "since the time of the stipulation" (*Matter of Hight v Hight*, 19 AD3d 1159, 1160 [internal quotation marks omitted]), we conclude, contrary to her contention, that there is a sound and substantial basis for Family Court's determination that the father had established such a change in circumstances (*see generally Matter of Chapman v Tucker*, 74 AD3d 1905, 1906; *Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1449). The mother does not challenge the merits of the court's determination that the children's best interests are served by awarding physical custody to the father.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1412**

**CA 13-01127**

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

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IN THE MATTER OF JOVAN FLUDD,  
PETITIONER-APPELLANT,

V

ORDER

DALE ARTUS, SUPERINTENDENT, WENDE CORRECTIONAL  
FACILITY, ET AL., RESPONDENTS-RESPONDENTS.

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JOVAN FLUDD, PETITIONER-APPELLANT PRO SE.

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

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Appeal from a judgment (denominated order) of the Supreme Court,  
Erie County (Russell P. Buscaglia, A.J.), entered February 13, 2013 in  
a CPLR article 78 proceeding. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed  
without costs as moot (*see Matter of Ansari v Travis*, 9 AD3d 901, *lv*  
*denied* 3 NY3d 610).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1420**

**CA 13-01691**

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

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IN THE MATTER OF HARRY ELMORE,  
PETITIONER-APPELLANT,

V

ORDER

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

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

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

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Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.) entered July 30, 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: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

**1423**

**KA 09-00280**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

LANCE J. REED, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered December 9, 2008. 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.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1424**

**KA 11-01211**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EDWARD HARVEY, DEFENDANT-APPELLANT.

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LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered April 26, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Onondaga County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a guilty plea of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We agree with defendant that the plea colloquy conducted by County Court is factually insufficient to establish territorial jurisdiction. "Because the State only has power to enact and enforce criminal laws within its territorial borders, there can be no criminal offense unless it has territorial jurisdiction" (*People v McLaughlin*, 80 NY2d 466, 471). Contrary to the People's contention, the issue of territorial jurisdiction raised by defendant survives his waiver of the right to appeal (*see People v Montane*, 110 AD3d 1101, 1101-1102, *lv denied* 22 NY3d 1089), does not require preservation (*see People v Holmes*, 101 AD3d 1632, 1633, *lv denied* 21 NY3d 944; *see generally People v Hanley*, 20 NY3d 601, 604-605; *People v Correa*, 15 NY3d 213, 222), and is not waived by his guilty plea (*see Montane*, 110 AD3d at 1102-1103; *People v Casias*, 303 AD2d 294, 294, *Iv denied* 100 NY2d 579; *see generally People v Carvajal*, 6 NY3d 305, 312; *McLaughlin*, 80 NY2d at 471).

As a general rule, "for the State to have criminal jurisdiction, either the alleged conduct or some consequence of it must have occurred within the State" (*McLaughlin*, 80 NY2d at 471). Here, although the indictment alleged conduct by defendant that occurred in the State of Ohio and the City of Syracuse, during his plea colloquy

defendant admitted to possessing a weapon in Ohio only; there was no mention during the plea colloquy of possession of a weapon in Syracuse. We conclude that this case is analogous to cases in which the plea colloquy negates an element of the crime to which defendant is pleading guilty, and, thus, we further conclude that, "where[, as here,] the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the [State's power to prosecute the case], . . . the trial court has a duty to inquire further to ensure that [the State has territorial jurisdiction]" (*People v Lopez*, 71 NY2d 662, 666; see generally *Carvajal*, 6 NY3d at 312). Because the court failed to do so, we reverse the judgment of conviction, vacate the plea and remit the matter to County Court for further proceedings on the indictment.

In light of our determination, we need not review defendant's remaining contention.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1425

**KA 12-00509**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JULIE A. FULLER, DEFENDANT-APPELLANT.

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

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (KRISTYNA S. MILLS OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered October 3, 2011. The judgment convicted defendant, upon her plea of guilty, of attempted 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 her upon her plea of guilty of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]), defendant contends that her plea was not knowingly or voluntarily entered because she was under the influence of alcohol at the time of the plea. Although that contention survives defendant's valid waiver of the right to appeal (*see generally People v Seaberg*, 74 NY2d 1, 10; *People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746), and is preserved for our review by defendant's motion to vacate the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665), we conclude that it is without merit. Defendant told County Court during the plea colloquy that she had not consumed any drugs or alcohol in the previous 24 hours, and there is nothing in the record to suggest otherwise (*see People v Forshey*, 298 AD2d 962, 963, *lv denied* 99 NY2d 558, *reconsideration denied* 100 NY2d 561; *see also People v Galagan*, 35 AD3d 973, 974; *People v Ackerman*, 199 AD2d 576, 577, *lv denied* 83 NY2d 848). Defendant further contends that she received ineffective assistance of counsel because she informed defense counsel that she was intoxicated and defense counsel failed to advise the court of that fact. That contention, insofar as it survives her guilty plea, is based on matters outside the record and thus is not reviewable on direct appeal (*see People v Davis*, 119 AD3d 1383, 1384, *lv denied* 24 NY3d 960; *People v Bethune*, 21 AD3d 1316, 1316, *lv denied* 6 NY3d 752).

Finally, inasmuch as defendant failed to obtain leave to appeal from the order denying her CPL 440.10 motion, her contentions with respect to the denial of that motion are not properly before us (see CPL 450.15 [1]; 460.15; *People v Acosta*, 19 AD3d 1041, 1041, *lv denied* 5 NY3d 803; *People v Brown*, 277 AD2d 987, 987, *lv denied* 96 NY2d 781).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1427**

**KA 13-01907**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

MARK M. UTLEY, DEFENDANT-APPELLANT.

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NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (GREGORY A. KILBURN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered July 22, 2013. 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: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1428

**KA 12-02265**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIE MARTIN, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CLAIRE H. FORTIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered October 22, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted 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 attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [b]), defendant contends that the waiver of the right to appeal is invalid and challenges the severity of the sentence. Although defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), we nevertheless agree with defendant that the waiver does not preclude his challenge to the severity of the sentence. "While it is evident that defendant waived [his] right to appeal [his] conviction, there is no indication in the record that defendant waived the right to appeal the harshness of [his] sentence" (*People v Maracle*, 19 NY3d 925, 928; *see People v Peterson*, 111 AD3d 1412, 1412). On the merits, we conclude that the sentence is not unduly harsh or severe.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1429**

**KAH 13-01488**

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

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
FRANK GARCIA, PETITIONER-APPELLANT,

V

ORDER

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

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WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., WARSAW (NORMAN P. EFFMAN  
OF COUNSEL), FOR PETITIONER-APPELLANT.

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Appeal from a judgment (denominated order) of the Supreme Court,  
Wyoming County (Mark H. Dadd, A.J.), entered June 18, 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.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

1431

**CAF 14-00136**

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

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IN THE MATTER OF DANA P. BROWN,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

VICKI L. HEUBUSCH, RESPONDENT-RESPONDENT.

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

WILLIAM D. BRODERICK, JR., ATTORNEY FOR THE CHILDREN, ELMA.

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Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered November 26, 2013 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

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

Memorandum: In this proceeding pursuant to article 8 of the Family Court Act, petitioner father appeals from an order that dismissed his petition for lack of jurisdiction. We affirm. The father concedes that respondent mother moved with the children to Florida more than six months before the filing of the petition, and there is no evidence that they ever returned to New York. The record establishes that the children no longer "have a significant connection" with New York and that "substantial evidence is no longer available in this [S]tate concerning the child[ren]'s care, protection, training, and personal relationships" (Domestic Relations Law § 76-a [1] [a]), and the father failed to submit any evidence to the contrary. We therefore conclude that Family Court properly dismissed the petition for lack of jurisdiction (*see Matter of Maida v Capraro*, 86 AD3d 924, 924; *Matter of Zippo v Zippo*, 41 AD3d 915, 916).

We have considered the father's remaining contention and conclude that it is without merit.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1433

**CAF 13-02219**

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

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IN THE MATTER OF BERNADETTE SIERAK,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

KYLE STARING, RESPONDENT-APPELLANT.  
(APPEAL NO. 1.)

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MARK A. WOLBER, UTICA, FOR RESPONDENT-APPELLANT.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR  
PETITIONER-RESPONDENT.

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Appeal from a corrected order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered August 5, 2013 in a proceeding pursuant to Family Court Act article 6. The corrected order, among other things, dismissed petitions filed by Kyle Staring.

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

Memorandum: Respondent father filed numerous petitions alleging violations of an order of custody and visitation and seeking modification of that order. After petitioner mother moved to dismiss those petitions, the father filed an additional petition seeking to modify the order of custody and visitation, and he relied exclusively on an affidavit he had previously submitted in opposition to the mother's motion to dismiss. In appeal No. 1, the father appeals from the corrected order pursuant to which Family Court, inter alia, granted the mother's motion to dismiss the initial petitions and, sua sponte, dismissed the final petition in the interest of judicial economy. The court also directed the mother's attorney to submit an affidavit and a proposed order directing payment of attorney's fees. In appeal No. 2, the father appeals from the order awarding the mother \$3,200 in attorney's fees.

Contrary to the father's contention in appeal No. 1, the court did not err in sua sponte dismissing the final petition to modify custody and visitation in the interest of justice and without a hearing. As noted above, that petition was supported solely by an affidavit already before the court. We thus agree with the mother that the allegations contained in that petition, including allegations of a change of circumstances, were "duly reviewed, argued and considered by the court" in the context of the mother's motion to

dismiss. "[T]he record reflects that, despite ample opportunity to do so, [the father] failed to present credible evidence to support [his] allegations against [the mother] and that the court had sufficient evidence on which to determine that a change of custody [or visitation] was not in the best interests of the child. In the absence of the necessary evidentiary showing, the court was not required to hold a hearing" (*Matter of Shelia M. v Joseph G.*, 77 AD3d 420, 420; see *Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417-1418; see also *Matter of Harry P. v Cindy W.*, 48 AD3d 1100, 1100).

With respect to appeal No. 2, the father contends that the court abused its discretion in awarding the mother attorney's fees because the mother's attorney failed to substantially comply with the requirements of Domestic Relations Law § 237 (b) and 22 NYCRR 1400.3. That contention, "raised for the first time on appeal, is not properly before this Court" (*Matter of Felix v Felix*, 110 AD3d 805, 806; see *Greenfield v Greenfield*, 270 AD2d 57, 57; see also *Matter of Eby v Joseph E.S.*, 28 AD3d 1091, 1092, lv dismissed 7 NY3d 783).

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

**1434**

**CAF 13-02220**

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

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IN THE MATTER OF BERNADETTE SIERAK,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

KYLE STARING, RESPONDENT-APPELLANT.  
(APPEAL NO. 2.)

---

MARK A. WOLBER, UTICA, FOR RESPONDENT-APPELLANT.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR  
PETITIONER-RESPONDENT.

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Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered September 6, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, ordered Kyle Staring to pay attorney's fees in the sum of \$3,200.

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

Same Memorandum as in *Matter of Sierak v Staring* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1435

**CAF 13-02092**

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

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IN THE MATTER OF JAXSIN L.

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

HEATHER L., RESPONDENT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRYCE THERRIEN OF  
COUNSEL), FOR RESPONDENT-APPELLANT.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (POLLY E. JOHNSON OF  
COUNSEL), FOR PETITIONER-RESPONDENT.

LISA M. FAHEY, ATTORNEY FOR THE CHILD, EAST SYRACUSE.

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Appeal from an order of the Family Court, Onondaga County  
(Michael L. Hanuszczak, J.), entered November 4, 2013 in a proceeding  
pursuant to Family Court Act article 10. The order, insofar as  
appealed from, denied respondent visitation with the subject child.

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

Memorandum: As limited by her brief, respondent mother appeals  
from an order that denied her visitation with the subject child.  
Inasmuch as a subsequent order has been entered terminating the  
mother's parental rights, we dismiss this appeal as moot (*see Matter  
of Lateesha J.*, 252 AD2d 503, 503-504; *see also Matter of Alexander M.  
[Michael M.]*, 83 AD3d 1400, 1401, *lv denied* 17 NY3d 704). We conclude  
that the exception to the mootness doctrine does not apply herein (*see  
Matter of Francis S. [Wendy H.]*, 67 AD3d 1442, 1442, *lv denied* 14 NY3d  
702).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1438

CA 14-00816

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

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KATHLEEN E. ST. JOHN, CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK AND NEW YORK STATE THRUWAY  
AUTHORITY, DEFENDANTS-RESPONDENTS.  
(CLAIM NO. 112856.)

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CANTOR, DOLCE & PANEPINTO, P.C., BUFFALO (ANNE M. WHEELER OF COUNSEL),  
FOR CLAIMANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MICHAEL  
FEELEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

---

Appeal from an order of the Court of Claims (Jeremiah J. Moriarty, III, A.J.), entered July 30, 2013. The order, among other things, granted the motion of defendants for summary judgment and dismissed the claim.

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

Memorandum: Claimant commenced this Labor Law and common-law negligence action seeking damages for injuries she sustained when she allegedly slipped or tripped as she attempted to attach a piece of equipment to the hitch of a pickup truck. At the time of the accident, claimant was employed by a contractor hired by defendant State of New York (State) for a highway reconstruction project. The accident occurred at a parking lot leased by claimant's employer for, inter alia, the storage of material and equipment used on the project, and claimant and her coworker were preparing to transport a large, two-wheeled light plant to the construction site when she slipped or tripped.

The Court of Claims properly granted defendants' motion seeking summary judgment dismissing the claim and denied claimant's cross motion seeking, inter alia, partial summary judgment on the issue of liability with respect to her Labor Law § 241 (6) claim. Defendants established as a matter of law that purported defendant New York State Thruway Authority had no connection with the project and was erroneously named a defendant, and claimant failed to raise a triable issue of fact (*see Koch v Haven-Busch Co.*, 41 AD2d 774, 774; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Defendants further established as a matter of law that the State is not an

"owner" for purposes of liability under Labor Law § 241 (6). The State "was the owner of the construction site, but was not the owner of the property where [claimant] was injured" (*Sanzone v City of Rome*, 292 AD2d 777, 778), and it had no legal authority over the parking lot, which was located on private property that had been leased by claimant's employer (see *Farruggia v Town of Penfield*, 119 AD3d 1320, 1321, *lv denied* 24 NY3d 906). In addition, with respect to the Labor Law § 200 and common-law negligence claims, the State established that it "did not occupy, own, or control the [parking lot] and did not employ it for a special use, and thus did not owe [claimant] a duty of care" (*Knight v Realty USA.com, Inc.*, 96 AD3d 1443, 1444). Claimant failed to raise a triable issue of fact in response to defendants' submissions (see *Farruggia*, 119 AD3d at 1322; see generally *Zuckerman*, 49 NY2d at 562). Inasmuch as the claim is dismissed, there is no basis for claimant to seek leave to amend her bill of particulars (see *Farruggia*, 119 AD3d at 1322) and, thus, the court properly denied that part of claimant's cross motion seeking such leave.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1440**

**CA 14-00222**

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

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JASON RUPP, PLAINTIFF-APPELLANT,

V

ORDER

JEREMY BURGER, DEFENDANT-RESPONDENT.

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KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JESSICA REICH OF COUNSEL),  
FOR PLAINTIFF-APPELLANT.

HOGAN WILLIG, PLLC, AMHERST (GEOFFREY GISMONDI OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered October 4, 2013. The judgment granted in part the motion of defendant for summary judgment, dismissed the complaint, determined defendant to be the fee-title owner of disputed real property and denied the cross motion of plaintiff for summary judgment.

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

**1442**

**CA 14-01050**

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

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IN THE MATTER OF RALPH DAHLGREN,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES  
AND BARBARA FIALA, COMMISSIONER, NEW YORK  
STATE DEPARTMENT OF MOTOR VEHICLES,  
RESPONDENTS-RESPONDENTS.

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ANTHONY J. LANA, BUFFALO, FOR PETITIONER-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered August 22, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: In this CPLR article 78 proceeding, petitioner appeals from a judgment that dismissed his petition seeking to annul a determination of the Commissioner of Motor Vehicles (Commissioner). The Commissioner granted petitioner's application for relicensing and imposed an A2 restriction on petitioner's license for a period of five years, thereby requiring petitioner to install an ignition interlock device on any motor vehicle he owns or operates (see 15 NYCRR 136.5 [b] [3] [ii]). We agree with the Commissioner that Supreme Court properly dismissed the petition and now affirm.

The decision to relicense a driver after a period of mandatory revocation is within the sound discretion of the Commissioner (see Vehicle and Traffic Law §§ 510 [5]-[6]; 1193 [2] [c] [1]; 1194 [2] [d] [1]; 15 NYCRR 136.1 [a]). If the Commissioner grants an application for relicensing after a person's license has been revoked for an alcohol- or drug-related offense, and such person has had three or four alcohol- or drug-related driving convictions within the 25-year look back period (see 15 NYCRR 136.5 [a] [3]), the Commissioner must impose a restriction "on such person's license for a period of five years and shall require the installation of an ignition interlock device in any motor vehicle owned or operated by such person for such five-year period" (15 NYCRR 136.5 [b] [3] [ii]).

Here, petitioner had his license revoked on September 14, 2000 as a result of a conviction of driving while intoxicated (*see generally* Vehicle and Traffic Law § 1192). Within the 25 years preceding the offense, petitioner had twice been convicted of driving while ability impaired (*see generally id.*). Petitioner thus had three alcohol-related driving convictions within the 25-year look back period (*see* 15 NYCRR 136.5 [a] [3]). He applied for a new license on June 15, 2012, and the Commissioner granted the application and imposed the ignition interlock restriction on petitioner's license in accordance with 15 NYCRR 136.5 (b) (3) (ii).

We reject petitioner's contention that his license should not be subject to the ignition interlock restriction because he waited nearly 10 years to apply for a new license. The Commissioner's regulations permit the imposition of the A2 restriction upon granting an application for a new license without regard to how long the applicant has been without one. That rule is in keeping with the Commissioner's "responsibility to provide meaningful safeguards for the general public who are users of the highways . . . [and] to take disciplinary action in order to force a change in the attitude and driving habits of problem drivers" (15 NYCRR 136.1 [a]).

As to petitioner's remaining contentions, we conclude that the delay in processing petitioner's application was neither unlawful nor an abuse of discretion (*see Matter of Scism v Fiala*, 122 AD3d 1197, 1198; *see generally Hyslip v Sloan*, 124 AD2d 1060, 1061, *lv denied* 69 NY2d 611, *cert denied* 484 US 914), and that the Commissioner properly applied the "25 year look back period" (15 NYCRR 136.5 [a] [3]; *see Matter of Funes v New York State Dept. of Motor Vehs.*, 2013 NY Slip Op 31082[U], \*1).

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

**1443**

**CA 14-00843**

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

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IN THE MATTER OF THE APPLICATION OF WILLIAM MITCHELL, PETITIONER-RESPONDENT, FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND/OR PROPERTY OF DEBORAH A.L., AN ALLEGED INCAPACITATED PERSON, RESPONDENT-APPELLANT. (PROCEEDING NO. 1.)

MEMORANDUM AND ORDER

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IN THE MATTER OF THE APPLICATION OF MICHAEL G. LANG, PETITIONER-RESPONDENT, FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND/OR PROPERTY OF DEBORAH A.L., AN ALLEGED INCAPACITATED PERSON, RESPONDENT-APPELLANT. (PROCEEDING NO. 2.)

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AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (JOHN D. CONNERS OF COUNSEL), FOR RESPONDENT-APPELLANT.

SHANLEY LAW OFFICES, OSWEGO (P. MICHAEL SHANLEY OF COUNSEL), FOR PETITIONER-RESPONDENT MICHAEL G. LANG.

RODAK LAW OFFICE, P.C., OSWEGO (JOSEPH G. RODAK OF COUNSEL), FOR PETITIONER-RESPONDENT WILLIAM MITCHELL.

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Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered July 8, 2013 in proceedings pursuant to Mental Hygiene Law article 81. The order determined that respondent is an incapacitated person.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Supreme Court, Oswego County, for further proceedings in accordance with the following Memorandum: In these proceedings pursuant to Mental Hygiene Law article 81, respondent, an alleged incapacitated person (AIP), appeals from an order that determined that she is incapacitated and in need of a guardian. We agree with the AIP that Supreme Court erred in making that determination without considering "the 'sufficiency and reliability of available resources' (Mental Hygiene Law § 81.02 [a] [2]) to satisfy the AIP's personal needs and property management without the need for a guardian" (*Matter of Samuel S. [Helene S.]*, 96 AD3d 954, 957, lv dismissed 19 NY3d 1065). It is undisputed that the AIP had "available resources," i.e., a power of attorney and healthcare proxy (see Mental Hygiene Law § 81.03 [e]), and the court should therefore have inquired whether those advance directives were adequate to protect the AIP's personal and

property interests before determining that she is incapacitated and in need of a guardian (see *Samuel S.*, 96 AD3d at 956-957; *Matter of May Far C.*, 61 AD3d 680, 680; *Matter of Maher*, 207 AD2d 133, 140, lv denied 86 NY2d 703, rearg denied 86 NY2d 886).

We therefore remit the matter to Supreme Court for further proceedings on the petitions.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1444**

**KA 13-00556**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ERROL FOWLER-GRAHAM, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered November 18, 2011. The judgment convicted defendant, upon a jury verdict, of rape in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [1]), defendant contends that County Court erred in denying his challenge for cause to a prospective juror. We reject that contention. Pursuant to CPL 270.20 (1) (b), a challenge for cause to a prospective juror may be made "on the ground that . . . he [or she] has a state of mind that is likely to preclude him [or her] from rendering an impartial verdict based upon the evidence adduced at the trial." Only statements that "cast serious doubt on [a prospective juror's] ability to render an impartial verdict" trigger a court's obligation to obtain an unequivocal assurance from the prospective juror that he or she can render an impartial verdict (*People v Arnold*, 96 NY2d 358, 363; see *People v Harris*, 19 NY3d 679, 685). Here, the prospective juror stated that her daughter had been the victim of a sexual assault, but nothing that she said raised a serious doubt as to her ability to render an impartial verdict (see *People v Campanella*, 100 AD3d 1420, 1421, lv denied 20 NY3d 1060; *People v Turner*, 6 AD3d 1190, 1190, lv denied 3 NY3d 649). In any event, in responding to follow-up questions from the court and defense counsel, the prospective juror gave an "unequivocal assurance that [she could] set aside any bias and render an impartial verdict based on the evidence" (*People v Johnson*, 94 NY2d 600, 614; see *People v Chambers*, 97 NY2d 417, 419).

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

reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, the sentence is not unduly harsh or severe.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1445

**KA 11-02476**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ERIC TAPIA-DEJESUS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MISHA A. COULSON OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered June 29, 2011. 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 reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Viewing the evidence in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621), we conclude that it is legally sufficient to support the conviction (see generally *People v Bleakley*, 69 NY2d 490, 495). Moreover, viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we also conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495).

As defendant correctly contends, however, reversal is required based on County Court's error in denying defendant's challenge for cause to a prospective juror, following which defendant exhausted his peremptory challenges (see CPL 270.20 [2]; *People v Nicholas*, 98 NY2d 749, 752). Upon questioning by defense counsel, a prospective juror stated that there was a possibility that he would have "sympathy" for police officer witnesses. Despite further questioning on the issue, the prospective juror did not provide an unequivocal assurance that he would not be biased in favor of the police. It is well settled that, once a potential juror has indicated a possible bias, he or she "must be excused unless [he or she] provide[s] 'unequivocal assurance that [he or she] can set aside any bias and render an impartial verdict based on the evidence' " (*Nicholas*, 98 NY2d at 751-752, quoting *People*

*v Johnson*, 94 NY2d 600, 614). Inasmuch as the court erred in denying defendant's challenge for cause, we reverse the judgment and grant a new trial.

We further agree with defendant that reversal is also required on the ground that he was denied effective assistance of counsel based upon, inter alia, defense counsel's elicitation of testimony that had been precluded by the court's pretrial ruling and defense counsel's characterization of defendant as a "drug dealer" on summation (see generally *People v Benevento*, 91 NY2d 708, 712-713). Although "[i]solated errors in counsel's representation generally will not rise to the level of ineffectiveness" (*People v Henry*, 95 NY2d 563, 565-566), here defense counsel's failures were "so serious, and resulted in such prejudice to the defendant, that he was denied a fair trial thereby" (*People v Alford*, 33 AD3d 1014, 1016; see *People v Turner*, 5 NY3d 476, 480-481).

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



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

1449

**KA 13-01703**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAYVON GUICE, DEFENDANT-APPELLANT.

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NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (MARSHALL A. KELLY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered July 22, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted promoting prison contraband 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 promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [2]). The record establishes that defendant 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: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1450

**KA 13-00336**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSE DEALMEIDA, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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LABE M. RICHMAN, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered March 23, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated and the matter is remitted to Oneida County Court for further proceedings on the indictment.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03). In appeal No. 2, defendant appeals by permission of this Court from an order denying his motion pursuant to CPL article 440 seeking to vacate that judgment.

With respect to appeal No. 1, we reject defendant's contention that the plea was rendered involuntary by County Court's failure to advise him of the immigration consequences of the plea. Assuming, arguendo, that due process required the court to apprise defendant of the immigration consequences of his misdemeanor plea (*see People v Peque*, 22 NY3d 168, 197 n 9), we conclude that the court fulfilled its obligation during the plea colloquy. The colloquy shows that "the court assure[d] itself that the defendant kn[ew] of the possibility of deportation prior to entering [the] guilty plea, [and therefore] the plea [is] knowing, intelligent and voluntary" (*id.* at 197). We likewise reject defendant's contention that he received ineffective assistance of counsel based on defense counsel's alleged failure to advise him of the immigration consequences of the guilty plea. Defense counsel indicated during the plea that there was a "risk of deportation" (*Padilla v Kentucky*, 559 US 356, 374). We reject

defendant's contention that defense counsel should have advised defendant that deportation was "virtually mandatory," and we conclude that defendant was not denied effective assistance of counsel on this ground (see *People v Galan*, 116 AD3d 787, 789-790; *People v Montane*, 110 AD3d 1101, 1102, *lv denied* 22 NY3d 1089).

We agree with defendant, however, that he was denied effective assistance of counsel based on defense counsel's failure to move to suppress the drugs that the police seized from his person during a traffic stop. In a supporting deposition, a police officer stated that he stopped defendant's vehicle after observing defective brake lights, in violation of Vehicle and Traffic Law § 375 (40). He observed that defendant was nervous, and defendant gave responses to questions concerning where he was coming from and where he was going that did not make sense considering the direction in which he was traveling. The officer ordered defendant out of the vehicle and asked him "if he had anything illegal on him," and defendant responded that he had "coke" in his pocket. The officer then searched defendant's pocket and retrieved what was later determined to be cocaine.

We conclude that defendant established that a motion to suppress would likely be successful, and that defense counsel had no strategic or other legitimate explanation for not moving to suppress the evidence (*cf. People v Morris*, 117 AD3d 1580, 1581; *People v Johnson*, 81 AD3d 1428, 1428-1429, *lv denied* 16 NY3d 896). The officer's question whether defendant had anything illegal on him constituted a level two common-law inquiry, which required a founded suspicion that criminal activity was afoot (see *People v Loretta*, 107 AD3d 541, 541, *lv denied* 22 NY3d 1157; *People v Carr*, 103 AD3d 1194, 1195; *People v Lowe*, 79 AD3d 1676, 1676, *lv denied* 16 NY3d 833; see also *People v Garcia*, 20 NY3d 317, 324). Defendant's nervousness and discrepancies in describing where he was coming from and going are not enough to give rise to a reasonable suspicion that criminal activity is afoot (see *People v Banks*, 85 NY2d 558, 562, *cert denied* 516 US 868; *People v Milaski*, 62 NY2d 147, 156; *cf. Lowe*, 79 AD3d at 1676-1677; see also *Carr*, 103 AD3d at 1195). We further conclude that defendant's contention survives his guilty plea inasmuch as defense counsel's error infected the plea bargaining process (see generally *People v Atkinson*, 105 AD3d 1349, 1350, *lv denied* 24 NY3d 958). We therefore reverse the judgment in appeal No. 1, vacate the plea, and remit the matter to Oneida County Court for further proceedings on the indictment.

In light of our determination in appeal No. 1, we decline to review defendant's remaining contention therein, and we dismiss as moot defendant's appeal from the order in appeal No. 2 (see *People v Adams*, 15 AD3d 987, 987, *lv denied* 4 NY3d 851).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1451**

**KA 13-02188**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSE DEALMEIDA, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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LABE M. RICHMAN, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Supreme Court, Oneida County (Barry M. Donalty, A.J.), dated November 15, 2013. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL article 440.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same Memorandum as in *People v Dealmeida* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1453**

**KA 12-00210**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEVIN M. MINEMIER, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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

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

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Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered January 20, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree, assault in the first degree (two counts) and assault in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following Memorandum: Defendant pleaded guilty to an indictment charging him with attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), two counts of assault in the first degree (§ 120.10 [1], [4]), and one count of assault in the second degree (§ 120.05 [4]), in return for a promise from County Court that his aggregate sentence of imprisonment would not exceed 20 years. Defendant committed the crimes when he was 18 years old and, because he was not convicted of an armed felony (see CPL 1.20 [41]), he was eligible for youthful offender treatment (see CPL 720.10 [2]). The court imposed concurrent sentences, the greatest of which is a 20-year determinate term of incarceration plus a period of postrelease supervision, but, as the People correctly concede, the court erred in failing to determine whether defendant should be adjudicated a youthful offender. Thus, on defendant's appeal from the judgment of conviction in appeal No. 1, we hold the case, reserve decision and remit the matter to County Court "to make and state for the record a determination whether defendant should be granted youthful offender status" (*People v Potter*, 114 AD3d 1183, 1184; see *People v Rudolph*, 21 NY3d 497, 503). Defendant raises no contention with respect to the amended sentence in appeal No. 2, which added restitution, and we therefore dismiss the appeal therefrom.

Defendant further contends in appeal No. 1 that his sentence

should be vacated because the court reviewed written submissions from the victims and refused defense counsel's request for disclosure of those statements. Although it is clear from the record that the court reviewed written statements that were not disclosed to defendant, those statements are not included in the record on appeal, and we therefore cannot address the merits of defendant's contention. We further direct the court, upon remittal, to make a record of what statements it reviewed and to state its reasons for refusing to disclose them to defendant. Finally, we reject defendant's contention that the court abused its discretion in allowing the parents of one of the victims to speak at sentencing (*see generally People v Hemmings*, 2 NY3d 1, 6-7, *rearg denied* 2 NY3d 824; *People v Rabsatt*, 70 AD3d 863, 863, *lv denied* 14 NY3d 891; *People v Iovinella*, 295 AD2d 753, 753, *lv denied* 99 NY2d 536).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1454**

**KA 13-01213**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEVIN M. MINEMIER, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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

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

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Appeal from an amended sentence of the Monroe County Court (Victoria M. Argento, J.), rendered March 14, 2013. The amended sentence directed defendant to pay restitution in the amount of \$34,501.08.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same Memorandum as in *People v Minemier* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [Jan. 2, 2015]).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1455

**KA 13-00721**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GARY CHAPPELL, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered March 26, 2013. The judgment convicted defendant, upon a nonjury verdict, of driving while ability impaired, aggravated unlicensed operation of a motor vehicle in the first degree and speeding.

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 driving while ability impaired (Vehicle and Traffic Law § 1192 [1]), aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]), and speeding (§ 1180 [d]). We reject defendant's contention that the evidence is legally insufficient to support the conviction. The arresting officer testified that, after he stopped defendant's vehicle for speeding, defendant had glassy eyes and slurred speech, and he smelled of alcohol. In addition, defendant failed three of four field sobriety tests and refused to submit to a chemical test. That evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish that defendant operated a motor vehicle while his ability to do so was impaired by alcohol (*see People v McDonald*, 27 AD3d 949, 950). The evidence is also legally sufficient to support the conviction of aggravated unlicensed operation of a motor vehicle in the first degree (*see People v Jarocha*, 66 AD3d 1384, 1384, lv denied 13 NY3d 908). With respect to the speeding conviction, we conclude that, "even if the radar evidence standing alone were deemed insufficient to support the conviction, there is additional evidence here that sufficiently corroborates the accuracy of the radar reading so as to establish defendant's guilt beyond a reasonable doubt" (*People v Knight*, 72 NY2d 481, 488). Viewing the evidence in light of the elements of the



offenses in this bench trial (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, we agree with the People that defendant's attorney was not ineffective in failing to make a suppression motion "that ha[d] little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1456

**KA 13-00940**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EDMUND M. SERWINOWSKI, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MEGAN E. MORAN 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 Supreme Court, Erie County (M. William Boller, A.J.), rendered May 9, 2013. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. We agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence because "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction 'that he was also waiving his right to appeal any issue concerning the severity of the sentence' " (*People v Lorenz*, 119 AD3d 1450, 1450, lv denied 24 NY3d 962, quoting *People v Pimentel*, 108 AD3d 861, 862, lv denied 21 NY3d 1076). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1458

**KAH 13-02106**

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

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
ADAM A. JAMISON, PETITIONER-APPELLANT,

V

ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN  
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

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

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Appeal from a judgment (denominated order) of the Supreme Court,  
Cayuga County (Thomas G. Leone, A.J.), entered August 29, 2013 in a  
habeas corpus proceeding. The judgment granted the motion of  
respondent to dismiss and dismissed the petition.

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1459

CA 13-01693

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

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IN THE MATTER OF PETER SYLVESTER,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

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

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

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

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Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered August 15, 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.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that denied his inmate grievance while he was incarcerated at Attica Correctional Facility (Attica). Petitioner correctly concedes that two of the claims in his grievance are moot inasmuch as he has since been transferred to another correctional facility, and we agree with respondent that the third claim likewise presents no justiciable controversy. Petitioner's third claim was that Attica was improperly applying decisions rendered by the Central Office Review Committee (CORC) to inmates at Attica. According to petitioner's inmate grievance form, "CORC decisions that did not originate at grievant's current facility should not be applied to this facility." As an example, petitioner cited a CORC decision that prohibits inmates from possessing a particular brand of radios. Because "the rights of the parties cannot be affected by the determination of this appeal," it must be dismissed as moot (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714). Even assuming, arguendo, that the exception to the mootness doctrine applies with respect to petitioner's third claim (*see generally id.* at 714-715), we conclude that petitioner failed to demonstrate that respondent's denial of that claim was "arbitrary or capricious or without a rational basis" (*Matter of Patel v Fischer*, 67 AD3d 1193, 1193, lv denied 14 NY3d

703).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1460**

**CA 14-00944**

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

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DOLORES A. BEVILLE, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

OLEAN GENERAL HOSPITAL AND UPPER ALLEGHENY  
HEALTH SYSTEMS, INC., DEFENDANTS-APPELLANTS.

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GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (SALLY J. BROAD OF COUNSEL),  
FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, LANCASTER (MICHAEL R. DRUMM OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Cattaraugus County  
(Paula L. Feroletto, J.), entered January 9, 2014. The order denied  
the motion of defendants to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is  
unanimously modified on the law by granting the motion in part and  
dismissing the claim for punitive damages and as modified the order is  
affirmed without costs.

Memorandum: In February 2011 plaintiff was hospitalized at Olean  
General Hospital (defendant) and received insulin injections during  
her stay. In January 2013 defendant sent plaintiff a letter informing  
her that, during the period in which she was hospitalized, insulin  
pens used to administer insulin may have been shared by more than one  
patient. The letter also offered her free and confidential testing  
for hepatitis B, hepatitis C and HIV. Plaintiff thereafter commenced  
this action alleging, inter alia, that defendant was negligent in  
permitting the use of insulin pens on more than one patient and that,  
as a result of such negligence, she suffered emotional distress  
arising from her fear of contracting a blood-borne illness.

Supreme Court properly denied defendants' motion to dismiss the  
complaint pursuant to CPLR 3211 (a) (7). Affording plaintiff the  
benefit of every possible favorable inference (see *Leon v Martinez*, 84  
NY2d 83, 87-88), we conclude that "the complaint state[s] causes of  
action for negligence and negligent infliction of emotional distress"  
(*Brijlall v R.G. Ortiz Funeral Home, Inc.*, 13 AD3d 322, 323).  
Nevertheless, we agree with defendants that, even affording the  
complaint a liberal construction and accepting the facts alleged in  
the complaint as true, those allegations do not support a claim for  
punitive damages (see *Fragrancenet.com, Inc. v Fragrancex.com, Inc.*,

68 AD3d 1051, 1052). We therefore modify the order accordingly.

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

1462

CA 13-01587

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

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IN THE MATTER OF JUNIOR WILSON,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

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

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

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

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Appeal from a judgment of the Supreme Court, Wyoming County (Mark  
H. Dadd, A.J.), entered August 2, 2013 in a CPLR article 78  
proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his  
CPLR article 78 petition seeking to annul the determination after a  
tier III hearing that he violated inmate rule 113.24 (7 NYCRR 270.2  
[B] [14] [xiv] [drug use]). Petitioner contends that his due process  
rights were violated because his urine sample was not tested  
immediately, and it therefore should have been refrigerated prior to  
testing. Petitioner failed to exhaust his administrative remedy with  
respect to that contention because he failed to raise it in his  
administrative appeal, and this Court "has no discretionary power to  
reach [it]" (*Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071, *appeal  
dismissed* 81 NY2d 834).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court



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

1464

CA 14-00993

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

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JODI HAUSRATH, AS ADMINISTRATRIX OF THE ESTATE  
OF ANTOINETTE ADIMEY, DECEASED, AND ANTHONY  
ADIMEY, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

PHILLIP MORRIS USA INC., ET AL., DEFENDANTS,  
LIGGETT GROUP, INC., NOW KNOWN AS BROOKE  
GROUP, LTD., AND LIGGETT & MYERS TOBACCO COMPANY,  
DEFENDANTS-APPELLANTS.

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KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP, NEW YORK CITY (JULIE R.  
FISCHER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR  
PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered August 13, 2013. The order granted plaintiffs' motion to restore the case to the court calendar and to schedule a preliminary conference.

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

Memorandum: Liggett Group, Inc., now known as Brooke Group, Ltd., and Liggett & Myers Tobacco Company (defendants) appeal from an order granting plaintiffs' motion to restore the case to the court calendar and to schedule a preliminary conference. According to defendants, the action should have been deemed abandoned pursuant to CPLR 3404 and dismissed for neglect to prosecute. We reject that contention. As Supreme Court properly determined, CPLR 3404 does not apply because the case was never marked "off" or struck from the calendar, nor was it unanswered on a clerk's calendar call. Instead, the case was mistakenly marked "discontinued" by the clerk's office. "Thus, the case was not subject to the provisions of CPLR 3404, and [the court] properly granted the plaintiff[s'] motion and restored the action to its prior place on the calendar" (*Hernandez v City of New York*, 290 AD2d 416, 416; see *Berde v North Shore-Long Is. Jewish Health Sys., Inc.*, 98 AD3d 932, 933; *Baez v Kayantas*, 298 AD2d 416, 416-417; cf. *Amsterdam Leather Bag v New York Prop. Ins. Underwriting Assn.*, 240 AD2d 272, 272). We note that the court scheduled the matter for trial after the clerk mistakenly marked the action "discontinued," and there is no indication in the record that

plaintiffs were aware of the clerk's error. We also note that, although plaintiffs were dilatory in seeking a new trial date after the adjournment of the initially scheduled trial due to the justice's retirement, defendants were not prejudiced by the delay and, indeed, did not move for dismissal of the action for want of prosecution pursuant to CPLR 3216 (a).

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1466**

**CA 14-01051**

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

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FEDERATED FINANCIAL CORPORATION OF AMERICA, AS  
ASSIGNEE OF ADVANTA BANK CORP.,  
PLAINTIFF-RESPONDENT,

V

ORDER

FORJONE TRUCKING & EXCAVATING, INC., AND JOHN  
FORJONE, INDIVIDUALLY, DEFENDANTS-APPELLANTS.

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THERESA M. SUOZZI, SARATOGA SPRINGS, FOR DEFENDANTS-APPELLANTS.

PLATZER, SWERGOLD, LEVINE, GOLDBERG, KATZ & JASLOW, LLP, NEW YORK CITY  
(DANIEL B. FIX OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered September 30, 2013. The order denied the motion of defendants to vacate a default judgment.

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

Entered: January 2, 2015

Frances E. Cafarell  
Clerk of the Court

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

**1467**

**KA 14-01386**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MATTHEW L. LOMAGLIO, DEFENDANT-APPELLANT.

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THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered January 14, 2014. The judgment convicted defendant, upon a nonjury verdict, of course of sexual conduct against a child in the second degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reversing that part convicting defendant of endangering the welfare of a child under count two of the indictment and dismissing that count of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [a]) and endangering the welfare of a child (§ 260.10 [1]). Viewing the evidence in light of the elements of the crimes in this bench 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). Although a different verdict would not have been unreasonable (*see Danielson*, 9 NY3d at 348), we conclude that, "[b]ased on the weight of the credible evidence, [Supreme C]ourt . . . was justified in finding the defendant guilty beyond a reasonable doubt" (*id.*; *see People v Romero*, 7 NY3d 633, 642-643). " 'Great deference is to be accorded to the fact[finder's] resolution of credibility issues based upon its superior vantage point and its opportunity to view witnesses, observe demeanor and hear the testimony' " (*People v Gritzke*, 292 AD2d 805, 805-806, *lv denied* 98 NY2d 697), and we perceive no reason to disturb the court's credibility determinations.

Contrary to defendant's contention, the court did not err in allowing the People to present testimony regarding the victim's prompt complaint. The victim in this case made a prompt disclosure to his mother when he was in second grade that he was afraid of defendant, one of his gym teachers, that he did not want to go to gym class, and that he had a nightmare that defendant raped him. The testimony of the mother was admissible under the prompt outcry exception to the hearsay rule (see *People v Carfora*, 69 AD3d 751, 751, lv denied 14 NY3d 798, reconsideration denied 15 NY3d 748; see generally *People v Rosario*, 17 NY3d 501, 511). In any event, any error in admitting that testimony is harmless (see *Matter of Dandre H.*, 89 AD3d 553, 554; *People v Olsowske*, 247 AD2d 856, 857, lv denied 91 NY2d 1011). "In a bench trial, the court is presumed to have 'considered only competent evidence in reaching its verdict,' " and defendant has not shown "that the admission of inadmissible testimony prejudiced him" (*People v Gilbert*, 239 AD2d 906, 906, lv denied 90 NY2d 905; see *Dandre H.*, 89 AD3d at 554).

Also contrary to defendant's contention, the court properly allowed the People to present the testimony of an expert witness concerning child sexual abuse accommodation syndrome (CSAAS). That testimony was relevant to explain the victim's delayed disclosure of the actual sexual abuse, which he did not report until six years later (see *People v Carroll*, 95 NY2d 375, 387; *People v Gunther*, 67 AD3d 1477, 1478). Defendant's further contention regarding the People's use of hypotheticals in examining the CSAAS expert is not preserved for our review (see *People v Spicola*, 16 NY3d 441, 465-466, cert denied \_\_\_ US \_\_\_, 132 S Ct 400; *People v Mehmood*, 112 AD3d 850, 851-852). In any event, the expert's testimony did not exceed permissible bounds (see *Spicola*, 16 NY3d at 466). "Although some of the testimony discussed behavior similar to that alleged by the [victim] in this case, the expert spoke of such behavior in general terms" (*People v Diaz*, 20 NY3d 569, 575; see *People v Davis*, 118 AD3d 906, 907-908).

Defendant failed to preserve for our review his contention that the counts in the indictment are time-barred (see *People v Spencer*, 119 AD3d 1411, 1412, lv denied 24 NY3d 965). In any event, the count charging course of sexual conduct against a child in the second degree is not time-barred because the period of limitation did not begin to run until April 2012, when the victim disclosed the sexual abuse to his mother and she contacted a law enforcement agency (see CPL 30.10 [3] [f]). Contrary to defendant's contention, the period of limitation did not begin to run six years earlier inasmuch as no "offense" was "reported to a law enforcement agency or statewide central register of child abuse and maltreatment" (CPL 30.10 [3] [f]). "[T]he term 'the offense' [as used in CPL 30.10 (3) (f)] refers to a discrete criminal act or series of acts that satisfies the elements of a particular penal statute" (*People v Quinto*, 18 NY3d 409, 417). Here, the victim made a prompt disclosure of his fear of defendant, but did not report any offense.

As the People correctly concede, however, the count charging endangering the welfare of a child should be dismissed as time-barred.

The statute of limitations for that offense is two years (see CPL 30.10 [2] [c]), and the tolling provision of CPL 30.10 (3) (f) does not apply to that offense (see *People v Heil*, 70 AD3d 1490, 1491). Although, as noted, defendant's contention is unpreserved for our review, we exercise our power to address it as a matter of discretion in the interest of justice, and we modify the judgment accordingly (see *Spencer*, 119 AD3d at 1412). We reject defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to move to dismiss the counts of the indictment as time-barred (see *People v Wise*, 49 AD3d 1198, 1200, lv denied 10 NY3d 940, reconsideration denied 10 NY3d 966). "[D]efense counsel's single omission did not 'so seriously compromise[] [the] defendant's right to a fair trial [as to] qualify as ineffective representation' " (*id.*).

Defendant failed to preserve for our review his contention that his waiver of the right to a jury trial was not knowing, voluntary, and intelligent (see *People v White*, 43 AD3d 1407, 1407, lv denied 9 NY3d 1010; *People v Jackson*, 26 AD3d 781, 781-782, lv denied 6 NY3d 849; *People v Williams*, 5 AD3d 1043, 1044, lv denied 2 NY3d 809). In any event, it is without merit (see *White*, 43 AD3d at 1407-1408; *Jackson*, 26 AD3d at 782; *Williams*, 5 AD3d at 1044). A waiver of the right to a jury trial must be in writing and signed by defendant in open court in the presence of the court, all of which occurred here (see CPL 320.10 [2]). "[T]here is nothing in the record which would have alerted the court to the possibility that defendant was not fully aware of the consequences of the waiver" (*People v Magnano*, 158 AD2d 979, 979, *affd* 77 NY2d 941, *cert denied* 502 US 864; see CPL 320.10 [2]). Finally, the sentence is not unduly harsh or severe.

MOTION NO. (1896/89) KA 05-02532. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEVIN J. JOHNSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Jan. 2, 2015.)

MOTION NO. (2000/94) KA 14-01587. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ATO D. CLYBURN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, VALENTINO, AND DEJOSEPH, JJ. (Filed Jan. 2, 2015.)

MOTION NOS. (153-154/96) KA 05-01122. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER YOUNG, DEFENDANT-APPELLANT. KA 05-01123. -  
- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER YOUNG, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND WHALEN, JJ. (Filed Jan. 2, 2015.)

MOTION NO. (286/02) KA 97-05362. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL SPIRLES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ. (Filed Jan. 2, 2015.)

**MOTION NO. (1008/08) KA 04-02863. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARLES E. HATHAWAY, DEFENDANT-APPELLANT.** -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, SCONIERS, AND WHALEN, JJ. (Filed Jan. 2, 2015.)

**MOTION NO. (701/09) KA 08-00129. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V COLIN MOAR, DEFENDANT-APPELLANT.** -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, VALENTINO, AND DEJOSEPH, JJ. (Filed Jan. 2, 2015.)

**MOTION NO. (995/10) KA 08-02649. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RONALD BRINK, DEFENDANT-APPELLANT.** -- Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal, specifically, whether the court erred when it failed to comply with CPL 310.30 in regard to jury note #3. Upon our review of the motion papers, we conclude that the issue may have merit. The order of November 12, 2010 is vacated and this Court will consider the appeal de novo (*see People v LeFrois*, 151 AD2d 1046). Defendant is directed to file and serve his records and briefs with this Court on or before April 2, 2015. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Jan. 2, 2015.)



MOTION NO. (432/14) KA 12-02226. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHAWN GLOVER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND WHALEN, JJ. (Filed Jan. 2, 2015.)

MOTION NO. (874/14) CA 13-00766. -- TREMAIN CASON, PLAINTIFF-RESPONDENT, V KIRBY SY SMITH, III AND WERNER ENTERPRISES, INC., DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Jan. 2, 2015.)

MOTION NO. (877/14) CA 13-01025. -- IN THE MATTER OF NIAGARA PRESERVATION COALITION, INC., PETITIONER-PLAINTIFF-APPELLANT, V NEW YORK POWER AUTHORITY, GIL C. QUINIONES, PRESIDENT AND CHIEF EXECUTIVE OFFICER OF NEW YORK POWER AUTHORITY, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, ROSE HARVEY, COMMISSIONER, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION AND MAID OF THE MIST CORPORATION, RESPONDENTS-DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Jan. 2, 2015.)

MOTION NO. (884/14) CA 14-00252. -- IN THE MATTER OF HORNBLLOWER YACHTS, LLC, PETITIONER-APPELLANT, V ROSE HARVEY, COMMISSIONER, NEW YORK STATE

OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, ANDY BEERS,  
EXECUTIVE DEPUTY COMMISSIONER, NEW YORK STATE OFFICE OF PARKS, RECREATION  
AND HISTORIC PRESERVATION, NEW YORK STATE OFFICE OF PARKS, RECREATION AND  
HISTORIC PRESERVATION, MAID OF THE MIST CORPORATION, GIL C. QUINIONES,  
PRESIDENT AND CHIEF EXECUTIVE OFFICER, NEW YORK POWER AUTHORITY AND NEW  
YORK POWER AUTHORITY, RESPONDENTS-RESPONDENTS. -- Motion for reargument or  
leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J.,  
PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Jan. 2, 2015.)

MOTION NO. (909/14) KA 10-00801. -- THE PEOPLE OF THE STATE OF NEW YORK,  
RESPONDENT, V ROOSEVELT ROBERTS, DEFENDANT-APPELLANT. -- Motion for  
reargument denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND LINDLEY,  
JJ. (Filed Jan. 2, 2015.)

MOTION NO. (927/14) CA 13-02149. -- MARY BEEBE AND ROBERT BEEBE,  
PLAINTIFFS-RESPONDENTS-APPELLANTS, V ST. JOSEPH'S HOSPITAL HEALTH CENTER,  
DEFENDANT, ASSOCIATES FOR WOMEN'S MEDICINE, PLLC, CHRISTOPHER LARUSSA,  
M.D., DEFENDANTS-APPELLANTS-RESPONDENTS, AND SUCHITRA KAVETY, M.D.,  
DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the  
Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, VALENTINO, AND  
WHALEN, JJ. (Filed Jan. 2, 2015.)

MOTION NO. (1008/14) CAF 13-00423. -- IN THE MATTER OF TALEEYA M. CAYUGA

COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER-RESPONDENT;  
RANESHA S., RESPONDENT-APPELLANT. -- Motion for leave to appeal to the  
Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, SCONIERS, WHALEN,  
AND DEJOSEPH, JJ. (Filed Jan. 2, 2015.)

MOTION NO. (1026/14) KA 11-01476. -- THE PEOPLE OF THE STATE OF NEW YORK,  
RESPONDENT, V LARON ROBINSON, DEFENDANT-APPELLANT. -- Motion for reargument  
denied. PRESENT: SMITH, J.P., PERADOTTO, WHALEN, AND DEJOSEPH, JJ.  
(Filed Jan. 2, 2015.)

MOTION NO. (1142/14) CA 13-01283. -- IN THE MATTER OF BERNICE MALCOLM,  
PETITIONER-APPELLANT, V NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE  
DEPARTMENT OF LABOR UNEMPLOYMENT INSURANCE BOARD'S ADMINISTRATIVE LAW JUDGE  
SECTION, ADMINISTRATIVE LAW JUDGE ANNETTE GAUL, IN HER OFFICIAL CAPACITY  
AND INDIVIDUALLY, NEW YORK STATE DIVISION OF HUMAN RIGHTS, HONEOYE  
FALLS-LIMA CENTRAL SCHOOL DISTRICT, MICHELLE KAVANAUGH, IN HER OFFICIAL  
CAPACITY AS SUPERINTENDENT OF SCHOOLS AND INDIVIDUALLY, AND WAYNE A. VANDER  
BYL, IN HIS OFFICIAL CAPACITY AS SCHOOL ATTORNEY AND INDIVIDUALLY,  
RESPONDENTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the  
Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, SCONIERS, WHALEN,  
AND DEJOSEPH, JJ. (Filed Jan. 2, 2015.)