SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

AUGUST 22, 2019

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

1184/18

CA 18-00960

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

WENDY S. LITTLE, PLAINTIFF-RESPONDENT,

V ORDER

PETER A. CAMPIONE, M.D., AND BUFFALO MEDICAL GROUP, P.C., DEFENDANTS-APPELLANTS.

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (LYNN M. BOCHENEK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 13, 2018. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

Now, upon stipulation of discontinuance signed by the attorneys for the parties on February 19 and 20, 2019, and filed in the Erie County Clerk’s Office on March 19, 2019,

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

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

1306

CA 18-01169

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

CLIFFORD SCHLEMMER, PLAINTIFF-APPELLANT,

V ORDER

JANICE COVELL, DEFENDANT-RESPONDENT.

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

HAGELIN SPENCER LLC, BUFFALO (SEAN M. SPENCER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered May 8, 2018. The order denied the motion of plaintiff for partial summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on May 9, 2019, and filed in the Niagara County Clerk’s Office on May 10, 2019,

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

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

1328/18

CA 18-01162

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

SHAWNA SOOTHERAN, PLAINTIFF-RESPONDENT,

V ORDER

CARROLS LLC, DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KRISTIN L. NORFLEET OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (SCOTT SCHWARTZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered April 6, 2018. The order denied the motion of defendant for summary judgment dismissing the complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on January 7 and 24, 2019, and filed in the Niagara County Clerk’s Office on January 24, 2019,

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

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

1418

CA 18-00669

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

IN THE MATTER OF ROSS M. CELLINO, JR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CELLINO & BARNES, P.C., AND STEPHEN E. BARNES,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

DUKE HOLZMAN PHOTIADIS & GRESENS LLP, BUFFALO (GREGORY P. PHOTIADIS OF COUNSEL), AND LIPSITZ GREEN SCIME CAMBRIA LLP, FOR RESPONDENTS-APPELLANTS.

CONNORS LLP, BUFFALO (TERRENCE M. CONNORS OF COUNSEL), AND HODGSON RUSS LLP, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered February 6, 2018. The order, insofar as appealed from, granted in part the cross motion of petitioner for the appointment of a temporary receiver.

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

Memorandum: Petitioner, one of the two directors and 50% shareholders of respondent corporation Cellino & Barnes, P.C. (PC), brought this special proceeding against the PC and petitioner's co-shareholder Stephen E. Barnes (collectively, respondents) seeking, inter alia, judicial dissolution of the PC pursuant to Business Corporation Law § 1104 (a) (1) and (3). Formed in 1998 by petitioner and Barnes, the PC began as a regional law firm with offices in Buffalo and Rochester. In 2008, the PC began its expansion into the downstate market, and in 2013, Barnes approached petitioner about opening an office in California. Petitioner declined but, according to petitioner, by that time Barnes and the chief operating officer (COO) of the PC had already made preparations to open an office in Los Angeles. Barnes thereafter formed Cellino & Barnes, L.C. (LC), a California corporation that was separate from the PC and in which Barnes had a 99.9% interest. Petitioner became a minority owner with a .1% ownership in the LC.

In 2017, petitioner filed an initial petition for dissolution of the PC and also withdrew from and divested himself of his interest in the LC. Petitioner subsequently filed an amended petition for

dissolution alleging, among other things, that there had been a breakdown in communication between himself and Barnes with respect to the management and direction of the PC. In particular, petitioner alleged that Barnes had favored the LC to the detriment of the PC by allowing the LC to utilize the PC's computer network, telephone number, and employees without adequate compensation. Petitioner further alleged, inter alia, that Barnes had directed to the LC mass tort cases solicited by the PC in the Northeast; paid a bonus to the PC's COO from the PC's account for work that the COO did on behalf of the LC; refused petitioner's request to terminate the COO as a PC employee and hire him as an LC employee; and rejected petitioner's request to restrict the COO's access to the PC's bank account. Respondents moved, inter alia, for summary judgment dismissing the amended petition, and petitioner cross-moved for the appointment of a temporary receiver pursuant to Business Corporation Law § 1202 (a) (1). In appeal No. 1, respondents appeal from an order that granted in part petitioner's cross motion for the appointment of a temporary receiver. In appeal No. 2, respondents appeal, as limited by their brief, from that part of an order of Supreme Court denying respondents' motion insofar as it sought summary judgment dismissing the amended petition. We affirm in both appeals.

Addressing first appeal No. 2, we reject respondents' contention that the court erred in denying their motion insofar as it sought summary dismissal of the amended petition on the ground that dissolution would not benefit the shareholders because the PC has continued to function effectively and prosperously. The determination whether a corporation should be dissolved is within the discretion of the court (*see* Business Corporation Law § 1111 [a]; *Matter of Kemp & Beatley [Gardstein]*, 64 NY2d 63, 73 [1984]), and "the benefit to the shareholders of a dissolution is of paramount importance" in making that determination (§ 1111 [b] [2]). Although respondents submitted evidence demonstrating that the PC has continued to conduct business at a profit, dissolution is not to be denied in a proceeding brought pursuant to Business Corporation Law § 1104 simply because the corporate business has been conducted at a profit (*see* § 1111 [b] [3]) or because the dissension has not yet had an appreciable impact on the profitability of the corporation (*see Molod v Berkowitz*, 233 AD2d 149, 150 [1st Dept 1996], *lv dismissed* 89 NY2d 1029 [1997]).

Here, the record contains ample evidence of dissension and deadlock between petitioner and Barnes, and we conclude that, in opposition to respondents' showing that the PC continues to operate profitably, petitioner raised issues of fact whether dissension and deadlock have so impeded the ability of the PC to function effectively that dissolution would benefit the shareholders. In a close corporation like the PC, "the relationship between the shareholders is akin to that of partners and when the relationship begins to deteriorate, the ensuing deadlock and dissension can effectively destroy the orderly functioning of the corporation" (*Greer v Greer*, 124 AD2d 707, 708 [2d Dept 1986], *appeal dismissed* 69 NY2d 947 [1987]). When a point is reached at which the shareholders who are actively conducting the business of the corporation cannot agree, dissolution may be in the best interests of those shareholders (*see*

Matter of Gordon & Weiss, 32 AD2d 279, 281 [1st Dept 1969]), and we agree with the court's determination that a hearing should be held to give the parties an opportunity to present their evidence on this controverted issue (*see Matter of Ricci v First Time Around*, 112 AD2d 794, 794 [4th Dept 1985]; *Matter of Pivot Punch & Die Corp.*, 9 AD2d 861, 861 [4th Dept 1959]; *see also Matter of Giordano v Stark*, 229 AD2d 493, 494 [2d Dept 1996]; *Matter of Kournianos [H.M.G., Inc.]*, 175 AD2d 129, 129-130 [2d Dept 1991]).

Contrary to respondents' contention in appeal No. 1, we conclude that the court did not abuse its discretion in appointing a temporary receiver (*see generally Greer*, 124 AD2d at 708; *Nelson v Nelson*, 99 AD2d 917, 918 [3d Dept 1984]) for the limited purposes of "oversee[ing] the separation of the LC and the PC; . . . assess[ing] the appropriate amounts due and owing from the LC to the PC, if any; and . . . oversee[ing] the separation of clients between the two entities." In a proceeding for judicial dissolution brought under article 11 of the Business Corporation Law, the court has discretion to "make all such orders as it may deem proper in connection with preserving the property and carrying on the business of the corporation, including the appointment . . . of a receiver under article 12 (Receivership)" (Business Corporation Law § 1113; *see* § 1202 [a] [1]), and petitioner's submissions in support of his application for the appointment of a temporary receiver demonstrated that the entanglement of the PC and the LC created a danger of irreparable loss and that a receivership is necessary for the protection of the interests of the parties (*see generally Matter of Armienti*, 309 AD2d 659, 661 [1st Dept 2003]; *Matter of Harrison Realty Corp.*, 295 AD2d 220, 220 [1st Dept 2002]). Specifically, the affidavits of petitioner, a licensed certified public accountant (CPA) and certified valuation analyst retained by petitioner, a former CPA for the PC, and an office manager for the PC supported petitioner's allegations of economic improprieties in the form of inadequate reimbursement by the LC to the PC for cross-charges. Those affidavits also raised issues of fact whether the LC was taking mass tort cases that otherwise would have been handled by the PC and whether it was using web addresses owned by the PC to redirect clients to the LC's new website. Inasmuch as it likely will be difficult to quantify what, if any, economic harm the PC has suffered as a result of clients being shepherded from the PC to the LC and inasmuch as respondents have refused to allow petitioner's CPA to speak with the COO of the PC, we conclude that the court did not abuse its discretion in appointing a temporary receiver (*see generally Greer*, 124 AD2d at 708; *Nelson*, 99 AD2d at 918) to determine what if any amount the LC owes the PC, rather than ordering an accounting.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

1419

CA 18-00670

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

IN THE MATTER OF ROSS M. CELLINO, JR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CELLINO & BARNES, P.C., AND STEPHEN E. BARNES,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

DUKE HOLZMAN PHOTIADIS & GRESENS LLP, BUFFALO (GREGORY P. PHOTIADIS OF COUNSEL), AND LIPSITZ GREEN SCIME CAMBRIA LLP, FOR RESPONDENTS-APPELLANTS.

CONNORS LLP, BUFFALO (TERRENCE M. CONNORS OF COUNSEL), AND HODGSON RUSS LLP, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered April 2, 2018. The order, insofar as appealed from, denied in part the motion of respondents to dismiss the amended petition.

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

Same memorandum as in *Matter of Cellino v Cellino & Barnes, P.C.* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-01610

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

DAVID PEZZINO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WEDGEWOOD HEALTH CARE CENTER, LLC,
DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, BUFFALO (ADAM M. LYNCH OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF MARK H. CANTOR, LLC, BUFFALO (MARK H. CANTOR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), dated November 28, 2017. The order, among other things, granted that part of the motion of plaintiff seeking summary judgment on the issue of liability.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law and in the exercise of discretion by denying that part of the motion seeking summary judgment on the issue of liability and by adding to the second ordering paragraph immediately preceding "; and it is further" the following: ", unless defendant, within three months of service of a copy of the order of this Court with notice of entry, serves responses to all outstanding discovery demands and pays plaintiff's attorney $3,000 toward costs and attorney's fees as a sanction" and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as a result of negligent acts committed by defendant's "employees and agents." Although plaintiff commenced this action in 2011 and the parties each served discovery demands in 2012, the action lay dormant for several years while plaintiff sought to obtain relief from defendant's insurance carrier in a bankruptcy proceeding in a different state. Plaintiff revived the action in November 2016 by, inter alia, resubmitting his 2012 discovery demands.

In February 2017, plaintiff filed a motion seeking sanctions pursuant to CPLR 3126 as well as summary judgment on the issues of liability and damages. Supreme Court held a conference and issued a scheduling order directing that plaintiff provide "new medical/health care authorizations" by April 17, 2017, and that all paper discovery

be completed by July 31, 2017. Plaintiff did not provide the authorizations until July 13, 2017, and defendant had not responded to the discovery demands by September 6, 2017, when plaintiff filed the instant motion again seeking, inter alia, the relief sought in the February 2017 motion.

The court granted that part of plaintiff's motion seeking sanctions, struck defendant's answer as to liability, and deemed all issues of liability resolved in plaintiff's favor. We agree with defendant that the court improvidently exercised its discretion in granting that sanction.

As a preliminary matter, we conclude that the court erred in finding that defendant did "not oppose[] that aspect of [p]laintiff's motion which [sought] a determination in [p]laintiff's favor on the issues that are the subject of the 2012 [d]emands based on [d]efendant's wil[l]ful failure to respond." A reading of defendant's submissions makes clear that it did, in fact, oppose that aspect of plaintiff's motion.

With respect to the merits, it is well settled that " '[t]he nature and degree of the penalty to be imposed on a CPLR 3126 motion lies within the sound discretion of the trial court and will be disturbed only if there has been an abuse or [an] improvident exercise of discretion' " (*Perry v Town of Geneva*, 64 AD3d 1225, 1226 [4th Dept 2009]). Nevertheless, the Court of Appeals has recognized that, with respect to the supervision of disclosure, "the Appellate Division is vested with its own discretion and corresponding power to substitute its own discretion for that of the trial court, even in the absence of abuse" (*Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]). In recognition of the fact that "[a]ctions should be resolved on their merits wherever possible" (*Mironer v City of New York*, 79 AD3d 1106, 1107 [2d Dept 2010]), "this Court has repeatedly held that the striking of a pleading is appropriate only where there is a clear showing that the failure to comply with discovery demands [was] willful, contumacious, or in bad faith" (*Perry*, 64 AD3d at 1226 [internal quotation marks omitted]; *see generally Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877, 880 [2013]; *Legarreta v Neal*, 108 AD3d 1067, 1070-1071 [4th Dept 2013]).

" 'The willful or contumacious character of a party's conduct can be inferred from the party's *repeated* failure to respond to demands or to comply with discovery orders' " (*Legarreta*, 108 AD3d at 1071 [emphasis added]; *see Kopin v Wal-Mart Stores*, 299 AD2d 937, 937-938 [4th Dept 2002]). Here, however, we conclude that plaintiff did not establish that defendant's failure to respond or to comply was willful or contumacious inasmuch as plaintiff failed to establish that defendant had engaged in "repeated noncompliance" (*CDR Créances S.A.S. v Cohen*, 23 NY3d 307, 318 [2014]; *cf. Legarreta*, 108 AD3d at 1069; *Doherty v Schuyler Hills, Inc.*, 55 AD3d 1174, 1176 [3d Dept 2008]).

Although defendant did not respond to the 2012 discovery demands, the record establishes that plaintiff's attorney abandoned the New

York action to pursue remedies in the bankruptcy proceeding. As a result, we conclude that defendant's failure to respond to the abandoned discovery demands does not constitute willful, contumacious or bad faith conduct. Once plaintiff revived the action in November 2016, the court essentially gave each party a fresh start, issuing the first and only scheduling order. Notably, it was plaintiff who first failed to comply with that order, providing the medical authorizations three months after the court-ordered deadline and only 18 days before all discovery was to be completed. While there may be some dispute whether defendant could have partially responded to the discovery demands inasmuch as some of the demands concerned information that defendant should have had readily available, it is our view that defendant's failure to respond was occasioned, in part, by plaintiff's own discovery violations. We thus conclude, in the exercise of our own discretion (*see Those Certain Underwriters at Lloyds, London*, 11 NY3d at 845), that defendant's conduct does not warrant the striking of its answer as to liability.

"Nonetheless, [defendant's] conduct during discovery cannot be countenanced" (*L&L Auto Distribs. & Suppliers Inc. v Auto Collection, Inc.*, 85 AD3d 734, 736 [2d Dept 2011]). Considering all of the facts and circumstances of this action, we conclude that a monetary sanction in the sum of $3,000 is warranted to compensate plaintiff "for the time expended and costs incurred in connection with [defendant's] failure to . . . comply with discovery" (*id.*). We thus exercise our discretion and modify the order by providing that the motion insofar as it seeks sanctions pursuant to CPLR 3126 is granted as set forth in the second ordering paragraph of the order unless defendant, within three months of service of the order of this Court with notice of entry, serves responses to all of the outstanding discovery demands and pays plaintiff's attorney $3,000 toward costs and attorney's fees as a sanction (*see Perry*, 64 AD3d at 1226).

Defendant further contends that the court erred in granting plaintiff's motion insofar as it sought summary judgment on the issue of liability, and we agree. That part of the motion was premature and, further, the affidavit of plaintiff's expert "was . . . conclusory, and offered . . . opinions and conclusions that the expert was not competent to render" (*Abalola v Flower Hosp.*, 44 AD3d 522, 522 [1st Dept 2007]). We therefore further modify the order accordingly. In light of our determination, we do not address defendant's remaining contentions.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-01701

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

MATTHEW ZINNO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FRANK J. SCHLEHR, M.D., P.C., A NEW YORK PROFESSIONAL CORPORATION, DEFENDANT-RESPONDENT.

ROACH, LENNON & BROWN, PLLC, BUFFALO (DAVID L. ROACH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered March 8, 2018. The order denied plaintiff's motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part with respect to the issues of liability under Labor Law § 193 and plaintiff's entitlement to the amount of any underpayment, reasonable attorneys' fees, and prejudgment interest under Labor Law § 198 (1-a), and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a former employee of defendant medical group, commenced this action seeking to recover, inter alia, "additional compensation" that he earned during his employment with defendant. Pursuant to the terms of his employment agreement, plaintiff was entitled to receive an annual salary plus certain "additional compensation" if he exceeded certain thresholds, which were calculated based on the actual gross receipts attributable to plaintiff for services he rendered during his employment with defendant, including receipts received within 90 days following any termination of his employment.

After his employment with defendant terminated, plaintiff became entitled to additional compensation, which defendant was required to pay to plaintiff by June 21, 2016. Although defendant paid plaintiff in part, defendant admitted that it failed to pay plaintiff the entire amount owed for additional compensation. Plaintiff commenced this action asserting, inter alia, a cause of action for violations of Labor Law § 193 (1) and alleging that, pursuant to Labor Law § 198 (1-a), defendant is liable for the unpaid additional compensation, liquidated damages, interest, and attorneys' fees. Plaintiff moved

for partial summary judgment on liability with respect to that cause of action, and Supreme Court denied the motion.

We agree with plaintiff that the court erred in denying his motion with respect to the issue of liability under Labor Law § 193 (1), and we therefore modify the order accordingly. There is no dispute that the additional compensation owed to plaintiff constituted earned "wages" that were "vested and mandatory as opposed to discretionary and forfeitable" (*Truelove v Northeast Capital & Advisory*, 268 AD2d 648, 649 [3d Dept 2000], *affd* 95 NY2d 220 [2000]; *see* Labor Law § 190 [1]; *see also Doolittle v Nixon Peabody LLP*, 126 AD3d 1519, 1520 [4th Dept 2015]), and we conclude that defendant's failure to pay plaintiff by June 21, 2016 the full amount of the additional compensation that plaintiff had earned, as required by the parties' agreement, constituted a deduction from wages in violation of Labor Law § 193 (1) (*cf. Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449-450 [1st Dept 2017]; *Miles A. Kletter D.M.D. & Andrew S. Levine, D.D.S., P.C. v Fleming*, 32 AD3d 566, 567 [3d Dept 2006]; *see generally Doolittle*, 126 AD3d at 1522). Thus, plaintiff met his initial burden of establishing "entitlement to judgment as a matter of law" with respect to that part of his motion (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Defendant failed to raise material issues of fact whether it violated Labor Law § 193 (1) (*see generally Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]).

In light of that determination, we further conclude that plaintiff is entitled "to recover the full amount of any underpayment, all reasonable attorney's fees, [and] prejudgment interest" (Labor Law § 198 [1-a]), and we therefore further modify the order accordingly.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

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KA 16-00290

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STANLEY LOSTUMBO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated October 9, 2015. The order denied the motion of defendant pursuant to CPL 440.10 to vacate a judgment of conviction.

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

Memorandum: In appeal No. 1, defendant appeals, by permission of this Court, from an order denying his motion pursuant to CPL 440.10 to vacate the judgment convicting him after a nonjury trial of, inter alia, sexual abuse in the first degree (Penal Law § 130.65 [1]), stemming from his alleged sexual abuse of his wife. In appeal No. 2, defendant appeals, also by permission of this Court, from an order denying a successive CPL 440.10 motion seeking to vacate the same judgment. In both appeals, he contends that Supreme Court erred in summarily denying his motions because defense counsel was ineffective in failing to properly and timely investigate allegedly exculpatory text messages sent to defendant by his wife in the hours before his arrest for the instant crimes. We affirm.

In support of his first CPL 440.10 motion, defendant submitted only his affidavit, wherein he asserted that, after his arrest, he told defense counsel that the wife had a motive for fabricating accusations against him because, in the hours before his arrest, she sent him numerous text messages, most of which he deleted without reading. In support of his second CPL 440.10 motion, defendant submitted the affidavit of defense counsel, who admitted that, at the time of defendant’s arrest, he did nothing with the information defendant provided him regarding the text messages because he did not

"perceive the[ir] significance" at that time. When defense counsel did try to recover the deleted text messages from defendant's cell phone provider, he learned that most of them were no longer available. Thereafter, however, defense counsel was able to recover some of the deleted messages directly from defendant's phone, i.e., 74 text messages sent by the wife during the relevant time period.

"[I]t is well settled that a defendant's right to representation . . . entitle[s] him [or her] to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself [or herself] time for reflection and preparation for trial" (*People v Kates*, 162 AD3d 1627, 1632 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018], *reconsideration denied* 32 NY3d 1173 [2019] [internal quotation marks omitted]; *see People v Oliveras*, 21 NY3d 339, 346-347 [2013]). Further, "the failure to investigate or [produce] exculpatory witnesses [or evidence] may amount to ineffective assistance of counsel" (*People v Nau*, 21 AD3d 568, 569 [2d Dept 2005]; *see People v Mosley*, 56 AD3d 1140, 1140-1141 [4th Dept 2008]). A CPL 440.10 motion raising such a claim warrants a hearing where a defendant's submissions "support[the defendant's] contention that he [or she] was denied effective assistance of counsel . . . and raise[ ] a factual issue" with respect to the failure to produce such evidence or witnesses (*People v Conway*, 118 AD3d 1290, 1291 [4th Dept 2014]; *see People v Dombrowski*, 87 AD3d 1267, 1267-1268 [4th Dept 2011]). However, a hearing to develop background facts is not "invariably necessary" on a CPL 440.10 motion (*People v Satterfield*, 66 NY2d 796, 799 [1985]).

Here, we conclude that the court did not abuse its discretion in denying the motions without a hearing because the motion papers did not include any of the actual text messages that formed the basis of defendant's ineffective assistance of counsel contention and therefore did not allow the court to conduct a full examination of that contention (*see generally People v Samandarov*, 13 NY3d 433, 436 [2009]; *People v Gil*, 285 AD2d 7, 11 [1st Dept 2001]). Indeed, because the recovered text messages were not submitted and the contents of those messages were only described in defendant's affidavit (*see generally* CPL 440.30 [4] [d]), the court had no proper basis to ascertain whether they were exculpatory and whether defense counsel was ineffective for failing to properly investigate the messages (*cf. Conway*, 118 AD3d at 1291; *Dombrowski*, 87 AD3d at 1267-1268; *Nau*, 21 AD3d at 569). Thus, on the present record, which does not include the actual text messages sent to defendant, we affirm the orders without prejudice.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

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KA 16-00291

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STANLEY LOSTUMBO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated November 17, 2015. The order denied the motion of defendant pursuant to CPL 440.10 to vacate a judgment of conviction.

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

Same memorandum as in *People v Lostumbo* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-01448

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

IN THE MATTER OF TOWN OF IRONDEQUOIT AND TOWN OF BRIGHTON, PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

COUNTY OF MONROE, TIMOTHY P. MURPHY, AS DIRECTOR OF REAL PROPERTY TAX SERVICE FOR COUNTY OF MONROE, AND ROBERT FRANKLIN, DIRECTOR OF FINANCE AND CHIEF FINANCIAL OFFICER OF COUNTY OF MONROE, RESPONDENTS-DEFENDANTS-APPELLANTS.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (MATTHEW D. BROWN OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

HARTER SECREST & EMERY LLP, ROCHESTER (EDWARD F. PREMO, II, OF COUNSEL), FOR PETITIONER-PLAINTIFF-RESPONDENT TOWN OF IRONDEQUOIT.

GORDON & SCHAAL, LLP, ROCHESTER (KENNETH W. GORDON OF COUNSEL), FOR PETITIONER-PLAINTIFF-RESPONDENT TOWN OF BRIGHTON.

SARAH B. BRANCATELLA, ASSOCIATE COUNSEL, ALBANY, FOR STATE OF NEW YORK ASSOCIATION OF TOWNS, AMICUS CURIAE.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered November 9, 2017 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment denied the motion of respondents-defendants to dismiss the petition-complaint and granted the petition-complaint.

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

Memorandum: Respondents-defendants (County respondents) appeal in this hybrid CPLR article 78 proceeding and declaratory judgment action from a judgment that, inter alia, granted the petition-complaint of petitioners-plaintiffs (Town petitioners), denied the County respondents' motion to dismiss the petition-complaint, compelled the County respondents to guarantee and credit the maintenance, repair, and demolition charges assessed by the Town petitioners on certain properties located within their boundaries (maintenance charges), and declared that the County respondents are legally obligated to guarantee and credit those charges. We reverse.

As a preliminary matter, we note that this is properly only a CPLR article 78 proceeding inasmuch as the relief sought by the Town petitioners is available under CPLR article 78 without the necessity of a declaration (*see generally* CPLR 7801; *Matter of Level 3 Communications, LLC v Chautauqua County*, 148 AD3d 1702, 1703 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018]).

We further conclude that the County respondents failed to preserve their constitutional challenge to the local laws of the Town petitioners inasmuch as they failed to raise that challenge in Supreme Court (*see Matter of Town of Rye v New York State Bd. of Real Prop. Servs.*, 10 NY3d 793, 795 [2008]). We agree with the County respondents, however, that RPTL 936 does not require them to credit the Town petitioners for the amount of the unpaid maintenance charges or to guarantee those amounts.

With respect to the maintenance charges, Town Law § 64 (5-a) provides that a town may "require the owners of land to cut, trim or remove from the land owned by them brush, grass, rubbish, or weeds, or to spray poisonous shrubs or weeds on such land." If a landowner fails to comply, the town may perform such work and place a "lien and charge" on the real property for the "total expense" incurred by the town for that work (*id.*). Pursuant to Town Law § 130 (16), towns are also permitted to "[p]rovid[e] for the removal or repair of buildings in business, industrial and residential sections that, from any cause, may now be or shall hereafter become dangerous or unsafe" and to assess the cost of such service against the land on which the building is situated (*see* § 130 [16] [g]).

Section 936 (1) of the RPTL provides that the county guarantees the town's "taxes" by crediting the town "with the amount of . . . unpaid delinquent taxes." The question raised on this appeal is whether the maintenance charges are "taxes" for the purposes of RPTL 936 and thus whether the County respondents must credit the Town petitioners for the amount of any such charge that goes unpaid or is delinquent.

The maintenance charges are assessed against individual properties for their benefit and thus do not fall within the general definition of "tax," which instead contemplates " 'public burdens imposed generally for governmental purposes benefitting the entire community' " (*Matter of Piccolo v New York State Tax Appeals Trib.*, 108 AD3d 107, 112 [3d Dept 2013]; *see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 58 [1978]; *see generally* RPTL 102 [20]). Nor do those charges constitute "special ad valorem levies" as defined by RPTL 102 (14). A " '[s]pecial ad valorem levy' " is "a charge imposed upon benefitted real property in the same manner and at the same time as taxes for municipal purposes to defray the cost, including operation and maintenance, of a special district improvement or service" (*id.*). Although the definition of "tax" does, in certain enumerated circumstances, include "special ad valorem levies" (RPTL 102 [20]), the maintenance charges are not special ad valorem levies because they are not used to defray the cost of a "special district improvement or service" (RPTL 102 [14]). Maintenance charges also are

not assessed "ad valorem" because the amount of the charge is not based on property value but is instead based on the actual expense to the town. Moreover, assuming, arguendo, that the charges are "special assessments" as defined by RPTL 102 (15), we note that the definition of "tax" specifically excludes "special assessments" (RPTL 102 [20]).

We further agree with the County respondents that section 10 of the Monroe County Tax Act does not expand the County respondents' obligations under RPTL 936, i.e., it does not require them to guarantee or credit the maintenance charges. Additionally, although Municipal Home Rule Law § 10 (1) permits towns to collect the maintenance charges, we disagree with the Town petitioners that the Municipal Home Rule Law renders those charges "taxes" under RPTL 936. Similarly, although Irondequoit Town Code §§ 94-9 and 104-14 provide that the maintenance charges shall be "collected in the same manner" as other town charges and special ad valorem levies, that describes the procedure for collecting the charges and does not address whether they must be guaranteed pursuant to RPTL 936.

All concur except NEMOYER, and TROUTMAN, JJ., who dissent in part and vote to modify in accordance with the following memorandum: We respectfully dissent in part. We agree with the majority that this is properly only a CPLR article 78 proceeding. Unlike the majority, however, we conclude that, when a town exercises its statutory authority to assess maintenance, repair, and demolition charges against real property (*see* Town Law §§ 64 [5-a]; 130 [16]), such charges must be guaranteed by the county "in the same manner" as property taxes and special ad valorem levies (§ 64 [5-a]; *see generally* RPTL 936). Therefore, we would modify the judgment by dismissing the petition-complaint insofar as it seeks declaratory relief and by vacating the declaration, and we would otherwise affirm.

A brief overview of New York State's property tax collection scheme is necessary to understand the issue. Under that scheme, the county guarantees the town's property taxes and credits the town with the amount of any "unpaid delinquent taxes" (RPTL 936 [1]). In turn, the county retains the sole power to commence tax foreclosure proceedings against real property "which remain[s] subject to delinquent tax liens" (RPTL 1123 [1]). The power to foreclose has its advantages. A county, for example, may "take title to privately-held property for the nonpayment of property taxes even where the taxes owing represent only a small fraction of the value of the land," and may thereby "realize a substantial windfall" in a tax foreclosure proceeding (*Matter of Foreclosure of Tax Liens*, 165 AD3d 1112, 1122 [2d Dept 2018]; *see* RPTL 1100 *et seq.*). The statute thus incorporates a trade-off. The town lacks recourse against defaulters, but is guaranteed to recover its delinquent taxes from the county. The county accepts the deficiency, but may reap a windfall in collecting delinquent taxes.

The question here is whether the definition of "delinquent taxes" encompasses maintenance, repair, and demolition charges assessed by a town against real property (*see* Town Law §§ 64 [5-a]; 130 [16]). We agree with the majority that such charges are, strictly speaking, not

taxes. Rather, they are more appropriately classified as " 'special assessment[s]' " (RPTL 102 [15]; *see generally Lane v City of Mount Vernon*, 38 NY2d 344, 347-348 [1976]), which are excluded from the strict definition of a "tax" (RPTL 102 [20]).

The RPTL, however, expressly contemplates that special assessments, under some circumstances, are to be treated as taxes for purposes of property tax collection. The term "delinquent tax," when used in article 11 of the RPTL, entitled "Procedures for Enforcement of Collection of Delinquent Taxes," includes an unpaid "special assessment or other charge imposed upon real property by or on behalf of a municipal corporation . . . relating to any parcel which is included in the return of unpaid delinquent taxes prepared pursuant to [RPTL 936]" (RPTL 1102 [2]). Moreover, special assessments may be used to finance public improvements (*see* Town Law § 231 *et seq.*) and, if the town is unable to collect such assessments, the tax roll listing the unpaid assessments is then transmitted to the county "and collection thereof shall be enforced in the manner provided by law for the collection of unpaid town taxes" (§ 243). Likewise, maintenance, repair, and demolition charges are to be "collected in the same manner and at the same time as other town charges" (§ 64 [5-a]). Indeed, counsel for the State Board of Equalization and Assessment, citing the same provisions, opined long ago that maintenance, repair, and demolition charges assessed by the town against real property are "in the same nature" as taxes, and thus they are guaranteed by the county pursuant to RPTL 936 (9 Op Counsel SBEA No. 55 [1990]). That has been the law in this State for decades.

If the rule proposed by the majority were to stand, towns would almost never be able to recoup their costs for maintaining, repairing, or demolishing blighted properties. Although the legislature has given towns the power to place a "lien and charge" on real property for the "total expense" of performing such necessary work (Town Law § 64 [5-a]; *see* § 130 [16] [g]), in practice, towns would lack the ability to enforce the liens or collect the charges from defaulting owners, forcing the towns to accept the deficiency. In our view, such a rule is not consistent with the statutory scheme, nor is it consistent with historical practices, nor is it good policy.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-01645

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

TRACY PRESTON, AS ADMINISTRATOR OF THE ESTATE
OF ERIC S. LEHMAN, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

APCH, INC., ALSTOM POWER, INC.,
DEFENDANTS-APPELLANTS,
AND COMBUSTION ENGINEERING, INC.,
DEFENDANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JILL L. YONKERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND DEFENDANT.

PULOS & ROSELL, LLP, HORNELL (WILLIAM W. PULOS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered December 21, 2017. The order denied the motion of defendants-appellants for summary judgment dismissing the amended complaint and granted plaintiff's cross motion for partial summary judgment on the issue of liability.

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

Memorandum: Plaintiff commenced this action seeking damages for the wrongful death and conscious pain and suffering of plaintiff's decedent resulting from an accident that occurred while he was employed as a welder with defendant Alstom Power, Inc. (Alstom). Decedent and a coworker were assigned during the course of their employment to participate in the assembly of a rotor compartment weighing approximately five tons at an industrial facility in Wellsville, New York (plant) owned by defendant APCH, Inc. (APCH) (*see Preston v APCH, Inc.*, 89 AD3d 65, 67-72 [4th Dept 2011]). The rotor compartment was being assembled to fulfill Alstom's contract with a customer that owned and operated a power plant in Bow, New Hampshire for the replacement of certain components of the customer's air preheater. Decedent was positioned in front of the rotor compartment and was comparing his welding work with that of the coworker when the rotor compartment fell from its stands thereby pinning him to the floor and causing his death.

Following motion practice, the only cause of action remaining for our consideration is that alleging a violation of Labor Law § 240 (1) against Alstom and APCH (defendants) inasmuch as plaintiff withdrew all other causes of action against those defendants and withdrew all causes of action against defendant Combustion Engineering, Inc. On this appeal, defendants contend that Supreme Court erred in denying their motion for summary judgment dismissing the amended complaint and granting plaintiff's cross motion for partial summary judgment on the issue of liability. We agree.

"Labor Law § 240 (1) imposes a nondelegable duty and absolute liability upon owners and contractors for failing to provide safety devices necessary for workers subjected to elevation-related risks in circumstances specified by the statute" (*Soto v J. Crew Inc.*, 21 NY3d 562, 566 [2013]). "To recover, the [worker] must have been engaged in a covered activity—'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' (Labor Law § 240 [1]; *see Panek v County of Albany*, 99 NY2d 452, 457 [2003])—and must have suffered an injury as 'the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009])" (*Soto*, 21 NY3d at 566). The issue presented in this appeal concerns the first question, i.e., whether decedent was engaged in a covered activity (*see id.*).

Although "Labor Law § 240 (1) is to be construed as liberally as necessary to accomplish the purpose of protecting workers" (*Wicks v Trigen-Syracuse Energy Corp.*, 64 AD3d 75, 78 [4th Dept 2009]; *see Martinez v City of New York*, 93 NY2d 322, 325-326 [1999]), "the language of Labor Law § 240 (1) 'must not be strained' to accomplish what the Legislature did not intend" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 292 [2003], quoting *Martinez*, 93 NY2d at 326; *see Bish v Odell Farms Partnership*, 119 AD3d 1337, 1337-1338 [4th Dept 2014]; *Wicks*, 64 AD3d at 79; *see generally Shannahan v Empire Eng'g Corp.*, 204 NY 543, 548 [1912]). "It is apparent from the text of Labor Law § 240 (1), and its history confirms, that its central concern is the dangers that beset workers in the construction industry" (*Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521, 525 [2012]; *see Soto*, 21 NY3d at 566). "[T]he purpose of the statute is to place 'ultimate responsibility for safety practices at building construction jobs where such responsibility . . . belongs' " (*Dahar*, 18 NY3d at 525). "While the reach of section 240 (1) is not limited to work performed on actual construction sites" (*Martinez*, 93 NY2d at 326; *see Dahar*, 18 NY3d at 525; *Joblon v Solow*, 91 NY2d 457, 464 [1998]), the statute does not extend so far as to cover a worker who performs "customary occupational work of fabricating" a component "during the normal manufacturing process" at a facility and is not involved in any construction project nor involved in renovation or alteration work on the facility (*Jock v Fien*, 80 NY2d 965, 966, 968 [1992]; *see Davis v Wind-Sun Const., Inc.*, 70 AD3d 1383, 1383 [4th Dept 2010]; *Solly v Tam Ceramics, Inc.*, 258 AD2d 914, 914 [4th Dept 1999]; *Foster v Joseph Co.*, 216 AD2d 944, 944-945 [4th Dept 1995]; *Warsaw v Eastern Rock Prods.*, 193 AD2d 1115, 1115 [4th Dept 1993]; *see generally Dahar*, 18

NY3d at 525-526).

Here, defendants' submissions established that Alstom made air preheaters at the plant and was in the business of supplying various components, including rotor compartments, for air preheaters based on individual specifications of customers such as power plants, oil refineries, and chemical plants. Decedent was employed as a welder by Alstom at the plant. As was routine, decedent and the coworker were following the plans and specifications prepared by an Alstom engineer to fabricate the subject rotor compartment. The specifications showed, for example, where to apply welds, and a supervisor or Alstom inspector would explain how to remedy any issues such as missing welds. Inasmuch as Alstom's business was supplying components for air preheaters, welders such as decedent and the coworker regularly fabricated rotor compartments similar to the one that they were working on at the time of the accident. It is undisputed that the rotor compartment upon which decedent was working was one of several sections that would be loaded on a truck and transported from the plant in Wellsville, New York to the customer's power plant in Bow, New Hampshire where the air preheater would be assembled. We conclude that defendants thus established that decedent was not engaged in a covered activity under Labor Law § 240 (1) inasmuch as he was performing his "customary occupational work of fabricating" and welding a rotor compartment "during the normal manufacturing process" at the plant in Wellsville, and was not involved in the construction project in New Hampshire nor involved in renovation or alteration work on the plant in Wellsville (*Jock*, 80 NY2d at 966, 968; *see Davis*, 70 AD3d at 1383; *Solly*, 258 AD2d at 914; *Foster*, 216 AD2d at 944-945; *Warsaw*, 193 AD2d at 1115).

Plaintiff nonetheless contends, and the court agreed, that defendants failed to establish that the work in which decedent was engaged was part of a normal manufacturing process rather than part of a construction project. We reject that contention.

First, contrary to the suggestion of plaintiff, the court, and the dissent, while there is evidence that the rotor compartment upon which decedent was working was of a different style than those previously produced in terms of size, shape, and weight, the fact that decedent was fabricating a rotor compartment that was customized to the customer's specifications and not of universal or uniform design does not transform the nature of the work from fabrication during the normal manufacturing process to a covered activity as part of a construction project. After all, Alstom's business model was to supply various components, including rotor compartments, based on individual specifications of customers, and welders such as decedent routinely followed such specifications in fabricating and welding those air preheater components (*see Davis*, 70 AD3d at 1383; *see also Solly*, 258 AD2d at 914; *Foster*, 216 AD2d at 944-945; *Warsaw*, 193 AD2d at 1115).

Second, as defendants correctly contend, the terminology used in the contract does not control the inquiry whether decedent was engaged in protected activity under Labor Law § 240 (1). "The critical

inquiry in determining coverage under the statute is 'what type of work the plaintiff was performing at the time of the injury' " (*Panek,* 99 NY2d at 457, quoting *Joblon*, 91 NY2d at 465). Contrary to plaintiff's contention, while a contract may well provide evidence of the type of work that a worker was performing, the protection afforded by section 240 (1) is not invoked simply because a contract repeatedly uses the word "construction." Moreover, contrary to the dissent's suggestion, the fact that, pursuant to the contract here, Alstom provided technical assistance at the installation site is of no moment because the critical inquiry is the type of work that was performed by decedent (*see Panek*, 99 NY2d at 457), who had no responsibility for or involvement with the construction project in New Hampshire (*see Davis*, 70 AD3d at 1383; *cf. Gallagher v Resnick*, 107 AD3d 942, 944 [2d Dept 2013]; *see also Flores v ERC Holding LLC*, 87 AD3d 419, 420-421 [1st Dept 2011]).

Third, we agree with defendants that plaintiff's reliance on the affidavit of her expert engineer is misplaced inasmuch as the expert relied on the terminology used in the contract to a large extent and also provided impermissible legal conclusions (*see Penda v Duvall*, 141 AD3d 1156, 1157-1158 [4th Dept 2016]; *see generally Singh v Kolcaj Realty Corp.*, 283 AD2d 350, 351 [1st Dept 2001]).

Based on the foregoing, we conclude that the court erred in denying defendants' motion for summary judgment dismissing the amended complaint and granting plaintiff's cross motion for partial summary judgment on the issue of liability. In light of our determination, we do not consider defendants' remaining contentions.

All concur except WHALEN, P.J., and LINDLEY, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent inasmuch as we would affirm the order of Supreme Court in its entirety. Contrary to the contention of defendants-appellants (defendants), plaintiff's decedent was engaged in an activity protected by Labor Law § 240 (1) at the time of the accident.

A determination whether a particular activity falls within the ambit of Labor Law § 240 (1) "must be determined on a case-by-case basis, depending on the context of the work" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 883 [2003]; *see Saint v Syracuse Supply Co.*, 25 NY3d 117, 124-125 [2015]; *see generally Joblon v Solow*, 91 NY2d 457, 464-465 [1998]). Further, although the majority's determination is based on the distinction between manufacturing and construction for the purpose of Labor Law, that distinction is not clearly defined, and we agree with the majority that the terminology used by either party to describe decedent's work is not dispositive of whether decedent was engaged in a protected activity at the time of the accident. Indeed, to manufacture or fabricate something is to "make" or "construct" it (American Heritage Dictionary 632, 1067 [4th ed 2000]) and the words themselves, out of context, are generic and interchangeable. Instead, a determination distinguishing manufacturing from construction for the purpose of invoking the statutory protection at issue must be based, not on mere semantics, but on the totality of circumstances under which the fabrication or

construction is performed (*see Prats*, 100 NY2d at 883).

In our opinion, the majority takes too narrow a view of the work performed by plaintiff's decedent and his employer, defendant Alstom Power, Inc. (Alstom). Although the majority characterizes the business of Alstom as the mere fabrication of individual rotor compartments, Alstom's " 'customary business' " (*Solly v Tam Ceramics*, 258 AD2d 914, 914 [4th Dept 1999]) is the custom "designing and building" of air preheaters, which are stand-alone structures or "building[s]" consisting of a rotor assembly or assemblies within a support system. The rotor compartments that create a rotor assembly are not a universal or uniform design; instead, a rotor assembly can consist of one to forty-eight separate compartments that are then shipped to the construction site. Alstom's aftermarket engineering design manager testified at his deposition that the air preheater for which the decedent and his coworker were constructing rotor compartments is a multistory stand-alone structure consisting of two rotor assemblies that were originally designed and supplied by Alstom in 1959 and for which Alstom personnel designed the replacement rotor assemblies as part of the renovation project at issue. Further, although construction of the rotor assemblies began at an off-site facility in Wellsville, New York with the pre-assembly of rotor compartments, the one- to two-month on-site renovation of the air preheater was completed in New Hampshire under the supervision of Alstom personnel.

Thus, unlike the cases on which the majority relies, this is not a case where Alstom "was not engaged in any construction . . . project" at the time of the accident (*Jock v Fien*, 80 NY2d 965, 968 [1992]; *cf. Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521, 523 [2012]; *Davis v Wind-Sun Constr., Inc.*, 70 AD3d 1383, 1383 [4th Dept 2010]; *Solly*, 258 AD2d at 914; *Foster v Joseph Co.*, 216 AD2d 944, 944-945 [4th Dept 1995]; *Warsaw v Eastern Rock Prods.*, 193 AD2d 1115, 1115 [4th Dept 1993]), or where Alstom's involvement could be deemed merely incidental to or attenuated from the renovation project at issue. The fabrication of the rotor compartments, themselves the primary components of a multistory stand-alone air preheater, "[does] not fall into a separate phase easily distinguishable from other parts of the larger construction project," i.e., the renovation of the air preheater (*Prats*, 100 NY2d at 881). Instead, "a confluence of factors brings [decedent's] activity within the statute: his position as a [welder] who routinely undertook an enumerated activity, his employment with a company engaged under a contract to carry out an enumerated activity, and his participation in an enumerated activity during the specific project" (*id.* at 883).

The majority nonetheless concludes that, while Alstom personnel were integrally involved in the renovation of the air preheater structure throughout the construction project, Labor Law § 240 (1) does not apply because decedent "had no responsibility for or involvement with the construction project in New Hampshire." Although the renovation project was not "at the same site where the injury occurred" (*Prats*, 100 NY2d at 883), the Court of Appeals has explicitly stated that "it is neither pragmatic nor consistent with

the spirit of the statute to isolate the moment of injury and ignore the general context of the work" (*id.* at 882; *see Saint*, 25 NY3d at 124). The majority's distinction would preclude workers such as decedent from the protections of Labor Law § 240 (1) because his erection and alteration of the rotor compartment was performed at an ancillary location at the direction of Alstom's supervisors, but workers performing similar work on the rotor compartments at the direction of an Alstom supervisor during the on-site installation would fall within the ambit of the statute. That would constitute a distinction based solely on the location of the work, a distinction that the majority acknowledges is impermissible (*see Martinez v City of New York*, 93 NY2d 322, 326 [1999]; *see also Dahar*, 18 NY3d at 525; *Joblon*, 91 NY2d at 464), and would improperly "compartmentalize [decedent's] activity and exclude from the statute's coverage preparatory work essential to the enumerated act" (*Saint*, 25 NY3d at 125). In contrast, our recognition under the facts of this case that decedent and Alstom were actively involved in covered activities at the time of decedent's accident would not illogically expand the protection of Labor Law § 240 (1) beyond that intended by the legislature (*cf. Dahar*, 18 NY3d at 526).

We also reject defendants' contention, to the extent that it is properly before us (*see Paul v Cooper*, 45 AD3d 1485, 1486 [4th Dept 2007]), that the court erred in granting plaintiff's cross motion for partial summary judgment on liability on the Labor Law § 240 (1) cause of action because the rotor compartment on which decedent was working was not a "structure" within the meaning of the statute. We agree with the court that the approximately nine-foot-tall, five-ton steel rotor compartment that decedent was welding constituted a " 'piece of work artificially built up or composed of parts joined together in some definite matter' " (*Lewis-Moors v Contel of N.Y.*, 78 NY2d 942, 943 [1991]; *see Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Defendants' remaining contention is not properly before us inasmuch as it is raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

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CA 18-01072

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

HERKIMER COUNTY INDUSTRIAL DEVELOPMENT AGENCY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF HERKIMER, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(ACTION NO. 1.)

IN THE MATTER OF HERKIMER COUNTY INDUSTRIAL
DEVELOPMENT AGENCY, PETITIONER-RESPONDENT,

V

VILLAGE OF HERKIMER AND JOHN SPANFELNER, AS
CODES OFFICER FOR VILLAGE OF HERKIMER,
RESPONDENTS-APPELLANTS.
(ACTION NO. 2.)

HODGSON RUSS LLP, BUFFALO (CHARLES W. MALCOMB OF COUNSEL), FOR PLAINTIFF-APPELLANT AND PETITIONER-RESPONDENT.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL J. LONGSTREET OF COUNSEL), FOR DEFENDANT-RESPONDENT AND RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an amended judgment (denominated amended order) of the Supreme Court, Herkimer County (Erin P. Gall, J.), entered March 9, 2018. The amended judgment, inter alia, granted that part of the motion of defendant-respondent Village of Herkimer seeking partial summary judgment on the issue of liability on its counterclaim in action No. 1, and granted the petition in action No. 2.

It is hereby ORDERED that the amended judgment so appealed from is modified on the law by granting in part the motion of defendant-respondent Village of Herkimer (Village) and respondent John Spanfelner, as Codes Officer for the Village, dismissing the petition insofar as it sought to prohibit the Village and Spanfelner from enforcing the New York State Uniform Fire Prevention and Building Code against plaintiff-petitioner and vacating the second decretal paragraph to the extent that it granted such relief, and by granting judgment in favor of the Village as follows:

It is ADJUDGED AND DECLARED that plaintiff Herkimer

County Industrial Development Agency is liable to defendant Village of Herkimer for the subject unpaid water rents,

and as modified the amended judgment is affirmed without costs.

Memorandum: Plaintiff-petitioner, Herkimer County Industrial Development Agency (HCIDA), as part of an industrial development project, leased a facility to a corporation (tenant) on properties located in defendant-respondent Village of Herkimer (Village). The tenant operated its business at the facility and incurred charges for water supplied by the Village, but subsequently went bankrupt and left two years of unpaid water rents. As we explained on the prior appeals in this matter, HCIDA commenced action No. 1 seeking a declaration that the real property taxes levied against it by the Village as a means of collecting the unpaid water rents are void inasmuch as HCIDA is exempt from the payment of such taxes (*Herkimer County Indus. Dev. Agency v Village of Herkimer*, 124 AD3d 1298 [4th Dept 2015] [*Herkimer II*]; *Herkimer County Indus. Dev. Agency v Village of Herkimer*, 84 AD3d 1707 [4th Dept 2011] [*Herkimer I*]). As relevant here, we declared in *Herkimer II* that the assessment of such taxes was unlawful based on HCIDA's tax exempt status and that defendant County of Herkimer had properly cancelled the tax lien against properties owned by HCIDA (124 AD3d at 1298). We concluded, however, that Supreme Court erred in dismissing the Village's counterclaim against HCIDA, alleging that HCIDA is responsible for the unpaid water rents as the owner, and we therefore reinstated the counterclaim (*id*. at 1300-1301).

Thereafter, inasmuch as the vacant properties had fallen into a state of disrepair, the Village issued an order to remedy to HCIDA directing that it remedy various violations of the New York State Uniform Fire Prevention and Building Code (Building Code) (19 NYCRR 1219.1 *et seq.*; *see* Executive Law § 377). After HCIDA failed to comply, respondent John Spanfelner, as Codes Officer for the Village, issued an appearance ticket charging HCIDA criminally for violations of the Building Code. HCIDA commenced a proceeding pursuant to CPLR article 78 in action No. 2 seeking several forms of relief including, in effect, a writ of prohibition barring the Village and Spanfelner (collectively, respondents) from enforcing the Building Code against it.

HCIDA appeals and respondents cross-appeal from an amended judgment that, inter alia, granted that part of the Village's motion in action No. 1 for partial summary judgment on the issue of liability on the counterclaim and, in action No. 2, denied respondents' motion to, among other things, dismiss the petition and granted HCIDA's petition by, inter alia, prohibiting respondents from enforcing the Building Code against HCIDA.

HCIDA contends on its appeal in action No. 1 that the Village has no authority to recover directly from it for the unpaid water rents. We reject that contention.

As a general matter, "[w]here a person applies for water for his [or her] premises[,] a contract to pay the rates charged therefor

arises" (*Security Bldg. & Loan Assn. v Carey*, 259 App Div 42, 47 [4th Dept 1940], *affd* 286 NY 646 [1941]; *see generally State Univ. of N.Y. v Patterson*, 42 AD2d 328, 329 [3d Dept 1973]). When "the charge . . . depends solely upon the quantity of water used[,] . . . there is merely a voluntary purchase by the consumer from the [municipality] of such quantity of water as [the consumer] chooses to buy . . . , and the obligation to pay therefor must primarily rest upon [the consumer] who buys and consumes the article" (*New York Univ. v American Book Co.*, 197 NY 294, 297 [1910]).

Nonetheless, where, as here, an owner "consents to the tenant's using water in [a] building, supplied through pipes installed by the owner, or continued by the owner, for the purpose of connecting the building with the [municipality's] water main, the owner assents to the [municipality's] supplying water to the tenant for use in the building" (*Dunbar v City of New York*, 177 App Div 647, 649 [1st Dept 1917], *affd* 223 NY 597 [1918], *affd* 251 US 516 [1920]). In the case before us, it appears that the water pipes of the facility that were connected to the Village's water mains "were installed by the owner of the [facility], if not by the present owner, [HCIDA], then by [its] predecessor in title and the connection was never shut off or disconnected by [HCIDA]," and we note that "[t]he only purpose of maintaining a connection between [the facility] and the [Village's] water mains [was] to have the [Village] supply the [facility] with water" (*id.* at 648). Moreover, the lease contemplated that the tenant would incur utility charges as part of its operation, use, and occupancy of the leased facility. "When such assent [to] or arrangement [for the tenant's use of water] is made, it must be deemed to be made with a view to the existing law" (*id.* at 649). We therefore must evaluate the existing law at the time of HCIDA's assent to the Village supplying water to the tenant in order to determine whether liability for the unpaid water rents may be imposed upon HCIDA.

Village Law § 11-1116 provides that "[t]he board of water commissioners may adopt rules, regulations and local laws not inconsistent with law, for enforcing the collection of water rents and relating to the use of the water, and may enforce observance thereof by cutting off the supply of water." The Village adopted regulations for enforcing the collection of water rents and relating to the use of water in 1958 (regulations). It is well settled that the language of a regulation is to be construed in light of the regulation as a whole and according to the ordinary and plain meaning of its words (*see Rodriguez v Joseph*, 149 AD2d 14, 18 [1st Dept 1989], *lv dismissed* 75 NY2d 809 [1990]; *Matter of Parker v Kelly*, 140 AD2d 993, 993 [4th Dept 1988]; *see also* McKinney's Cons Laws of NY, Book 1, Statutes §§ 94, 97). Here, under the section entitled "Liability for Water Service," Rule No. 7 of the regulations provides that "[a]ll bills, whether for use of water or repairs to water service, are a charge against the owner of the premises or property where the water is used, and said bills will be rendered to the owner or occupant of said premises." Under the same section, Rule No. 8 provides, in pertinent part, that "[a]ll bills for the use of water become due and payable and are a lien on the premises where the water is used" and that "[f]ailure to

receive bills for said water services . . . does not relieve the owner and/or consumer from liability to pay." Consistent therewith, Rule No. 22 provides the duration and measure of the owner's liability, stating that "[t]he property owner will be held liable for all water bills rendered" from the setting of the meter until 48 hours (excluding Sundays and holidays) after receipt of written notice of discontinuation of service as measured by the meter or estimated by the Village from the best available information if the meter has incorrectly registered actual consumption. Upon construing the regulations as a whole and according to the ordinary and plain meaning of the words therein, we conclude that the regulations provide for the imposition of liability on property owners for water consumed on such property and supplied by the Village.

HCIDA attempts to rebut the effect of the regulatory language imposing liability on property owners by referencing the language of Rule No. 8 and that part of Rule No. 9 authorizing the Village to discontinue and shut off the water supply for nonpayment. Those attempts are unavailing. Rule Nos. 8 and 9 are consistent, respectively, with Village Law § 11-1118 in providing that unpaid water bills constitute a lien on the property by operation of law and with Village Law § 11-1116 in providing that the collection of water rents may be enforced by shutting off the water supply. Those remedies, however, are available in addition to, and not exclusive of, direct liability against property owners (*see City of New York v Idlewild Beach Co., Inc.*, 182 Misc 205, 207-208 [NY City Ct 1943], *affd* 182 Misc 213 [App Term, 1st Dept 1944]).

Based on the foregoing, we conclude that HCIDA assented to the Village supplying water to the tenant for use in the facility at a time when the existing law imposed liability on property owners for municipal water service, thereby giving rise to an implied contract for such service between HCIDA and the Village (*see Dunbar*, 251 US at 517-518; *Puckett v City of Muldraugh*, 403 SW2d 252, 255-256 [Ky 1966]; *see also Sherwood Ct. v Borough of S. Riv.*, 294 NJ Super 472, 478-479 [Super Ct App Div 1996]). In other words, inasmuch as HCIDA accepted water service that was supplied to and used by the tenant in the facility, it "impliedly agree[d] to pay the service charge as provided in the [regulations]" (*Puckett*, 403 SW2d at 255, citing *Dunbar*, 177 App Div at 649; *see Dunbar*, 251 US at 517-518). Contrary to the contentions of HCIDA and the dissent, the imposition of such liability does not violate common-law principles, nor do the regulations require the property owner to pay the debt of another (*see Dunbar*, 177 App Div at 649; *Puckett*, 403 SW2d at 255; *see also Sherwood Ct.*, 294 NJ Super at 479-481). Additionally, unlike the dissent, we do not read the language of the counterclaim so narrowly as to foreclose reliance on the underlying legal theory by which the regulations function to impose liability on HCIDA.

HCIDA further contends on its appeal in action No. 1 that, even if the Village has the authority to hold property owners directly liable for water rents, HCIDA's ownership interest in the facility is insufficient to impose liability on it. We reject that contention. The regulations impose liability for water service on property owners,

among others, and we see no reason for excluding owners such as HCIDA from the scope of the regulations (*see Adimey v Erie County Indus. Dev. Agency*, 89 NY2d 836, 838 [1996], *mod for the reasons stated in dissenting in part mem* 226 AD2d 1053 [4th Dept 1996]; *cf. Matter of Erie County Indus. Dev. Agency v Roberts*, 94 AD2d 532, 539-540 [4th Dept 1983], *affd* 63 NY2d 810 [1984]; *Smith v New York City Indus. Dev. Agency*, 265 AD2d 477, 478 [2d Dept 1999]).

We thus conclude that the court properly granted that part of the Village's motion in action No. 1 for partial summary judgment on the issue of liability on the counterclaim. The court erred, however, in failing to declare the rights of the parties (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]; *Herkimer II*, 124 AD3d at 1299), and we modify the amended judgment accordingly.

As limited by their brief on their cross appeal in action No. 2, respondents contend that the court erred in granting the petition, and denying their motion to dismiss the petition, insofar as the petition sought to prohibit them from enforcing the Building Code against HCIDA. We agree, and we therefore further modify the amended judgment accordingly. We conclude on this record that HCIDA is not entitled to a writ of prohibition inasmuch as that form of relief is "not appropriate where[, as here,] a criminal defendant may 'raise legal arguments and receive appropriate relief . . . in the criminal prosecution' " (*Matter of Henry v Fandrich*, 159 AD3d 1409, 1410 [4th Dept 2018], *appeal dismissed* 31 NY3d 1072 [2018], quoting *Cayuga Indian Nation of N.Y. v Gould*, 14 NY3d 614, 633 [2010], *cert denied* 562 US 953 [2010]; *see Matter of Whitehurst v Kavanagh*, 218 AD2d 366, 368-369 [3d Dept 1996], *lv denied in part and dismissed in part* 88 NY2d 873 [1996]).

All concur except DEJOSEPH, and NEMOYER, JJ., who dissent in part and vote to modify in accordance with the following memorandum: In action No. 2, we join all aspects of the majority's determination and reasoning. As the majority explains, a writ of prohibition is unwarranted where, as here, the very argument upon which the petitioner seeks prohibition can be made and adjudicated in a pending criminal case.

In action No. 1, however, the majority strays outside the four corners of the answer and grants a judgment to defendant-respondent Village of Herkimer (Village) on its counterclaim based on a theory of liability that the Village did not assert therein. Moreover, the majority's analysis conflates in rem liability with personal liability, does not address the principles of contractual privity raised by plaintiff-petitioner Herkimer County Industrial Development Agency (IDA), and effectively permits a single municipality to rewrite—to its own advantage—the foundational rules governing the enforcement of contracts. We must therefore dissent in action No. 1.

At its core, the IDA's appeal in action No. 1 calls upon us to resolve a single overarching question: did Supreme Court properly award the Village summary judgment as to liability on its

counterclaim? To properly answer that question, we must first identify the nature and scope of the counterclaim at issue. As we read it, the Village's counterclaim asserts a single theory of liability, namely, that the IDA is directly and personally liable to the Village for the unpaid water bills of its tenant, a bankrupt manufacturing company that is not a party to this action. The IDA's liability, the counterclaim explains, is traceable to Regulation 22 of the Village's Water Department, which says in relevant part that "[t]he property owner will be held liable for water bills."

As an aside, we note that the meaning of the term "property owner" in Regulation 22 is unclear. Does that term mean the entity that owned the property when it was first connected to the water-supply system? Or does it mean any entity that subsequently acquired the property? We do not know, because the regulation does not say.

In discerning the scope of the counterclaim at issue, it is also important to emphasize what the counterclaim does not do. It does not allege that the property itself—as opposed to the IDA as its owner—should be liable on an in rem basis for the unpaid water bills. It does not seek to enforce a lien against the property for the unpaid water bills. And it makes no mention of any Village regulation or ordinance other than Regulation 22, much less attempt to base the IDA's ostensible liability on any Village ordinance or regulation other than Regulation 22.

In our view, the counterclaim's theory of direct, personal liability under Regulation 22 does not, as a matter of law, have merit. In other words, the counterclaim's theory of liability does not hold water. The legislature has authorized a village board of water commissioners to "adopt rules, regulations and local laws *not inconsistent with law*, for enforcing the collection of water rents and relating to the use of the water" (Village Law § 11-1116 [emphasis added]), and we have held that the common law of this State is included within the law to which local regulations must conform pursuant to such a statute (*see Lyth v Hingston*, 14 App Div 11, 17 [4th Dept 1897]). As we explained in *Lyth*, the legislatively delegated authority to enact municipal ordinances not "inconsistent with the laws" does not allow a "municipality to adopt ordinances which should be superior to the common law of the [s]tate" (*id.*). Thus, when an enabling statute explicitly forbids the enactment of municipal ordinances at odds with state law, as Village Law § 11-1116 does here, "it is not within the province of the municipal assembly to create a cause of action" if, "[u]nder the general law [i.e., the common law] the owner owed no duty and was under no liability . . . under such circumstances" (*Koch v Fox*, 71 App Div 288, 294 [1st Dept 1902]). Put simply, when the legislature has denied a municipality the power to enact ordinances inconsistent with state law, the municipality may not create a cause of action or theory of liability inconsistent with, or otherwise unrecognized by, state statute or the common law.

Were it otherwise, municipalities could vary the common law rules governing the enforcement of contracts, thereby creating a chaotic

patchwork of inconsistent and conflicting regulations in which a person's rights and obligations under an identical contract and set of facts would depend on the municipality in which the transaction arose. Granting municipalities the power to alter the common law of contracts would cause significant instability in all commercial transactions across the State.

We do not suggest, of course, that a municipality may never create a cause of action in derogation of the common law. Indeed, the legal landscape is replete with municipal enactments that properly supercede the common law (*see e.g.* Administrative Code of City of NY § 8-107). Rather, we argue only that a municipality may not create a cause of action in derogation of the common law where, as here, the municipality's underlying power to regulate derives exclusively from a state statute that prohibits any municipal enactment "inconsistent with law," including the common law.

Unfortunately for the Village, applying Regulation 22 under these circumstances is precisely what Village Law § 11-1116 prohibits—the enforcement of a municipally-enacted cause of action conflicting with the common law of this State. At common law, absent certain quasi-contractual scenarios not implicated or raised here, a plaintiff cannot recover a personal judgment for a debt "against a party with whom it was not in privity," i.e., a party with whom it did not contract (*Outrigger Constr. Co. v Bank Leumi Trust Co. of N.Y.*, 240 AD2d 382, 383 [2d Dept 1997], *lv denied* 91 NY2d 807 [1998]; *see Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 86 AD3d 919, 920 [4th Dept 2011]; *LaBarte v Seneca Resources Corp.*, 285 AD2d 974, 975 [4th Dept 2001]). This foundational proposition of contract law does not fall by the wayside simply because the subject contract involves the supply of water by a municipal utility. As the Court of Appeals stated, "water rents" are exacted "for water actually used and supplied to [the customer] under an express contract that he [or she] would pay for it at the rates established by the [municipality]" (*Silkman v Board of Water Commrs. of City of Yonkers*, 152 NY 327, 331-332 [1897]), and a person who did not contract for the provision of water does not become the guarantor for a person who did so contract merely because the noncontracting party happens to own the building in which the water is supplied (*see Dunbar v City of New York*, 177 App Div 647, 649 [1st Dept 1917], *affd* 223 NY 597 [1918], *affd* 251 US 516 [1920]).

In this case, it is undisputed that the water rents at issue were contracted for and incurred solely by the manufacturer tenant, which owned the property at the time it contracted for water from the Village. It is also undisputed that the IDA never contracted with the Village for water, that the IDA never received or used any water from the Village, and that the IDA never agreed to pay for the tenant's water. In short, it is undisputed that the IDA was not in contractual privity with the Village with respect to the disputed water rents. Thus, there can be no dispute that the common law prohibits a direct, personal recovery against the IDA for the tenant's unpaid water bills.

Yet the Village's interpretation of Regulation 22 would seem to

impose the very liability prohibited by common law. Indeed, under the Village's interpretation, Regulation 22 does what the common law explicitly forbids: it imposes direct personal liability upon one person for the debts of another without regard to whether he or she contractually agreed to pay those debts. Thus, if applied to these facts, Regulation 22 would abrogate the common-law requirement of contractual privity with respect to the provision of water in the Village. And that is simply beyond the Village's power to do (*see Koch*, 71 App Div at 294; *Lyth*, 14 App Div at 17).

The majority's contrary holding is grounded in the proposition that, when a property owner "consents to the tenant's using water in [a] building, supplied through pipes installed by the owner, or continued by the owner, for the purpose of connecting the building with the [municipality's] water main, the owner assents to the [municipality's] supplying water to the tenant for use in the building" (*Dunbar*, 177 App Div at 649). That proposition is longstanding and not controversial, and we take no issue with it here. But the majority overlooks the well-defined *legal significance* of that proposition: it allows the imposition of a lien against the property, not the imposition of personal liability against the property's owner. The First Department—as affirmed by both the Court of Appeals and the United States Supreme Court—wrote just that in *Dunbar*: "the tenant is liable to the city primarily for the water consumed, and the *owner's property* is also liable . . . for water furnished to the tenant for use in the building with the owner's assent" (*id.* [emphasis added]). *Dunbar* did not hold, as the majority does now, that the owner is personally liable for the tenant's unpaid water bills in the absence of contractual privity. Quite the opposite, the First Department in *Dunbar* rejected the very rule adopted today by the majority, i.e., "that the obligation of the owner was that of a surety [to the tenant/customer] and to be construed according to the rules of suretyship" (*id.*). *Dunbar*'s analysis makes perfect sense in its own context because, in that case, the City of New York sought to foreclose a lien against a property, not to hold the property's owner personally liable for the debts of her tenant.

The majority's reliance on *Dunbar* and other lien-law cases to support the imposition of personal liability in this case conflates in rem with personal liability, and it assumes that a property's in rem liability is necessarily coextensive with the personal liability of its owner. That is not the law; as we wrote decades ago, "[e]vidence which warrants an inference of consent sufficient to give a lien is not necessarily sufficient to warrant an inference of an agreement, express or implied, to pay" (*Weinheimer v Hutzler*, 234 App Div 566, 566 [4th Dept 1932], *affd* 260 NY 687 [1932]; *see generally Ferrara v Peaches Café LLC*, 32 NY3d 348 [2018], *affg* 138 AD3d 1391 [4th Dept 2016]). So too here; although the evidence might warrant an inference that the IDA, as the property owner, sufficiently consented to the provision of water so as to give rise to a valid lien against the property, it is undisputed that the IDA never agreed, expressly or impliedly, to pay for the water bills of its tenant. In fact, the contract between the IDA and the tenant explicitly made the tenant solely responsible for all utility bills. To hold the IDA personally

liable notwithstanding the contrary provisions of its contract with the tenant is particularly unjust given that the IDA never received any water bills from the Village until *after* the Village's claim against the tenant for those bills had failed in bankruptcy court.

Unlike the majority, we cannot read the counterclaim to assert any theory of liability based on Regulation 8 or Regulation 9 of the Herkimer Village Water Department. In any event, even if—as the majority posits—those regulations operated to create a lien against the property as a matter of law, any such lien would not be self-executing. It would require an action to foreclose the lien, which is not part of the Village's counterclaim before us. Thus, even if an unrecorded lien exists, the Village's failure to seek any relief predicated on such a lien reinforces our view that lien-law cases are inapposite in resolving this appeal.

In closing, we return to the language of the counterclaim. It does not seek in rem liability, it seeks personal liability. The majority's analysis makes a compelling case for imposing in rem liability against the property at issue, but that is not what the Village sought in its counterclaim. Rather, the Village alleged only a theory of liability upon which it cannot prevail, namely, personal and direct liability against the IDA to recover a debt for which the IDA never contracted. We are constrained by the language of the counterclaim, and we are not free to grant judgment on a theory not pleaded or argued below (*see generally Misicki v Caradonna*, 12 NY3d 511, 518-520 [2009]). And because the only theory pleaded and argued below is legally meritless, we must dissent in part and vote to modify the amended judgment by denying the Village's motion in action No. 1 insofar as it sought summary judgment on the issue of liability on the counterclaim, granting the IDA's motion in action No. 1 insofar as it sought a judgment declaring that the IDA is not personally liable to the Village for the subject water rents, and granting the motion of respondents-appellants in action No. 2 insofar as it sought to dismiss that part of the petition seeking to prohibit them from enforcing the New York State Uniform Fire Prevention and Building Code against the IDA.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

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KA 13-02068

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM A. WILKINS, ALSO KNOWN AS MUGSY,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered November 19, 2013. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, robbery in the first degree (three counts) and attempted robbery in the first degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3] [felony murder]), three counts of robbery in the first degree (§ 160.15 [2]), and two counts of attempted robbery in the first degree (§§ 110.00, 160.15 [2]), defendant contends that the judgment must be reversed because of several errors that Supreme Court made during jury selection and in its instructions to the jury. We reject those contentions.

Defendant contends that the court violated the rule in *People v Antommarchi* (80 NY2d 247, 250 [1992], *rearg denied* 81 NY2d 759 [1992]) when it conducted several sidebar conferences in his absence and that reversal is required with respect to two of those conferences. We disagree with defendant that reversal is required as a result of any violation of defendant's *Antommarchi* rights. It is well settled that a criminal defendant has a statutory right to be present at all material stages of the trial (*see* CPL 260.20; *People v Sprowal*, 84 NY2d 113, 117 [1994]), including the sidebar questioning of a prospective juror when the purpose of the questioning is "intended to

search out a prospective juror's bias, hostility or predisposition to believe or discredit the testimony of potential witnesses" (*Antommarchi*, 80 NY2d at 250; *see People v Velasquez*, 1 NY3d 44, 47 [2003]; *People v Sloan*, 79 NY2d 386, 392 [1992]). Nevertheless, "reversal is not required when, because of the matter then at issue before the court or the practical result of the determination of that matter, the defendant's presence could not have afforded him or her any meaningful opportunity to affect the outcome" (*People v Roman*, 88 NY2d 18, 26 [1996], *rearg denied* 88 NY2d 920 [1996]). In determining whether the defendant's presence could have afforded him or her such an opportunity, the test is whether the record negates the possibility that the defendant "could have provided valuable input on his [or her] counsel's apparently discretionary choice to excuse those venire persons" (*People v Feliciano*, 88 NY2d 18, 28 [1996]). Thus, reversal is not required where the defendant's attorney does not exercise a choice to exclude a prospective juror, such as where a prospective juror is excused for cause or where the People have exercised a peremptory challenge to the prospective juror (*see People v Camacho*, 90 NY2d 558, 561 [1997]; *Feliciano*, 88 NY2d at 28; *People v Lucious*, 269 AD2d 766, 768 [4th Dept 2000]).

Here, we conclude that defendant had no opportunity to provide any input that might have affected the outcome regarding the relevant prospective jurors. One of the subject prospective jurors was sua sponte excused by the court for cause. Although defense counsel stated that he did not oppose that decision, the court had already made its determination when that statement was made, and thus "defendant's presence [at the conference regarding that prospective juror] could not have afforded him . . . any meaningful opportunity to affect the outcome" (*Roman*, 88 NY2d at 26).

We reach the same conclusion regarding the second prospective juror at issue. In this trial, which involved two defendants and two defense counsels, the record establishes that the court directed each defense counsel to independently exercise peremptory challenges, without input from the other defense counsel (*cf.* CPL 270.25 [3]). No objection to that procedure was raised. In addition, the record establishes that defense counsel for the codefendant exercised his peremptory challenges before defense counsel for defendant. Thus, the record demonstrates that the codefendant's defense counsel exercised a peremptory challenge to the second prospective juror, before defendant's defense counsel had any opportunity to consider whether to challenge that prospective juror. Thus, we further conclude that, under the circumstances of this case, defendant could not "have provided valuable input" (*Feliciano*, 88 NY2d at 28), or indeed any input, regarding the peremptory challenge of that prospective juror. Therefore, reversal is not required.

Although the court erred in instructing the jury, without a request for such an instruction from defendant, that it was to draw no adverse inference from defendant's failure to testify (*see generally* CPL 300.10 [2]), "the court's unrequested remarks . . . about defendant's possible failure to testify do not call for reversal" inasmuch as any error was harmless (*People v Koberstein*, 66 NY2d 989,

991 [1985]; *see People v Robtoy*, 144 AD3d 1190, 1192 [3d Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *People v Robinson*, 1 AD3d 985, 986 [4th Dept 2003], *lv denied* 1 NY3d 633 [2004], *reconsideration denied* 2 NY3d 805 [2004]). We also reject defendant's contention that reversal is required because the court sua sponte explained to the jury that the third person at defendant's table was a deputy and referred to defendant's custodial status. The court instructed the jury that "it was to draw no unfavorable inferences from the fact that defendant was in custody and unable to make bail, and the jury is presumed to have followed that instruction" (*People v Pressley*, 156 AD3d 1384, 1384 [4th Dept 2017], *amended on rearg* 159 AD3d 1613 [4th Dept 2018], *lv dismissed* 31 NY3d 1085 [2018]; *see also People v Konovalchuk*, 148 AD3d 1514, 1516 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]; *see generally People v Smith*, 23 AD3d 415, 415 [2d Dept 2005], *lv denied* 6 NY3d 781 [2006]).

As defendant contends and the People correctly concede, however, the court erred in directing that the sentence on the felony murder count run consecutively to the consecutive sentences on the robbery and attempted robbery counts (*see People v Glover*, 117 AD3d 1477, 1478 [4th Dept 2014], *lv denied* 23 NY3d 1036 [2014], *reconsideration denied* 24 NY3d 961 [2014]; *see generally People v Parks*, 95 NY2d 811, 814-815 [2000]), and we therefore modify the judgment by directing that the sentence imposed on count one of the indictment, i.e., the felony murder count, run concurrently with the consecutive sentences imposed on the remaining counts. The sentence, as modified, is not unduly harsh or severe.

All concur except CURRAN, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent and conclude that the violation of *People v Antommarchi* (80 NY2d 247 [1992], *rearg denied* 81 NY2d 759 [1992]) that occurred in this case requires reversal of the judgment and remittal for a new trial. The majority does not dispute that an *Antommarchi* violation occurred in this case when defendant did not attend a sidebar conference during which, inter alia, the codefendant's defense counsel used a peremptory challenge to strike a prospective juror. At that time, defendant had not yet waived—either expressly or by his conduct—the right to be present at sidebar conferences (*see People v Flinn*, 22 NY3d 599, 601 [2014], *rearg denied* 23 NY3d 940 [2014]).

Despite the *Antommarchi* violation, the majority concludes that reversal is not required because there was no possibility that "defendant's presence at [the sidebar conference] could . . . have afforded any meaningful opportunity to affect the outcome" (*People v Davidson*, 89 NY2d 881, 882 [1996]; *see People v Roman*, 88 NY2d 18, 26 [1996], *rearg denied* 88 NY2d 920 [1996]). Specifically, the majority concludes that defendant could not have affected the outcome of the relevant sidebar conference because he could not influence the codefendent's independent use of one of their 20 collective peremptory challenges. I disagree.

It is well settled that reversal for an *Antommarchi* violation is

not required where a "potential juror has been excused for cause by the court or as a result of a peremptory challenge by the People" (*People v Maher*, 89 NY2d 318, 325 [1996]). Thus, I agree with the majority that there was no reversible error with respect to Supreme Court's sua sponte decision to excuse for cause a different prospective juror during a sidebar conference from which defendant was absent (*see People v Feliciano*, 88 NY2d 18, 28 [1996]). I disagree, however, with the majority's conclusion that defendant could not have affected the outcome of the relevant sidebar conference because nothing in the record supports the majority's determination that defendant could not have protested the codefendant's use of the peremptory challenge at that time.

CPL 270.25 (3) provides that, "[w]hen two or more defendants are tried jointly, the number of peremptory challenges prescribed in subdivision two is not multiplied by the number of defendants, but such defendants are to be treated *as a single party*. In any such case, a peremptory challenge by one or more defendants must be allowed if a *majority* of the defendants join in such challenge. Otherwise, it must be disallowed" (emphasis added). Defendant and the codefendant were collectively entitled to 20 peremptory challenges here because they were charged with, inter alia, murder in the second degree, a class A felony (Penal Law § 125.25 [3]; *see* CPL 270.25 [2] [a]). The majority's conclusion that defendant could not affect the codefendant's use of a peremptory strike and that, therefore, defendant's presence at the relevant sidebar conference could not have afforded him a meaningful opportunity to affect the outcome thereof hinges entirely on the assumption that the procedure set forth in CPL 270.25 (3) was not being followed during jury selection. I cannot accept that assumption.

Initially, I note that the People did not make the argument relied on by the majority in their respondent's brief, a point they conceded at oral argument on this appeal. In any event, the record is wholly devoid of support for the majority's conclusion that the court directed defense counsel to proceed in disregard of the requirements of CPL 270.25 (3). Before the relevant sidebar conference, the court stated that it had "indicated in chambers this morning that the [20] challenges afforded to the defendants will be a total or cumulative number." The court then asked the codefendant's defense counsel if he had any peremptory challenges to exercise, and the codefendant's defense counsel struck the prospective juror in question without any objection by defendant's defense counsel. Nothing about that minimal exchange demonstrates that CPL 270.25 (3) was not being followed at the time, that it did not apply to defendant's and the codefendant's use of peremptory challenges, or that defendant's defense counsel waived his right to oppose the exercise of peremptory challenges by the codefendant's defense counsel. Moreover, given the "presumption of regularity [that] attaches to judicial proceedings" (*People v Walker*, 117 AD3d 1578, 1578 [4th Dept 2014] [internal quotation marks omitted]; *see generally People v Cruz*, 14 NY3d 814, 816 [2010]; *People v Hawkins*, 113 AD3d 1123, 1125 [4th Dept 2014], *lv denied* 22 NY3d 1156 [2014]) and the lack of any evidence that the court deviated from the procedure set forth in CPL 270.25 (3), I conclude that CPL 270.25 (3)

was being followed at the time of the relevant sidebar conference and that the assent of both defendant and the codefendant was therefore needed to use any of their joint peremptory strikes.

Because CPL 270.25 (3) was being followed at the time, I further conclude that the failure of defendant's defense counsel to object to the codefendant's use of a peremptory challenge to the prospective juror can only be construed as consent to the use of that challenge and, based on the record before us, should not be construed as meaning that defense counsel *lacked the power* to so object. "Because defendant might have provided valuable input regarding his attorney's discretionary decision to excuse [the prospective juror], the record do[es] not negate the possibility that defendant might have made a meaningful contribution to the proceeding" (*Davidson*, 89 NY2d at 883 [internal quotation marks omitted]; *see generally Maher*, 89 NY2d at 325; *People v Allen*, 300 AD2d 1098, 1098 [4th Dept 2002]).

Inasmuch as I conclude that defendant could have provided his defense counsel with some "valuable input" during the relevant sidebar conference from which he was absent, I cannot adhere to the majority's conclusion that the *Antommarchi* violation here does not warrant reversal (*see Maher*, 89 NY2d at 325; *Davidson*, 89 NY2d at 883).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

231

KA 16-00752

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE LOIZ, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSE LOIZ, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered November 2, 2015. 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 said appeal is unanimously dismissed.

Same memorandum as in *People v Loiz* ([appeal No. 2] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

232

KA 18-00527

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE LOIZ, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSE LOIZ, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a resentence of the Onondaga County Court (Joseph E. Fahey, J.), rendered June 2, 2016. Defendant was resentenced upon his conviction of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the resentence so appealed from is modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment to a determinate term of seven years and the period of postrelease supervision to a period of 1½ years, and as modified the resentence is affirmed.

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 third degree (Penal Law § 220.16 [12]). In appeal No. 2, defendant appeals from a resentence imposing a determinate term of 12 years' imprisonment and a period of three years' postrelease supervision (PRS) upon that conviction. We note at the outset that defendant's appellate contentions concern only the resentence in appeal No. 2, and we therefore dismiss the appeal from the judgment in appeal No. 1 (*see People v Patterson*, 128 AD3d 1377, 1377 [4th Dept 2015]).

With respect to appeal No. 2, we agree with defendant that, under the circumstances of this case, the resentence is unduly harsh and severe. We therefore modify the resentence as a matter of discretion in the interest of justice by reducing the sentence of imprisonment to a determinate term of seven years and the period of PRS to a period of 1½ years (*see generally* CPL 470.15 [6] [b]; CPL 470.20 [6]; Penal Law §§ 60.04 [3]; 70.70 [3] [b] [i]; 70.45 [2] [b]).

Defendant's remaining contention in his main brief is academic. Finally, inasmuch as defendant failed to obtain leave to appeal from the order denying his CPL 440.10 motion, his contentions in the pro se supplemental brief concerning the denial of that motion are not properly before us (*see People v Fuller*, 124 AD3d 1394, 1395 [4th Dept 2015], *lv denied* 25 NY3d 989 [2015]).

All concur except CARNI and CURRAN, JJ., who dissent and vote to modify in accordance with the following memorandum: We respectfully disagree with the majority's decision in appeal No. 2 to modify the resentence as a matter of discretion in the interest of justice by reducing defendant's sentence of imprisonment. After police found him in possession of over 35 ounces of cocaine, defendant was indicted on counts of, among other things, criminal possession of a controlled substance in the first and third degrees (Penal Law §§ 220.21 [1]; 220.16 [1]). Defendant pleaded guilty to criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]) in full satisfaction of the indictment in exchange for a sentence that was less than the maximum term of incarceration. Thus, defendant, who faced the risk of multiple felony convictions, obtained a favorable plea bargain that significantly limited his sentencing exposure. We therefore reject defendant's contention that the bargained-for sentence of incarceration is unduly harsh and severe (*see generally People v Grucza*, 145 AD3d 1505, 1506 [4th Dept 2016]).

We agree with defendant, however, that the period of postrelease supervision should be reduced to 1½ years. Although defendant's contention is unpreserved (*see People v Sprague*, 82 AD3d 1649, 1649 [4th Dept 2011], *lv denied* 17 NY3d 801 [2011]), we would nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). During the plea proceedings, the original sentencing court promised defendant that it would impose the minimum period of postrelease supervision and, thereafter, imposed an illegal period of postrelease supervision of five years under the belief that this was the minimum allowed. The record reflects that the resentencing court later imposed the maximum legal period of postrelease supervision, i.e., three years, under the mistaken belief that the original sentencing court had also intended to impose the maximum (*see* Penal Law § 70.45 [2] [d]). We would therefore modify the resentence as a matter of discretion in the interest of justice by reducing the period of postrelease supervision to the minimum period of 1½ years in order to effectuate the sentence promised under the plea agreement (*see* Penal Law § 70.45 [2] [d]; *see generally People v Consilio*, 74 AD3d 1809, 1810 [4th Dept 2010], *lv denied* 19 NY3d 959 [2012]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

236

CAF 17-01879

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF LINDSAY R. BETTS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

WAYNE E. MOORE, RESPONDENT-RESPONDENT.

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

CHRISTINE F. REDFIELD, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered July 20, 2017 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, dismissed the petition and amended petition of petitioner for modification of custody and visitation.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order that, inter alia, dismissed her "[p]etition and [a]mended [p]etition" seeking, among other things, to modify a prior order of custody and visitation by permitting her to relocate with the subject child from Ontario County to Monroe County and by granting her sole custody of the child. We affirm.

Initially, we agree with the mother that Family Court erred in denying her request for permission to relocate on the ground that she failed to establish a change in circumstances sufficient to warrant such a modification of the existing order of custody and visitation (*see Lauzonis v Lauzonis*, 120 AD3d 922, 923 [4th Dept 2014]). The mother was not required to demonstrate a change of circumstances (*see Lauzonis*, 120 AD3d at 923; *Matter of Chancer v Stowell*, 5 AD3d 1082, 1083 [4th Dept 2004]); rather, because she sought permission to relocate with the subject child, the court was required to determine whether the proposed relocation was in the child's best interests by analyzing the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 739-741 [1996]; *see generally Matter of Adams v Bracci*, 91 AD3d 1046, 1046-1047 [3d Dept 2012], *lv denied* 18 NY3d 809 [2012]).

Although the court did not engage in the *Tropea* analysis, the record is sufficient to permit this Court to do so (*see Matter of*

Mineo v Mineo, 96 AD3d 1617, 1618 [4th Dept 2012]). It is well settled that, when confronted with a custodial parent's request to relocate with his or her child, the court is required to consider all relevant circumstances, "with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child" (*Tropea*, 87 NY2d at 739; *see Matter of Boyer v Boyer*, 281 AD2d 953, 953 [4th Dept 2001]). After considering all of the relevant factors (*see Tropea*, 87 NY2d at 740-741), we conclude that the mother failed to meet her burden of establishing by a preponderance of the evidence that the proposed relocation from Ontario County to an unspecified place in Monroe County is in the child's best interests (*see Matter of Shepherd v Stocker*, 159 AD3d 1441, 1441-1442 [4th Dept 2018]). Although the mother cited improved job prospects and a better school district among her primary reasons for relocating, the mother did not indicate the particular school district into which she planned to move, and thus she "failed to establish that the child would receive a better education in" Monroe County than in her current school district (*id.* at 1442). Further, the evidence submitted by the mother indicated that she had merely a possibility of finding a better job in Monroe County. Consequently, she failed to establish that her life and that of the child "would be 'enhanced economically . . . by the move' " (*Matter of Holtz v Weaver*, 94 AD3d 1557, 1558 [4th Dept 2012], quoting *Tropea*, 87 NY2d at 741; *see Matter of Williams v Epps* [appeal No. 1], 101 AD3d 1695, 1695 [4th Dept 2012]). Additionally, the parties stipulated to the condition in the prior order of custody and visitation that precluded either parent from "permanently remov[ing] the [subject c]hild from the Canandaigua School District" without the agreement of the other or a court order, which, although not dispositive, is a factor that militates against granting the mother's request to relocate (*see Tropea*, 87 NY2d 741 n 2; *Lauzonis*, 120 AD3d at 923).

Finally, we reject the mother's contention that the court erred in denying her request for sole custody of the subject child. We conclude that the court properly denied that part of the amended petition because "there is a sound and substantial basis in the record for [the c]ourt'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 subject child would be served by modifying the existing custody arrangement" (*Matter of Wawrzynski v Goodman*, 100 AD3d 1559, 1559 [4th Dept 2012]; *see Laveck v Laveck*, 160 AD3d 1397, 1398 [4th Dept 2018]; *Matter of Avola v Horning*, 101 AD3d 1740, 1740-1741 [4th Dept 2012]).

We have considered the mother's remaining contentions and conclude that none warrants modification or reversal of the order.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

243

CA 18-01946

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

TOWN OF MEXICO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF OSWEGO AND COUNTY OF OSWEGO HIGHWAY DEPARTMENT, DEFENDANTS-RESPONDENTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (DANIEL J. PAUTZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RICHARD C. MITCHELL, COUNTY ATTORNEY, OSWEGO, FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Oswego County (James W. McCarthy, J.), entered April 6, 2018. The judgment granted the motion of defendants to dismiss the complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion in part and reinstating the breach of contract cause of action insofar as it alleges that defendants waived the 30-day billing deadline, and as modified the judgment is affirmed without costs.

Memorandum: In this action to recover damages for, inter alia, breach of contract, plaintiff appeals from a judgment granting defendants' pre-answer motion to dismiss the complaint. In November 2016, plaintiff entered into a contract with defendant County of Oswego Highway Department pursuant to which plaintiff agreed to provide snow and ice removal services on certain county roads. Article 4 of the contract included a billing deadline clause that required plaintiff to submit to defendant County of Oswego (County) all invoices within 30 days of the work and services performed. It further provided that: "Any compensation for the work and services performed and submitted after the [30-day] billing deadline shall be deemed to be forfeited by [plaintiff]." Plaintiff performed approximately $26,000 worth of snow and ice removal services during the month of December 2016, but did not submit the invoices for that month until February 9, 2017. The County refused to reimburse plaintiff on the ground that the invoices were not submitted within the requisite 30 days. Plaintiff commenced this action against defendants, asserting causes of action for breach of contract and unjust enrichment. With respect to the breach of contract cause of action, plaintiff alleged in its complaint that defendants had waived the 30-day billing deadline clause by previously accepting late

invoices under the current contract and prior agreements with identical provisions and that the billing deadline clause constituted an unenforceable penalty. Before answering, defendants moved to dismiss the complaint based on, inter alia, documentary evidence (*see* CPLR 3211 [a] [1]). Supreme Court granted the motion on that basis, and plaintiff appeals.

"When a court rules on a CPLR 3211 motion to dismiss, it 'must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord [the] plaintiff[] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the [plaintiff's] claim[s]" (*Lots 4 Less Stores, Inc. v Integrated Props., Inc.*, 152 AD3d 1181, 1182 [4th Dept 2017] [internal quotation marks omitted]).

Contrary to plaintiff's contention, the court properly granted the motion with respect to the unjust enrichment cause of action inasmuch as the documentary evidence established as a matter of law that a valid and enforceable contract exists between the parties (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]; *see also Auble v Doyle*, 38 AD3d 1264, 1266 [4th Dept 2007]).

With respect to the breach of contract cause of action, we reject plaintiff's contention that the billing deadline clause is an unenforceable penalty and conclude that the clause is instead an enforceable condition precedent to plaintiff's right to payment (*see Tops Mkts. v S&R Co. of W. Seneca*, 275 AD2d 988, 988-989 [4th Dept 2000]; *see generally 1029 Sixth v Riniv Corp.*, 9 AD3d 142, 149-150 [1st Dept 2004], *lv dismissed* 4 NY3d 795 [2005]; *Weisblatt v Schwimmer*, 249 AD2d 297, 298 [2d Dept 1998]). We agree with plaintiff, however, that the court erred in granting defendants' motion with respect to that cause of action insofar as it alleges that defendants waived the 30-day billing deadline, and we therefore modify the judgment accordingly. Although the contract unambiguously provided a 30-day billing deadline, the complaint alleged that the County had previously accepted invoices submitted past the 30-day deadline and thus that defendants had waived the 30-day provision. It is well settled that the abandonment of a contractual right " 'may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage' " (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]). Whether a party intended to waive a contractual right is a question of fact (*see id.*) and, in our view, the documentary evidence submitted in support of defendants' motion failed to "utterly refute . . . plaintiff's factual allegations [that defendants waived the 30-day billing deadline clause] or conclusively establish a defense as a matter of law" (*Vassenelli v City of Syracuse*, 138 AD3d 1471, 1473 [4th Dept 2016] [internal quotation marks omitted]).

Additionally, contrary to defendants' contention, the fact that the 30-day billing deadline clause is unambiguous does not change this result. In its complaint, plaintiff does not challenge the plain meaning of the billing deadline clause, but rather asserts that defendants, through their conduct, waived a contractual right that "but for the waiver, would have been enforceable" (*Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982], *rearg denied* 57 NY2d 674 [1982]).

Mark W. Bennett

Entered: August 22, 2019

Clerk of the Court

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

261

CA 18-01209

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

MEDICAL CARE OF WESTERN NEW YORK,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY,
DEFENDANT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (JERRY MARTI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered November 1, 2017. The order denied defendant's motion to dismiss the amended complaint.

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

Memorandum: Plaintiff, as the assignee of claims for no-fault benefits of individuals who had received health care services from plaintiff for injuries sustained in motor vehicle accidents, commenced this action against defendant, the issuer of the assignors' no-fault policies. In its amended complaint, plaintiff alleged, inter alia, that defendant violated the no-fault regulations by requesting verifications and examinations under oath and delaying the payment of claims for treatment rendered by plaintiff to the assignors. Although the no-fault claims were adjudicated and paid by defendant after arbitration, plaintiff sought further damages from defendant for the manner in which those claims were processed. Prior to serving its answer, defendant moved to dismiss the amended complaint on, inter alia, the ground that it failed to state a cause of action upon which relief could be granted (*see* CPLR 3211 [a] [7]). Supreme Court denied the motion, and we reverse.

On a CPLR 3211 (a) (7) motion to dismiss, "[w]e accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see Hall v McDonald's Corp.*, 159 AD3d 1591, 1592 [4th Dept 2018]). "The allegations in a complaint,

however, 'cannot be vague and conclusory . . . , and [b]are legal conclusions will not suffice' " (*Choromanskis v Chestnut Homeowners Assn., Inc.*, 147 AD3d 1477, 1478 [4th Dept 2017]; *see Simkin v Blank*, 19 NY3d 46, 52 [2012]).

We agree with defendant that the court erred in denying the motion with respect to the breach of contract cause of action. The amended complaint alleged that defendant and plaintiff "were parties to the applicable insurance contracts by way of the [a]ssignments of [b]enefits" and that "[t]he underlying verification requests, examinations under oath, and subsequent non-payment of bills by . . . [d]efendant represent a breach of contract." The amended complaint, however, failed to identify the specific insurance contracts that plaintiff had performed services under or the contract provisions that defendant allegedly breached. Inasmuch as bare legal conclusions without factual support are insufficient to withstand a motion to dismiss, we conclude that the amended complaint fails to state a cause of action for breach of contract. Additionally, we note that plaintiff conceded in its respondent's brief that "[d]efendant[] did not fail to perform their obligations under the contract[s]" and that "the contracts have specific remedies available to plaintiff . . . , and all such remedies have already been applied" (*see generally Non-Instruction Adm'rs & Supervisors Retirees Assn. v School Dist. of City of Niagara Falls*, 118 AD3d 1280, 1283 [4th Dept 2014]).

With respect to the cause of action for negligent hiring, supervision, or retention, the amended complaint alleged that defendant's employees delayed the payment of plaintiff's claims and sent plaintiff requests for verification and examinations under oath, that defendant was aware of its employees' propensity to commit those acts, and that defendant nevertheless continued to employ them. Although "[a]n employer may be liable for a claim of negligent hiring or supervision if an employee commits an independent act of negligence outside the scope of employment and the employer was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act" (*Lamb v Stephen M. Baker, O.D., P.C.*, 152 AD3d 1230, 1231 [4th Dept 2017] [internal quotation marks omitted]), the amended complaint failed to allege that the acts of defendant's employees were committed independent of defendant's instruction or outside the scope of employment (*see id.*). The amended complaint also failed to allege how the employees' purported acts of sending requests for verification and examinations under oath constituted acts of negligence. We therefore conclude that the court erred in denying defendant's motion with respect to the cause of action for negligent hiring, supervision, or retention.

We also agree with defendant that the amended complaint failed to allege facts sufficient to state a cause of action for prima facie tort (*see generally Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]). "There can be no recovery [for prima facie tort] unless a disinterested malevolence to injure [a] plaintiff constitutes the sole motivation for [the] defendant['s] otherwise lawful act" (*Backus v Planned Parenthood of Finger Lakes*, 161 AD2d 1116, 1117 [4th Dept 1990] [internal quotation marks omitted]). Here, the amended

complaint alleged that defendant acted in "bad faith" and intentionally caused harm to plaintiff by requesting verifications and examinations under oath. Those conclusory allegations, however, failed to state that defendant had " 'a malicious [motive] unmixed with any other and exclusively directed to [the] injury and damage of [plaintiff]' " (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]). Furthermore, it is "[a] critical element of [a prima facie tort] cause of action . . . that plaintiff suffered specific and measurable loss" (*Freihofer*, 65 NY2d at 143; *see Lincoln First Bank of Rochester v Siegel*, 60 AD2d 270, 279-280 [4th Dept 1977]). Here, the injuries alleged in the amended complaint, i.e., delayed payment of claims resulting in a "reduced cash flow," are "couched in broad and conclusory terms" (*Lincoln First Bank of Rochester*, 60 AD2d at 280), and do not constitute "specific and measurable loss" (*Freihofer*, 65 NY2d at 143; *cf. S.E. Nichols, Inc. v Grossman* [appeal No. 1], 50 AD2d 1086, 1086 [4th Dept 1975]). Thus, the court erred in denying the motion with respect to the prima facie tort cause of action.

Finally, as conceded by plaintiff's counsel at oral argument of this appeal before this Court, defendant is entitled to dismissal of the remaining causes of action asserted in the amended complaint.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

266

CA 18-02077

PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ.

ROBERT J. CARNEVALE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LORAN M. BOMMER AND APPLIANCE PLUS OUTLET, LLC,
DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RICHARD T. SARAF OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CONNORS LLP, BUFFALO (CAITLIN M. HIGGINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis Ward, J.), entered April 20, 2018. The order, insofar as appealed from, granted that part of the motion of plaintiff seeking summary judgment on the issue of negligence.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion is denied in part with respect to the issue of negligence.

Memorandum: Plaintiff commenced this personal injury action seeking damages for injuries he sustained when the vehicle he was operating collided with a vehicle operated by a nonparty to this action. Plaintiff alleged that Loran M. Bommer (defendant), who was operating a pickup truck owned by defendant Appliance Plus Outlet, LLC, turned the pickup truck in front of plaintiff's vehicle, thereby causing plaintiff to lose control of his vehicle and strike the oncoming vehicle. It is undisputed that the pickup truck did not collide with any vehicles or sustain any damage. Plaintiff moved for summary judgment on the issues of negligence and serious injury, and Supreme Court granted the motion. As limited by their brief, defendants appeal from the order insofar as it granted the motion on the issue of negligence.

We agree with defendants that the court erred in granting the motion to that extent. Although plaintiff was not required to establish the absence of his own comparative fault (*see Rodriguez v City of New York*, 31 NY3d 312, 315 [2018]), "in seeking . . . summary judgment on liability, plaintiff[] [was] required to establish . . . that [defendant] was negligent and that [his] negligence was a proximate cause of the accident" (*Edwards v Gorman*, 162 AD3d 1480, 1481 [4th Dept 2018]). Here, plaintiff's submissions in support of the

motion included plaintiff's own deposition testimony and the deposition testimony of defendant. Defendant testified that he stopped the pickup truck behind several vehicles for up to 25 seconds while waiting for the traffic light to turn green. During that time, defendant observed plaintiff's vehicle in his side-view mirror as it passed the pickup truck on the left, crossed the double yellow line, and collided with the vehicle that was traveling in the opposite lane. According to defendant, plaintiff's vehicle appeared to be traveling in excess of the speed limit. Plaintiff, on the other hand, testified that he was traveling at a speed of 20 to 25 miles per hour when the pickup truck suddenly swerved into his lane, causing him to collide with the vehicle in the oncoming traffic lane. Thus, plaintiff's own submissions raise triable issues of fact whether defendant was negligent and whether that negligence was a proximate cause of the accident, and the burden never shifted to defendants (*see generally Edwards*, 162 AD3d at 1481; *Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

305

CA 18-02105

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

THE WALTON & WILLET STONE BLOCK, LLC, FOWLER GARDELLA CONSTRUCTION, LLC, AND THOMAS J. MILLAR, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF OSWEGO COMMUNITY DEVELOPMENT OFFICE, CITY OF OSWEGO AND CAMELOT LODGE, LLC, DEFENDANTS-RESPONDENTS.

KIRWAN LAW FIRM, P.C., SYRACUSE (TERRY J. KIRWAN, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (CLIFFORD TSAN OF COUNSEL), FOR DEFENDANT-RESPONDENT CAMELOT LODGE, LLC.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered April 16, 2018. The order granted the motion of defendant Camelot Lodge, LLC for leave to renew its motion to dismiss the second amended complaint against it and, upon renewal, dismissed plaintiffs' second amended complaint against defendant Camelot Lodge, LLC and dismissed the specific performance cause of action against all defendants.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, defendant Camelot Lodge, LLC's motions are denied, the second amended complaint against defendant Camelot Lodge, LLC is reinstated and the first cause of action against the remaining defendants is reinstated.

Memorandum: Plaintiffs commenced this action seeking, inter alia, specific performance of a contract and damages for the breach of that contract. They appeal from an order that granted the motion of defendant Camelot Lodge, LLC (Camelot) for leave to renew its motion to dismiss the second amended complaint against it and, upon renewal, dismissed the second amended complaint against Camelot and dismissed the specific performance cause of action against all defendants. We reverse.

It is well settled that "[a] motion for leave to renew must be based upon new facts that were unavailable at the time of the original motion . . . and, inter alia, that would change the prior determination" (*Blazynski v A. Gareleck & Sons, Inc.*, 48 AD3d 1168, 1170 [4th Dept 2008], *lv denied* 11 NY3d 825 [2008] [internal quotation

marks omitted]; *see* CPLR 2221 [e] [2]). Further, "[a]lthough a court has discretion to 'grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made' . . . , it may not exercise that discretion unless the movant establishes a 'reasonable justification for the failure to present such facts on the prior motion' " (*Robinson v Consolidated Rail Corp.*, 8 AD3d 1080, 1080 [4th Dept 2004]; *see* CPLR 2221 [e] [3]). In particular, "[l]eave to renew is not warranted where the factual material adduced in connection with the subsequent motion is merely cumulative with respect to the factual material submitted in connection with the original motion" (*Constructamax, Inc. v Dodge Chamberlin Luzine Weber, Assoc. Architects, LLP*, 157 AD3d 852, 853 [2d Dept 2018] [internal quotation marks omitted]; *see Violet Realty, Inc. v Gerster Sales & Serv., Inc.* [appeal No. 2], 128 AD3d 1348, 1349-1350 [4th Dept 2015]; *Skoney v Pittner*, 21 AD3d 1422, 1423 [4th Dept 2005]).

Here, we conclude that Supreme Court erred in granting Camelot's motion for leave to renew because the evidence it submitted in support of that motion was plainly cumulative to evidence submitted in support of the initial motion (*see Constructamax*, 157 AD3d at 853). Furthermore, even assuming that the allegedly new evidence was not cumulative, we conclude that Camelot's evidence adduced in support of renewal could have been, and should have been, submitted as part of its initial motion, which involved the same issue that was raised in the motion for leave to renew (*see e.g. Matter of Granto v City of Niagara Falls*, 148 AD3d 1694, 1696-1697 [4th Dept 2017]; *Priant v New York City Tr. Auth.*, 142 AD3d 491, 491-492 [2d Dept 2016], *lv denied* 31 NY3d 1134 [2018]).

In reaching our conclusion, we note that Camelot failed to provide any "reasonable justification" for its failure to present the purportedly new facts on the original motion (CPLR 2221 [e] [3]; *see Robinson*, 8 AD3d at 1080). Camelot contends that it provided reasonable justification for not presenting certain facts on the initial motion because the issue to which they pertained first arose at oral argument. We reject that contention because Camelot's initial motion papers referenced the precise same issue and relevant facts as on renewal. Thus, the purportedly new facts were available to Camelot at the time of the original motion. The cases relied upon by Camelot are inapposite, inasmuch as, in those cases, there was a reasonable justification for failure to present the new facts on the initial motion because those facts were relevant to *new* issues that were raised in the movant's reply papers or interjected by the court during oral argument (*see e.g. Matter of Lutheran Med. Ctr. v Daines*, 65 AD3d 551, 553 [2d Dept 2009], *lv denied* 13 NY3d 712 [2009]; *Olean Urban Renewal Agency v Herman*, 101 AD2d 712, 713 [4th Dept 1984]). Neither scenario is applicable here, and to permit renewal under these circumstances—where the issue was already squarely presented by the initial motion—would only invite parties to attempt to cure deficiencies in their initial motion papers after those deficiencies are discovered at oral argument.

We reject our dissenting colleagues' conclusion that the court would have been "justified" in exercising discretion to treat the motion to renew as a motion to reargue, and that it effectively did so in granting Camelot's motion. We disagree. There is no justification in this case to "deem" Camelot's motion as one seeking reargument and we decline to do so because, in our view, Camelot actively foreclosed that avenue of relief. The order appealed from refers only to the motion for leave to renew because the parties stipulated to a resolution of the reargument motion. In fact, Camelot even states in its brief that its request for leave to reargue is an "issue [that] is not being appealed." Inasmuch as there is nothing in the record or briefs supporting the dissent's suggestion that the parties were pressing a case in favor of reargument, we conclude that, at best, the dissent offers an advisory opinion on the merits, on which we offer no opinion.

We therefore conclude that the circumstances of this case do not warrant granting leave to renew, nor do they warrant granting leave to reargue.

All concur except SMITH, J.P., and NEMOYER, J., who dissent and vote to affirm in the following memorandum: We agree with the majority that Supreme Court erred in granting the motion of defendant Camelot Lodge, LLC (Camelot), for leave to renew its prior motion to dismiss the second amended complaint against it based on the doctrine of laches. Nevertheless, the court would have been justified in reconsidering its prior determination under the circumstances presented, and we therefore respectfully dissent and vote to affirm an order that, for all practical purposes, accomplishes that very result.

It is well settled that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]; *see Garland v RLI Ins. Co.*, 79 AD3d 1576, 1576 [4th Dept 2010], *lv dismissed* 17 NY3d 774 [2011], 18 NY3d 877 [2012]), and we agree with the majority that Camelot failed to submit new evidence in support of its motion. Furthermore, " '[a]lthough a court has discretion to grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made . . . , it may not exercise that discretion unless the movant establishes a reasonable justification for the failure to present such facts on the prior motion' " (*Foxworth v Jenkins*, 60 AD3d 1306, 1307 [4th Dept 2009]), and we also agree with the majority that Camelot failed to establish such a justification.

Notwithstanding Camelot's failure to meet the requirements for a motion for leave to renew, however, the court possessed discretion to "deem[ ] [Camelot's] motion for renewal to be one for reargument" (*Autry v Children's Hosp. of Buffalo*, 270 AD2d 845, 846 [4th Dept 2000]; *see Lewis v City of Rochester*, 156 AD3d 1472, 1472 [4th Dept 2017]; *Lahey v Lahey*, 68 AD3d 1656, 1657 [4th Dept 2009]; *see generally* CPLR 2001), and the submissions in support of its motion justified treating Camelot's motion as such. Consequently, we would

deem the order on appeal to be one granting a motion for leave to reargue, which is appealable as of right (*see* CPLR 5701 [a] [2] [viii]).

With respect to the merits of the court's determination, the court relied on the doctrine of laches to dismiss the second amended complaint against Camelot and the specific performance cause of action against all defendants. Under the "centuries-old common-law equitable defense of laches, '[w]hen [a] lapse of time is occasioned or accompanied[] by a refusal or a failure to [interpose an equitable] claim . . . , and is so great or of such characteristics as to amount to a waiver or abandonment of the [claim], the party who comes not into court until after such delay[] will have forfeited all claim to equity' " (*EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 54 [1st Dept 2004], *lv dismissed* 3 NY3d 656 [2004], *lv denied* 3 NY3d 607 [2004], quoting *Merchants' Bank v Thomson*, 55 NY 7, 12 [1873] [emphasis omitted]). In more modern terms, the doctrine of laches provides that, "where neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect operates as a bar to a remedy and is a basis for asserting the defense of laches, particularly in the area of land development" (*Matter of Crowell v Zoning Bd. of Appeals of the Town of Queensbury*, 151 AD3d 1247, 1250 [3d Dept 2017] [internal quotation marks omitted]).

As the Court of Appeals has emphasized, "the essential element of laches [is] prejudice" (*Matter of Flamenbaum*, 22 NY3d 962, 966 [2013] [internal quotation marks omitted]) and, here, the prejudice to Camelot is both severe and obvious. Plaintiffs and others entered a contract with defendant City of Oswego (City) to develop a building as part of a larger redevelopment plan. The City terminated that agreement after three years of inaction on the plan, and eventually entered into a new agreement whereby Camelot would purchase the building. Certain plaintiffs then commenced an action against the City. That action was dismissed, and, on appeal, this Court affirmed the order dismissing that action (*Walton & Willet Stone Block, LLC v City of Oswego Community Dev. Off. & City of Oswego*, 137 AD3d 1707 [4th Dept 2016]). Plaintiffs commenced a new action, but waited approximately eight months to join Camelot as a defendant in that action. Meanwhile, Camelot invested approximately one million dollars to stabilize and secure the building, which is an important part of the heritage of the City, in order to ensure its economic utility for Camelot, the City, and the entire surrounding region. It is undisputed that Camelot undertook these efforts openly, in good faith, and in reliance upon its executed purchase agreement with the City. Moreover, given Camelot's acquisition of equitable title upon execution of its purchase agreement with the City (*see Matter of City of New York*, 306 NY 278, 282 [1954]), the fact that some of Camelot's emergency stabilization work occurred before it was vested with legal title is inconsequential to the equitable calculus of laches. Indeed, that emergency work was actually contemplated and required by the purchase agreement itself, which required, inter alia, that Camelot "perform repairs to stabilize and protect the building and Property at its sole expense" prior to closing as one of the conditions of the sale. Plaintiffs' failure to join Camelot in an action prior to

Camelot performing the repairs on the property is precisely the type of scenario that laches was designed to prevent. Indeed, courts have invoked the doctrine of laches to bar specific performance claims where the plaintiff's delay was less protracted and the defendant's loss less pronounced than here (*see e.g. Crowell*, 151 AD3d at 1250; *Matter of Miner v Town of Duanesburg Planning Bd.*, 98 AD3d 812, 814 [3d Dept 2012]; *Geithman v Herman*, 54 AD2d 797, 798 [3d Dept 1976]).

There are no contested factual issues surrounding the defense of laches, and plaintiffs are not entitled to a jury trial on the equitable claim against which the defense is interposed, i.e., specific performance of the original contract between the City and plaintiffs (*see Allen v Berry*, 43 AD3d 1418, 1418-1419 [4th Dept 2007]; *Perfetto v Scime*, 182 AD2d 1126, 1126 [4th Dept 1992]). Thus, under these circumstances, the court properly granted, effectively upon reargument, Camelot's motion to dismiss the second amended complaint against it and thereupon properly dismissed the cause of action for specific performance against all defendants. We therefore vote to affirm the order because it reaches that ultimate result.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

308

CA 18-01773

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

BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF UNITED STATES OF AMERICA AND NORTH TONAWANDA LODGE NUMBER 860 OF BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF UNITED STATES OF AMERICA, INC., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CREATIVE COMFORT SYSTEMS, INC., AND REIMER HEATING AND AIR CONDITIONING, INC., DEFENDANTS-APPELLANTS.
(ACTION NO. 1.)

LEXINGTON INSURANCE COMPANY, AS SUBROGEE OF BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF UNITED STATES OF AMERICA AND NORTH TONAWANDA LODGE NUMBER 860 OF BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF UNITED STATES OF AMERICA, INC., AND ALL OTHER NAMED INSUREDS UNDER POLICY #12944761, PLAINTIFFS-RESPONDENTS,

V

CREATIVE COMFORT SYSTEMS, INC., AND REIMER HEATING AND AIR CONDITIONING, INC., DEFENDANTS-APPELLANTS.
(ACTION NO. 2.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARCO CERCONE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WEBSTER SZANYI LLP, BUFFALO (ANDREW O. MILLER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered April 10, 2018. The order, insofar as appealed from, granted that part of the motion of plaintiffs in action No. 1 seeking to disqualify Rupp Baase Pfalzgraf Cunningham, LLC, from representing defendants.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, and that part of the motion seeking disqualification of Rupp Baase Pfalzgraf Cunningham, LLC is denied.

Memorandum: Defendants appeal from an order that, inter alia, granted the motion of plaintiffs in action No. 1 (plaintiffs) insofar as it sought to disqualify Rupp Baase Pfalzgraf Cunningham, LLC (Rupp Baase) from representing defendants in the instant matter. This action stems from a fire on plaintiffs' property, which was allegedly caused by defendants' improper installation of a boiler. Nearly three years after commencing the action, plaintiffs learned that defendants intended to substitute their counsel and retain Rupp Baase. Plaintiffs thereafter moved to, among other things, disqualify Rupp Baase from representing defendants based on an alleged attorney-client relationship between Rupp Baase and a trustee (Trustee) of North Tonawanda Lodge Number 860 of the Benevolent and Protective Order of Elks of the United States of America, Inc. (Lodge), a plaintiff in action No. 1. In support of their motion, plaintiffs alleged that Rupp Baase represented the Trustee in connection with business transactions that were unrelated to the Lodge, as well as in connection with the Trustee's personal estate planning. As limited by their brief, defendants contend on appeal that Supreme Court erred in granting plaintiffs' motion to the extent that it sought to disqualify Rupp Baase. We reverse the order insofar as appealed from.

As an initial matter, defendants failed to preserve their contention that plaintiffs lacked standing to seek disqualification of Rupp Baase, and thus the issue is not properly before us (*see Van Damme v Gelber*, 79 AD3d 534, 535 [1st Dept 2010], *lv denied* 16 NY3d 708 [2011], *rearg denied* 17 NY3d 757 [2011]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

We agree with defendants, however, that plaintiffs failed to meet their initial burden with respect to the motion insofar as it sought disqualification based on the existence of a prior attorney-client relationship (*see Sgromo v St. Joseph's Hosp. Health Ctr.*, 245 AD2d 1096, 1097 [4th Dept 1997]; *see generally Dietrich v Dietrich*, 136 AD3d 461, 462 [1st Dept 2016]). In order to meet that burden, plaintiffs were required to establish "the existence of a prior attorney-client relationship . . . , that the interests of [defendants] and [the Trustee] are materially adverse and that the matters involved in both representations are substantially related" (*Sgromo*, 245 AD2d at 1097; *see Matter of Peters*, 124 AD3d 1266, 1267 [4th Dept 2015]). To meet the third requirement, plaintiffs "had to establish that the issues in the present litigation are identical to or essentially the same as those in the prior representation or that [Rupp Baase] received specific, confidential information substantially related to the present litigation" (*Sgromo*, 245 AD2d at 1097). Even assuming, arguendo, that a prior attorney-client relationship existed between Rupp Baase and the Trustee, we conclude that plaintiffs failed to establish that the interests of defendants in this action are materially adverse to the interests of the Trustee individually, who is not a named party and is merely a trustee of the Lodge. Plaintiffs likewise failed to establish that any alleged prior representation involved issues that were "identical to or essentially the same" as those in the instant lawsuit (*id.*). Although the Trustee asserts that he told Rupp Baase during their alleged representation of him that a fire had occurred on plaintiffs' property due to defendants' boiler

installation, a claim that Rupp Baase disputes, we conclude that, even if the Trustee provided that information, it was not "specific [and] confidential" and thus does not warrant disqualification (*id.*; *see Matter of Colello* [appeal No. 3], 167 AD3d 1445, 1448 [4th Dept 2018]; *Gustafson v Dippert*, 68 AD3d 1678, 1679 [4th Dept 2009]). Because plaintiffs failed to establish that the Trustee's interests are materially adverse to defendants' in this lawsuit and that this lawsuit is substantially related to the alleged prior representation, the court abused its discretion in granting that part of plaintiffs' motion seeking disqualification of Rupp Baase (*cf. Colello*, 167 AD3d at 1448; *see generally Medical Capital Corp. v MRI Global Imaging, Inc.*, 27 AD3d 427, 428 [2d Dept 2006]).

We reject plaintiffs' contention, which is raised as an alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]), that the Rules of Professional Conduct (22 NYCRR 1200.0) Rule 1.7 preclude Rupp Baase from representing defendants. Even assuming, arguendo, that Rupp Baase's alleged representation of the Trustee was ongoing at the time it sought to represent defendants, we conclude that Rupp Baase's representation of defendants will not "involve [Rupp Baase] in representing differing interests," and will not create "a significant risk that [Rupp Baase's] professional judgment on behalf of a client will be adversely affected by [its] own financial, business, property or other personal interests" (Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.7 [a] [1], [2]).

All concur except CURRAN, J., who concurs in the result in the following memorandum: I concur in the result reached by my colleagues, but respectfully disagree with the analysis they apply to reach that result. Although the majority responds to the course charted largely by the parties, in my view, doing so requires us to improperly decide a nonjusticiable issue—namely whether there is a conflict of interest between nonparty Paul Ertel—who is one of plaintiffs' members and trustees—and defendants' counsel, Rupp Baase Pfalzgraf Cunningham, LLC (Rupp Baase).

That part of plaintiffs' motion seeking to disqualify Rupp Baase from representing defendants in this action is based on the premise that Ertel, a nonparty to this litigation, was at the time of the proposed representation a prior client of Rupp Baase. "[A] fundamental principle of our jurisprudence [is] that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal" and that courts are forbidden from deciding "academic, hypothetical, moot, or otherwise abstract questions" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]; *see Berger v Prospect Park Residence, LLC*, 166 AD3d 937, 938 [2d Dept 2018]).

In my view, because Ertel is a nonparty to this litigation, his purported conflict with Rupp Baase cannot be in controversy here, and therefore the courts have no power to address that conflict via plaintiffs' disqualification motion. It is well settled that courts

generally do not have the power to decide matters "[w]hen a determination would have no practical effect on the parties" (*Berger*, 166 AD3d at 938; *see also Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 811 [2003], *cert denied* 540 US 1017 [2003]). Simply put, here, the parties improperly request that we make a decision "that will affect persons not parties to this action"—i.e., Ertel—which, I submit, we cannot do (*Boehm v Dillon*, 195 AD2d 1080, 1080 [4th Dept 1993]; *see generally Wood v Squires*, 60 NY 191, 193 [1875]; *Johnson v Flynn*, 248 App Div 649, 650 [3d Dept 1936]; *Security Trust Co. of Rochester v Campbell*, 184 App Div 961, 961 [4th Dept 1918]). Absent evidence that Rupp Baase ever represented *plaintiffs*, there is nothing to establish that its representation of defendants would cause "actual prejudice or a substantial risk thereof" to plaintiffs (*Christensen v Christensen* [appeal No. 1], 55 AD3d 1453, 1455 [4th Dept 2008]).

It is irrelevant whether plaintiffs have standing to assert a particular contention on behalf of Ertel or whether that contention was preserved. It is my position that courts simply are without the power to answer the abstract question whether Rupp Baase has a conflict of interest due to representing a nonparty. In doing so here, I am concerned that the majority is creating the impression that courts can address disqualification motions made by a corporate party based on purported conflicts of interest between law firms representing an opposing party and any representative of the corporate party, no matter how tangentially related to the subject of the litigation, and without requiring a showing that the corporate party has sustained actual prejudice or a substantial risk thereof as a result of the purported conflict. Here, plaintiffs have not made any such showing.

To the extent that plaintiffs argue that they and Ertel are the same "person" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.0 [n]) and therefore the same client of Rupp Baase, I conclude that plaintiffs did not meet their "burden of making 'a clear showing that disqualification is warranted' " (*Lake v Kaleida Health*, 60 AD3d 1469, 1470 [4th Dept 2009]). Plaintiffs did not submit any evidence supporting their argument that they and Ertel are one and the same for purposes of disqualifying Rupp Baase based on a conflict of interest. Consequently, I would reverse the order insofar as appealed from and dismiss that part of plaintiffs' motion seeking disqualification of Rupp Baase as academic.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

329

CA 18-01476

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

PAUL M. BAVISOTTO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL DOLDAN, INDIVIDUALLY AND AS PARENT OF SARAH DOLDAN, SARAH DOLDAN, DEFENDANTS-RESPONDENTS, AND MEGHAN GRAY, DEFENDANT.

SHAW & SHAW, P.C., HAMBURG (LEONARD D. ZACCAGNINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (ALYSON CULLITON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 21, 2018. The order granted the motion of defendants Michael Doldan, individually and as parent of Sarah Doldan, and Sarah Doldan for summary judgment and dismissed the complaint and all cross claims against them.

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

Memorandum: Plaintiff commenced this action against Michael Doldan, individually and as parent of Sarah Doldan, and Sarah Doldan (collectively, defendants), as well as Meghan Gray, seeking damages for injuries he sustained at defendants' home when Gray poured kerosene onto a fire in a fire pit, spraying plaintiff in the process and causing him to catch fire. Defendants moved for, inter alia, summary judgment dismissing the complaint against them on the ground that the sole proximate cause of plaintiff's injuries was Gray's act of pouring kerosene onto the active fire. Supreme Court granted defendants' motion, and we affirm.

We conclude that defendants met their burden to "make a prima facie showing of entitlement to judgment as a matter of law, [by] tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Defendants' submissions in support of their motion established that Gray owned the can of kerosene and brought it to defendants' property some time prior to the date of the incident for the purpose of soaking wicks for use in the art of fire spinning. On the night of the incident, despite her experience with using kerosene

as an accelerant, Gray retrieved the kerosene from defendants' yard and poured it into the active fire pit. We conclude that "the record eliminates any legal cause other than the reckless conduct of [Gray,] who by virtue of [her] general knowledge of [the injury-causing instrument], [her] observations prior to the accident, and plain common sense . . . must have known that [her actions] posed a danger of injury" (*Howard v Poseidon Pools*, 72 NY2d 972, 974-975 [1988] [internal quotation marks omitted]; *see Steir v London Guar. & Acc. Co., Ltd.*, 227 App Div 37, 38-39 [1st Dept 1929], *affd* 254 NY 576 [1930]). Where "only one conclusion may be drawn from the established facts . . . the question of legal cause may be decided as a matter of law" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]). Having merely furnished the occasion for the occurrence of the incident, defendants did not cause plaintiff's injury and may not be held liable (*see Riccio v Kid Fit, Inc.*, 126 AD3d 873, 874 [2d Dept 2015]).

Although plaintiff correctly contends that defendants owed him a duty of care as a guest on their property (*see Comeau v Lucas*, 90 AD2d 674, 675 [4th Dept 1982]), defendants' submissions establish that they did not breach their duty to "act as . . . reasonable [persons] in maintaining [the] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Basso v Miller*, 40 NY2d 233, 241 [1976] [internal quotation marks omitted]). All attendees of the gathering at defendants' property on the night of the incident were adults, and it was not unreasonable for defendants to allow the small group of adults to use the premises for an unsupervised gathering around a fire pit.

We respectfully disagree with the view of our dissenting colleague that defendants' own submissions contained conflicting deposition testimony with respect to whether Sarah Doldan breached a duty to control the conduct of Gray. We reject the view of the dissent that Sarah Doldan's deposition testimony that she warned Gray not to use the kerosene and told Gray to give her the can of kerosene conflicted with Gray's deposition testimony that she did not recall a warning not to use the kerosene. Gray repeatedly testified during her deposition that she did not recall a warning, which is not the same as testimony that no such warning was uttered. Inasmuch as that distinction was not initially clear from her testimony, Gray was specifically asked to clarify whether she meant that she did not recall a warning or that Sarah Doldan did not warn her not to use the kerosene. Gray maintained that she did not recall Sarah Doldan warning her not to use the kerosene. Even viewing this testimony in the light most favorable to plaintiff and giving him the benefit of every favorable inference (*see Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), Gray's testimony about her inability to recall the happening of an event is not affirmative proof that the event did not happen. Gray's testimony that she did not recall Sarah Doldan's warning was thus insufficient to create an issue of fact (*see e.g. Cortese v Pobejimov*, 136 AD3d 635, 636 [2d Dept 2016]; *Lombardo v Tag Ct. Sq., LLC*, 126 AD3d 949, 951 [2d Dept 2015]; *Sandu v Sandu,* 94 AD3d 1545, 1546 [4th Dept 2012]).

Furthermore, the mere presence of kerosene on the premises did not render the premises unsafe or present a known dangerous condition. Plaintiff does not allege that the kerosene was stored so close to the fire pit as to present a foreseeable danger of contact between the fire and the accelerant, and the deposition testimony submitted by defendants in support of their motion established that the can of kerosene was "pretty far away from the fire." Inasmuch as kerosene has legitimate household uses and the likelihood of it causing injury to a guest was low, given the age of the guests and the fact that the fire pit had been used by members of the group many times before Gray brought the kerosene to the property for use in connection with fire spinning (*see Steir*, 227 App Div at 39), we conclude that the mere presence of the kerosene did not render the premises unsafe or warrant such concern that defendants were required to see to its disposal. We further conclude that the issue whether defendants asked Gray to remove the can of kerosene from their property prior to the incident is immaterial.

Even assuming, arguendo, that defendants were negligent in allowing the kerosene to remain on their property, we conclude that the mere presence of the kerosene was insufficient to make them "reasonably aware of the need" to control Gray's actions (*D'Amico v Christie*, 71 NY2d 76, 85 [1987]). Although Gray was knowledgeable about the nature of kerosene and had experience using it, she created the dangerous condition when she committed the unforeseeable superseding act of pouring the kerosene onto an open flame (*see Boltax v Joy Day Camp*, 67 NY2d 617, 619-620 [1986]; *Jones v City of New York*, 10 AD3d 411, 411-412 [2d Dept 2004], *lv denied* 4 NY3d 706 [2005]), thereby severing any causal nexus between defendants' purported negligence and plaintiff's injuries (*cf. Derdiarian*, 51 NY2d at 315-316).

In opposition to defendants' showing, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

All concur except PERADOTTO, J., who dissents in part and votes to modify in accordance with the following memorandum: I respectfully dissent in part because, in my view, Michael Doldan, individually and as parent of Sarah Doldan, and Sarah Doldan (defendants) failed to establish as a matter of law on their motion for, inter alia, summary judgment dismissing the complaint against them that Sarah Doldan did not breach a duty to control the conduct of defendant Meghan Gray. I would therefore modify the order on the law by denying in part the motion of defendants and reinstating the complaint against Sarah Doldan.

It is well established that landowners and those in control or possession of the premises "have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control" (*D'Amico v Christie*, 71 NY2d 76, 85 [1987]; *see Dynas v Nagowski*, 307 AD2d 144, 146, 147 [4th Dept 2003]). Here, I conclude that defendants' own papers contain conflicting deposition testimony

of Sarah Doldan and Gray regarding whether Sarah Doldan had the opportunity to prevent Gray from pouring kerosene on the fire and whether she attempted to do so by warning Gray against such conduct (*see Struebel v Fladd*, 75 AD3d 1164, 1165 [4th Dept 2010]; *Lasek v Miller*, 306 AD2d 835, 835-836 [4th Dept 2003]; *Fantuzzo v Attridge*, 291 AD2d 871, 872 [4th Dept 2002]). Contrary to the majority's assertion, when viewed in context and in the light most favorable to plaintiff while giving him the benefit of every reasonable inference (*see Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), Gray's testimony was that she did not recall anyone, including Sarah Doldan, warning her against pouring kerosene on the fire because no such warning was uttered. Gray's testimony in this regard did not, as the majority asserts, convey an "inability to recall the happening of an event." Rather, Gray's testimony, when properly viewed, conflicts with Sarah Doldan's testimony that she told Gray not to use the kerosene and instructed her to hand it over. In addition, inasmuch as Gray did not act spontaneously and instead mentioned putting kerosene on the fire and then retrieved it from a distance "pretty far away from [the] fire" before returning thereto and inasmuch as Sarah Doldan was admittedly aware of such conduct, I conclude that there is an issue of fact whether Sarah Doldan could have "reasonably anticipated or prevented" Gray's conduct (*Kramer v Arbore*, 309 AD2d 1208, 1209 [4th Dept 2003]; *cf. Hillen v Queens Long Is. Med. Group, P.C.*, 57 AD3d 946, 947 [2d Dept 2008]; *see also Lasek*, 306 AD2d at 835-836).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

365

CA 18-01516

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

IN THE MATTER OF GARY WORKMAN AND
TALITHA WORKMAN, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

MICHELE DUMOUCHEL, RESPONDENT-APPELLANT.

THE LAW OFFICES OF MATTHEW ALBERT, ESQ., BUFFALO (GRIFFIN DALT OF COUNSEL), FOR RESPONDENT-APPELLANT.

ADAM R. MATTESON, LOWVILLE, FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Jefferson County Court (Kim H. Martusewicz, J.), dated June 5, 2017. The order affirmed a judgment of the Town Court of the Town of Champion dated October 19, 2016, which adjudged that defendant's dog should be euthanized.

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

Memorandum: Respondent appeals from an order of County Court that affirmed a judgment of Town Court directing the euthanization of respondent's dog Wally. The testimony and evidence at the hearing held pursuant to Agriculture and Markets Law § 123 established that Wally broke free of his tether, ran into petitioners' yard, and bit petitioners' three-year-old daughter. Even after the child's mother picked up the child, the dog continued to bite the child until the dog was finally restrained by respondent. The child sustained multiple lacerations to her lower leg, chest, and buttocks; the most severe laceration was a bite wound to her buttocks that required surgical intervention and approximately 30 stitches to repair. At the hearing, petitioners submitted the child's medical records and photographs of her injuries.

Our dissenting colleague contends that there was "a failure of the entire process" in this case and addresses issues that are not before us. The only issue raised by respondent is that County Court erred in affirming the judgment directing euthanasia because the child's injuries do not constitute a "serious physical injury" (Agriculture and Markets Law § 123 [3] [a]), and it is axiomatic that "parties to a civil dispute are free to chart their own litigation course" (*Mitchell v New York Hosp.*, 61 NY2d 208, 214 [1984]; *see also Misicki v Caradonna*, 12 NY3d 511, 519 [2009]).

Respondent does not dispute that petitioners established by clear and convincing evidence that her dog is a "dangerous dog" (Agriculture and Markets Law §§ 108 [24] [a] [i]; 123 [2]). A justice may direct humane euthanasia of a dangerous dog if, inter alia, the dog, without justification, attacks a person, "causing serious physical injury" (§ 123 [3] [a]; *see People v Jornov*, 65 AD3d 363, 367 [4th Dept 2009]). The Agriculture and Markets Law defines "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes death or serious or protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (§ 108 [29]). The only issue here is whether the child sustained a "serious or protracted disfigurement" (*id.*). Inasmuch as those terms are used in the Penal Law definition of serious physical injury (*see* Penal Law § 10.00 [10]), reliance upon criminal cases involving what constitutes a serious or protracted disfigurement is appropriate. As petitioners correctly note, however, the Penal Law definition of a serious injury as, inter alia, a serious *and* protracted disfigurement (*id.*) does not apply here.

Contrary to respondent's contention, the evidence establishes that the child sustained a serious injury inasmuch as the dog attack caused serious or protracted disfigurement (*see Matter of Town of Concord v Edbauer*, 161 AD3d 1528, 1528-1529 [4th Dept 2018]). A "disfigurement" is "that which impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen or imperfect or deforms in some manner" (*People v McKinnon*, 15 NY3d 311, 315 [2010] [internal quotation marks omitted], quoting *Fleming v Graham*, 10 NY3d 296, 301 [2008]). "A person is 'seriously' disfigured when a reasonable observer would find her altered appearance distressing or objectionable" (*id.*). The standard is an objective one and depends on various factors, including the nature and the location of the injury (*see id.*). We conclude that the injuries sustained by the child here, particularly the bite wound to the buttocks that required surgery and approximately 30 stitches, constitute serious disfigurement (*see Edbauer*, 161 AD3d at 1528-1529). Although the analysis could end there, we conclude that those injuries also constitute a protracted disfigurement (*see id.*).

Moreover, contrary to respondent's contention, the location of the scars alone does not preclude a finding of serious or protracted disfigurement inasmuch as the location of the injury is but one factor to consider (*see McKinnon*, 15 NY3d at 315). Although respondent contends, and our dissenting colleague agrees, that the injuries do not rise to the level of serious disfigurement because most of the child's injuries are in locations generally concealed by clothing, there may certainly be times, such as in a school locker room, when the injuries are not concealed. Moreover, the location of the injuries here, in particular the laceration to the child's buttocks, actually supports the objectionable nature of the disfigurement inasmuch as it is "unusually disturbing" (*McKinnon*, 15 NY3d at 316). Respondent points out that the small wound to the child's lower leg is commonplace, such as that sustained through innocent horseplay or athletics, and would not cause an observer to find her appearance to

be distressing or objectionable. But respondent's argument only highlights why the wound to the child's buttocks *is* a serious injury. Few people may see that scar, but those who do will find it "distressing" inasmuch as it is *not* a commonplace injury (*id.*).

We respectfully disagree with our dissenting colleague's conclusion that the court erred in determining that the child sustained a serious injury because there was no evidence that her scarring would be permanent or protracted. With respect to the child's injuries, the proof at the hearing consisted of the testimony of the child's parents, photographs of the child's injuries that appeared to be taken shortly after treatment, and the child's medical records. In concluding that the evidence was insufficient to show that the injuries would leave a permanent scar and asserting that the trier of fact should consider evidence of the child's appearance after a reasonable period of healing, our dissenting colleague relies primarily on civil cases involving "significant disfigurement" under Insurance Law § 5102 (d), which we find wholly inappropriate. Rather, as stated earlier, reliance upon criminal cases involving the interpretation of Penal Law § 10.00 (10) *is* appropriate, and *People v Irwin* (5 AD3d 1122 [4th Dept 2004], *lv denied* 3 NY3d 642 [2004]) is one such case. In *Irwin*, the victim was unable to testify at trial, but photographs depicting the sutured wounds to his arm and hand were admitted in evidence (*id.* at 1123). We held that "the jury could reasonably infer from that evidence that the sutured wounds resulted in permanent scars," and that the evidence was thus legally sufficient to establish that the victim sustained a serious physical injury (*id.*). Contrary to the interpretation of *Irwin* offered by our dissenting colleague, we did not determine that the jury could reasonably infer from the " '[m]edical evidence' " that the sutured wounds resulted in permanent scars; rather, we made that determination based solely on the photographs depicting the injury. Thus, consistent with *Irwin*, we conclude that Town Court here could reasonably infer from the photographs and the fact that the child had 30 stitches that the injuries would result in permanent scarring.

We further note that hearings of this type must, by statute, be held swiftly (*see* Agriculture and Markets Law § 123 [2]), a requirement that is incompatible with our dissenting colleague's interpretation of what evidence is necessary to establish a serious or protracted disfigurement (§§ 108 [29]; 123 [3] [a]). A court is not "deprive[d] . . . of the evidence necessary to reach a proper determination" when a hearing is held shortly after a dog has unjustifiably attacked a person, as our dissenting colleague believes. Indeed, in this case, the evidence plainly established that Wally, without justification, attacked a three-year-old child and caused her serious injury, and County Court's order affirming the judgment directing euthanasia must be affirmed.

All concur except TROUTMAN, J., who dissents and votes to modify in accordance with the following memorandum: I respectfully dissent. Town Court lacked the power to order the euthanasia of respondent's dog Wally, because petitioners failed to meet their burden of establishing that their child sustained "serious physical injury"

(Agriculture and Markets Law § 123 [3] [a]), i.e., "serious or protracted disfigurement" (§ 108 [29]; *cf. Matter of Town of Concord v Edbauer*, 161 AD3d 1528, 1528-1529 [4th Dept 2018]). This was not merely a failure of the evidence, but a failure of the entire process. I would modify County Court's order by vacating the judgment directing euthanasia, and I would remit the matter to Town Court (hereafter, court) for further proceedings pursuant to Agriculture and Markets Law § 123 (2).

The relevant facts are largely undisputed. One day, Wally unexpectedly broke free from his tether, entered a neighboring backyard, and bit petitioners' three-year-old child, causing a laceration to her buttocks and other injuries. Immediately after the incident, the child was taken to the hospital, where the wound to her buttocks was washed out and closed "with no complications." Closure of the wound involved approximately 30 stitches. Shortly thereafter, photographs of the injuries were taken.

Three days later, petitioners commenced this proceeding pursuant to Agriculture and Markets Law § 123. One week after the incident, the child went to a follow-up appointment at the hospital. Hospital records from that visit stated: "Since discharge, [the child] has done well . . . No issues with the lacerations." Within two weeks of the incident, a friend of petitioners wrote a letter that included an update on the child's condition: "While [the child's] physical wounds appear to be healing nicely, I cannot say the same about the psychological and emotional wounds that have been inflicted on her mother." The friend urged swift retribution: "Most men I speak with say they would have personally killed the dog themselves."

A hearing commenced 15 days after the incident and took place over two days. On the first day, the child's father, who is one of the two petitioners, explained that the "nature" and "severity" of the injury was "due to luck," effectively acknowledging that the location of the injury reduced its seriousness. "[W]e were very lucky, due to the areas that were bitten." Shortly thereafter, the court adjourned the hearing for 13 days to permit respondent to retain an attorney. At the outset of the second day, respondent's attorney proposed a settled disposition: Wally would be neutered, he would receive training, respondent would construct a yard fence acceptable to petitioners, and, in the meantime, Wally would be removed from the neighborhood. The court rejected that proposal without consulting petitioners, stating: "I'm going to have the dog put down. That dog attacked that girl in her yard for no reason and injured her severely, and not just the physical, but there may be some issues down the road with her . . . being around animals, psychological issues . . . I don't want to take a chance whether that dog gets counseling . . . I don't believe it works . . . I never want to see it back and I don't want it in any neighborhood or around anybody. I think it's a dangerous dog and it fits all the criteria of a dangerous dog and so my alternative to this is, is to have the dog put down."

The court then agreed to hear testimony in order to avoid "a mess on appeal." Testimony by two of the parties shed no further light on

whether the child sustained serious physical injury. Recent photographs of the injuries were not offered in evidence. An opinion of a certified behavioral expert was not offered. As expected, the court ordered euthanasia, noting that "the severity of this young girl's injuries and I think what the family's going to have to deal with in the future could be a real serious injury."

Initially, I must note my disappointment with the court's conduct in predetermining the result of the proceeding. Judges have an ethical responsibility to perform the duties of office impartially, without prejudice (*see* 22 NYCRR 100.3). The court failed in that responsibility.

In an Agriculture and Markets Law § 123 proceeding, the petitioner has the burden of establishing by clear and convincing evidence that a dog is a "dangerous dog" (§ 123 [2]). The standard of proof is higher than it was in the past. For much of the last century, the standard of proof in such a proceeding was by a preponderance of the evidence (*see City of Hornell v Harrison*, 192 Misc 2d 273, 273 [Hornell City Ct 2002]; *Matter of LaBorie v Habes*, 52 Misc 2d 768, 770 [Webster Just Ct 1967]). If a dog was determined to be a dangerous dog under that standard, the trial court was required to order either euthanasia or permanent confinement, and it had unqualified discretion to do either (*see* former § 121 [4]). In 2004, the legislature undertook a comprehensive reform of the statute (*see* L 2004, ch 392, § 3), raising the standard of proof to clear and convincing evidence, which is the standard of proof most appropriate when the "interests at stake in a . . . proceeding are both 'particularly important' and 'more substantial than mere loss of money' " (*Santosky v Kramer*, 455 US 745, 756 [1982], quoting *Addington v Texas*, 441 US 418, 424 [1979]). The legislature's adoption of that standard of proof in dangerous dog proceedings reflects that body's recognition that our society appreciates that the life of a dog has particular importance and inherent value greater than that of mere property.

Since the reform, if it is established that the dog is a dangerous dog, the court is empowered to order appropriate measures for the protection of the public (*see* Agriculture and Markets Law § 123 [2]). The court has a wide array of humane measures available to it. Those measures must include spaying or neutering and microchipping, and they may include humane confinement, leashing or muzzling in public, maintenance of an insurance policy, or evaluation by a certified behavioral expert and training as deemed appropriate by that expert (*see id.*). The court lacks the power to order the most drastic measure, i.e., euthanasia, unless the petitioner establishes the existence of one of the aggravating circumstances enumerated in the statute (*see* § 123 [3]). Such circumstances include those where the dog, without justification, attacked a person, causing "serious physical injury" (§ 123 [3] [a]), meaning, as relevant here, "serious or protracted disfigurement" (§ 108 [29]).

Respondent's sole contention on appeal is that County Court erred in affirming the judgment directing euthanasia because petitioners

failed to establish serious or protracted disfigurement. I agree, and I have no difficulty in doing so. In my view, "it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Cianchetti v Burgio*, 145 AD3d 1539, 1540 [4th Dept 2016], *lv denied* 29 NY3d 908 [2017] [internal quotation marks omitted], quoting *Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993]).

Protracted disfigurement was not established here. A "disfigurement" is "that which impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen or imperfect or deforms in some manner" (*People v McKinnon*, 15 NY3d 311, 315 [2010] [internal quotation marks omitted]). A "protracted" disfigurement is one that is prolonged in duration (*see* Webster's Third New International Dictionary 1826 [2002]). Petitioners offered no evidence of the duration of the disfigurement. None whatsoever.

Contrary to the majority's reasoning, *People v Irwin* (5 AD3d 1122 [4th Dept 2004], *lv denied* 3 NY3d 642 [2004]) undermines its decision to affirm. In *Irwin*, the victim received multiple stab wounds inflicted by a 12-inch machete and, at trial, the People offered "[m]edical evidence," i.e., the testimony of the victim's treating surgeon concerning the potential for permanent injuries (*id.* at 1123). We thus concluded that the People offered legally sufficient evidence to establish the presence of permanent scarring (*id.*), citing only to *People v Gagliardo* (283 AD2d 964 [4th Dept 2001], *lv denied* 96 NY2d 901 [2001]), in which "[t]he trauma surgeon who treated the victim testified that the victim suffered lacerations . . . [that] resulted in permanent scarring" (*id.* at 964). To the extent that the majority's interpretation is correct, *Irwin* is an aberration and should not be followed. Indeed, we have never cited to *Irwin* for the proposition that the fact finder may conclude that an injury would result in permanent scarring based solely upon photographs of the injury taken shortly after the injury was inflicted, nor would I be inclined to do so.

Serious disfigurement likewise was not established. Contrary to petitioners' assertion, "serious disfigurement" has a well-established definition. The Court of Appeals, drawing on definitions in cases decided under the Workers' Compensation Law, has stated that "[a] person is 'seriously' disfigured when a reasonable observer would find [his or] her altered appearance distressing or objectionable. The standard is an objective one, but we do not imply that the only relevant factor is the nature of the injury; the injury must be viewed in context, considering its location on the body and any relevant aspects of the victim's overall physical appearance" (*McKinnon*, 15 NY3d at 315).

To establish serious disfigurement, at least one court has required some evidence of the victim's appearance after "a reasonable period of healing": "The time for determining whether a disfiguring condition is distressing or objectionable is not immediately at the time of disfigurement but, rather, after a reasonable period of

healing. Otherwise, even the most non-permanent injury could so qualify due to transitory swelling, bruising and blood" (*Fitzgerald v Varney*, 60 Misc 3d 943, 946 [Warren County Ct 2018]). That rule is consistent with case law involving "significant disfigurement" under Insurance Law § 5102 (d). A disfigurement is *not significant* where an injury is "not readily observable to others" (*Smyth v McDonald*, 101 AD3d 1789, 1791 [4th Dept 2012]; *see Koch v Richardson*, 144 AD3d 1638, 1638-1639 [4th Dept 2016]; *Heller v Jansma*, 103 AD3d 1160, 1161 [4th Dept 2013]; *cf. Garcia v County of Suffolk*, 149 AD3d 812, 812 [2d Dept 2017]; *Cross v Labombard*, 127 AD3d 1355, 1357 [3d Dept 2015]) or where it subsides within a reasonable period of time (*see Forster v Novic*, 127 AD3d 605, 605 [1st Dept 2015]; *Pecora v Lawrence*, 28 AD3d 1136, 1137 [4th Dept 2006]; *Wiegand v Schunck*, 294 AD2d 839, 839 [4th Dept 2002]; *cf. Feutcher v Composite Tr.*, 171 AD3d 647, 647-648 [1st Dept 2019]).

Petitioners failed to establish that their child was seriously disfigured. Disfigurement is a purely cosmetic type of injury, and thus the location of a disfigurement is a significant factor in determining its seriousness (*see McKinnon*, 15 NY3d at 315). A disfigurement that is unlikely to be seen is necessarily less serious than one that is likely to be seen. Here, the injury was highly unlikely to be seen by others. A laceration to the buttocks is especially easy to conceal, perhaps more so than any other conceivable injury, and it almost certainly would have remained concealed in public at all times. Moreover, the child healed quickly. Those who saw her one or two weeks after the incident reported that there were "[n]o issues" with the laceration and that it was "healing nicely." Recent photographs were not offered. The child's father even conceded that the location of the injury reduced its seriousness. Thus, petitioners failed to establish that a reasonable observer would have found their child's "altered appearance distressing or objectionable" (*McKinnon*, 15 NY3d at 315).

Petitioners rely on *Edbauer*, but that case is plainly distinguishable because it involved an injury resulting in 36 stitches to the victim's face and neck (*see* 161 AD3d at 1528). A person's face is especially difficult to conceal, and it would be unreasonable to expect a person to keep her face covered in public. The face is also where a disfiguring injury is most likely to attract unwanted attention and cause distress to others. Moreover, the victim in *Edbauer* actually appeared in the courtroom on multiple occasions over a five-month period and testified (*see id.*), thereby giving the court the opportunity to observe the progress of her injuries in person. That did not happen here.

Without evidence of serious *physical* injury, the court focused on psychological or emotional injuries that the child "may" develop in the future and reasoned that those injuries "could be a real serious injury." But emotional trauma does not establish a serious physical injury. A person may suffer "a horrifying experience that might well leave serious and permanent emotional scars. Scars of that kind, however," are *not* evidence of serious disfigurement or a physical

injury of any kind (*McKinnon*, 15 NY3d at 316-317). Sympathy for this child, who endured a traumatic experience, is certainly appropriate, but it does not excuse the court from following the law faithfully or from conducting a fair proceeding. The law's preference is to use euthanasia only as a last resort to protect the public from dangerous dogs when alternative, humane methods have been considered and determined to be inadequate. It is not a form of retributive justice or a means of emotional catharsis.

Finally, the majority opines that, under my reasoning, it would be impossible to establish serious or protracted disfigurement in hearings of this type because they "must, by statute, be held swiftly." The majority's reasoning is empirically wrong and ignores the realities of litigation. We concluded that such disfigurement was established in *Edbauer*, and I do not take issue with that decision. That proceeding was held over a period of five months notwithstanding the language upon which the majority relies, which states that, upon the making of a complaint, a court "shall immediately" make a probable cause determination and then hold the hearing "within five days" (Agriculture and Markets Law § 123 [2]). Cases do not move that quickly. This case did not. *Edbauer* certainly did not. Indeed, the temporal guidelines in the statute predate the 2004 legislative reform and appear to be a relic. Not only did the legislative reform raise the evidentiary standard to proof by clear and convincing evidence, but it also conferred upon an aggrieved respondent the right of appeal (*see* L 2004, ch 392, § 3), which prolongs the resolution of these types of proceedings. Those aspects of the statute as it now exists are incompatible with the majority's interpretation, which would encourage hasty proceedings and thereby deprive the courts of the evidence necessary to reach a proper determination.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

371

CA 18-01818

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

CHANDRA NIEDZWIECKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JARRETT E. YEATES, GERARD A. YEATES AND SALLY ANN YEATES, DEFENDANTS-APPELLANTS.

HAGELIN SPENCER LLC, BUFFALO (MATTHEW D. PFALZER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered July 26, 2018. The order, insofar as appealed from, granted the cross motion of plaintiff for summary judgment on the issues of negligence and proximate cause and dismissing defendants' affirmative defenses based on the emergency doctrine and plaintiff's comparative negligence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion in part with respect to the issues of negligence and proximate cause and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the vehicle she was operating was rear-ended by a vehicle driven by Jarrett E. Yeates (defendant) and owned by defendants Gerard A. Yeates and Sally Ann Yeates. Defendants appeal from an order that, inter alia, granted plaintiff's cross motion for partial summary judgment on the issues of negligence and proximate cause and dismissing four of defendants' affirmative defenses, including those based on the emergency doctrine and plaintiff's comparative negligence.

We agree with defendants that Supreme Court erred in granting the cross motion with respect to the issues of defendant's negligence and proximate cause, and we therefore modify the order accordingly. "It is well settled that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, . . . [and, i]n order to rebut the presumption [of negligence], the driver of the rear vehicle must submit a non[]negligent explanation for the collision" (*Tate v Brown*, 125 AD3d 1397, 1398 [4th Dept 2015] [internal quotation marks omitted]; *see Macri v Kotrys*, 164 AD3d 1642, 1643 [4th Dept 2018]). "One of several

nonnegligent explanations for a rear-end collision is a sudden stop of the lead vehicle . . . , and such an explanation is sufficient to overcome the inference of negligence and preclude an award of summary judgment" (*Tate*, 125 AD3d at 1398 [internal quotation marks omitted]; *see Macri*, 164 AD3d at 1643; *Brooks v High St. Professional Bldg., Inc.*, 34 AD3d 1265, 1266 [4th Dept 2006]).

Here, plaintiff failed to meet her initial burden on the cross motion inasmuch as she submitted the deposition testimony of defendant, in which he " 'provided a nonnegligent explanation for the collision,' " i.e., that the collision occurred when plaintiff stopped abruptly in front of his vehicle after a nonparty vehicle suddenly pulled in front of plaintiff's vehicle (*Gardner v Chester*, 151 AD3d 1894, 1896 [4th Dept 2017]; *see Rosario v Swiatkowski*, 101 AD3d 1609, 1609 [4th Dept 2012]). Thus, plaintiff's own submissions raise "a triable issue of fact as to whether a nonnegligent explanation exists for the rear-end collision" (*Bell v Brown*, 152 AD3d 1114, 1115 [3d Dept 2017]; *see Rosario*, 101 AD3d at 1609-1610; *see also Macri*, 164 AD3d at 1643; *Tate*, 125 AD3d at 1398-1399).

We reject defendants' contention, however, that the court erred in granting the cross motion with respect to the affirmative defense based on the emergency doctrine. Plaintiff met her initial burden of establishing that the emergency doctrine is not applicable to the facts of this case, and defendants failed to raise a triable issue of fact (*see generally Shehab v Powers*, 150 AD3d 918, 920 [2d Dept 2017]).

Finally, we reject defendants' further contention that the court erred in granting the cross motion with respect to the affirmative defense of comparative negligence. Plaintiff met her initial burden of establishing that she was free from comparative negligence by submitting evidence that she was required to stop short in front of defendant's vehicle in order to avoid colliding with the nonparty vehicle that suddenly pulled in front of her vehicle. In opposition, defendants failed to submit "evidentiary proof in admissible form" sufficient to raise an issue of fact to defeat that part of the cross motion (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Mark W. Bennett

Entered: August 22, 2019

Clerk of the Court

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

415

CA 18-01938

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

UTICA MUTUAL INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

V ORDER

ABEILLE GENERAL INSURANCE COMPANY, NOW KNOWN
AS 21ST CENTURY NATIONAL INSURANCE CO., ET AL.,
DEFENDANTS-RESPONDENTS.

FELT EVANS, LLP, CLINTON (KENNETH L. BOBROW OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN G. FELTER OF COUNSEL), FOR DEFENDANT-RESPONDENT FINANCIAL SECURITY ASSURANCE OF IOWA INCORPORATED, NOW KNOWN AS ADVANTAGE WORKERS COMPENSATION INSURANCE COMPANY.

FREEBORN & PETERS LLP, NEW YORK CITY (SEAN THOMAS KEELY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ALFA MUTUAL INSURANCE COMPANY, ET AL.

O'MELVENY & MYERS LLP, NEW YORK CITY (TANCRED V. SCHIAVONI), FOR DEFENDANTS-RESPONDENTS INSURANCE COMPANY OF NORTH AMERICA AND AETNA INSURANCE COMPANY, NOW KNOWN AS TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered March 16, 2018. The order and judgment, among other things, dismissed the complaint in its entirety.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties in July 2019,

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

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

429

CA 18-02240

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

DEBORAH CLINE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RALPH J. CODE, DEFENDANT-RESPONDENT.

THE WRIGHT LAW FIRM, LLC, ROCHESTER (RON F. WRIGHT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON LLP, ROCHESTER (ROY Z. ROTENBERG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered May 21, 2018. The order and judgment granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is modified on the law by denying the motion in part and reinstating the complaint, as amplified by the bill of particulars, with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained when the vehicle she was driving was struck from behind by a vehicle operated by defendant. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff cross-moved for partial summary judgment on the issue of serious injury. Supreme Court denied plaintiff's cross motion, granted defendant's motion, and dismissed plaintiff's complaint in its entirety.

Initially, we reject the assertion of defendant and our dissenting colleague that plaintiff's notice of appeal limits our review to that part of the order and judgment that denied plaintiff's cross motion for partial summary judgment. The notice of appeal provides, in relevant part, that plaintiff "hereby appeals . . . from the . . . [o]rder and [j]udgment . . . denying [p]laintiff's [c]ross[m]otion for [s]ummary [j]udgment. Plaintiff appeals from each and every part of said [o]rder denying [p]laintiff's [c]ross[m]otion."

Contrary to our dissenting colleague's position, inasmuch as the notice of appeal states that plaintiff sought to appeal from "each and every part" of the order and judgment and does not contain language restricting the appeal to only a specific part thereof, we conclude that the appeal is not limited to review of the denial of plaintiff's cross motion and that the reference thereto simply constitutes language describing the order and judgment (*see Matter of Long Is. Pine Barrens Socy., Inc. v Central Pine Barrens Joint Planning & Policy Commn.*, 113 AD3d 853, 855-856 [2d Dept 2014]; *Cantineri v Carrere*, 60 AD3d 1331, 1332 [4th Dept 2009]; *cf. City of Mount Vernon v Mount Vernon Hous. Auth.*, 235 AD2d 516, 516-517 [2d Dept 1997]).

Our determination that the reference to the cross motion in the notice of appeal is descriptive and does not constitute evidence that plaintiff excluded from her appeal that part of the order and judgment granting defendant's motion is further supported by the fact that, in her cross motion, plaintiff expressly sought as part of the requested relief "[a]n [o]rder denying defendant's [m]otion for [s]ummary [j]udgment in its entirety." Thus, given the lack of language specifically limiting the appeal to that part of the order and judgment denying the cross motion, and considering that the relief sought in the cross motion included the denial of defendant's motion, and that granting the other relief sought by plaintiff in the cross motion and on appeal from the denial thereof, i.e., partial summary judgment on the issue of serious injury, would necessarily require denial of defendant's motion for summary judgment dismissing the complaint, we conclude that plaintiff did not limit her appeal to challenging only that part of the order and judgment that denied her cross motion for summary judgment while leaving unchallenged that part of the order and judgment granting defendant's motion for summary judgment dismissing the complaint (*see Long Is. Pine Barrens Socy., Inc.*, 113 AD3d at 855-856; *Cantineri*, 60 AD3d at 1332).

With respect to the merits, we note that, as limited by her brief, plaintiff challenges the court's determination only with respect to the permanent consequential limitation of use and significant limitation of use categories, and she has therefore abandoned her claims with respect to any remaining categories of serious injury that were alleged in her complaint, as amplified by the bill of particulars (*see Koneski v Seppala*, 158 AD3d 1211, 1212 [4th Dept 2018]; *Boroszko v Zylinski*, 140 AD3d 1742, 1743 [4th Dept 2016]).

Taking plaintiff's cross motion first, we agree with plaintiff that the court erred in discounting entirely the opinion of her treating chiropractor, inasmuch as the perceived deficiencies therein raised matters of credibility that are not amenable to resolution on a motion for summary judgment (*see Hines-Bell v Criden*, 145 AD3d 1537, 1538 [4th Dept 2016]; *Cook v Peterson*, 137 AD3d 1594, 1597 [4th Dept 2016]; *Crutchfield v Jones*, 132 AD3d 1311, 1311 [4th Dept 2015]). Nonetheless, although the affidavit of plaintiff's chiropractor provides support for the conclusion that plaintiff sustained a serious injury to her cervical spine (*see generally Grier v Mosey*, 148 AD3d 1818, 1819-1820 [4th Dept 2017]; *Garner v Tong*, 27 AD3d 401, 401-402 [1st Dept 2006]; *Mazo v Wolofsky*, 9 AD3d 452, 453 [2d Dept 2004]),

plaintiff's own submissions also included medical records that raise triable issues of fact whether the injuries to her cervical spine constituted a permanent consequential limitation of use or a significant limitation of use, and therefore plaintiff failed to establish her entitlement to summary judgment on the issue of serious injury (*see generally Monterro v Klein*, 160 AD3d 1459, 1460 [4th Dept 2018]; *Summers v Spada*, 109 AD3d 1192, 1192 [4th Dept 2013]). In any event, even if we assume, arguendo, that plaintiff satisfied her prima facie burden, defendant's submissions were sufficient to raise a triable issue of fact (*see generally Crutchfield*, 132 AD3d at 1311-1312). Defendant's orthopedic medical expert opined that there were no disc herniations to plaintiff's spine, and that her range of motion was actually higher than normal in four directions and only negligibly limited in two directions. Those views were essentially repeated in the affirmed statements of two other physicians that were submitted by defendant.

For the same reasons, we agree with plaintiff that the court erred in granting defendant's motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury, and we therefore modify the order and judgment accordingly. Even assuming, arguendo, that defendant met his initial burden, we conclude that plaintiff raised triable issues of fact with respect to those two categories (*see Armella v Olson*, 134 AD3d 1412, 1413 [4th Dept 2015]). The parties presented conflicting expert opinions on the issue of serious injury requiring denial of both plaintiff's cross motion and defendant's motion (*see generally Cicco v Durolek*, 147 AD3d 1487, 1488 [4th Dept 2017]; *Hines-Bell*, 145 AD3d at 1538; *Crutchfield*, 132 AD3d at 1311).

All concur except CURRAN, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent and vote to affirm the order and judgment because, in my view, the specific limiting language in the notice of appeal deprives this Court of jurisdiction to consider whether Supreme Court properly granted defendant's motion for summary judgment. Instead, the notice's express language restricts our review to only that part of the order and judgment denying plaintiff's cross motion for partial summary judgment.

Notices of appeal are of a jurisdictional nature, without which we are without authority to entertain an appeal (*see* CPLR 5515 [1]; *Matter of Winans v Manz*, 54 AD2d 597, 597 [4th Dept 1976]; *see also Rich v Manhattan Ry. Co.*, 150 NY 542, 544, 546 [1896]; *Matter of Long Is. Pine Barrens Socy., Inc. v Central Pine Barrens Joint Planning & Policy Commn.*, 113 AD3d 853, 855 [2d Dept 2014]; *see generally* Siegel, NY Prac § 530 at 942 [5th ed 2011]). From that general precept, it is well settled that a party may limit his or her appeal because "[a]n appeal from only part of an order constitutes a waiver of the right to appeal from other parts of the order" (*Boyle v Boyle*, 44 AD3d 885, 886 [2d Dept 2007]; *see e.g. Levitt v Levitt*, 97 AD3d 543, 545 [2d Dept 2012]; *Commissioners of the State Ins. Fund v Ramos*, 63 AD3d 453, 453 [1st Dept 2009]; *Ferguson Elec. v Kendal at Ithaca*, 284 AD2d 643, 644 [3d Dept 2001]; *City of Mount Vernon v Mount Vernon Hous. Auth.*, 235

AD2d 516, 517 [2d Dept 1997]). Thus, where the clear language of a notice of appeal specifically limits the appeal to only certain parts of an order, it is as though there is no notice of appeal regarding the parts of the order not appealed from, and we are therefore without authority to review those portions not so delineated by the notice.

Here, plaintiff's notice of appeal states, in relevant part, that she "hereby appeals to the Appellate Division, Fourth Department, from the . . . [o]rder and [j]udgment . . . entered . . . on May 21, 2018, *denying [p]laintiff's [c]ross[m]otion for [s]ummary [j]udgment*. Plaintiff appeals from each and every part of said [o]rder *denying [p]laintiff's [c]ross[m]otion*" (emphasis added). In my view, this express language unambiguously conveys that plaintiff limited her appeal to challenging only that part of the order and judgment that denied her cross motion for summary judgment. Plaintiff even referenced that portion of the order and judgment, "[p]laintiff's [c]ross[m]otion," twice and made no reference to any other part of the order and judgment. This repeated language compels the conclusion that plaintiff did not seek to challenge the court's granting of defendant's motion.

I cannot agree with the majority's reading of the notice of appeal as broadly encompassing both defendant's motion and plaintiff's cross motion because it essentially ignores the limiting language quoted above. To reach that conclusion, the majority states that it is construing the words in the notice of appeal, "from each and every part," to mean that plaintiff is also challenging the grant of defendant's summary judgment motion. In doing this, however, the majority ignores the specific restricting language that follows the word "order," i.e., "denying" and "[p]laintiff's [c]ross[m]otion." It is one thing to broadly construe ambiguous language; it is another thing entirely to do so in the face of plain, express limiting language to the contrary.

The majority's legal analysis avoids actively confronting the limiting language in the notice of appeal by designating the language that follows the word "order" as "descriptive" in nature. Neither of the cases cited by the majority for that unique proposition actually support there being a distinction between "descriptive" and jurisdictional language in a notice of appeal, and, as the majority recognizes by using the "*cf.*" signal, one of the cases that they cite actually contravenes that view. In short, I am unwilling to ignore unambiguous language in the notice of appeal, which defines our jurisdiction to review the appealable paper, as merely "descriptive." There is simply no authority permitting us to disregard certain language in a notice of appeal as merely "descriptive." In fact, I can conceive of no coherent or consistent basis for ascertaining what language is descriptive, and what language actually bears on our jurisdiction. Instead, I would interpret *all* the language in the notice of appeal, construed together and as a whole, to determine precisely what appellant had appealed from. Here, viewed as a whole, I am of the conclusion that plaintiff limited her appeal to only that part of the order and judgment denying her cross motion for summary judgment.

As an illustration, consider two hypothetical notices of appeal. First, a notice of appeal stating: "Plaintiff appeals from each and every part of the order, *except* for that part which denied plaintiff's cross motion." Alternatively, consider a notice of appeal stating that the appeal is from an order deciding six motions and states that the appeal is from "each and every part" of the order denying only two of those six motions. Under the majority's approach, because those notices of appeal include the phrase "each and every part," this Court is permitted to review both what is specifically excepted from the appeal in the first hypothetical notice of appeal, and the four other motions decided in the second hypothetical notice of appeal, despite the clear subsequent limiting language—apparently because it is merely "descriptive." As noted, it is untenable for us to simply pick and choose what language is jurisdictional and what language is not—i.e., "descriptive."

The majority tethers its conclusion that the notice of appeal's reference to that part of the order and judgment denying plaintiff's cross motion encompasses that part of the order and judgment granting defendant's motion to language in plaintiff's cross motion that affirmatively sought denial of defendant's motion. The CPLR, however, provides no support for that construction, inasmuch as a party seeking the denial of a moving party's motion is not required to make a cross motion (*see e.g.* CPLR 2215). The reference to the plaintiff's cross motion papers seeking denial of defendant's motion not only validates a superfluous demand for relief, it also amply demonstrates just how far the majority's analysis has gone astray.

To the extent it may seem more fair to adopt the majority's approach in construing notices of appeal, I consider it significant that, in his respondent's brief, defendant specifically argued that the notice of appeal foreclosed plaintiff from challenging the grant of defendant's motion, a position that plaintiff did not refute because she did not file a reply brief. Thus, by broadly construing the notice of appeal, we are only being fair to a party who did not even address the issue or request that we broadly construe the notice. This is all the more concerning given that the majority's rationalization of its reading of the notice of appeal is premised, in part, on its conclusion that "granting the . . . relief sought . . . would necessarily require denial of defendant's motion for summary judgment." In other words, the majority essentially looks to the merits of plaintiff's position to justify its exercise of jurisdiction under a broad interpretation of the language of the notice of appeal. Our jurisdiction, of course, is unconnected to our view of the merits, and is in fact the necessary predicate to our review of them.

Nevertheless, to the extent the notice of appeal permits our review of the order and judgment, I agree with the majority that the court properly denied plaintiff's cross motion because her own submissions raised an issue of fact on the issue of serious injury under Insurance Law § 5102 (d) (*see generally Monterro v Klein*, 160 AD3d 1459, 1460 [4th Dept 2018]; *Summers v Spada*, 109 AD3d 1192, 1192 [4th Dept 2013]). For the reasons stated above, however, I submit that this is where our analysis of the merits of this case *must* end,

and I offer no view on whether the court properly granted defendant's motion for summary judgment.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

432

CA 18-01719

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

ROBERTA MCCULLOCH, PLAINTIFF-APPELLANT,

V ORDER

NEW YORK CENTRAL MUTUAL INSURANCE COMPANY,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

BROWN CHIARI LLP, BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered February 15, 2018. The order denied plaintiff's motion to set aside the jury's verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435 [2d Dept 1989]; *see also* CPLR 5501 [a] [1]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

433

CA 18-01720

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

ROBERTA MCCULLOCH, PLAINTIFF-APPELLANT,

V ORDER

NEW YORK CENTRAL MUTUAL INSURANCE COMPANY,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

BROWN CHIARI LLP, BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Frank Caruso, J.), entered April 17, 2018. The judgment dismissed the complaint upon a jury verdict of no cause of action.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see RES Exhibit Servs., LLC v Genesis Vision, Inc.* [appeal No. 3], 155 AD3d 1515, 1517 [4th Dept 2017]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

434

CA 18-02253

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

ROBERTA MCCULLOCH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL INSURANCE COMPANY,
DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

BROWN CHIARI LLP, BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Frank Caruso, J.), entered October 22, 2018. The judgment dismissed the complaint and awarded defendant costs and disbursements.

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

Memorandum: Plaintiff commenced this action seeking supplementary uninsured/underinsured motorist (SUM) benefits from defendant, her motor vehicle liability insurer, based on injuries that plaintiff allegedly sustained in a motor vehicle accident. The jury returned a verdict finding that the accident was not "a substantial factor in causing an injury to [plaintiff]." Thereafter, Supreme Court denied plaintiff's motion to set aside the verdict as against the weight of the evidence. Plaintiff appeals from a judgment entered after the jury's verdict, and we affirm.

We reject plaintiff's initial contention that the court erred in precluding her from calling as witnesses at trial any claims representatives employed by defendant or from entering into evidence any proof of insurance. It was undisputed at trial that plaintiff carried SUM coverage pursuant to a policy issued by defendant and that the SUM coverage was applicable to plaintiff's motor vehicle accident, and thus there was no need for plaintiff to offer further evidence establishing the existence of the policy. Similarly, there is no indication in plaintiff's pleadings or elsewhere in the record that she was alleging that defendant denied her claim for SUM benefits in bad faith (*see e.g. Bi-Econ. Mkt., Inc. v Harleysville Ins. Co. of New York*, 10 NY3d 187, 191-192 [2008]), and thus evidence that defendant conducted an internal investigation regarding plaintiff's claim was

not relevant to the issues at trial. Indeed, it is understandable that defendant engaged in such an investigation inasmuch as, "[w]hen an insured injures someone in a motor vehicle accident, the injured party is subject to the serious injury requirement in the No-Fault Law and cannot sue for noneconomic loss unless the serious injury threshold is met (*see* Insurance Law § 5104 [a]). Since the purpose of supplementary coverage is to extend to the insured the same level of coverage provided to an injured third party under the policy, the insured must also meet the serious injury requirement before entitlement to supplementary benefits. If this were not the case, the insured would receive coverage more comprehensive than that available to a third party injured by the insured" (*Raffellini v State Farm Mut. Auto. Ins. Co.*, 9 NY3d 196, 205 [2007]). Here, we agree with defendant that its representatives were not witnesses to the accident, have no personal knowledge of the facts of the accident, and are not medical doctors qualified to testify regarding plaintiff's alleged injuries. Thus, defendant's internal investigation and evaluation of plaintiff's claim is therefore irrelevant to the issue whether plaintiff sustained a serious injury, which, along with the issue whether any such injury was causally related to the accident, were the primary issues before the jury (*see generally 40 Rector Holdings, LLC v Travelers Indem. Co.*, 40 AD3d 482, 483 [1st Dept 2007]). We also agree with defendant that plaintiff did not need a representative from defendant to explain the relationship between the parties. Plaintiff's counsel could have requested a special instruction from the court or elicited detailed testimony from the plaintiff on that topic. Moreover, plaintiff's counsel did explain to the jury in his opening and closing statements the relationship between the parties.

Contrary to plaintiff's contention, the court properly rejected her request to charge the jury pursuant to PJI 2:282 regarding the aggravation of a preexisting injury inasmuch as " 'there was no factual basis for such a charge' " (*Dennis v Massey*, 134 AD3d 1532, 1533-1534 [4th Dept 2015]; *cf. Mazurek v Home Depot U.S.A.*, 303 AD2d 960, 961 [4th Dept 2003]). We thus reject plaintiff's contention that a "rational jury could have found that [plaintiff] had asymptomatic pre-existing arthritis that was activated and precipitated by the injury" and that a charge pursuant to PJI 2:282 was therefore warranted. We note, however, that plaintiff's contention supports a charge under PJI 2:283 regarding increased susceptibility to injury, and that charge was given in this case (*see Martin v Volvo Cars of N. Am.*, 241 AD2d 941, 943 [4th Dept 1997]).

We also reject plaintiff's contention that the court erred in failing to set aside the verdict as against the weight of the evidence. It is well established that "[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" (*Sauter v Calabretta*, 103 AD3d 1220, 1220 [4th Dept 2013] [internal quotation marks omitted]). "That determination is addressed to the sound discretion of the trial court, but if the verdict is one that reasonable persons could have rendered

after receiving conflicting evidence, the court should not substitute its judgment for that of the jury" (*Ruddock v Happell*, 307 AD2d 719, 720 [4th Dept 2003]; *see Todd v PLSIII, LLC—We Care*, 87 AD3d 1376, 1377 [4th Dept 2011]). "Where 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 [4th Dept 2011] [internal quotation marks omitted]). Here, there was sharply conflicting expert testimony with respect to whether plaintiff sustained an injury as a result of the accident, and the jury was entitled to credit the testimony of defendant's expert and reject the testimony of plaintiff's experts (*see McMillian v Burden*, 136 AD3d 1342, 1344 [4th Dept 2016]).

While we conclude under the circumstances of this case that the verdict is not against the weight of the evidence, we nonetheless note that the first question on the verdict sheet – i.e., "[w]as the accident . . . a substantial factor in causing an injury to [plaintiff]?" – invites the very problem we addressed in *Brown v Ng* (163 AD3d 1464, 1465 [4th Dept 2018]), where we noted that an interrogatory asking whether the plaintiff sustained an "injury" fails to address the appropriate legal issue, which is whether the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d). The first question on the verdict sheet was unnecessary here inasmuch as the second and third questions asked the jury to determine whether plaintiff sustained a serious injury under the relevant categories that was causally related to the accident.

Finally, we reject plaintiff's contention that the court erred in denying her motion for a directed verdict on the issue of liability. Contrary to plaintiff's contention, defendant was not required to issue a disclaimer regarding the serious injury threshold (*see generally* Insurance Law § 3420 [f] [1], [2]; *Raffellini*, 9 NY3d at 205; *Meegan v Progressive Ins. Co.*, 43 AD3d 182, 184-185 [4th Dept 2007]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

448

CA 17-00413

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

HARPAL SODHI AND GUNWANT SODHI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DOLLAR TREE STORES, INC., ET AL., DEFENDANTS,
PORTAGE CENTER, LLC, BALDWIN REAL ESTATE
CORPORATION, DEFENDANTS-APPELLANTS,
AND TOPS MARKETS, LLC, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

THE TARANTINO LAW FIRM, LLP, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

NASH CONNORS, BUFFALO (MICHAEL B. DIXON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered November 14, 2016. The order denied the motion of defendants Portage Center, LLC, and Baldwin Real Estate Corporation for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Harpal Sodhi (plaintiff) when she slipped and fell on ice in the parking lot of a shopping center. Defendant Portage Center, LLC (Portage) is a real estate holding company and the owner of the premises, and defendant Baldwin Real Estate Corporation (Baldwin) is the property manager of the premises. Defendant Dollar Tree Stores, Inc. (Dollar Tree) and defendant Tops Markets, LLC (Tops) were tenants in the shopping center where the incident occurred, and they shared the parking lot in which plaintiff fell. In appeal No. 1, Portage and Baldwin appeal from an order denying their motion seeking summary judgment dismissing the amended complaint against them and seeking summary judgment on their cross claims against Tops for common-law indemnification and contractual indemnification. In appeal No. 2, Tops appeals from an order denying its motion for summary judgment dismissing the amended complaint against it. We affirm in both appeals.

It is well settled that "[a] property owner is not liable for an alleged hazard on [its] property involving snow or ice unless [it] created the defect, or had actual or constructive notice of its existence" (*Sweeney v Lopez*, 16 AD3d 1174, 1175 [4th Dept 2005] [internal quotation marks omitted]; *see Groth v BJ's Wholesale Club, Inc.*, 59 AD3d 1086, 1086 [4th Dept 2009]). We note at the outset that plaintiffs did not allege that Portage, Baldwin and Tops (collectively, defendants) created the icy condition or had actual notice of its existence. Therefore, in their respective motions, defendants had the "initial burden of establishing that the ice was not visible and apparent . . . or that the ice formed so close in time to the accident that [they] could not reasonably have been expected to notice and remedy the condition" (*Gwitt v Denny's Inc.*, 92 AD3d 1231, 1231-1232 [4th Dept 2012] [internal quotation marks omitted]). Contrary to defendants' contentions, we conclude in both appeals that they failed to meet that burden.

In support of their motions, defendants submitted plaintiff's deposition testimony that she observed "ice all around [her]" after she fell, which presented a question of fact whether the icy condition was visible and apparent (*see Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469-1470 [4th Dept 2013]; *Gwitt*, 92 AD3d at 1232; *King v Sam's E., Inc.*, 81 AD3d 1414, 1415 [4th Dept 2011]).

Defendants also failed to establish " 'that the ice formed so close in time to [plaintiff's fall] that [they] could not reasonably have been expected to notice and remedy the condition' " (*Conklin v Ulm*, 41 AD3d 1290, 1291 [4th Dept 2007]; *see Piersielak v Amyell Dev. Corp.*, 57 AD3d 1422, 1423 [4th Dept 2008]). Here, defendants' submissions raised a triable issue of fact regarding whether the icy condition existed for a sufficient length of time for the defendants to discover and remedy it (*see Roy v City of New York*, 65 AD3d 1030, 1031 [2d Dept 2009]).

We reject the further contention of Portage and Baldwin in appeal No. 1 that they were not responsible for the removal of snow and ice from the area where the incident occurred. Although an out-of-possession landlord is generally not responsible for injuries that occur on its premises unless it has retained control over the premises or is contractually obligated to maintain or repair the alleged hazard (*see Ferro v Burton*, 45 AD3d 1454, 1454 [4th Dept 2007]), the evidence submitted by Portage and Baldwin, which included testimony of Baldwin's commercial administration manager, failed to establish that Baldwin and Portage had not retained control of the premises (*see Gronski v County of Monroe*, 18 NY3d 374, 380-381 [2011], *rearg denied* 19 NY3d 856 [2012]).

Furthermore, even assuming, arguendo, that Portage and Baldwin established that they did not retain control of the premises, plaintiffs raised a triable issue of fact in opposition by submitting a lease agreement between Portage's predecessor and Dollar Tree, which provided that the "Landlord" was required to maintain "Common Areas" of the premises, including "parking areas."

We reject the contention of Portage and Baldwin that they are entitled to summary judgment on their cross claim for common-law indemnification inasmuch as they failed to establish that Portage complied with its duty to maintain the parking lot in a reasonably safe condition or that it relinquished that duty to Tops (*see generally Robinson v Brooks Shopping Ctrs., LLC*, 148 AD3d 522, 523 [1st Dept 2017]; *Mathis v Central Park Conservancy*, 251 AD2d 171, 172 [1st Dept 1998]). Portage and Baldwin also failed to establish as a matter of law that they were entitled to contractual indemnification (*see generally Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 931 [2d Dept 2016]). Furthermore, the alternative contention of Portage and Baldwin that the court should have granted judgment on their cross claims "on a conditional basis" was raised for the first time in a reply brief and is therefore not properly before us on appeal (*see Cleere v Frost Ridge Campground, LLC*, 155 AD3d 1645, 1649 [4th Dept 2017]).

Finally, Tops' contention in appeal No. 2 that there was a storm in progress was raised for the first time in its reply papers and thus was not properly before Supreme Court (*see generally Jacobson v Leemilts Petroleum, Inc.*, 101 AD3d 1599, 1600 [4th Dept 2012]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

449

CA 17-00416

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

HARPAL SODHI AND GUNWANT SODHI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DOLLAR TREE STORES, INC., ET AL., DEFENDANTS,
AND TOPS MARKETS, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

NASH CONNORS, BUFFALO (MICHAEL B. DIXON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered November 14, 2016. The order denied the motion of defendant Tops Markets, LLC, for summary judgment.

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

Same memorandum as in *Sodhi v Dollar Tree Stores, Inc*. ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

471

CA 18-01990

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

BATAVIA CITY CENTRE MERCHANTS ASSOCIATION, INC.,
PLAINTIFF,

V MEMORANDUM AND ORDER

CITY OF BATAVIA, DEFENDANT-RESPONDENT.
(ACTION NO. 1.)

CITY OF BATAVIA, PLAINTIFF-RESPONDENT,

V

BATAVIA CITY CENTRE MERCHANTS ASSOCIATION, INC.,
DEFENDANT.
(ACTION NO. 2.)

RTMS PROPERTIES LLC, NONPARTY APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (DAVID J. MCNAMARA OF COUNSEL), FOR NONPARTY APPELLANT.

UNDERBERG & KESSLER LLP, BUFFALO (GEORGE S. VANNEST OF COUNSEL), FOR DEFENDANT-RESPONDENT AND PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Genesee County (Catherine R. Nugent Panepinto, J.), entered January 24, 2018. The judgment granted the motion of the City of Batavia for a declaration that a Settlement Agreement, Termination of Agreements and Restated Easement Agreement are binding and enforceable on nonparty appellant RTMS Properties LLC.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law with costs, the motion is dismissed, and the declaration is vacated.

Memorandum: Nonparty appellant RTMS Properties LLC appeals from a judgment that granted the motion of defendant-plaintiff City of Batavia (City) for, in effect, a declaration that a proposed settlement agreement was binding and enforceable against appellant notwithstanding appellant’s refusal to approve such agreement. We now reverse the judgment, dismiss the City’s motion, and vacate the declaration.

Appellant is not and has never been a party to either of the

instant actions between the City and plaintiff-defendant Batavia City Centre Merchants Association, Inc. Moreover, the City never filed a supplemental summons and amended verified complaint against appellant, nor did it obtain either leave of court or a proper stipulation to add appellant as a party. Thus, the City's motion by order to show cause for a declaration against appellant was "ineffective either to join the appellant[] to [either] pending action or to commence a new action against [it]" (*Monks v Pandolfi*, 274 AD2d 381, 381 [2d Dept 2000]; *see* CPLR 305 [a]; CPLR 1003; *Crook v E.I. du Pont de Nemours Co.* [appeal No. 2], 181 AD2d 1039, 1039-1040 [4th Dept 1992], *affd for reasons stated* 81 NY2d 807 [1993]; *Benn v Losquadro Ice Co., Inc.*, 65 AD3d 655, 656 [2d Dept 2009]).

Contrary to the City's contention, the record is devoid of any evidence that appellant ever engaged in settlement negotiations on its own behalf in connection with either action. In any event, even had appellant engaged in settlement negotiations, such efforts would not have constituted an appearance that would have waived any waivable jurisdictional objections to the City's improper method of seeking relief against appellant (*see R. L. C. Invs. v Zabski*, 109 AD2d 1053, 1053 [4th Dept 1985]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

472

CA 18-01742

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

JOHN A. KELSEY AND MARY M. KELSEY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

GERALD E. HOURIGAN, JR., INDIVIDUALLY, AND
DOING BUSINESS AS GERALD HOURIGAN DAIRY FARM,
PATRICIA J. HOURIGAN, GERALD E. HOURIGAN, JR.,
AND PATRICIA J. HOURIGAN, INDIVIDUALLY, AND
DOING BUSINESS AS HOURIGAN'S UDDER PLACE,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (JAMES GASCON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOHN A. MAYA, UTICA, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered March 21, 2018. The order, among other things, denied defendants' motion seeking, inter alia, summary judgment dismissing the complaint and granted that part of plaintiffs' cross motion seeking to strike defendants' fifth and sixth affirmative defenses.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the cross motion with respect to the fifth affirmative defense and reinstating that affirmative defense, and granting the motion in part and dismissing the complaint, and as modified the order is affirmed without costs.

Memorandum: John A. Kelsey (plaintiff) was injured when a cow fell on him at a dairy farm owned by defendants. After the accident, he filed a workers' compensation claim that listed Gerald E. Hourigan, Jr., individually and doing business as Gerald Hourigan Dairy Farm (defendant), as his employer, and the Workers' Compensation Board (Board) issued a determination in plaintiff's favor that listed defendant as his employer. While defendant's administrative appeal of that determination was pending, plaintiffs commenced this action seeking to recover damages for injuries that plaintiff sustained in the accident. Thereafter, defendant withdrew his administrative appeal, and the Board awarded plaintiff $142,384.32, which was paid through October 30, 2018.

In appeal No. 1, defendants appeal from an order that, inter alia, denied that part of their motion seeking summary judgment dismissing the complaint, and granted that part of plaintiffs' cross motion seeking dismissal of the fifth affirmative defense, which was based upon workers' compensation exclusivity, pursuant to CPLR 3126. We agree with defendants that Supreme Court erred in denying the motion and granting the cross motion to that extent, and we therefore modify the order accordingly. Workers' compensation is an exclusive remedy (*see* Workers' Compensation Law § 11; *O'Rourke v Long*, 41 NY2d 219, 221 [1976]) and, for purposes of workers' compensation exclusivity, "a partnership and its partners are considered one entity when acting in furtherance of partnership business" (*Rainey v Jefferson Vil. Condo No. 11 Assoc.*, 203 AD2d 544, 546 [2d Dept 1994], *lv denied* 84 NY2d 804 [1994]; *see Colon v Aldus III Assoc.*, 296 AD2d 362, 362 [1st Dept 2002]). Here, plaintiff "initiated a workers' compensation claim against defendant and . . . received benefits from defendant" (*Alfonso v Lopez*, 149 AD3d 1535, 1536 [4th Dept 2017]). Further, plaintiffs alleged in their complaint that defendants operated the farm as business partners, and defendants admitted that allegation in their answer. We thus conclude that the workers' compensation benefits that plaintiff received are his "sole remedy" against defendants (*id.*).

In light of our determination, defendants' remaining contentions in appeal No. 1 are academic.

In appeal No. 2, defendants appeal from an order denying their motion for leave to renew and reargue their motion for summary judgment. Insofar as the order in appeal No. 2 denied that part of defendants' motion seeking leave to reargue, no appeal lies from that part of the order (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]). Insofar as the order in appeal No. 2 denied that part of defendants' motion seeking leave to renew, we dismiss the appeal as moot in light of our determination in appeal No. 1 (*see JPMorgan Chase Bank, N.A. v Kobee*, 140 AD3d 1622, 1624 [4th Dept 2016]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

473

CA 18-01954

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

JOHN A. KELSEY AND MARY M. KELSEY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

GERALD E. HOURIGAN, JR., INDIVIDUALLY, AND
DOING BUSINESS AS GERALD HOURIGAN DAIRY FARM,
PATRICIA J. HOURIGAN, GERALD E. HOURIGAN, JR.,
AND PATRICIA J. HOURIGAN, INDIVIDUALLY AND
DOING BUSINESS AS HOURIGAN'S UDDER PLACE,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (JAMES GASCON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOHN A. MAYA, UTICA, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered October 11, 2018. The order denied defendants' motion for leave to renew and reargue their motion for summary judgment.

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

Same memorandum as in *Kelsey v Hourigan* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

478

KA 13-01175

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT L. LATHROP, ALSO KNOWN AS “LIL B”,
DEFENDANT-APPELLANT.

EFTIHIA BOURTIS, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered March 13, 2013. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of murder in the second degree (Penal Law § 125.25 [3]). Initially, we agree with defendant that his waiver of the right to appeal is invalid. Although the record reflects that Supreme Court explained to defendant that the waiver of the right to appeal would encompass certain issues, including those related to sentencing and the court’s suppression ruling, the record fails to establish that “defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty” (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Ware*, 159 AD3d 1401, 1401 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]). Moreover, the court never elicited an acknowledgment that defendant was voluntarily waiving his right to appeal (*see People v Alston*, 163 AD3d 843, 844 [2d Dept 2018], *lv denied* 32 NY3d 1062 [2018]; *see also People v Haskins*, 86 AD3d 794, 796 [3d Dept 2011], *lv denied* 17 NY3d 903 [2011]; *People v Moran*, 69 AD3d 1055, 1056 [3d Dept 2010]). We nevertheless affirm the judgment of conviction.

Defendant contends that the court abused its discretion in denying his request for new counsel, made following the entry of his plea and prior to sentencing. To the extent that defendant’s contention survives his guilty plea (*see People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]), we conclude that it lacks merit. “It is well settled that an indigent defendant is guaranteed the right to counsel by both the Federal and New York

State Constitutions (*see* US Const 6th Amend; NY Const, art I, § 6), but this entitlement does not encompass the right to counsel of [his or her] own choosing . . . While a court has a duty to investigate complaints concerning counsel, 'this is far from suggesting that an indigent's request that a court assign new counsel is to be granted casually' " (*People v Porto*, 16 NY3d 93, 99 [2010], quoting *People v Sawyer*, 57 NY2d 12, 19 [1982], *rearg dismissed* 57 NY2d 776 [1982], *cert denied* 459 US 1178 [1983]). Rather, "a court's duty to consider such a motion is invoked only where a defendant makes . . . specific factual allegations of 'serious complaints about counsel' " (*id.* at 99-100, quoting *People v Medina*, 44 NY2d 199, 207 [1978]). "If such a showing is made, the court must make at least a 'minimal inquiry,' and discern meritorious complaints from disingenuous applications" (*id.* at 100, quoting *People v Sides*, 75 NY2d 822, 825 [1990]). Substitution may then occur only for "good cause," and such a determination is "within the discretion and responsibility of the trial judge" (*id.* at 99-100 [internal quotation marks omitted]). Here, "[e]ven assuming, arguendo, that defendant's complaints about defense counsel suggested a serious possibility of good cause for a substitution of counsel requiring a need for further inquiry," we conclude that the court "afforded defendant the opportunity to express his objections concerning defense counsel, and the court thereafter reasonably concluded that defendant's objections were without merit" (*People v Bethany*, 144 AD3d 1666, 1669 [4th Dept 2016], *lv denied* 29 NY3d 996 [2017], *cert denied* — US —, 138 S Ct 1571 [2018]; *see People v Martinez*, 166 AD3d 1558, 1559 [4th Dept 2018]).

Additionally, to the extent that defendant's contention that he was denied effective assistance of counsel survives his guilty plea, we conclude that it lacks merit. "There is no basis upon which to conclude that defendant did not enter the plea knowingly, voluntarily and intelligently" (*People v Williams*, 124 AD3d 1285, 1286 [4th Dept 2015], *lv denied* 25 NY3d 1078 [2015]) and, although defendant contends that defense counsel was ineffective in failing to move to withdraw the guilty plea, 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" (*id.* [internal quotation marks omitted]; *see People v Caban*, 5 NY3d 143, 152 [2005]). Moreover, defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Booth*, 158 AD3d 1253, 1255 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018] [internal quotation marks omitted]).

Finally, we have considered defendant's remaining contention and conclude that it does not require modification or reversal of the judgment.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

479

KA 18-02304

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

ALEKSEY SHEVCHENKO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered December 5, 2016. The judgment convicted defendant, upon a nonjury verdict, of rape 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 nonjury verdict of rape in the first degree (Penal Law § 130.35 [2]). Defendant met the victim outside a bar, they drank together, and they then went together to defendant's apartment where, defendant contends, they engaged in consensual sex. The victim testified at trial that she had consumed a significant amount of alcohol and that her memory of the evening contained a gap from a point before she met defendant until she awoke to find defendant on top of her with his penis in her vagina. She was confused and upset when she woke, did not know where she was or who defendant was, and felt like she was not in command of her body. She repeatedly asked defendant what was going on, but defendant did not respond. Instead, he flipped her over, put her face in a pillow, and continued to engage in sex. The victim eventually took a cab home and reported to her roommate that she had been raped, and then she went to the hospital. A test from blood drawn several hours later revealed a concentration of alcohol and a small amount of the disassociative anesthetic drug ketamine, which the victim testified she had not knowingly taken. An inmate who had been incarcerated with defendant testified that defendant told him in detail about the night in question, including that defendant "took half of an E pill" when he and the victim were at his apartment and that he gave the victim "a Special K"—a street term for the drug ketamine—by mixing it into her drink.

Defendant contends that the conviction is not supported by

legally sufficient evidence because the evidence did not establish the element of physical helplessness inasmuch as the victim's testimony indicated that she could not remember whether she had consented and that she woke up and struggled with defendant during the attack. We reject that contention. As relevant here, a person is physically helpless when he or she "is unconscious or for any other reason is physically unable to communicate unwillingness to an act" (Penal Law § 130.00 [7]; *see* § 130.35 [2]). "A person who is asleep or unable to communicate as a result of voluntary intoxication is considered to be physically helpless" (*People v Bjork*, 105 AD3d 1258, 1260 [3d Dept 2013], *lv denied* 21 NY3d 1040 [2013], *cert denied* 571 US 1213 [2014]). We conclude that the evidence, including the victim's testimony regarding her alcohol consumption and limited ability to remember the night in question, as well as the expert testimony establishing that the ketamine found in the victim's blood could have caused unconsciousness or sedation, provides a " 'valid line of reasoning and permissible inferences' " to permit a rational factfinder to conclude beyond a reasonable doubt that the victim was physically helpless while defendant engaged in sexual intercourse with her (*People v Danielson*, 9 NY3d 342, 349 [2007]; *see People v Stahl*, 141 AD3d 962, 963-964 [3d Dept 2016], *lv denied* 28 NY3d 1127 [2016], *reconsideration denied* 29 NY3d 1001 [2017], *cert denied* — US —, 138 S Ct 222 [2017]; *People v Lewis*, 140 AD3d 1593, 1594 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). Defendant's additional contention that the conviction is not supported by legally sufficient evidence because he established as an affirmative defense that he "did not know of the facts or conditions responsible for [the victim's] incapacity to consent" (§ 130.10 [1]) is unpreserved (*see generally People v Gray*, 86 NY2d 10, 19 [1995]). In any event, whether defendant met his burden of establishing the affirmative defense is a question of fact, which the factfinder was entitled to resolve against defendant (*see People v Beach*, 188 AD2d 1079, 1079-1080 [4th Dept 1992]). Furthermore, viewing the evidence in light of the elements of the crime in this nonjury trial (*see Danielson*, 9 NY3d at 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see Stahl*, 141 AD3d at 963-964; *Bjork*, 105 AD3d at 1259-1261; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant also contends that he was denied a fair trial by prosecutorial misconduct that occurred throughout the trial. That contention is unpreserved for our review (*see generally People v Larkins*, 153 AD3d 1584, 1587 [4th Dept 2017], *lv denied* 30 NY3d 1061 [2017]; *People v Goodson*, 144 AD3d 1515, 1516 [4th Dept 2016], *lv denied* 29 NY3d 949 [2017]). In any event, we conclude that any improprieties were not so pervasive or egregious as to deprive defendant of a fair trial (*see People v Pruchnicki*, 74 AD3d 1820, 1822 [4th Dept 2010], *lv denied* 15 NY3d 855 [2010]). Moreover, "where, as here, 'a case is tried without a jury, absent a showing of prejudice, the [court] is presumed to have considered only competent evidence adduced at trial in reaching the verdict' " (*id.*).

Defendant contends that he was denied effective assistance of counsel because defense counsel did not request a hearing to determine

whether a fellow inmate who was called as a witness acted as an agent of police. Inasmuch as that contention involves matters outside the record, it must be raised by way of a CPL article 440 motion (*see generally People v Bakerx*, 114 AD3d 1244, 1247 [4th Dept 2014], *lv denied* 22 NY3d 1196 [2014]). Defendant further contends that defense counsel was ineffective for failing to call a police officer to testify regarding the failure to preserve a surveillance video that showed defendant and the victim together at the bar before they went to defendant's home. We reject that contention inasmuch as defendant failed to demonstrate the absence of strategic or other legitimate explanations for that decision (*see generally People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Rivera*, 71 NY2d 705, 709 [1988]).

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

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

485

CAF 18-01011

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

IN THE MATTER OF LEON C. BLOOM, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KATI MANCUSO, RESPONDENT-RESPONDENT.

BRIDGET L. FIELD, ROCHESTER, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered May 18, 2018 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for a modification of visitation.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order that dismissed his petition seeking in-person visitation with the subject child at the correctional facility in which he is currently incarcerated. We affirm.

The father is currently serving a sentence imposed on a conviction stemming from an incident in which he entered respondent mother's home and choked her, in the presence of the then-infant subject child, while the father and mother were married but separated. In 2014, the father was convicted in connection with that incident of burglary in the second degree (Penal Law § 140.25 [2]) and criminal obstruction of breathing or blood circulation (§ 121.11). He was sentenced, as a second violent felony offender, to an aggregate determinate term of 10 years in prison with five years' postrelease supervision, and orders of protection were issued prohibiting the father from, inter alia, having contact with the mother or the subject child until 2031. On a prior appeal, we modified the judgment of conviction by amending the order of protection regarding the subject child to delete the provisions that prohibited the father "from communicating with or contacting the subject child by mail, telephone, email, voicemail or other electronic means" (*People v Bloom*, 149 AD3d 1462, 1464 [4th Dept 2017], *lv denied* 30 NY3d 947 [2017]).

Preliminarily, the father's contention that Family Court erred in failing to draw an adverse inference against the mother based on her failure to appear or testify in opposition to his petition is not

preserved for our review. It is well settled that "[t]he party seeking a missing witness inference has the initial burden of setting forth the basis for the request as soon as practicable" (*Matter of Lewis*, 158 AD3d 1247, 1250 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018] [internal quotation marks omitted]; *see Matter of Liam M.J. [Cyril M.J.]*, 170 AD3d 1623, 1625 [4th Dept 2019]; *see generally People v Nguyen*, 156 AD3d 1461, 1462 [4th Dept 2017], *lv denied* 31 NY3d 1016 [2018]) and, here, the record establishes that the father never requested that the court draw an adverse inference against the mother. Furthermore, inasmuch as a court may not sua sponte draw a missing witness inference (*see Matter of Spooner-Boyke v Charles*, 126 AD3d 907, 909 [2d Dept 2015]), the court did not err in failing to do so here.

Contrary to the father's further contention, we conclude that "a sound and substantial basis exist[s] in the record for the court's determination that the visitation requested by petitioner would not be in the . . . child's best interest[s] under the present circumstances" (*Matter of Ellett v Ellett*, 265 AD2d 747, 748 [3d Dept 1999]; *see Matter of Smith v Stewart*, 145 AD3d 1534, 1535 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]). Although visitation with a noncustodial parent is presumed to be in the best interests of the child, even when the parent seeking visitation is incarcerated (*see Matter of Granger v Misercola*, 21 NY3d 86, 89 [2013]; *Matter of Brown v Terwilliger*, 108 AD3d 1047, 1048 [4th Dept 2013], *lv denied* 22 NY3d 858 [2013]), that presumption is rebuttable, and "a demonstration 'that such visitation would be harmful to the child will justify denying such a request' " (*Granger*, 21 NY3d at 91; *see Matter of Rulinsky v West*, 107 AD3d 1507, 1509 [4th Dept 2013]).

First, while the record establishes that the father committed acts of domestic violence against the mother in the presence of the subject child, the court noted that it observed "no expression of remorse or acknowledgment that [the father's] behaviors were detrimental to the child." "[W]here, as here, domestic violence is alleged, 'the court must consider the effect of such domestic violence upon the best interests of the child' " (*Matter of Moreno v Cruz*, 24 AD3d 780, 781 [2d Dept 2005], *lv denied* 6 NY3d 712 [2006], quoting Domestic Relations Law § 240 [1]; *see Smith*, 145 AD3d at 1535). Second, the record establishes that the father was a stranger to the subject child and had never been involved in the child's life in any meaningful way (*cf. Granger*, 21 NY3d at 89). At the time of the hearing, the subject child was almost five years old, and the father had been incarcerated since the child was approximately three months old (*see e.g. Matter of Fewell v Ratzel*, 121 AD3d 1542, 1543 [4th Dept 2014]; *Rulinsky*, 107 AD3d at 1509). Furthermore, although the father had a "plan to accomplish the requested visitation" (*Smith*, 145 AD3d at 1535), that plan entailed having his father transport the child from Rochester to Attica Correctional Facility, two weekend mornings per month, for visitations of five or six hours each, in a room shared by several other inmates and their visitors. Critically, the child had never met the paternal grandfather or any other members of the father's family. Thus, we find no basis to disturb the court's

determination denying the father's request for in-person visitation with the subject child at the prison (*see id.*; *Matter of Butler v Ewers*, 78 AD3d 1667, 1667-1668 [4th Dept 2010]; *see generally Matter of Ruple v Harkenreader*, 99 AD3d 1085, 1086 [3d Dept 2012]). Nevertheless, we note that "visitation need not always include contact visitation at the prison" (*Rulinsky*, 107 AD3d at 1509 [internal quotation marks omitted]), and the father is permitted to have contact with the child "by mail, telephone, email, voicemail or other electronic means" (*Bloom*, 149 AD3d at 1464).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

491

CA 18-02269

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

CHRISTOPHER WOLF, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LEDCOR CONSTRUCTION INC., COSTCO WHOLESALE CORP., CAMERON GROUP, LLC, AND HINSDALE ROAD GROUP, LLC, DEFENDANTS-APPELLANTS.

SANTACROSE & FRARY, ALBANY (KEITH M. FRARY OF COUNSEL), FOR DEFENDANTS-APPELLANTS LEDCOR CONSTRUCTION INC. AND COSTCO WHOLESALE CORP.

BURKE, SCOLAMIERO & HURD, LLP, ALBANY (JUDITH B. AUMAND OF COUNSEL), FOR DEFENDANTS-APPELLANTS CAMERON GROUP, LLC AND HINSDALE ROAD GROUP, LLC.

STANLEY LAW OFFICES, SYRACUSE (ANTHONY R. MARTOCCIA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered May 10, 2018. The order, among other things, granted plaintiff's motion for partial summary judgment pursuant to Labor Law § 240 (1).

It is hereby ORDERED that the order so appealed from is modified on the law by denying that part of the cross motion of defendants Cameron Group, LLC and Hinsdale Road Group, LLC seeking summary judgment on their cross claim for contractual indemnification insofar as that cross claim seeks contractual indemnification of defendant Cameron Group, LLC by defendant Costco Wholesale Corp., and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries that he sustained on a construction site when the scaffold on which he was standing tipped over. In their amended answer, defendants Cameron Group, LLC (Cameron) and Hinsdale Road Group, LLC (Hinsdale) asserted a cross claim for contractual indemnification against defendants Ledcor Construction Inc. (Ledcor) and Costco Wholesale Corp. (Costco). Plaintiff moved for partial summary judgment on liability with respect to his Labor Law § 240 (1) claim, Ledcor and Costco cross-moved for, inter alia, summary judgment dismissing the complaint against them, and Cameron and Hinsdale cross-moved for, inter alia, summary judgment dismissing the complaint against them and summary judgment on their

cross claim for contractual indemnification against Ledcor and Costco. Now, Ledcor and Costco and Cameron and Hinsdale appeal from an order that, inter alia, granted plaintiff's motion, denied those parts of the cross motions seeking summary judgment dismissing the Labor Law § 240 (1) claim against them, denied that part of the cross motion of Ledcor and Costco seeking summary judgment dismissing the Labor Law § 200 claim and the common-law negligence cause of action against them, and granted that part of the cross motion of Cameron and Hinsdale seeking summary judgment on their cross claim for contractual indemnification insofar as they sought contractual indemnification from Costco.

Preliminarily, Ledcor, Costco and Hinsdale do not dispute that they were either owners or contractors who may be held liable pursuant to Labor Law § 240 (1). The contention of Cameron and Hinsdale that Cameron should be dismissed from the action because it was the site developer and is therefore not a statutory defendant is raised for the first time on appeal, and thus that contention is not properly before this Court (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). We note that Cameron and Hinsdale do not contend in the alternative that plaintiff's motion for partial summary judgment should be denied with respect to Cameron.

We reject the contentions of defendants that Supreme Court erred in granting plaintiff's motion for partial summary judgment on the issue of liability with respect to his Labor Law § 240 (1) claim and denying defendants' cross motions insofar as they sought dismissal of that claim. "A plaintiff is entitled to summary judgment under Labor Law § 240 (1) by establishing that he or she was subject to an elevation-related risk, and [that] the failure to provide any safety devices to protect the worker from such a risk [was] a proximate cause of his or her injuries" (*Wolfe v Wayne-Dalton Corp.*, 133 AD3d 1281, 1283 [4th Dept 2015] [internal quotation marks omitted]; *see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015], *rearg denied* 25 NY3d 1211 [2015]). Here, plaintiff met his initial burden of establishing a statutory violation by submitting evidence that he was standing on a scaffold hanging sheetrock when a wheel on the scaffold fell into a floor drain and caused the scaffold to tip over. The wheel had been placed on top of a plastic curing blanket that had been applied over the newly installed concrete floor and was stretched over the drain hole, and the accident occurred when the wheel ripped through the plastic curing blanket and fell into the hole. Various witnesses provided deposition testimony that, during the installation of a concrete floor, a floor drain should have a temporary cover that would prevent anything from falling into the drain. At the time of plaintiff's accident, however, the floor drain was covered with a permanent half grate, which had a hole into which the scaffold wheel fell.

Although it is well settled that " 'the extraordinary protections of [Labor Law § 240 (1)] . . . apply only to a narrow class of dangers' " (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96-97 [2015], *rearg denied* 25 NY3d 1195 [2015], quoting *Melber v 6333 Main St.*, 91 NY2d 759, 762 [1998]), and " 'do not encompass *any and all*

perils that may be connected in some tangential way with the effects of gravity' " (*Nicometi*, 25 NY3d at 97, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]), we reject defendants' contentions that plaintiff's accident was not caused by an elevation-related risk contemplated by section 240 (1). "[T]he relevant and proper inquiry is whether the hazard plaintiff encountered . . . was a separate hazard wholly unrelated to the hazard which brought about [the] need [for a safety device] in the first instance" (*Nicometi*, 25 NY3d at 98 [internal quotation marks omitted]). Here, it is undisputed that the scaffold on which plaintiff was standing tipped over because one of its wheels was placed over an open floor drain hole. The fact that the scaffold tipped and plaintiff fell to the ground "demonstrates that it was not so placed . . . as to give proper protection to [him]" (*Alati v Divin Bldrs., Inc.*, 137 AD3d 1577, 1578 [4th Dept 2016] [internal quotation marks omitted]; *cf. Nicometi*, 25 NY3d at 93-94). We therefore conclude that plaintiff's accident was caused by an elevation-related risk as contemplated in section 240 (1) (*see Thome v Benchmark Main Tr. Assoc., LLC*, 86 AD3d 938, 939 [4th Dept 2011]; *Gallagher v Bechtel Corp.*, 245 AD2d 36, 36 [1st Dept 1997]).

We reject defendants' contentions that the sole proximate cause of the accident was plaintiff's failure to observe the drain hole and position the scaffold in such a manner to avoid it. "[T]here can be no liability under [Labor Law §] 240 (1) when there is no violation and the worker's actions . . . are the 'sole proximate cause' of the accident" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]), and "[a] defendant is entitled to summary judgment dismissing a Labor Law § 240 (1) cause of action or claim by establishing that . . . the plaintiff's conduct was the sole proximate cause of the accident" (*Bruce v Actus Lend Lease*, 101 AD3d 1701, 1702 [4th Dept 2012]). Plaintiff submitted the testimony of four witnesses, including the project superintendent of the subcontractor that installed the drain and the project manager and superintendent of the subcontractor that installed the concrete floor and curing blanket. Each testified that a temporary cover should be placed over an open drain during the installation of the concrete floor, and therefore plaintiff established that a statutory violation, i.e., the placement of the scaffold over the improperly covered drain hole, was a proximate cause of the accident (*see generally Whalen v ExxonMobil Oil Corp.*, 50 AD3d 1553, 1554 [4th Dept 2008]). Thus, even assuming, arguendo, that plaintiff was negligent in failing to observe the drain hole and positioning the scaffold over it, we conclude that his "actions . . . render him [merely] contributorily negligent, a defense unavailable under [Labor Law § 240 (1)]" (*Calderon v Walgreen Co.*, 72 AD3d 1532, 1533 [4th Dept 2010], *appeal dismissed* 15 NY3d 900 [2010] [internal quotation marks omitted]; *see Barreto*, 25 NY3d at 433; *Blake*, 1 NY3d at 289). "Because plaintiff established that a statutory violation was a proximate cause of [his] injury, [he] 'cannot be solely to blame for it' " (*Woods v Design Ctr., LLC*, 42 AD3d 876, 877 [4th Dept 2007], quoting *Blake*, 1 NY3d at 290).

Ledcor and Costco contend that the court erred in denying that

part of their cross motion seeking to dismiss the Labor Law § 200 claim and the common-law negligence cause of action because they did not direct or control the manner or method of plaintiff's work. We reject that contention. Cases involving section 200 and common-law negligence "fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Mayer v Conrad*, 122 AD3d 1366, 1367 [4th Dept 2014] [internal quotation marks omitted]). Here, it is undisputed that neither the manner nor the method of plaintiff's work created the open drain in the floor that caused plaintiff's scaffold to tip over. Thus, this matter falls into the "dangerous or defective premises conditions" category of cases (*id.*).

"Where[, as here,] a premises condition is at issue, property owners [and general contractors] may be held liable for a violation of Labor Law § 200 [and under a theory of common-law negligence] if the owner [or general contractor] either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition" (*id.* [internal quotation marks omitted]). A defendant seeking summary judgment dismissing a cause of action or claim based on a dangerous condition on the premises is "required to establish as a matter of law that [it] did not exercise any supervisory control over the general condition of the premises or that [it] neither created nor had actual or constructive notice of the dangerous condition on the premises" (*Parkhurst v Syracuse Regional Airport Auth.*, 165 AD3d 1631, 1632 [4th Dept 2018] [internal quotation marks omitted]; *see Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1416 [4th Dept 2011]).

The submissions of Ledcor and Costco, which included the testimony of the superintendent for Ledcor and the project manager for Costco, did not establish as a matter of law that they did not exercise supervisory control over the premises (*see generally Parkhurst*, 165 AD3d at 1632). Rather, the evidence they submitted establishes that Ledcor had oversight and control over safety issues on the construction site and the work of its various subcontractors, including the plumber. Indeed, Ledcor's superintendent testified that it was his job "to oversee the entire project," and that subcontractors would report safety issues to Ledcor. Thus, Ledcor was responsible for correcting unsafe behaviors on the site. Furthermore, the submissions of Ledcor and Costco establish that Costco's project manager had safety responsibilities and would advise Ledcor if he observed a safety violation. Thus, the submissions of Ledcor and Costco did not meet their initial burden with respect to the Labor Law § 200 claim and common-law negligence cause of action inasmuch as they raised issues of fact whether they exercised supervisory control over the general condition of the premises.

With respect to the issue of notice, Ledcor and Costco do not dispute that they had notice, i.e., that they were aware that there was a drain under the curing blanket. Thus, that part of the cross motion of Ledcor and Costco for summary judgment dismissing plaintiff's Labor Law § 200 claim and common-law negligence cause of

action was properly denied (*see generally Cromwell v Hess*, 63 AD3d 1651, 1652-1653 [4th Dept 2009]).

Finally, we agree with Ledcor and Costco that the court erred in granting that part of the cross motion of Cameron and Hinsdale seeking summary judgment on their cross claim for contractual indemnification insofar as they sought contractual indemnification of Cameron by Costco. Cameron is not a party to any contract in the record, and thus, Cameron has no basis for seeking contractual indemnification against Costco (*see generally Northland Assoc. v Joseph Baldwin Constr. Co.* [appeal No. 2], 6 AD3d 1214, 1216 [4th Dept 2004]). We therefore modify the order accordingly.

All concur except CURRAN, J., who concurs in the result in the following memorandum: Although I am compelled by the weight of this Court's precedent to concur in the result reached by the majority, I write separately to set forth my understanding of the breadth of our holding in this case with respect to plaintiff's Labor Law § 240 (1) claim. I do not dispute that, here, and in a legion of prior cases, this Court has consistently held that Labor Law § 240 (1) is violated, and strict liability imposed, whenever a defendant owner or contractor fails to ensure the *placement* and *replacement* of an adequate safety device at the work site (*see e.g. Kopasz v City of Buffalo*, 148 AD3d 1686, 1687 [4th Dept 2017]; *Alati v Divin Bldrs., Inc.*, 137 AD3d 1577, 1578 [4th Dept 2016]; *Fronce v Port Byron Tel. Co., Inc.*, 134 AD3d 1405, 1407 [4th Dept 2015]; *Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1403 [4th Dept 2015]; *Bernard v Town of Lysander*, 124 AD3d 1289, 1290 [4th Dept 2015]; *Custer v Jordan*, 107 AD3d 1555, 1558 [4th Dept 2013]; *Miles v Great Lakes Cheese of N.Y., Inc.*, 103 AD3d 1165, 1167 [4th Dept 2013]; *Kin v State of New York*, 101 AD3d 1606, 1607 [4th Dept 2012]; *Kirbis v LPCiminelli, Inc.*, 90 AD3d 1581, 1582 [4th Dept 2011]; *Dean v City of Utica*, 75 AD3d 1130, 1131 [4th Dept 2010]; *Chacon-Chavez v City of Rochester*, 72 AD3d 1636, 1636 [4th Dept 2010]; *Arnold v Baldwin Real Estate Corp.*, 63 AD3d 1621, 1621 [4th Dept 2009]; *Evans v Syracuse Model Neighborhood Corp.*, 53 AD3d 1135, 1136 [4th Dept 2008]; *Whalen v ExxonMobil Oil Corp.*, 50 AD3d 1553, 1554 [4th Dept 2008]; *Woods v Design Ctr., LLC*, 42 AD3d 876, 877 [4th Dept 2007]; *Owczarek v Austin Co.*, 19 AD3d 1003, 1003 [4th Dept 2005]; *Ward v Cedar Key Assoc., L.P.*, 13 AD3d 1098, 1098 [4th Dept 2004]; *Villeneuve v State of New York*, 274 AD2d 958, 958 [4th Dept 2000]; *Connors v Wilmorite, Inc.*, 225 AD2d 1040, 1040 [4th Dept 1996]; *Orcutt v American Linen Supply Co.*, 212 AD2d 979, 979-980 [4th Dept 1995]; *see also Kipp v Marinus Homes, Inc.*, 162 AD3d 1673, 1676-1677 [4th Dept 2018, Whalen, P.J., dissenting], *lv denied* 32 NY3d 911 [2018]; *Thome v Benchmark Main Tr. Assoc., LLC*, 86 AD3d 938, 942 [4th Dept 2011, Peradotto, J., dissenting]).

Here, plaintiff was injured when the scaffold on which he was working tipped, causing him to fall to the ground. Evidence established that the scaffold tipped when one of its wheels entered a drain hole in the floor. Plaintiff furnished the brand new scaffold for his work, testifying at his deposition that it functioned properly on the day of the accident and was sufficient for him to perform his

work. He also testified that he did not need any other type of safety device to perform his work. Plaintiff and his employee were the only people who ever moved the scaffold, and plaintiff acknowledged that, when he moved it just before the accident, he would have checked the area where he set it up to ensure it was level and hazard-free. Plaintiff later learned from his employee that the wheel of the scaffold was set on top of the hole; he did not feel the scaffold move before he fell.

It is well settled that "[t]here are two circumstances when [Labor Law § 240 (1)] is invoked: when no safety device is provided and when a safety device that is provided fails to furnish proper protection" (1B NY PJI3d 2:217 at 471 [2019]; *see Kuntz v WNYG Hous. Dev. Fund Co. Inc.*, 104 AD3d 1337, 1338 [4th Dept 2013]). Here, the safety device at issue was provided by plaintiff himself, and we are considering only whether the scaffold did not provide him proper protection. The alleged inadequacy of the scaffold is rooted in the improper placement of its wheel over the uncovered drain hole. Thus, inasmuch as the alleged inadequacy of the scaffold is solely based on its improper placement, the question is whether Labor Law § 240 (1) imposes a nondelegable duty upon owners and contractors to initially *place*, and always thereafter *replace*, safety devices so as to provide protection from harm. In my view, our aforementioned precedent affirmatively stands for that proposition.

Notably, I am unaware of any Court of Appeals decision that specifically endorses the existence of a duty as broad as this Court, although some cases have come close to doing so (*see e.g. Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Bland v Manocherian*, 66 NY2d 452, 459-461 [1985]). In *Bland*, however, the dissenting judge noted that "I simply cannot accept the notion that there is a duty upon an owner to follow a worker and verify that the worker has 'properly placed' a ladder in order for the owner to satisfy the statutory mandate. Such a proposition is, on its face, absurd" (66 NY2d at 464). In *Blake v Neighborhood Hous. Servs. of N.Y. City* (1 NY3d 280, 291-292 [2003]), the Court of Appeals went to great lengths to distinguish *Bland*, which I note has not been cited since by the Court of Appeals for any significant proposition except in dissent.

What also can be gleaned from the prodigious line of cases set forth above, in my view, is that a violation of Labor Law § 240 (1) that occurs under circumstances similar to this case cannot logically be subjected to the "sole proximate cause" defense because, in every "improper placement" case, the improper placement of an otherwise properly-functioning safety device must *necessarily* be a proximate cause of plaintiff's fall. Thus, there is, conceptually, no room in this analysis for the sole proximate cause defense where the evidence establishes that a statutory violation occurred proximately causing harm to plaintiff, precluding consideration of plaintiff's comparative fault in the placement of the adequate safety device (*see Bernard*, 124 AD3d at 1291; *Miles*, 103 AD3d at 1167).

I respectfully conclude that the majority's analysis of the proximate cause issue is disconnected from the statutory violation

upon which strict liability here is premised. I am in agreement with the majority's initial conclusion that, under our precedents, a statutory violation occurred when defendants failed to ensure the proper placement and replacement of the properly-functioning scaffold. I note that my colleagues then switch gears in discussing proximate cause to focus on the absence of a cover for the drain hole as the purported violation. As noted above, however, the absence of a drain hole cover is not the statutory violation at issue here, and I further conclude that could not be the violation because the cover is not a safety device enumerated in Labor Law § 240 (1), and is not a device that protects against elevation-related risks (*see Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 98-100 [2015], *rearg denied* 25 NY3d 1195 [2015]; *Melber v 6333 Main St.*, 91 NY2d 759, 763-764 [1998]).

Thus, although I am compelled to concur with the majority under the weight of our precedent, I think a more common sense approach would be not to interpret the statute so broadly as to require owners and contractors to ensure that devices such as ladders and scaffolds are always safely placed and replaced at work sites. In support of such an approach, I note that Labor Law § 240 (1) " 'should be construed with a commonsense approach to the realities of the workplace at issue' " and that we should be "careful not to interpret the statute in an 'illogical' manner that 'would be impractical and contrary to the work at hand' " (*Nicometi*, 25 NY3d at 101, quoting *Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

495

CA 18-01744

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

MEDLOCK CROSSING SHOPPING CENTER DULUTH, GA. LIMITED PARTNERSHIP, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN ALAN WARREN, ADRIENNE M. WARREN, FRED BULLARD AND DURANGO'S OF ATLANTA, INC. V, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

THE GLENNON LAW FIRM, P.C., ROCHESTER (FRANK J. FIELDS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (BRIAN LAUDADIO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and partial judgment (one paper) of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered March 9, 2018. The order and partial judgment, inter alia, granted in part the motion of plaintiff for summary judgment and denied the cross motion of defendants for leave to amend their answers.

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

Memorandum: Plaintiff owns a shopping center in a suburb of Atlanta, Georgia. In 2015, plaintiff leased space in the shopping center to nonparty restaurant Atlanta Fire Grill LLC (Fire Grill). Defendants executed guaranties of Fire Grill's obligations under the lease. In May 2016, Fire Grill ceased operations and thereafter stopped paying rent. Plaintiff leased the premises to another tenant in October 2016. Plaintiff commenced this action alleging, inter alia, that defendants breached their obligations under the guaranties. Shortly thereafter, Fire Grill sued plaintiff in a Georgia court, alleging that plaintiff had breached the lease. The Georgia action progressed quickly, and a jury there ultimately awarded plaintiff approximately $220,000 on its counterclaim, denying any recovery to Fire Grill. Plaintiff subsequently moved for summary judgment in this action, seeking, inter alia, payment on the guaranties. Defendants opposed the motion and cross-moved for leave to amend their answers to assert collateral estoppel as an affirmative defense, arguing that plaintiff was precluded from recovering more on the guaranties than had been awarded in the Georgia action and that plaintiff had failed to prove its entitlement to certain damages. Supreme Court thereafter

entered an order and partial judgment, which, inter alia, denied defendants' cross motion for leave to amend their answers, granted plaintiff partial summary judgment on the issue of liability, and awarded plaintiff certain damages, attorneys' fees, and expenses under the guaranties, and the court subsequently entered an order and partial final judgment, which awarded plaintiff certain additional damages, attorneys' fees, and expenses under the guaranties. In appeal No. 1, defendants appeal from the order and partial judgment and, in appeal No. 2, defendants appeal from the order and partial final judgment. We affirm in each appeal.

Contrary to defendants' contention in appeal No. 1, we conclude that they did not meet their burden of establishing that the Georgia action precludes plaintiff from recovering under the guaranties in this action. "[C]ollateral estoppel[] bars the relitigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment" (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72 [2018] [internal quotation marks omitted]). For collateral estoppel to apply, the issue in the prior action must have been, inter alia, identical to that in the subsequent action and decided after a full and fair opportunity to litigate (*see Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015], *rearg denied* 25 NY3d 1193 [2015]). "The party seeking to invoke collateral estoppel has the burden to show the identity of the issues, while the party trying to avoid application of the doctrine must establish the lack of a full and fair opportunity to litigate" (*Matter of Dunn*, 24 NY3d 699, 704 [2015]). Here, defendants failed to provide the transcript of the trial in the Georgia action, failed to demonstrate whether the jury award in the Georgia action fixed and liquidated the amount due under the lease, and failed to establish whether Fire Grill's liability under the lease was coextensive with defendants' liability under the guaranties. Thus, we conclude that defendants failed to establish an identity of issues between the Georgia action and this action (*see id.*; *Weslowski v Zugibe*, 167 AD3d 972, 975 [2d Dept 2018], *appeal dismissed* 33 NY3d 1000 [2019]; *Specialty Rests. Corp. v Barry*, 236 AD2d 754, 755-756 [3d Dept 1997]).

In light of our determination, we conclude that, contrary to defendants' further contention in appeal No. 1, the court did not err in denying their request for leave to amend their answers to assert the affirmative defense of collateral estoppel. Inasmuch as the court considered and rejected that affirmative defense on the merits, it would not have furthered justice to have allowed defendants to amend their answers to assert it (*see Kingsland Group, Inc. v J.B. Satcin Realty Corp.*, 16 AD3d 380, 382 [2d Dept 2005]; *Andersen v University of Rochester*, 91 AD2d 851, 851-852 [4th Dept 1982], *appeal dismissed* 59 NY2d 968 [1983]).

Furthermore, we reject defendants' contention in both appeals that the court erred in awarding plaintiff certain damages for brokers' commissions, rent, and other costs related to the premises, and in awarding plaintiff certain attorneys' fees and expenses. Plaintiff met its burden on its motion with respect to those damages, attorneys' fees, and expenses through its submission of the affidavits

of its attorneys and collections manager establishing the amounts paid for those items (*see generally BAC Home Loans Servicing, LP v Uvino*, 155 AD3d 1155, 1158 [3d Dept 2017]; *HSBC Bank USA, N.A. v Ozcan*, 154 AD3d 822, 826 [2d Dept 2017]), and defendants failed to raise a triable issue of material fact with respect to plaintiff's entitlement to those items.

Finally, we have reviewed defendants' remaining contentions in both appeals and conclude that they do not require reversal or modification of the order and partial judgment or the order and partial final judgment.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

496

CA 18-02151

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

MEDLOCK CROSSING SHOPPING CENTER DULUTH, GA. LIMITED PARTNERSHIP, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN ALAN WARREN, ADRIENNE M. WARREN, FRED BULLARD AND DURANGO'S OF ATLANTA, INC. V, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

THE GLENNON LAW FIRM, P.C., ROCHESTER (FRANK J. FIELDS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (BRIAN LAUDADIO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and partial final judgment (one paper) of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered July 12, 2018. The order and partial final judgment awarded plaintiff money damages, costs, disbursements and attorneys' fees.

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

Same memorandum as in *Medlock Crossing Shopping Ctr. Duluth, Ga. LP v Warren* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

497

CA 18-02147

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

JENNIFER D. ROGER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHELLE SOOS, ET AL., DEFENDANTS,
AND JEFFREY S. AHRNDT, DEFENDANT-APPELLANT.

BURGIO, CURVIN & BANKER, BUFFALO (JAMES P. BURGIO OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ANDREW J. CONNELLY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered October 19, 2018. The order, insofar as appealed from, denied in part the motion of defendant Jeffrey S. Ahrndt for summary judgment dismissing plaintiff's amended complaint against him.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety, and the amended complaint against defendant Jeffrey S. Ahrndt is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained in two separate motor vehicle accidents. In the second accident, plaintiff's vehicle was rear-ended by a vehicle operated by Jeffrey S. Ahrndt (defendant). Plaintiff alleged that, as a result of the accidents, she sustained injuries to, inter alia, her cervical and lumbar spine under the significant disfigurement, 90/180-day, permanent consequential limitation of use, and significant limitation of use categories of serious injury as defined in Insurance Law § 5102 (d). Defendant moved for summary judgment dismissing the amended complaint against him on the ground that plaintiff did not, as a result of the second accident, sustain a serious injury under any of those categories. Defendant now appeals from an order insofar as it denied the motion with respect to the permanent consequential limitation of use, significant limitation of use, and significant disfigurement categories, and we reverse the order insofar as appealed from.

Defendant met his initial burden of establishing "that plaintiff did not have any serious injury following the second accident that arose from aggravation or exacerbation of her preexisting injuries

and/or conditions" (*Boroszko v Zylinski*, 140 AD3d 1742, 1745 [4th Dept 2016]; *see Garcia v Feigelson*, 130 AD3d 498, 499 [1st Dept 2015]; *Kwitek v Seier*, 105 AD3d 1419, 1420 [4th Dept 2013]; *Kilmer v Streck*, 35 AD3d 1282, 1282-1284 [4th Dept 2006]). Specifically, defendant submitted plaintiff's medical records from before and after the second accident and affirmations from two experts. Both experts, after comparing pre-accident and post-accident magnetic resonance imaging (MRI) films, concluded that there was no change to plaintiff's lumbar and cervical spine and no showing of an acute injury. One of defendant's experts opined that all of the findings regarding the MRI films were compatible with only degenerative disc disease and that there was no evidence of posttraumatic injury attributable to the second accident. Additionally, the medical records submitted by defendant included a report from plaintiff's own expert in which plaintiff's expert determined that there was no change in plaintiff's MRI films after the second accident.

Although in that report plaintiff's expert also concluded that the second accident exacerbated plaintiff's symptoms and resulted in a decreased cervical range of motion, that conclusion was "based upon plaintiff's subjective complaints of pain and [is] unsupported by objective medical proof" (*Stowell v Safee*, 251 AD2d 1026, 1026 [4th Dept 1998]). Thus, defendant's submission of the report of plaintiff's expert did not raise issues of fact precluding summary judgment (*see generally id.*).

We further conclude that plaintiff failed to raise a triable issue of fact sufficient to defeat summary judgment (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In opposition, plaintiff submitted the affirmation of her expert and certain medical records and referenced the MRI of her cervical spine that was taken eight months after the second accident, which showed a new disc herniation at C6-7 on her right side and a progression of the previous C6-7 herniation. Plaintiff's expert, however, failed to explain how those changes were caused by the second accident, rather than by the ongoing degenerative process (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]) and, as noted, his conclusion that the second accident exacerbated plaintiff's injuries did not raise a triable issue of fact because it was unsupported by objective medical evidence (*see Stowell*, 251 AD2d at 1026). "[W]ith persuasive evidence that plaintiff's alleged pain and injuries were related to a preexisting condition, plaintiff had the burden to come forward with evidence addressing defendant's claimed lack of causation," and, here, plaintiff failed to meet that burden (*Carrasco v Mendez*, 4 NY3d 566, 580 [2005]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

508

CA 18-00994

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

PARAMAX CORPORATION, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VOIP SUPPLY, LLC, SAYERS TECHNOLOGY HOLDINGS, LLC, AND BENJAMIN SAYERS, DEFENDANTS-APPELLANTS.

GROSS SHUMAN P.C., BUFFALO (KEVIN R. LELONEK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (BENJAMIN M. ZUFFRANIERI, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered April 24, 2018. The order, insofar as appealed from, denied those parts of defendants' motion seeking to dismiss plaintiff's first, third, and fifth causes of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendants' motion seeking dismissal of the first cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover from defendants a "[s]uccess [f]ee" that plaintiff alleges it is owed under a contract, pursuant to which plaintiff provided defendants with "financial advisory services" in support of the sale of defendant VoIP Supply, LLC (VoIP). Under the contract, plaintiff was to be compensated for its services based on an hourly rate, plus a success fee of 5% of VoIP's ultimate sale price. Plaintiff alleges, inter alia, that the success fee is owed under the terms of the contract, and also that defendants made representations to plaintiff that they would pay the success fee in order to induce plaintiff to continue providing services in connection with a then-pending sale of VoIP to a buyer. Plaintiff further alleges that defendants terminated the contract prior to the completion of the sale of VoIP and refused to pay plaintiff the success fee. Defendants appeal from an order that, inter alia, denied those parts of their motion pursuant to CPLR 3211 (a) (1) and (7) seeking to dismiss the causes of action for breach of contract, breach of the implied duty of good faith and fair dealing, and promissory estoppel.

Initially, we take judicial notice of an amended complaint filed by plaintiff after Supreme Court ruled on defendants' motion (*see*

Wimbledon Fin. Master Fund, Ltd. v Weston Capital Mgt. LLC, 160 AD3d 596, 596 [1st Dept 2018]; *Federated Project & Trade Fin. Core Fund v Amerra Agri Fund, LP*, 106 AD3d 467, 467 [1st Dept 2013]), and incorporate its factual allegations into our CPLR 3211 (a) (7) analysis, in which " '[w]e 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' " (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see Southwestern Invs. Group, LLC v JH Portfolio Debt Equities, LLC*, 169 AD3d 1510, 1510-1511 [4th Dept 2019]). We reject plaintiff's contention that defendants' appeal is rendered moot by the filing of an amended complaint. Although an appeal from an order denying a motion to dismiss a complaint may be moot when that complaint has been superseded by an amended complaint, such an appeal is not moot where, as here "the new pleading does not substantively alter the existing causes of action" (*Aetna Life Ins. Co. v Appalachian Asset Mgt. Corp.*, 110 AD3d 32, 39 [1st Dept 2013]; *see Sim v Farley Equip. Co. LLC*, 138 AD3d 1228, 1228 n 1 [3d Dept 2016]; *Calcagno v Roberts*, 134 AD3d 1292, 1292 n [3d Dept 2015]).

We reject defendants' contention that the court erred in denying that part of the motion seeking to dismiss the cause of action for breach of the implied covenant of good faith and fair dealing. "[I]mplicit in every contract is a covenant of good faith and fair dealing . . . , which encompasses any promises that a reasonable promisee would understand to be included" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *see Elmhurst Dairy, Inc. v Bartlett Dairy, Inc.*, 97 AD3d 781, 784 [2d Dept 2012]), and which "embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract' " (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995], quoting *Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87 [1933]). "Even if a party is not in breach of its express contractual obligations, it 'may be in breach of the implied duty of good faith and fair dealing . . . when it exercises a contractual right as part of a scheme to realize gains that the contract implicitly denies or to deprive the other party of the fruit [or benefit] of its bargain' " (*Elmhurst Dairy, Inc.*, 97 AD3d at 784; *see Ahmed Elkoulily, M.D., P.C. v New York State Catholic Healthplan, Inc.*, 153 AD3d 768, 770 [2d Dept 2017]). Here, plaintiff's allegations that defendants represented to plaintiff that it had already earned the success fee, and simultaneously asked plaintiff to refrain from contacting the buyer in an effort to obstruct plaintiff from actually triggering its entitlement to that fee, are sufficient to state a cause of action for breach of the implied covenant of good faith and fair dealing inasmuch as the alleged conduct may constitute " 'a scheme to . . . deprive the other party of the fruit [or benefit] of its bargain' " (*Elmhurst Dairy, Inc.*, 97 AD3d at 784).

We also reject defendants' contention that the court erred in denying the motion with respect to the cause of action for promissory

estoppel. A cause of action for promissory estoppel requires "a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise" (*Vassenelli v City of Syracuse*, 138 AD3d 1471, 1475 [4th Dept 2016] [internal quotation marks omitted]; *see Durham Commercial Capital Corp. v Wadsworth Golf Constr. Co. of Midwest, Inc.*, 160 AD3d 1442, 1445 [4th Dept 2018], *lv denied* 32 NY3d 907 [2018]). Plaintiff's promissory estoppel cause of action is based on alleged assurances made by defendants after the written contract was executed, which the written contract does not govern. We conclude that plaintiff's allegations that defendants represented to plaintiff that they would pay the success fee in order to induce plaintiff to continue to work on the deal, that plaintiff relied on defendants' representations in performing the work, and that payment of the success fee was not made, are sufficient to state a cause of action for promissory estoppel.

We agree with defendants, however, that the court erred in denying that part of their motion seeking to dismiss the first cause of action for breach of contract. Plaintiff is not entitled to the success fee under the unambiguous terms of the contract, which required either that plaintiff identify or contact the buyer or that the sale close prior to termination of the contract. "A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties" (*Brad H. v City of New York*, 17 NY3d 180, 185 [2011]; *see Burgwardt v Burgwardt*, 150 AD3d 1625, 1626 [4th Dept 2017]). In construing an agreement, "language should not be read in isolation" (*Brad H.*, 17 NY3d at 185), rather, it " 'must be read as a whole to give effect and meaning to every term' " (*Maven Tech., LLC v Vasile*, 147 AD3d 1377, 1378 [4th Dept 2017]). In its respondent's brief, plaintiff contends that its provision to defendants of materials, advice, and revisions of documents related to the sale, which were later shared with the buyer by defendants, were sufficient to constitute "contact" between plaintiff and the buyer within the meaning of the contract. That interpretation, however, does not comport with plain meaning of the word "contact" (*see* Merriam-Webster Online Dictionary, contact [http://www.merriam-webster.com/dictionary/contact]), nor does it account for the contract's treatment of such services as separate discretionary items that were distinct from "contact[ing prospective buyers]." Inasmuch as the term "contact" is not reasonably susceptible of the meaning proffered by plaintiff, we agree with defendants that the breach of contract cause of action premised on that construction must be dismissed.

We have considered defendants' remaining contention and conclude that it is without merit.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

513

CA 18-02310

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

ELAINE WOODWARD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DANIEL CIAMARICONE AND KIMBERLY SALOTTO,
DEFENDANTS-RESPONDENTS.

STANLEY LAW OFFICES, SYRACUSE (ANTHONY R. MARTOCCIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANT-RESPONDENT DANIEL CIAMARICONE.

LAW OFFICE OF JENNIFER ADAMS, YONKERS (NICOLE B. PALMERTON OF COUNSEL), FOR DEFENDANT-RESPONDENT KIMBERLY SALOTTO.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered September 14, 2018. The order granted the cross motion of plaintiff to amend her bills of particulars and granted the motion of defendant Kimberly Salotto and cross motion of defendant Daniel Ciamaricone for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying in part the motion of defendant Kimberly Salotto and the cross motion of defendant Daniel Ciamaricone and reinstating the complaint with respect to the claim for economic loss in excess of basic economic loss, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained when the vehicle she was operating was struck from behind by a vehicle operated by defendant Daniel Ciamaricone, who also collided with a vehicle operated by defendant Kimberly Salotto. Plaintiff alleged that, as a result of the collision, she suffered a serious injury within the meaning of Insurance Law § 5102 (d) and incurred an economic loss in excess of basic economic loss within the meaning of Insurance Law § 5102 (a). The complaint, as amplified by the bills of particulars, sought recovery under four categories of serious injury, i.e., the permanent consequential limitation of use, significant limitation of use, significant disfigurement and 90/180-day categories (*see* § 5102 [d]), but plaintiff subsequently withdrew her claim of serious injury under the 90/180-day category. Salotto moved and Ciamaricone

cross-moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) that was causally related to the accident. Plaintiff cross-moved for leave to amend the bills of particulars to include allegations that the accident aggravated a preexisting injury. Plaintiff now appeals from an order that granted her cross motion, and also granted defendants' motion and cross motion and dismissed the complaint in its entirety.

Preliminarily, we reject plaintiff's contention that defendants failed to meet their initial burdens of establishing that plaintiff did not sustain a serious injury that was causally related to the accident. As the proponents of the motion and cross motion for summary judgment "dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), . . . defendant[s] bear[] the initial burden of establishing by competent medical evidence that . . . plaintiff did not sustain a serious injury caused by the accident" (*Gonyou v McLaughlin*, 82 AD3d 1626, 1627 [4th Dept 2011] [internal quotation marks omitted]; *see Aleksiejuk v Pell*, 300 AD2d 1066, 1066 [4th Dept 2002]). Here, defendants met that burden by establishing, through the affirmed reports of their experts who examined plaintiff and reviewed her medical records and imaging studies, that plaintiff's injuries to her lumbar and cervical spine were related to a preexisting condition and that she did not sustain a serious injury that was causally related to the subject accident (*see Perl v Meher*, 18 NY3d 208, 218 [2011]; *Goodwin v Walter*, 165 AD3d 1596, 1597 [4th Dept 2018]; *Kwitek v Seier*, 105 AD3d 1419, 1420-1421 [4th Dept 2013]). Salotto's expert orthopedic physician determined that plaintiff had "multiple levels of degeneration, both in the cervical and lumbar spine" that were "consistent with age-related degenerative changes." He thus opined that plaintiff's "chronic neck and back pain [were] due to a pre-existing degenerative condition and were not traumatically induced." Likewise, Ciamaricone's expert orthopedic surgeon determined that plaintiff's imaging studies showed "significant degenerative disease at the L4-5 level" and "degenerative disease . . . at the C5-6 and C6-7 levels with associated disc bulges and facet joint arthritis," and concluded that the "bony changes" in plaintiff's spine were "obviously chronic and longstanding." Ciamaricone's expert orthopedic surgeon diagnosed plaintiff with only cervical and thoracic strains, and opined that surgery was not necessary and that plaintiff was capable of working without restrictions.

Because defendants met their respective initial burdens on their motion and cross motion, the burden shifted to plaintiff "to come forward with evidence addressing defendant[s'] claimed lack of causation" (*Pommells v Perez*, 4 NY3d 566, 580 [2005]; *see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *see also Carpenter v Steadman*, 149 AD3d 1599, 1600 [4th Dept 2017]). Plaintiff, however, failed to present competent evidence in admissible form that "adequately address[ed] how plaintiff's alleged injuries, in light of [her] past medical history, [were] causally related to the subject accident" (*Fisher v Hill*, 114 AD3d 1193, 1194 [4th Dept 2014], *lv denied* 23 NY3d 909 [2014] [internal quotation marks omitted]; *see Franchini*, 1 NY3d

at 537; *French v Symborski*, 118 AD3d 1251, 1252 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014]), and therefore failed to raise a triable issue of fact in opposition. Contrary to her contention that she had no complaints related to her cervical spine until after the accident, plaintiff's own submissions in opposition to defendants' motion and cross motion established that, prior to the accident, she treated with a chiropractor more than 50 times for complaints of low back and neck pain. Furthermore, although plaintiff's orthopedic expert concluded that she had "40% permanent loss of use of the spine as a result of the automobile accident," he did not reject the opinions of defendants' experts, nor did he dispute the medical records or imaging studies that established the degenerative condition of plaintiff's cervical and lumbar spine, and he " 'failed to specify how plaintiff's conditions were caused or further exacerbated' by the subject accident" (*French*, 118 AD3d at 1252).

Finally, we agree with plaintiff that Supreme Court erred in granting defendants' motion and cross motion with respect to plaintiff's claim for economic loss in excess of basic economic loss (*see* Insurance Law §§ 5102 [a]; 5104 [a]; *see generally Wilson v Colosimo*, 101 AD3d 1765, 1767 [4th Dept 2012]). Although defendants' motion and cross motion sought summary judgment dismissing the complaint in its entirety, their moving papers did not address plaintiff's claim for economic loss, and thus defendants failed to establish that they were entitled to summary judgment with respect to that claim (*see Jones v Marshall*, 147 AD3d 1279, 1283 [3d Dept 2017]; *Martin v LaValley*, 144 AD3d 1474, 1477 [3d Dept 2016]). We therefore modify the order by denying Salotto's motion and Ciamaricone's cross motion in part and reinstating the complaint with respect to the claim for economic loss in excess of basic economic loss.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

514

CA 18-02352

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

DENNIS BUCHOVECKY AND ELAINE BUCHOVECKY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

S & J MORRELL, INC., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (MICHAEL C. PRETSCH OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE ZOGHLIN GROUP, PLLC, ROCHESTER (JACOB H. ZOGHLIN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, J.), entered July 10, 2018. The order granted plaintiffs' motion to dismiss the counterclaim of defendant S & J Morrell, Inc.

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

Memorandum: Plaintiffs commenced this action seeking to recover for damages that occurred when their property was inundated by a flood allegedly caused by the negligence of defendants and, in its answer, S & J Morrell, Inc. (defendant), interposed a counterclaim against plaintiffs for indemnification. Defendant appeals from an order that granted plaintiffs' motion pursuant to CPLR 3211 (a) (1) and (7) to dismiss the counterclaim. We affirm.

Even assuming, arguendo, that the counterclaim states a cause of action within the meaning of CPLR 3211 (a) (7), we conclude that Supreme Court properly granted the motion pursuant to CPLR 3211 (a) (1). A motion to dismiss a counterclaim pursuant to CPLR 3211 (a) (1) will be granted if "the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of [defendant's] claim[s]" (*Baumann Realtors, Inc. v First Columbia Century–30, LLC*, 113 AD3d 1091, 1092 [4th Dept 2014] [internal quotation marks omitted]; *see Murnane Bldg. Contrs., LLC v Cameron Hill Constr., LLC*, 159 AD3d 1602, 1603 [4th Dept 2018]).

In its counterclaim, defendant seeks to hold plaintiffs liable for indemnification pursuant to an agreement between defendant and 79 Coville Street, LLC (LLC), a New York limited liability company that is owned by plaintiffs. In support of their motion, plaintiffs

submitted that agreement, which includes an indemnification clause by which the LLC agreed to indemnify defendant for all damages to the LLC's property arising from work that defendant was performing on a neighboring property. The damage for which plaintiffs seek recovery in this action allegedly occurred on a parcel of property owned by plaintiffs, which is separate from both the LLC's property and the property on which defendant was performing the work that allegedly caused the flooding.

"[A] contract assuming th[e] obligation [to indemnify] must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed . . . In other words, we may not extend the language of an indemnification clause to include damages which are neither expressly within its terms nor of such character that it is reasonable to infer that they were intended to be covered under the contract" (*Autocrafting Fleet Solutions, Inc. v Alliance Fleet Co.*, 148 AD3d 1564, 1565-1566 [4th Dept 2017] [internal quotation marks omitted]; *see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent . . . The best evidence of what parties to a written agreement intend is what they say in their writing . . . Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms . . . A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion . . . Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract" (*Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002] [internal quotation marks omitted]; *see Potter v Grage*, 133 AD3d 1248, 1249 [4th Dept 2015]). Here, the court properly determined that the indemnification clause is only susceptible of one meaning, and that it may not be interpreted to require that the LLC indemnify defendant for damage that defendant causes to a property other than the LLC's property. Thus, the motion to dismiss the counterclaim pursuant to CPLR 3211 (a) (1) was "appropriately granted [inasmuch as] the documentary evidence utterly refutes [defendant's] factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Defendant's further contention that we should reverse the order, deny the motion and reinstate the counterclaim in order to permit defendant to pierce the corporate veil and seek to hold plaintiffs personally liable for indemnification is without merit. The doctrine of piercing the corporate veil "assumes that the corporation itself is liable for the obligation sought to be imposed [and thus] does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; *see generally Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 49-50 [2018]). Here, inasmuch as the agreement does not require the LLC to indemnify defendant for damages

caused to properties other than the property owned by the LLC, there is no basis upon which to pierce the corporate veil.

In any event, even assuming, arguendo, that the agreement could reasonably be interpreted to provide that the LLC had agreed to indemnify defendant for damages that it caused to plaintiffs' property, we conclude that there is no basis to pierce the corporate veil. It is well settled that a party "seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the [party seeking to pierce the corporate veil]" (*McCloud v Bettcher Indus., Inc.*, 90 AD3d 1680, 1681 [4th Dept 2011] [internal quotation marks omitted]; *see Abbott v Crown Mill Restoration Dev., LLC*, 109 AD3d 1097, 1101 [4th Dept 2013]). Here, defendant did not allege any facts from which it could be established that plaintiffs abused the privilege of doing business in the corporate form (*see generally TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339-340 [1998]; *Morris*, 82 NY2d at 141-142).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

533

CA 18-01750

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

LUPCO MANGOVSKI, INDIVIDUALLY AND IN THE NAME & RIGHT OF TDK OPERATING COMPANY, LLC, AND ANY OF ITS WHOLLY-OWNED SUBSIDIARIES, TDK-2 OPERATING COMPANY, LLC, AND ANY OF ITS WHOLLY-OWNED SUBSIDIARIES, TDK-3 OPERATING COMPANY, LLC, AND ANY OF ITS WHOLLY-OWNED SUBSIDIARIES, TDK-4 OPERATING COMPANY, LLC, AND ANY OF ITS WHOLLY-OWNED SUBSIDIARIES, AND ON BEHALF OF ALL OTHER MEMBERS OF THESE LLC'S LISTED SIMILARLY SITUATED, IF ANY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN DIMARCO, INDIVIDUALLY AND AS TRUSTEE FOR THE DAVID DIMARCO FAMILY TRUST, TDK OPERATING COMPANY, LLC, TDK-2 OPERATING COMPANY, LLC, TDK-3 OPERATING COMPANY, LLC, TDK-4 OPERATING COMPANY, LLC, TDK OPERATING COMPANY OF ONEIDA, LLC, TDK PROPERTY COMPANY OF ONEIDA, LLC, TDK PROPERTY COMPANY, LLC, TDK-4 PROPERTY COMPANY LLC, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(APPEAL NO. 1.)

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ELIZABETH A. HOFFMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BARCLAY DAMON, LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered December 18, 2017. The order, among other things, granted in part plaintiff's motion for a preliminary injunction.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion seeking a preliminary injunction directing defendants to provide plaintiff with a vehicle and to reinstate his health care plan and vacating the first, second, and ninth ordering paragraphs, and as modified the order is affirmed without costs.

Memorandum: In appeal No. 1, defendants-appellants (defendants) appeal from an order that, inter alia, granted in part plaintiff's motion for a preliminary injunction and directed plaintiff to post an

undertaking in the amount of $500. In appeal No. 2, defendants appeal from an order denying their motion seeking leave to renew their opposition to plaintiff's motion. With respect to appeal No. 1, we agree with defendants that Supreme Court abused its discretion in granting those parts of plaintiff's motion seeking a preliminary injunction directing defendants to provide plaintiff with a vehicle and to reinstate plaintiff's health care plan pending a final resolution of the action (*see generally Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216 [4th Dept 2009]), and we therefore modify the order by denying the motion to that extent and vacating the first and second ordering paragraphs. In light of that determination, there is no longer a need for an undertaking, and we therefore further modify the order by vacating the ninth ordering paragraph.

A party seeking a preliminary injunction "must establish, by clear and convincing evidence . . . , three separate elements: '(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor' " (*id.*, quoting *Doe v Axelrod*, 73 NY2d 748, 750 [1988]). Although we agree with plaintiff that he established a "likelihood of success on the merits in the underlying action" (*Park S. Assoc. v Blackmer*, 171 AD2d 468, 469 [1st Dept 1991]; *see generally Feldmeier v Feldmeier Equip., Inc.*, 164 AD3d 1093, 1096 [4th Dept 2018]; *McGuire v Huntress* [appeal No. 2], 83 AD3d 1418, 1420 [4th Dept 2011], *lv denied* 17 NY3d 712 [2011]) and that the balance of equities tips in his favor (*see generally Destiny USA Holdings, LLC*, 69 AD3d at 223), we agree with defendants that plaintiff failed to establish that he would suffer irreparable injury if he were denied access to one of defendants' vehicles and were required to fund his own health insurance. With respect to both the vehicle and the health insurance, " 'plaintiff has an adequate remedy in the form of monetary damages,' " rendering injunctive relief " 'both unnecessary and unwarranted' " (*id.* at 217).

With respect to health insurance, we note that plaintiff presented no evidence that he was unable to obtain a comparable policy or that the interruption in coverage would impact an ongoing course of medical treatment. Rather, his "allegation that a possible loss of health benefits constitute[d] a showing of irreparable harm [was] speculative and not supported by the record" (*Matter of Valentine v Schembri*, 212 AD2d 371, 372 [1st Dept 1995]; *see Custom Survey Group v Oxford Health Plans [NY], Inc.*, 2013 NY Slip Op 33557[U], *5 [Sup Ct, Suffolk County 2013]; *Matter of McGee v Tyco Intl. Ltd.*, 2004 WL 7329685, *1 [Sup Ct, NY County 2004]; *cf. International Union of Operating Engrs., Local No. 463 v City of Niagara Falls*, 191 Misc 2d 375, 380-381 [Sup Ct, Niagara County 2002], *affd sub nom. Bathurst v City of Niagara Falls*, 298 AD2d 1010 [4th Dept 2002], *lv denied* 99 NY2d 504 [2002]; *Gibouleau v Society of Women Engrs.*, 127 AD2d 740, 741 [2d Dept 1987]). There was no showing of any harm to plaintiff aside from economic loss, and "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm" (*EdCia Corp. v McCormack*, 44 AD3d 991, 994 [2d Dept 2007]).

We reject defendants' contention, however, that the court abused its discretion in granting that part of plaintiff's motion seeking to enjoin defendant companies from paying for the cost of the defense of this action, which is based on, inter alia, allegations that defendant Stephen DiMarco, individually and as Trustee for the David DiMarco Family Trust, breached a contract with plaintiff and otherwise breached his fiduciary duties to plaintiff. Although Limited Liability Company Law § 420 *permits* the advancement of legal fees to a member (*see Van Der Lande v Stout*, 13 AD3d 261, 261-262 [1st Dept 2004]), "the statutory language is permissive and does not per se create a legal duty to indemnify" (*546-522 West 146th St. LLC v Arfa*, 99 AD3d 117, 121 [1st Dept 2012]; *see Borriello v Loconte*, 42 Misc 3d 1228[A], 2014 NY Slip Op 50241[U], *6 [Sup Ct, Kings County 2014]).

As a result, we must review the language of the various operating agreements to determine whether DiMarco is entitled to the advancement of his legal fees (*see Ficus Invs., Inc. v Private Capital Mgt., LLC*, 61 AD3d 1, 7 [1st Dept 2009]; *Borriello*, 2014 NY Slip Op 50241[U], *6). The operating agreements at issue here "[do] not provide for advancement of legal fees, but only for indemnification provided that [DiMarco] is not found to be in breach of any [of his] duties" (*Borriello*, 2014 NY Slip Op 50241[U],*6; *cf. Ficus Invs., Inc.*, 61 AD3d at 7).

Additionally, even if the operating agreements permitted the advancement of legal fees before a determination on the merits of this action, we would nevertheless affirm that part of the order enjoining defendant companies from paying the cost to defend this action. In support of his motion, plaintiff submitted evidence raising significant concerns that DiMarco was engaging in acts that threatened " 'to render the judgment ineffectual' " (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 545 [2000]; *see* CPLR 6301; *Destiny USA Holdings, LLC*, 69 AD3d at 216-217). Inasmuch as the purpose of a preliminary injunction under CPLR 6301 "is to preserve the status quo and to prevent dissipation of property which may make a judgment ineffectual" (*Rattner & Assoc. v Sears, Roebuck & Co.*, 294 AD2d 346, 346 [2d Dept 2002]), we decline to disturb the court's discretionary determination to enjoin defendant companies from paying for the cost to defend this action.

Based on our determination, the contentions raised by defendants in appeal No. 2 are rendered moot (*see State Bank of Texas v Kaanam, LLC*, 120 AD3d 900, 901 [4th Dept 2014]) or academic (*see Rural Community Coalition, Inc. v Village of Bloomingburg*, 118 AD3d 1092, 1098 [3d Dept 2014]), and we therefore dismiss that appeal.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

534

CA 18-01917

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

LUPCO MANGOVSKI, INDIVIDUALLY AND IN THE NAME & RIGHT OF TDK OPERATING COMPANY, LLC, AND ANY OF ITS WHOLLY-OWNED SUBSIDIARIES, TDK-2 OPERATING COMPANY, LLC, AND ANY OF ITS WHOLLY-OWNED SUBSIDIARIES, TDK-3 OPERATING COMPANY, LLC, AND ANY OF ITS WHOLLY-OWNED SUBSIDIARIES, TDK-4 OPERATING COMPANY, LLC, AND ANY OF ITS WHOLLY-OWNED SUBSIDIARIES, AND ON BEHALF OF ALL OTHER MEMBERS OF THESE LLC'S LISTED SIMILARLY SITUATED, IF ANY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN DIMARCO, INDIVIDUALLY AND AS TRUSTEE FOR THE DAVID DIMARCO FAMILY TRUST, TDK OPERATING COMPANY, LLC, TDK-2 OPERATING COMPANY, LLC, TDK-3 OPERATING COMPANY, LLC, TDK-4 OPERATING COMPANY, LLC, TDK OPERATING COMPANY OF ONEIDA, LLC, TDK PROPERTY COMPANY OF ONEIDA, LLC, TDK PROPERTY COMPANY, LLC, TDK-4 PROPERTY COMPANY LLC, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(APPEAL NO. 2.)

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ELIZABETH A. HOFFMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BARCLAY DAMON, LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.) entered June 25, 2018. The order, among other things, denied defendants' motion for leave to renew their opposition to plaintiff's motion for a preliminary injunction.

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

Same memorandum as in *Mangovski v DiMarco* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

536

CA 18-02196

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

AMY M. GRIMSHAW, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES D. CARELLO, JR., DEFENDANT-APPELLANT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

LYNN LAW FIRM, LLP, SYRACUSE (KELSEY W. SHANNON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered June 21, 2018. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when she fell down the staircase in defendant's home. While visiting defendant's home as an overnight guest, plaintiff got out of bed to use the restroom, which was located off the hallway adjacent to the bedroom, at the top of the stairs. Plaintiff testified at her deposition that, rather than turn on the hallway lights, she "felt [her] way to the bathroom." After she finished using the bathroom, she turned off the bathroom light, opened the door into the dark hallway, reached out to feel her way back to the bedroom, which she knew was located to her right, and took one or two steps before falling down the stairs. Defendant moved for summary judgment dismissing the complaint on the grounds that there were no defects on his property that caused or contributed to plaintiff's injuries and that defendant had no duty to warn plaintiff of the unlit upstairs hallway. We conclude that Supreme Court erred in denying defendant's motion.

We agree with defendant that he met his initial burden of establishing as a matter of law that he maintained his property in a reasonably safe condition (*see generally Peralta v Henriquez*, 100 NY2d 139, 144 [2003]; *Basso v Miller*, 40 NY2d 233, 241 [1976]), i.e., that there was no inherently dangerous or defective condition on the property (*see generally Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]; *Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 1533

[4th Dept 2012]), and that plaintiff's own conduct in attempting to navigate the upstairs hallway in the dark without using any of the lights that were available to her created an open and obvious danger of which defendant had no duty to warn (*see Koval v Markley*, 93 AD3d 1171, 1172 [4th Dept 2012]).

Here, defendant's submissions in support of the motion, which included plaintiff's deposition testimony and the expert affidavit of a professional engineer, established that the staircase, the upstairs landing, the lighting and the light switches were code compliant and that the proximity of the bathroom doorway to the top of the stairs did not present an inherently unsafe condition. Defendant also submitted photographs of the area, which depict the hallway light switch on the wall directly outside the bedroom, and plaintiff testified that the lights for both the hallway and the hallway bathroom were working on the night of her fall. Plaintiff's deposition testimony further established that she was familiar with the hallway and its configuration, having traversed the stairs, the landing, and the upstairs hallway several times on the date of the incident. Plaintiff testified that, prior to her fall, she had toured the home and had climbed the staircase earlier in the evening with a clear view of the location of the bathroom in relation to the stairs and the bedroom. Indeed, plaintiff was aware that the stairs were located "straight ahead out of the bathroom," and that the bedroom was located to her right upon exiting the bathroom.

Plaintiff does not dispute that there were no code violations in defendant's home, and we reject her contention that defendant was negligent in failing to install night lights or utilize exterior lights for the purpose of interior illumination of the home. Plaintiff had multiple light sources available to her and chose not to use them. Just seconds before her fall, plaintiff—not defendant—turned off the bathroom light, which would have illuminated the area and allowed plaintiff to get her bearings if she had not turned off the light *before* she opened the door to the hallway. Thus, defendant established that it was plaintiff's own conduct in attempting to navigate the upstairs hallway without using any of the lights that were available to her that created an open and obvious danger of which defendant had no duty to warn (*see Koval*, 93 AD3d at 1172; *cf. McKnight v Coppola*, 113 AD3d 1087, 1087-1088 [4th Dept 2014]; *see also Tagle v Jakob*, 97 NY2d 165, 169 [2001]).

Even assuming, arguendo, that the affidavit of defendant's expert was rendered inadmissible by defendant's failure to attach the expert's curriculum vitae or the relevant building codes referenced in the affidavit, we conclude that the deposition testimony of plaintiff and defendant and the photographic evidence submitted by defendant were sufficient to meet defendant's burden on the motion. That evidence established that there were functioning lights in the area where the accident occurred, and that plaintiff was aware of those lights but chose not to use them (*see generally Koval*, 93 AD3d at 1171). Plaintiff failed to raise a material issue of fact in opposition to the motion (*see generally Alvarez v Prospect Hosp.*, 68

NY2d 320, 324 [1986]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

542

CA 18-02355

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

BERNADETTE AJA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HANS RICHTER, DEFENDANT-APPELLANT.

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

LAW OFFICES OF ROBERT D. BERKUN, BUFFALO (PHILIP A. MILCH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered April 27, 2018. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she tripped and fell on an elevated section of a sidewalk near the side yard of defendant's property in the Town of Amherst (Town). Defendant moved for summary judgment dismissing the complaint on the ground that, inter alia, he had no legal duty to maintain the sidewalk because he did not own that property or any property abutting it. We conclude that Supreme Court properly denied defendant's motion.

"Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions [on a] public sidewalk[] is placed on the municipality and not the abutting landowner" (*Hausser v Giunta*, 88 NY2d 449, 452-453 [1996]; *see Schroeck v Gies*, 110 AD3d 1497, 1497 [4th Dept 2013]; *see also Schiavone v Palumbo*, 177 AD2d 1045, 1045 [4th Dept 1991]). "[A]n exception to the general rule exists[, however,] where a municipal ordinance expressly imposes a duty on the landowner to maintain a sidewalk or curb and states that a breach of that duty will result in liability to injured third parties" (*Smalley v Bemben*, 50 AD3d 1470, 1471 [4th Dept 2008], *affd* 12 NY3d 751 [2009] [internal quotation marks omitted]; *see Hausser*, 88 NY2d at 453). Pursuant to the Code of the Town of Amherst (Town Code), "[t]he owner or occupant of any premises fronting or abutting on any street or highway shall repair, keep safe and maintain any sidewalk abutting the premises and keep it free and clear from snow, ice, dirt or other obstruction . . . Any

such owner or occupant shall be liable for any injury or damage by reason of omission or failure to repair, keep safe and maintain such sidewalk or to remove snow, ice or other obstructions therefrom or negligence in performing those functions" (Town Code § 83-9-5 [5-1.1]).

Contrary to defendant's contention, viewing the evidence in the light most favorable to plaintiff, as we must (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), we conclude that defendant failed to meet his initial burden on the motion (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also* CPLR 3212 [b]). Defendant's own submissions, which included his deposition testimony, raised triable issues of fact with respect to defendant's duty. Although defendant testified that his property did not abut the sidewalk that ran along the east side of his property, defendant also testified, inter alia, that he did not know where his property ended, that his lawn service mowed "all of the way up to the sidewalk just to make it look good," that he was responsible for the removal of snow from the sidewalk, and that he had repaired the sidewalk with concrete after learning of the accident in response to a letter that he received from the Town. Furthermore, when asked if "there [is] any way to tell . . . where [his] property ends before it gets to the sidewalk," defendant answered, "No."

Although defendant's additional submissions, including a land survey and affidavit of a land surveyor, established that defendant's property did not abut a flag that was used to mark the location of the "raised lip" on the sidewalk, those submissions failed to establish as a matter of law that defendant's property did not abut the sidewalk.

Contrary to defendant's further contention, we conclude that he failed to meet his initial burden on his motion of establishing that the defect was trivial and nonactionable as a matter of law (*see Lupa v City of Oswego*, 117 AD3d 1418, 1419 [4th Dept 2014]). "[A] mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable" (*Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]). Thus, in determining whether a defect is trivial, courts must examine all of "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury" (*id.* at 978). Here, defendant failed to "make a prima facie showing that the defect [was], under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances [did] not increase the risks it pose[d]" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

543.1

CA 17-01048

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

JOANNE FRASCA, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

LEGEND DEVELOPERS, LLC, DAVID L. VICKERS, IN HIS CAPACITY AS AN OFFICER AND/OR AGENT OF LEGEND DEVELOPERS, LLC AND/OR RAVEN ROCK HOMEOWNERS ASSOCIATION, INC., ROBERT M. CARRIER, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER AND/OR AGENT OF LEGEND DEVELOPERS, LLC AND/OR RAVEN ROCK HOMEOWNERS ASSOCIATIONS, INC., HOGAN ENGINEERING, P.C., TIMOTHY HOGAN, P.E., INDIVIDUALLY AND IN HIS CAPACITY AS AN AGENT OF LEGEND DEVELOPERS, LLC AND/OR RAVEN ROCK HOMEOWNERS ASSOCIATION, INC., RAVEN ROCK HOMEOWNERS ASSOCIATION, INC., ET AL., DEFENDANTS-RESPONDENTS,
DAVID L. VICKERS & SONS, AND DAVID L. VICKERS, INDIVIDUALLY, DEFENDANTS-APPELLANTS-RESPONDENTS.

DONALD CARDIFF, DIANA CARDIFF, RANDY J. SCHAAL, TRUSTEE OF THE ESTATE IN BANKRUPTCY OF PATRICIA MORSE, DOUGLAS SINGLETON, JAN SINGLETON, RICHARD TRIFICANA, MARTHA TRIFICANA, ELLEN SUE SESTITO, GLORIA M. IZZO, PLAINTIFFS-RESPONDENTS-APPELLANTS,
ET AL., PLAINTIFF,

V

ROBERT M. CARRIER, INDIVIDUALLY AND AS OFFICER/AGENT OF LEGEND DEVELOPERS, LLC, DAVID L. VICKERS, AS OFFICER/AGENT OF LEGEND DEVELOPERS, LLC, LEGEND DEVELOPERS, LLC, TIMOTHY HOGAN, P.E., INDIVIDUALLY AND AS OFFICER/AGENT OF HOGAN ENGINEERING, P.C., HOGAN ENGINEERING, P.C., JOINTLY AND SEVERALLY, DEFENDANTS-RESPONDENTS,
AND DAVID L. VICKERS, INDIVIDUALLY, DEFENDANT-APPELLANT-RESPONDENT.

DONALD CARDIFF, DIANE CARDIFF, RANDY J. SCHAAL, TRUSTEE OF THE ESTATE IN BANKRUPTCY OF PATRICIA MORSE, DOUGLAS SINGLETON, JAN SINGLETON, RICHARD TRIFICANA, MARTHA TRIFICANA, GLORIA M. IZZO, ELLEN SUE SESTITO, PLAINTIFFS-RESPONDENTS-APPELLANTS,
ET AL., PLAINTIFF,

V

RAVEN ROCK ESTATES HOMEOWNERS ASSOCIATION, INC., ROBERT M. CARRIER, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER AND/OR AGENT OF RAVEN ROCK ESTATES HOMEOWNERS ASSOCIATION, INC., ET AL., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

SAUNDERS KAHLER, LLP, UTICA (MERRITT S. LOCKE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT DAVID L. VICKERS & SONS.

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

OSBORN, REED & BURKE, LLP, UTICA (KELLY J. PARE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS DAVID L. VICKERS, IN HIS CAPACITY AS AN OFFICER AND/OR AGENT OF RAVEN ROCK HOMEOWNERS ASSOCIATION, INC., AND ROBERT M. CARRIER, IN HIS CAPACITY AS AN OFFICER AND/OR AGENT OF RAVEN ROCK HOMEOWNERS ASSOCIATIONS, INC.

MILBER MAKRIS PLOUSADIS & SEIDEN, LLP, WOODBURY (RICHARD A. LILLING OF COUNSEL), FOR DEFENDANT-RESPONDENT RAVEN ROCK HOMEOWNERS ASSOCIATION, INC.

VERSACE LAW OFFICE, P.C., ROME (MEADE H. VERSACE OF COUNSEL), FOR DEFENDANT-RESPONDENT HOGAN ENGINEERING, P.C.

Appeal and cross appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered December 10, 2015. The order, inter alia, granted in part the motions of defendants for summary judgment.

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

Same memorandum as in *Sestito v David L. Vickers & Sons* ([appeal No. 2] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

543.2

CA 17-01392

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

ELLEN SUE SESTITO, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DAVID L. VICKERS & SONS AND DAVID L. VICKERS, INDIVIDUALLY, DEFENDANTS-APPELLANTS-RESPONDENTS. (APPEAL NO. 2.)

SAUNDERS KAHLER, LLP, UTICA (MERRITT S. LOCKE OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from a judgment of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered April 20, 2017. The judgment awarded plaintiff money damages.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated and the order entered December 10, 2015 is modified on the law by granting that part of the motion of defendants David L. Vickers & Sons and David L. Vickers, individually, for summary judgment dismissing the negligence cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced these consolidated actions against several parties, including David L. Vickers & Sons and David L. Vickers, individually (collectively, Vickers defendants) seeking damages arising from the allegedly defective construction of homes that they had contracted with the Vickers defendants to build in a housing development. In appeal No. 1, the Vickers defendants appeal and plaintiffs-respondents-appellants (plaintiffs) cross-appeal from an order that, inter alia, granted in part the Vickers defendants' motion for summary judgment by dismissing all causes of action against them except, as relevant here, those sounding in negligence. In appeal Nos. 2 through 8, the Vickers defendants appeal and plaintiffs cross-appeal from seven judgments entered on the jury's finding of negligence on the part of the Vickers defendants.

Initially, we dismiss the appeal and the cross appeal in appeal No. 1 because the right to appeal from the intermediate order terminated upon the entry of the judgments in appeal Nos. 2 through 8 (*see Charter Sch. for Applied Tech. v Board of Educ. for City Sch. Dist. of City of Buffalo*, 105 AD3d 1460, 1461 [4th Dept 2013]; *Smith v*

Catholic Med. Ctr. of Brooklyn & Queens, 155 AD2d 435, 435 [2d Dept 1989]). The issues raised in appeal No. 1 concerning the order will be considered on the appeal and the cross appeal from the judgments in appeal Nos. 2 through 8 (*see Matter of Aho*, 39 NY2d 241, 248 [1976]).

We agree with the Vickers defendants' contention on their appeal that Supreme Court erred in denying that part of their motion seeking summary judgment dismissing the negligence causes of action. We therefore vacate the judgments in appeal Nos. 2 through 8 and modify the order in appeal No. 1 accordingly. This is a case in which the causes of action for contract and tort appear to overlap, i.e., "where the parties' relationship initially is formed by contract, but there is a claim that the contract was performed negligently" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]). It is well established that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]; *see Torok v Moore's Flatwork & Founds., LLC*, 106 AD3d 1421, 1422 [3d Dept 2013]; *Gallup v Summerset Homes, LLC*, 82 AD3d 1658, 1660 [4th Dept 2011]). "This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*Clark-Fitzpatrick, Inc.*, 70 NY2d at 389). "[M]erely alleging that the breach of a contract duty arose from a lack of due care will not transform a simple breach of contract into a tort" (*Sommer*, 79 NY2d at 551). "In considering whether plaintiffs have viable tort causes of action, we must also consider 'the nature of the injury, the manner in which the injury occurred and the resulting harm' " (*Gallup*, 82 AD3d at 1660, quoting *Sommer*, 79 NY2d at 552).

Here, we conclude that plaintiffs' allegations of negligence are "merely a restatement, albeit in slightly different language, of the . . . contractual obligations asserted in the cause[s] of action for breach of contract" (*Clark-Fitzpatrick, Inc.*, 70 NY2d at 390; *see Park Edge Condominiums, LLC v Midwood Lbr. & Millwork, Inc.*, 109 AD3d 890, 891 [2d Dept 2013]; *Gallup*, 82 AD3d at 1660). Contrary to plaintiffs' assertion, the circumstances of this case do not warrant imposition of an independent duty "based on the nature of the services performed and the [Vickers] defendant[s'] relationship with [plaintiffs]" (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 711 [2018]), and we note that plaintiffs did not allege injuries arising from an "abrupt, cataclysmic occurrence" (*Sommer*, 79 NY2d at 552; *see Gallup*, 82 AD3d at 1660).

We reject plaintiffs' contention on their cross appeal that the court erred in granting that part of the Vickers defendants' motion for summary judgment dismissing the breach of contract causes of action. "As a general rule, the existence of a statutory limited warranty precludes common-law causes of action, including causes of action for breach of contract" (*Gallup*, 82 AD3d at 1661). Nonetheless, "[a] breach of contract cause of action . . . is precluded only to the extent it is based on the breach of warranty" (*id.*). Here, plaintiffs' breach of contract causes of action are

precluded to the extent that they are based on the alleged breach of the statutory housing merchant implied warranty (*see* General Business Law § 777-a). To the extent that the breach of contract causes of action are not so precluded, we conclude that the Vickers defendants established their entitlement to summary judgment dismissing those causes of action, and plaintiffs failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Contrary to plaintiffs' further contention on their cross appeal, the court properly granted that part of the motion with respect to the breach of warranty causes of action based on General Business Law § 777-a (4) (a). The Vickers defendants' submissions, including a letter from plaintiffs' counsel and deposition testimony obtained during discovery, established as a matter of law that plaintiffs denied the Vickers defendants a "reasonable opportunity to inspect, test and repair the portion[s] of the home[s] to which the warranty claim[s] relate[]" (*id.*; *cf. Trificana v Carrier*, 81 AD3d 1339, 1341 [4th Dept 2011]), and plaintiffs failed to raise an issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

Finally, we have reviewed plaintiffs' remaining challenges to the court's determinations on the summary judgment and posttrial motions, including those with respect to the other defendants, and we conclude that such challenges are without merit.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

543.3

CA 17-01393

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

RICHARD TRIFICANA AND MARTHA TRIFICANA,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

DAVID L. VICKERS & SONS AND DAVID L. VICKERS,
INDIVIDUALLY, DEFENDANTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 3.)

SAUNDERS KAHLER, LLP, UTICA (MERRITT S. LOCKE OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from a judgment of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered April 20, 2017. The judgment awarded plaintiffs money damages.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated and the order entered December 10, 2015 is modified on the law by granting that part of the motion of defendants David L. Vickers & Sons and David L. Vickers, individually, for summary judgment dismissing the negligence cause of action and as modified the order is affirmed without costs.

Same memorandum as in *Sestito v David L. Vickers & Sons* ([appeal No. 2] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

543.4

CA 17-01394

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

DONALD CARDIFF AND DIANA CARDIFF,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

DAVID L. VICKERS & SONS AND DAVID L. VICKERS,
INDIVIDUALLY, DEFENDANTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 4.)

SAUNDERS KAHLER, LLP, UTICA (MERRITT S. LOCKE OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from a judgment of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered April 20, 2017. The judgment awarded plaintiffs money damages.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated and the order entered December 10, 2015 is modified on the law by granting that part of the motion of defendants David L. Vickers & Sons and David L. Vickers, individually, for summary judgment dismissing the negligence cause of action and as modified the order is affirmed without costs.

Same memorandum as in *Sestito v David L. Vickers & Sons* ([appeal No. 2] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

543.5

CA 17-01395

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

DOUGLAS SINGLETON AND JAN SINGLETON,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

DAVID L. VICKERS & SONS AND DAVID L. VICKERS,
INDIVIDUALLY, DEFENDANTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 5.)

SAUNDERS KAHLER, LLP, UTICA (MERRITT S. LOCKE OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from a judgment of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered April 20, 2017. The judgment awarded plaintiffs money damages.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated and the order entered December 10, 2015 is modified on the law by granting that part of the motion of defendants David L. Vickers & Sons and David L. Vickers, individually, for summary judgment dismissing the negligence cause of action and as modified the order is affirmed without costs.

Same memorandum as in *Sestito v David L. Vickers & Sons* ([appeal No. 2] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

543.6

CA 17-01396

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

RANDY J. SCHALL, TRUSTEE OF THE ESTATE IN BANKRUPTCY OF PATRICIA A. MORSE, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DAVID L. VICKERS & SONS AND DAVID L. VICKERS, INDIVIDUALLY, DEFENDANTS-APPELLANTS-RESPONDENTS. (APPEAL NO. 6.)

SAUNDERS KAHLER, LLP, UTICA (MERRITT S. LOCKE OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from a judgment of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered April 20, 2017. The judgment awarded money damages to Patricia A. Morse.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated and the order entered December 10, 2015 is modified on the law by granting that part of the motion of defendants David L. Vickers & Sons and David L. Vickers, individually, for summary judgment dismissing the negligence cause of action and as modified the order is affirmed without costs.

Same memorandum as in *Sestito v David L. Vickers & Sons* ([appeal No. 2] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

543.7

CA 17-01397

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

GLORIA M. IZZO, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DAVID L. VICKERS & SONS AND DAVID L. VICKERS, INDIVIDUALLY, DEFENDANTS-APPELLANTS-RESPONDENTS. (APPEAL NO. 7.)

SAUNDERS KAHLER, LLP, UTICA (MERRITT S. LOCKE OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from a judgment of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered April 20, 2017. The judgment awarded plaintiff money damages.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated and the order entered December 10, 2015 is modified on the law by granting that part of the motion of defendants David L. Vickers & Sons and David L. Vickers, individually, for summary judgment dismissing the negligence cause of action and as modified the order is affirmed without costs.

Same memorandum as in *Sestito v David L. Vickers & Sons* ([appeal No. 2] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

543.8

CA 17-01398

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

JOANNE FRASCA, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DAVID L. VICKERS & SONS AND DAVID L. VICKERS, INDIVIDUALLY, DEFENDANTS-APPELLANTS-RESPONDENTS. (APPEAL NO. 8.)

SAUNDERS KAHLER, LLP, UTICA (MERRITT S. LOCKE OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from a judgment of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered April 20, 2017. The judgment awarded plaintiff money damages.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated and the order entered December 10, 2015 is modified on the law by granting that part of the motion of defendants David L. Vickers & Sons and David L. Vickers, individually, for summary judgment dismissing the negligence cause of action and as modified the order is affirmed without costs.

Same memorandum as in *Sestito v David L. Vickers & Sons* ([appeal No. 2] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

543

CA 18-01684

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

IN THE MATTER OF CHERI ANN FLORIANO-KEETCH,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
NIAGARA CHARTER SCHOOL, RESPONDENTS-RESPONDENTS.

LAW OFFICE OF LINDY KORN, PLLC, BUFFALO (CHARLES L. MILLER, II, OF COUNSEL), FOR PETITIONER-APPELLANT.

GROSS SHUMAN P.C., BUFFALO (KEVIN R. LELONEK OF COUNSEL), FOR RESPONDENT-RESPONDENT NIAGARA CHARTER SCHOOL.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Niagara County (Daniel Furlong, J.), entered January 17, 2018 in a proceeding pursuant to CPLR article 78 and Executive Law § 298. The judgment denied the petition.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 and Executive Law § 298 seeking to annul the determination of respondent New York State Division of Human Rights (SDHR) that there was no probable cause to believe that petitioner's employer, Niagara Charter School (respondent), engaged in an unlawful discriminatory practice against her. We reject petitioner's contention that Supreme Court erred in denying the petition.

"Where, as here, SDHR renders a determination of no probable cause without holding a hearing, the appropriate standard of review is whether the probable cause determination was arbitrary and capricious or lacked a rational basis" (*Matter of Sullivan v New York State Div. of Human Rights*, 160 AD3d 1395, 1396 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of McDonald v New York State Div. of Human Rights*, 147 AD3d 1482, 1482 [4th Dept 2017]; *Matter of Smith v New York State Div. of Human Rights*, 142 AD3d 1362, 1363 [4th Dept 2016], *lv denied* 30 NY3d 913 [2018]). We note initially that, contrary to petitioner's contention, "the conflicting evidence before SDHR did not create a material issue of fact that warranted a formal hearing" (*Matter of Hall v New York State Div. of Human Rights*, 137 AD3d 1583, 1584 [2016]; *see McDonald*, 147 AD3d at 1483). "Courts give deference to SDHR due to its experience and expertise in evaluating

allegations of discrimination . . . , and such deference extends to [SDHR's] decision whether to conduct a hearing . . . [SDHR] has the discretion to determine the method to be used in investigating a claim, and a hearing is not required in all cases" (*McDonald*, 147 AD3d at 1482 [internal quotation marks omitted]; *see Smith*, 142 AD3d at 1363; *Matter of Napierala v New York State Div. of Human Rights*, 140 AD3d 1746, 1747 [4th Dept 2016]).

Furthermore, contrary to petitioner's contention, we conclude that SDHR's determination of no probable cause is not arbitrary or capricious, and it has a rational basis in the record. " 'Probable cause exists only when, after giving full credence to the complainant's version of the events, there is some evidence of unlawful discrimination' " (*Matter of Mambretti v New York State Div. of Human Rights*, 129 AD3d 1696, 1697 [4th Dept 2015], *lv denied* 26 NY3d 909 [2015]; *see Sullivan*, 160 AD3d at 1396). Here, there is no evidence of unlawful discrimination (*see Napierala*, 140 AD3d at 1747).

To the extent that petitioner challenges SDHR's determination on the basis that she was discriminated against based on her status as a caregiver, her challenge fails as a matter of law. As SDHR correctly determined, caring for an ailing family member is not a protected activity under the Human Rights Law (*see* Executive Law § 296 [1] [a]-[c]; *cf.* Administrative Code of City of NY §§ 8-102, 8-107 [1] [a]; *see generally Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). In addition, a rational basis supports SDHR's determination that there was no probable cause to believe that respondent discriminated against petitioner based on a perceived disability in the form of mental illness or addiction. Although respondent twice made inquiries concerning petitioner's behavior that respondent believed was unusual and on one occasion required her to complete a drug test, SDHR rationally concluded that those facts alone do not establish that respondent perceived that she suffered from an addiction or mental illness (*see* § 292 [21] [a]; *see generally Eustace v South Buffalo Mercy Hosp.*, 36 Fed Appx 673, 675 [2d Cir 2002]). Moreover, petitioner failed to allege that any adverse action resulted from those events or that she was subjected to "discriminatory intimidation, ridicule, and insult that [was] sufficiently severe or pervasive to alter the terms or conditions of employment" (*Vitale v Rosina Food Prods.*, 283 AD2d 141, 143 [4th Dept 2001] [internal quotation marks omitted]; *see Harris v Forklift Sys.*, 510 US 17, 21 [1993]; *Matter of Bowler v New York State Div. of Human Rights*, 77 AD3d 1380, 1381 [4th Dept 2010], *lv denied* 16 NY3d 709 [2011]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

545

KA 18-01805

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH E. SPRATLEY, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Victoria M. Argento, J.), entered July 17, 2018. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level one risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order classifying him as a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). We agree with defendant that County Court erred in assessing him 30 points under risk factor 5. Insofar as relevant here, that risk factor allows the court to assess 30 points if any of the victims is 10 years of age or less, or 20 points if any of the victims is between 11 and 16 years of age (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 11 [2006]). Defendant was convicted of possessing a sexual performance by a child (Penal Law § 263.16), which requires proof, inter alia, that defendant possessed a play, motion picture, or photograph depicting sexual conduct involving a child who is less than 16 years of age (*see* §§ 263.00 [1], [4]; 263.16). Consequently, defendant's plea of guilty to that charge does not constitute clear and convincing evidence that 30 points should be assessed under risk factor 5 (*cf. People v Hayes*, 166 AD3d 1533, 1533-1534 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]; *People v Asfour*, 148 AD3d 1669, 1670 [4th Dept 2017], *lv denied* 29 NY3d 914 [2017]). Additionally, the evidence submitted by the People, including the presentence report, did not constitute clear and convincing evidence that any of the victims was 10 years of age or less (*see generally People v Cephus*, 128 AD3d 656, 656 [2d Dept 2015], *lv denied* 26 NY3d 901

[2015]). The clear and convincing evidence, including the references to the children in the images possessed by defendant in the presentence report as preadolescent or prepubescent, coupled with the report's definition of such children as being between 10 and 13 years of age, however, supports the imposition of 20 points under risk factor 5 (*see People v Jean-Bart*, 145 AD3d 690, 691 [2d Dept 2016], *lv denied* 29 NY3d 904 [2017]; *People v Caban*, 61 AD3d 834, 835 [2d Dept 2009], *lv denied* 13 NY3d 702 [2009]). When the 30 points assessed under risk factor 5 is reduced to 20 points, defendant's score on the relevant risk factors is 70 points, making him a presumptive level one risk, and there is no basis in the record for granting an upward departure based on an aggravating factor not taken into account by the risk assessment guidelines (*see generally People v Grady*, 81 AD3d 1464, 1464 [4th Dept 2011]). We therefore modify the order accordingly.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

548

KA 18-01340

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS S. CLAYTON, DEFENDANT-APPELLANT.

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

WEEDEN A. WETMORE, SPECIAL DISTRICT ATTORNEY, ELMIRA, FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered April 24, 2017. The judgment convicted defendant, upon a jury verdict, of murder in the first degree and murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is modified on the law by reversing that part convicting defendant of murder in the second degree and dismissing count two of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the first degree (Penal Law § 125.27 [1] [a] [vi]; [b]) and murder in the second degree (§§ 20.00, 125.25 [1]).

Shortly after midnight on Tuesday, September 29, 2015, defendant returned home from a poker game to find his wife dead on the kitchen floor. An investigation led the police to suspect that defendant's former employee and tenant (principal) had bludgeoned her to death with a maul handle. Defendant was charged with, inter alia, murder in the first degree on the ground that he "procured commission of the killing pursuant to an agreement" with the principal to commit the killing "for the receipt, or in expectation of the receipt, of" a thing of "pecuniary value" (Penal Law § 125.27 [1] [a] [vi]).

Several women testified at trial that they were having sex with defendant while he and the victim were married. Defendant made disparaging remarks about the victim to some of those women, and he told at least one of them that "he couldn't divorce [the victim] because she would take everything." Approximately one year before the murder, defendant increased the limit on the victim's life insurance policy from $500,000 to $1,000,000. A few weeks after that, he told the victim's niece: "[T]his [is] going to be the last Christmas with

[me] around and us being together as a family."

Defendant had employed the principal at his businesses for years, during which time the principal often performed work around the home where defendant and the victim lived with their children. The principal was thus familiar with that property. The principal did not own a vehicle and did not have a driver's license. Twelve days before the murder, defendant's business partner terminated the principal's employment with the company. At the time of the principal's termination, he was living in an apartment in Elmira that was co-owned by defendant but, after the loss of his job, the principal could no longer afford to pay the rent. Over the next 12 days, defendant referred the principal to employers and bought the principal a bicycle, ostensibly to use as a mode of transportation to and from potential jobs. During that time, defendant and the principal had frequent telephone contact, the extent of which was detailed exhaustively at trial using cell phone records.

Six days before the murder, someone from defendant's company called the storage facility located next door and asked whether the company's property was within range of the storage facility's surveillance cameras. In fact, the company's parking lot was within range of the cameras, and surveillance footage from the night of the murder was played for the jury at trial.

Three days before the murder, defendant called an acquaintance and asked him whether there were surveillance cameras outside a certain inn located in Elmira. The acquaintance was not aware of any cameras, but offered to check. Defendant declined that offer.

On the night of the murder, defendant drove one of the company's trucks to his weekly poker game. Defendant's personal truck was not in his possession because he and one of his employees had temporarily exchanged trucks earlier that day, ostensibly to facilitate the unloading of an all-terrain vehicle (ATV) the employee had borrowed from defendant over the weekend. Surveillance footage showed defendant's personal truck leaving the parking lot around noon, presumably driven by the employee. The employee's maroon truck left the lot at 3:09 p.m. with the ATV in the back. When the maroon truck returned at 6:04 p.m., the ATV was no longer in the back, presumably having been unloaded by defendant. A few minutes later, a company truck and the maroon truck left the lot.

Defendant arrived at his poker game in the company truck around 8:00 p.m. During the poker game, he used his cell phone to look at social media. Sometime after 10:00 p.m., he asked his host's wife if he could use her cell phone to call a worker, claiming that he had left his cell phone in his truck. Defendant took the borrowed phone into an adjacent hallway, placed a call to the principal, engaged him in hushed conversation, and then deleted the call from the phone before returning it to its owner.

The principal picked a witness up that night in a maroon truck. They drove to the outskirts of Corning before pulling the truck to the

side of the road. The witness stayed inside the truck as a lookout while the principal took an object from the bed of the truck and walked off. Approximately 15 minutes later, the principal returned, breathless, sweating, and carrying a stick. On the way back to Elmira, the principal stopped the truck and threw the stick off to the side of the road. They drove a bit farther, and, when they came to a bridge near water, the principal slowed the truck so the lookout could throw a bag of clothes into the water. Surveillance footage showed a truck returning to the company's parking lot at 12:55 a.m. A few minutes later, someone rode away on a bicycle.

Defendant left the poker game around midnight, found the victim's lifeless body, and summoned the police. Observing no sign of forced entry, investigators immediately suspected defendant of committing the murder and took him to the police station for questioning around 4:30 a.m. Before the patrol car had left the driveway, defendant told investigators: "[W]ell, you'll know where I am because my vehicle has GPS on it."

A few weeks after the murder, investigators recovered a bag from a swampy area located approximately 40 feet from the inn in Elmira with respect to which defendant had previously inquired about the presence of surveillance cameras. The bag contained clothes, and genetic testing determined that the principal's DNA was on the clothes.

We reject defendant's contention that the evidence is legally insufficient to establish that he "procured commission of the killing pursuant to an agreement" with the principal (Penal Law § 125.27 [1] [a] [vi]). Although the case against defendant is circumstantial, the standard of review for determining whether a conviction is supported by legally sufficient evidence "is the same for circumstantial and non-circumstantial cases—whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (*People v Grassi*, 92 NY2d 695, 697 [1999], *rearg denied* 94 NY2d 900 [2000]; *see People v Marvin*, 162 AD3d 1744, 1745 [4th Dept 2018], *lv denied* 32 NY3d 1066 [2018]). Here, there was ample evidence from which a jury could have inferred that the principal killed the victim at the behest of defendant, who provided the principal with key logistical support. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is " 'a valid line of reasoning and permissible inferences from which a rational jury' " could have found the existence of such an agreement (*People v Danielson*, 9 NY3d 342, 349 [2007]; *see* § 125.27 [1] [a] [vi]). For the same reasons, we conclude that there is legally sufficient evidence that defendant, acting with the "intent to cause the death" of the victim, requested that the principal commit the killing or intentionally aided the principal in the commission thereof (§ 125.27 [1]; *see* § 20.00; *People v Glanda*, 5 AD3d 945, 948-949 [3d Dept 2004], *lv denied* 3 NY3d 640 [2004], *reconsideration denied* 3 NY3d 674 [2004], *cert denied* 543 US 1093 [2005]; *see generally People v Mateo*, 2 NY3d 383, 405 [2004], *cert denied* 542 US 946 [2004]).

We reject defendant's further contention that the evidence is legally insufficient to establish that, pursuant to the agreement, the principal committed the killing "for the receipt, or in expectation of the receipt, of" a thing of "pecuniary value" (Penal Law § 125.27 [1] [a] [vi]). The People identify several things of pecuniary value that defendant offered to the principal, including a bicycle, a promise to pay an outstanding fine, and referrals for new employment. Indeed, there is no dispute that, in the days leading up to the murder, defendant gave the principal a bicycle, which was not only a thing of pecuniary value but also an instrumentality in the crime. Moreover, cell phone records establish that the principal sent defendant a text message five days before the murder asking for "a little bit." In our view, that message, read in context, could be construed as a request for money. A rational jury thus could have inferred, in light of the principal's subsequent actions, that defendant procured commission of the killing by making an agreement pursuant to which the principal would kill the victim in exchange for something of pecuniary value (*see generally Danielson*, 9 NY3d at 349).

We and our dissenting colleagues agree on many points. All of us agree that there was sufficient evidence that defendant was complicit in his wife's murder. Further, all of us agree that there is evidence that the principal requested a payment of money from defendant only five days before the murder. Nevertheless, our dissenting colleagues characterize that request as "part of a string of otherwise innocent interactions" between defendant and the principal in the days leading up to the murder. The dissent even offers the possibility that the principal was "seeking a reward" from defendant—not for agreeing to murder defendant's wife, but for unrelated virtuous conduct. We cannot agree. In our view, the jury could rationally have concluded that the principal's request for a payment of money five days before the murder was not "innocent" at all, but in fact was part and parcel of the murder plot.

Contrary to defendant's contention, viewing the evidence in light of the elements of the crime of murder in the first degree as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence with respect to that count (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Although not raised by defendant, the count charging him with intentional murder in the second degree must be dismissed as a lesser included count of murder in the first degree (*see* CPL 300.40 [3] [b]; *People v Pierre*, 37 AD3d 1172, 1173 [4th Dept 2007], *lv denied* 8 NY3d 989 [2007]). Therefore, we modify the judgment accordingly. In light of that determination, we need not reach defendant's contentions concerning the weight and sufficiency of the evidence with respect to the murder in the second degree conviction.

Additionally, even though defendant contends that the People's untimely disclosure of *Rosario* material requires reversal, that contention is not preserved for our review because defendant "failed to make appropriate timely objections when the alleged violations came to his attention" (*People v Brandl*, 231 AD2d 895, 895 [4th Dept

1996]). In any event, the contention lacks merit because defendant failed to establish substantial prejudice as a result of the belated disclosure (*see generally People v Martinez*, 71 NY2d 937, 940 [1988]).

Defendant next contends that County Court erred in denying his request for a *Frye* hearing (*see Frye v United States*, 293 F 1013 [DC Cir 1923]) with respect to the admission of the cell phone tracking evidence. We reject that contention because the testimony of the People's expert "did not concern a novel scientific theory, technique, or procedure, but instead involved deductions made from cell phone site data in a manner consistent with a generally accepted scientific process" (*People v Littlejohn*, 112 AD3d 67, 73 [2d Dept 2013], *lv denied* 22 NY3d 1140 [2014]; *see generally People v Arafet*, 13 NY3d 460, 463-464 [2009]). For the same reason, the court properly denied defendant's request for a *Frye* hearing with respect to the GPS evidence (*see Matter of Carniol v New York City Taxi & Limousine Commn.*, 126 AD3d 409, 410-411 [1st Dept 2015]).

Contrary to defendant's final contention, the court properly denied his motion to set aside the verdict pursuant to CPL 330.30 (3) without a hearing because " 'the purported newly discovered evidence merely tended to impeach or discredit trial testimony' " (*People v Brewer*, 50 AD3d 1577, 1577-1578 [4th Dept 2008], *lv denied* 11 NY3d 786 [2008]; *cf. People v Bryant*, 117 AD3d 1586, 1587 [4th Dept 2014]).

All concur except WHALEN, P.J., and CARNI, J., who dissent and vote to modify in accordance with the following memorandum: Although we agree with the majority with respect to defendant's contentions regarding the untimely disclosure of *Rosario* material, the denial of his requests for *Frye* hearings and the denial of his CPL 330.30 motion, we respectfully dissent with respect to the legal sufficiency of the evidence concerning the pecuniary agreement element of murder in the first degree (Penal Law § 125.27 [1] [a] [vi]; [b]). The majority concludes that there is legally sufficient evidence supporting that element, i.e., evidence that defendant procured commission of the killing by making an agreement pursuant to which the principal would kill the victim in exchange for a bicycle, referrals to menial jobs, and an unknown amount of money. They conclude that such an agreement as to money was established by a single text that the principal sent to defendant five days before the murder, which reads, in its entirety: "need that eviction notice and a letter of release and a little bit please." Although we agree with the majority that the "little bit" language could be construed as a request for money, in our view the context in which that text was sent renders speculative any inference that the principal's request was made as part of a murder-for-hire agreement. In particular, the principal had been fired from his job at defendant's company just days before he sent the text, and defendant was in the process of evicting the principal and his family from their residence, which defendant owned. The text at issue was part of a string of otherwise innocent interactions between the principal and his former employer/landlord in which they discussed details relating to those events and discussed the principal's need to obtain documentation of the eviction and termination in order to apply for government benefits. Additionally,

the principal had recently accused a former coworker, now working at a rival company, of stealing equipment from defendant, and the principal may thus have been seeking a reward from defendant. The text is suspicious but, standing alone—or standing together with the gift of the bicycle and the unsuccessful job referrals—it is not legally sufficient in our view to prove that defendant procured commission of the killing pursuant to an agreement with the principal to kill the victim "for the receipt, or in expectation of the receipt, of" a thing of "pecuniary value" (§ 125.27 [1] [a] [vi]). Any inference that the jury could have drawn to the contrary would have been speculative inasmuch as the "jury could [not] rationally have excluded innocent explanations of the evidence offered by the defendant" (*People v Reed*, 22 NY3d 530, 535 [2014], *rearg denied* 23 NY3d 1009 [2014]). We therefore disagree that the evidence is legally sufficient to support the conviction of murder in the first degree.

We conclude, however, that the People presented legally sufficient evidence of defendant's shared intent with the principal and therefore that the evidence is legally sufficient to support defendant's conviction of murder in the second degree (Penal Law §§ 20.00, 125.25 [1]; *see generally People v Danielson*, 9 NY3d 342, 349 [2007]). Viewing the evidence in light of the elements of the crime of murder in the second degree as charged to the jury (*see Danielson*, 9 NY3d at 349), we further conclude that the verdict with respect to that crime is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Although defendant does not raise the issue, murder in the second degree is a lesser included offense of murder in the first degree, and County Court erred in failing to submit the counts to the jury in the alternative (*see* CPL 300.40 [3] [b]; *see generally People v Miller*, 6 NY3d 295, 300 [2006]). However, because we would dismiss the greater charge, defendant would not be prejudiced by that error (*see People v Pittman*, 33 AD3d 1118, 1120 [3d Dept 2006]). Further, we conclude that, "[i]nasmuch as a jury already has made . . . a determination [regarding murder in the second degree] and its verdict is legally sufficient and is fully supported by the weight of the evidence, there is no reason to remit th[at] charge[] for retrial" (*id.*).

We would therefore modify the judgment by reversing that part convicting defendant of murder in the first degree and dismissing count one of the indictment, and we would otherwise affirm.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

550

KA 17-00934

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SANDRO TIRADO, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered August 24, 2016. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, criminal use of a firearm in the first degree, assault in the first degree, criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the seventh 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 attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), criminal use of a firearm in the first degree (§ 265.09 [1] [b]), assault in the first degree (§ 120.10 [1]), criminal possession of a weapon in the second degree (§ 265.03 [3]), and criminal possession of a controlled substance in the seventh degree (§ 220.03). Defendant contends that County Court erred in admitting in evidence a hearsay statement that a four-year-old child made to a police detective, in which the child stated that defendant shot the child's mother. That contention is not properly before us. Although the court initially overruled defendant's objection and concluded that the statement was admissible under the excited utterance exception to the hearsay rule, the court later reconsidered that ruling and instructed the jury that they could not consider the statement for the truth of the matter asserted. The court further instructed the jury that they could consider that statement only to explain why the detective began questioning another witness about defendant and how that phase of the investigation began. Because the court reconsidered its ruling, defendant's contentions concerning the original ruling are moot (*see generally People v Albanese*, 38 AD3d 1015, 1018 n [3d Dept 2007], *lv denied* 8 NY3d 981 [2007]; *People v Villeneuve*, 232 AD2d 892, 893 [3d Dept 1996]). In any event, even

assuming, arguendo, that the court erred in admitting the statement in evidence under the excited utterance exception to the hearsay rule, we conclude that such error is harmless (*see People v Hernandez*, 28 NY3d 1056, 1058 [2016]; *People v Spencer*, 96 AD3d 1552, 1553 [4th Dept 2012], *lv denied* 19 NY3d 1029 [2012], *reconsideration denied* 20 NY3d 989 [2012]). Defendant failed to preserve for our review his contention that he was denied his right of confrontation concerning the child's statement (*see People v Liner*, 9 NY3d 856, 856-857 [2007], *rearg denied* 9 NY3d 941 [2007]; *People v Spirles*, 136 AD3d 1315, 1316 [4th Dept 2016], *lv denied* 27 NY3d 1007 [2016], *cert denied* — US —, 137 S Ct 298 [2016]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant failed to preserve his contention that the indictment is multiplicitous (*see People v Fulton*, 133 AD3d 1194, 1194-1195 [4th Dept 2015], *lv denied* 26 NY3d 1109 [2016], *reconsideration denied* 27 NY3d 997 [2016]; *People v Quinn*, 103 AD3d 1258, 1258 [4th Dept 2013], *lv denied* 21 NY3d 946 [2013]). In any event, we conclude that the " 'indictment is not multiplicitous [inasmuch as] each count requires proof of an additional fact that the other does not' " (*People v Jefferson*, 125 AD3d 1463, 1464 [4th Dept 2015], *lv denied* 25 NY3d 990 [2015]).

Defendant further contends that he may have been convicted by a non-unanimous jury because the trial evidence could have allowed a conviction on either the attempted murder or the assault counts based on the evidence that he shot the victim in the arm and that he shot her in the face. That is actually a claim of non-facial duplicity (*see People v Allen*, 24 NY3d 441, 448-449 [2014]), which requires preservation (*see id*. at 449-450; *People v Zeman*, 156 AD3d 1460, 1461 [4th Dept 2017], *lv denied* 31 NY3d 988 [2018]; *People v Garner*, 145 AD3d 1573, 1574 [4th Dept 2016], *lv denied* 29 NY3d 1031 [2017]), and defendant failed to preserve that contention. In any event, that contention lacks merit. It is well settled that "the jury need not necessarily concur in a single view of the transaction, in order to reach a verdict . . . '[I]f the conclusion may be justified upon [more than one] interpretation[ ] of the evidence, the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and part upon the other' " (*People v Mateo*, 2 NY3d 383, 408 n 13 [2004], *cert denied* 542 US 946 [2004]; *see People v Thomas*, 114 AD3d 1138, 1139 [4th Dept 2014], *lv denied* 24 NY3d 965 [2014], *cert denied* — US —, 135 S Ct 1502 [2015]).

Defendant further contends that the evidence is not legally sufficient to support the conviction, and that the verdict is against the weight of the evidence. Viewing the evidence in the light most favorable to the People (*see People v Gordon*, 23 NY3d 643, 649 [2014]), we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we also reject defendant's contention that

the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, the sentence is not unduly harsh or severe.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

559

CA 18-01717

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

IN THE MATTER OF UP STATE TOWER CO., LLC,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF LAKEWOOD, AND VILLAGE BOARD OF VILLAGE OF LAKEWOOD, INCLUDING MAYOR CARA BIRRITIERI, TRUSTEE DAVID DISALVO, TRUSTEE RANDALL HOLCOMB, TRUSTEE ELLEN BARNES, TRUSTEE SUSAN DRAGO, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF VILLAGE OF LAKEWOOD BOARD OF TRUSTEES,
RESPONDENTS-DEFENDANTS-RESPONDENTS.

BARCLAY DAMON LLP, SYRACUSE (ANDREW J. LEJA OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

LAW OFFICES OF RICHARD E. STANTON, BUFFALO (RICHARD E. STANTON OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered January 26, 2018 in a proceeding pursuant to CPLR article 78 and a declaratory judgment action. The judgment granted the motion of respondents-defendants to dismiss the third amended petition-complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion in part and reinstating the first and fourth causes of action, and as modified the judgment is affirmed without costs.

Memorandum: In this hybrid CPLR article 78 proceeding and declaratory judgment action, petitioner-plaintiff (petitioner) appeals from a judgment granting the motion of respondents-defendants (respondents) to dismiss the third amended petition-complaint. Petitioner had entered into a purchase agreement for real property located in respondent-defendant Village of Lakewood (Village) and thereafter filed an application with the Village seeking approval for construction of a wireless telecommunications tower on that property. During the pendency of that application, the Village adopted Local Law 4-2016, which amended the Village's zoning law and, among other things, instituted various fees and application requirements for those seeking approval to construct wireless telecommunication facilities.

Petitioner then commenced this proceeding-action raising various challenges to Local Law 4-2016. Petitioner's application to build a telecommunications tower remained pending during this matter. Supreme Court thereafter granted respondents' motion and dismissed each of petitioner's six causes of action on the ground that petitioner lacked standing.

As an initial matter, we note that petitioner does not challenge the court's dismissal of the fifth cause of action, alleging that Local Law 4-2016 is an illegal ex post facto zoning regulation. Thus, petitioner has abandoned any contentions with respect to the dismissal of that cause of action (*see generally Matter of Penfield Panorama Area Community v Town of Penfield Planning Bd.*, 253 AD2d 342, 345 [4th Dept 1999]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We also conclude that the court properly granted those parts of respondents' motion seeking dismissal of the second, third, and sixth causes of action, which each challenged Local Law 4-2016 on the basis of alleged violations of the Municipal Home Rule Law, because petitioner failed to demonstrate that it was harmed by those alleged statutory violations (*see Matter of Youngewirth v Town of Ramapo Town Bd.*, 98 AD3d 678, 680 [2d Dept 2012]; *cf. Matter of Village of Chestnut Ridge v Town of Ramapo*, 45 AD3d 74, 87 [2d Dept 2007], *lv dismissed* 12 NY3d 793 [2009], *lv dismissed* 15 NY3d 817 [2010]). Thus, petitioner failed to establish standing with respect to those causes of action.

We agree with petitioner, however, that the court erred in granting the motion with respect to the first cause of action, which alleged violations of the State Environmental Quality Review Act (ECL art 8), and we therefore modify the judgment accordingly. Petitioner established standing to assert that cause of action by demonstrating that it had a property interest in the Village that was impacted by the amendment to the zoning law effected by Local Law 4-2016, and was not required to allege the likelihood of environmental harm (*see Tupper v City of Syracuse*, 71 AD3d 1460, 1461 [4th Dept 2010]).

We likewise agree with petitioner that the court erred in granting the motion with respect to the fourth cause of action, alleging that Local Law 4-2016 imposes an illegal fee, and thus we further modify the judgment accordingly. Petitioner established standing to assert that cause of action by demonstrating that it had a property interest in property to which Local Law 4-2016, and the relevant fee, applies. Further, respondents took the position that petitioner must submit the fee in connection with its pending application pertaining to that property (*cf. Home Bldrs. Assn. of Cent. N.Y. v Town of Onondaga*, 267 AD2d 973, 974 [4th Dept 1999]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

562

OP 17-01942

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

IN THE MATTER OF CITY COUNCIL OF CITY OF JAMESTOWN, PETITIONER,

V MEMORANDUM AND ORDER

TOWN COUNCIL OF TOWN OF ELLICOTT AND BOARD OF TRUSTEES OF VILLAGE OF FALCONER, RESPONDENTS.

FALCONER CENTRAL SCHOOL DISTRICT, INTERVENOR-RESPONDENT.

(PROCEEDING NO. 1.)

BOND SCHOENECK & KING, PLLC, SYRACUSE (STEPHANIE M. CAMPBELL OF COUNSEL), FOR PETITIONER.

HARRIS BEACH PLLC, BUFFALO (PIETRA G. ZAFFRAM OF COUNSEL), FOR RESPONDENTS AND INTERVENOR-RESPONDENT.

Proceeding pursuant to General Municipal Law article 17 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to General Municipal Law § 712) for a declaration that a proposed annexation of land to the City of Jamestown is in the over-all public interest.

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

Memorandum: In an original proceeding pursuant to General Municipal Law § 712, the City Council of City of Jamestown (petitioner) seeks a determination that the proposed annexation of approximately four acres of land located in the Town of Ellicott and the Village of Falconer is in the over-all public interest. In a separate proceeding pursuant to CPLR article 78 and General Municipal Law § 711 (3), the City of Jamestown (City) seeks to annul respondents' respective determinations that the City's annexation petition failed to comply with the provisions of General Municipal Law article 17. The article 78 proceeding was transferred to this Court by order of Supreme Court, and we consolidated it with the original proceeding (*see* General Municipal Law § 712 [3]).

We agree with respondents that petitioner's original proceeding is untimely. The General Municipal Law allows for an original proceeding to be brought in the Appellate Division "[i]n the event that one or more but not all of the governing boards of the affected

local governments shall determine that it is not in the over-all public interest to approve the proposed annexation" (§ 712 [1]). The proceeding must be brought "within thirty days after the filing in the office of the county clerk of the order by which such determination was made" (§ 712 [2]; *see also* § 711 [5]). Here, petitioner seeks review of respondents' orders, each of which determined that annexation was not in the over-all public interest and each of which was filed in the office of the Chautauqua County Clerk on September 13, 2017. Petitioner's original proceeding, commenced on November 8, 2017, was therefore untimely.

Contrary to petitioner's contention, General Municipal Law § 712 (2) does not require that the governing boards of all of the affected local governments must have filed their respective orders in the office of the county clerk in order to trigger the 30-day period. Instead, by its terms, the limitations period commences upon the filing of "*the order* by which such determination [that annexation is not in the overall public interest] was made" (*id.* [emphasis added]). Contrary to petitioner's further contention, section 712 did not require either respondent to notify petitioner that such an order had been filed with the county clerk in order to begin the 30-day period.

We therefore dismiss the petition in the original proceeding as untimely. Because we dismiss the petition in the original proceeding, i.e., the proceeding by which review can be had of respondents' determinations that annexation is not in the public interest, we dismiss the City's CPLR article 78 petition as academic. In light of our determination, we do not address petitioners' remaining contentions.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

563

TP 17-02197

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

IN THE MATTER OF CITY OF JAMESTOWN, PETITIONER,

V MEMORANDUM AND ORDER

TOWN COUNCIL OF TOWN OF ELLICOTT AND BOARD OF TRUSTEES OF VILLAGE OF FALCONER, RESPONDENTS. (PROCEEDING NO. 2.)

BOND SCHOENECK & KING, PLLC, SYRACUSE (STEPHANIE M. CAMPBELL OF COUNSEL), FOR PETITIONER.

HARRIS BEACH PLLC, BUFFALO (PIETRA G. ZAFFRAM OF COUNSEL), FOR RESPONDENTS.

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, Chautauqua County [Frank A. Sedita, III, J.], entered December 15, 2017) to review determinations of respondents. The determinations found that the annexation petition of the City of Jamestown did not comply with statutory requirements.

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

Same memorandum as in *Matter of City Council of City of Jamestown v Town Council of Town of Ellicott* ([proceeding No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

567

CA 18-01305

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

TRANSPO BUS SERVICES, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK BUS SALES, L.L.C., DEFENDANT-RESPONDENT.

HOLTZBERG LAW FIRM, ROCHESTER, HARRIS BEACH PLLC, PITTSFORD (SVETLANA K. IVY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, SYRACUSE (BELLA S. SATRA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered April 4, 2018. The order, among other things, granted that part of defendant's motion seeking summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action alleging, inter alia, that defendant interfered with its contract to provide transportation services to nonparty Brighton Central School District (Brighton) by forwarding to Brighton an email originally sent from plaintiff's consultant to defendant. Plaintiff appeals from an order that, inter alia, granted that part of defendant's motion for summary judgment dismissing the complaint. We affirm.

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). We conclude that defendant established entitlement to judgment as a matter of law by submitting the affidavit of its owner stating that, in forwarding the email, defendant did not intend to induce a breach of the contract but instead intended to minimize any harm to defendant's reputation and to encourage Brighton to persuade plaintiff to perform its obligations under the contract (*see id.*; *American Recycling & Mfg. Co., Inc. v Kemp*, 165 AD3d 1604, 1606 [4th Dept 2018]; *Aldridge v Brodman*, 100 AD3d 1537, 1539 [4th Dept 2012]). In opposition, plaintiff failed to tender evidence raising a material question of fact whether defendant intended, by forwarding the email, to induce breach of the contract

(*see Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276, 281-282 [1978]; *American Recycling & Mfg. Co., Inc.*, 165 AD3d at 1606; *Aldridge*, 100 AD3d at 1539).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

576

TP 19-00050

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF MICHAEL HENDERSON, PETITIONER,

V MEMORANDUM AND ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered January 10, 2019) to review two determinations of respondent. The determinations found after two separate tier III hearings that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding with respect to the determination dated January 2, 2018 is unanimously dismissed, and the determination dated January 25, 2018, as modified by an administrative order dated March 6, 2018, is confirmed without costs and the petition with respect to that determination is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul two determinations, following two separate tier III hearings, that he violated certain inmate rules. After petitioner commenced this proceeding, respondent issued an administrative order reversing the first determination, dated January 2, 2018, and directing that all references to the subject disciplinary proceeding be expunged from petitioner's record. We therefore conclude that the proceeding insofar as it relates to the first determination should be dismissed as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1986]).

Contrary to petitioner's contention, the second determination, dated January 25, 2018, which as modified by an administrative order dated March 6, 2018, found that he violated inmate rules 180.11 (7 NYCRR 270.2 [B] [26] [ii] [facility correspondence violation]) and 107.11 (7 NYCRR 270.2 [B] [8] [ii] [harassment]), is supported by substantial evidence (*see Matter of Foster v Coughlin*, 76 NY2d 964,

966 [1990]; *People ex rel. Vega v Smith*, 66 NY2d 130, 139-140 [1985]). 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 Foster*, 76 NY2d at 966; *Matter of Britt v Evans*, 100 AD3d 1408, 1409 [4th Dept 2012]; *Matter of Bramble v Mead*, 242 AD2d 858, 858-859 [4th Dept 1997], *lv denied* 91 NY2d 803 [1997]). Petitioner's remaining contention is not preserved because it was not raised at the tier III hearing (*see Matter of Reeves v Goord*, 248 AD2d 994, 995 [4th Dept 1998], *lv denied* 92 NY2d 804 [1998]). Moreover, petitioner failed to exhaust his administrative remedies with respect to that contention because he failed to raise it in his administrative appeal, " 'and th[is C]ourt has no discretionary [authority] to reach [it]' " (*Britt*, 100 AD3d at 1409).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

577

TP 19-00141

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF CHARLES BRUCATO, PETITIONER,

V MEMORANDUM AND ORDER

STATE UNIVERSITY OF NEW YORK AT BUFFALO,
RESPONDENT.

LIPPES & LIPPES, BUFFALO (JOSHUA R. LIPPES OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Donna M. Siwek, J.], entered January 24, 2019) to review a determination of respondent. The determination found petitioner responsible for violations of respondent's student code of conduct and imposed a 1½ year suspension from the University at Buffalo.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is dismissed, and the preliminary injunction entered January 24, 2019 is vacated.

Memorandum: In this CPLR article 78 proceeding transferred to this Court pursuant to CPLR 7804 (g), petitioner, a student at respondent State University of New York at Buffalo, seeks to annul a determination finding him responsible for violations of respondent's student code of conduct arising from an incident of hazing. Following an administrative hearing and administrative appeal, respondent suspended petitioner for a period of 1½ years and placed a notation on petitioner's transcript.

We reject petitioner's contention that respondent's alleged violations of its own procedural rules during the disciplinary proceeding either denied petitioner "the full panoply of due process guarantees to which he was entitled or rendered the finding of responsibility arbitrary and capricious" (*Matter of Sharma v State Univ. of N.Y. at Buffalo*, 170 AD3d 1565, 1566 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Budd v State Univ. of N.Y. at Geneseo*, 133 AD3d 1341, 1342-1343 [4th Dept 2015], *lv denied* 26 NY3d 919 [2016]; *Matter of Nawaz v State Univ. of N.Y. Univ. at Buffalo School of Dental Medicine*, 295 AD2d 944, 944 [4th Dept

2002]).

Specifically, contrary to petitioner's contention, respondent's written charges against petitioner contained sufficient detail to allow petitioner to prepare a defense, and contained sufficient detail to comply with petitioner's right to due process and respondent's own procedures (*see generally Matter of Schwarzmueller v State Univ. of N.Y. at Potsdam*, 105 AD3d 1117, 1119-1120 [3d Dept 2013]). Likewise, respondent's written determinations following both the administrative hearing and appeal did not violate petitioner's right to due process inasmuch as they contained sufficient detail "to permit [petitioner] to effectively challenge the determination in administrative appeals and in the courts and to ensure that the decision was based on evidence in the record" (*Budd*, 133 AD3d at 1343). Further, the record before us does not support petitioner's contention that the determination of the administrative appeal was based on matters outside of the record.

We also reject petitioner's contention that he was denied the assistance of counsel at his disciplinary hearing in violation of his right to due process and his rights under State Administrative Procedure Act § 501 inasmuch as he was, as authorized by respondent's administrative hearing procedures, assisted by an attorney advisor throughout the disciplinary process, including at the hearing (*see Sharma*, 170 AD3d at 1566-1567).

We reject petitioner's further contention that respondent denied him due process by allegedly failing to provide him certain documents during prehearing discovery. Indeed, "[i]n a disciplinary hearing at a public institution of higher education, due process entitles a student accused of misconduct to a statement detailing the factual findings and the evidence relied upon by the decision-maker in reaching the determination of guilt" (*Budd*, 133 AD3d at 1343), and here the record reflects that petitioner was provided with the documents that were relied on by respondent (*see generally id.*). Contrary to petitioner's further contentions, he was not denied due process by respondent's determination to disallow live witnesses at the administrative hearing (*see id.* at 1343-1344; *see also Matter of Jacobson v Blaise*, 157 AD3d 1072, 1076 [3d Dept 2018]), and respondent complied with its own policies by allowing petitioner to submit a written statement from his own witness. The deadlines imposed by respondent regarding petitioner's submission of evidence in support of his defense did not violate respondent's own procedures and, contrary to petitioner's contention, did not deny his right to due process (*see generally Sharma*, 170 AD3d at 1566).

Petitioner failed to preserve his contention that he should have been supplied with a transcript or recording of the administrative hearing by failing to raise that issue at a time when it could have been corrected (*see generally Matter of Edmonson v Coombe*, 227 AD2d 975, 975 [4th Dept 1996], *lv denied* 88 NY2d 815 [1996]). Despite previously having requested a transcript or recording, petitioner nevertheless submitted the administrative appeal without mention of or objection to the lack of a transcript or recording. Petitioner failed

to raise his remaining procedural contentions during the administrative proceedings or administrative appeal, and thus they are not properly before us (*see Sharma*, 170 AD3d at 1567; *Matter of Lampert v State Univ. of N.Y. at Albany*, 116 AD3d 1292, 1294 [3d Dept 2014], *lv denied* 23 NY3d 908 [2014]).

We further conclude that, contrary to petitioner's contention, respondent's determination is supported by substantial evidence. The evidence considered by respondent constituted " 'such relevant proof as a reasonable mind may accept as adequate to support [the] conclusion' " that petitioner violated respondent's student code as charged by respondent (*Sharma*, 170 AD3d at 1567, quoting *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). Further, the alleged inconsistencies or conflict in the evidence "presented credibility issues that were within the sole province of respondent to determine," and we perceive no basis to disturb respondent's findings (*Lampert*, 116 AD3d at 1294). Lastly, petitioner's contention that respondent's student code unconstitutionally restricts petitioner's First Amendment freedom of association is not properly raised in this proceeding pursuant to CPLR article 78 (*see generally* CPLR 7803).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

580

KA 15-00161

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHALA WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JOHN R. LEWIS, SLEEPY HOLLOW, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered November 10, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, assault 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 affirmed.

Same memorandum as in *People v Williams* ([appeal No. 2] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

581

KA 18-00728

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHALA WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JOHN R. LEWIS, SLEEPY HOLLOW, FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Stephen J. Dougherty, J.), dated February 28, 2018. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of murder in the second degree, assault in the second degree, and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Onondaga County Court for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]). In appeal No. 2, defendant appeals from an order denying his CPL 440.10 motion to vacate the judgment of conviction on the ground of ineffective assistance of counsel.

Defendant contends in appeal No. 1 that County Court (Fahey, J.) erred in determining, following a *Sirois* hearing, that the People "demonstrate[d] by clear and convincing evidence that [he] engaged in misconduct aimed at least in part at preventing [a] witness from testifying and that those misdeeds were a significant cause of the witness's decision not to testify" (*People v Smart*, 23 NY3d 213, 220 [2014]) and that, consequently, the court erred in permitting the prosecution to elicit testimony concerning hearsay statements attributed to that witness in its direct case (*see generally People v Geraci*, 85 NY2d 359, 365-367 [1995]; *People v Vernon*, 136 AD3d 1276, 1277-1278 [4th Dept 2016], *lv denied* 27 NY3d 1076 [2016]). We reject that contention. The court found that the witness, while testifying at the *Sirois* hearing, appeared "agitated, anxious, uncomfortable and evasive." The court also credited the testimony of a law enforcement

officer that, according to the witness, defendant confronted the witness with a photograph of that witness approximately one week prior to trial and informed him that defendant was aware of the witness's upcoming testimony, and the witness asserted afterward that he would not testify. We further reject defendant's contention that the hearsay statement attributed to the witness at trial regarding defendant's purported admission to him was "so devoid of reliability as to offend due process" (*People v Cotto*, 92 NY2d 68, 78 [1998]).

Contrary to defendant's additional contention, he is not entitled to a new trial based on an alleged *Rosario* violation. Defendant failed to identify the "written or recorded statement" that the People allegedly withheld (CPL 240.45 [1] [a]), and his speculation that law enforcement notes of a specific witness interview may exist is improperly raised for the first time in his reply brief (*see generally People v Smith*, 147 AD3d 1527, 1529 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017]).

With respect to appeal No. 2, however, we agree with defendant that the court (Dougherty, J.) erred in denying his CPL 440.10 motion without a hearing. The issue whether counsel failed to file an alibi notice or adequately investigate and utilize potentially exculpatory witnesses involves matters outside the record on direct appeal (*see People v Conway*, 118 AD3d 1290, 1291 [4th Dept 2014]; *see also People v Blocker*, 132 AD3d 1287, 1287-1288 [4th Dept 2015], *lv denied* 27 NY3d 992 [2016]). Thus, the court was not required to deny the motion pursuant to CPL 440.10 (2) (b). Contrary to the court's further conclusion, defendant's ineffective assistance claim is not based upon " 'facts that should have been placed on the record during trial [proceedings]' " (*People v Culver*, 69 AD3d 976, 979 [3d Dept 2010]; *see* CPL 440.10 [3] [a]). Thus, inasmuch as we agree with defendant that his submissions raise a factual issue whether he was denied effective assistance of counsel, we remit the matter for a hearing.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

582

KA 17-00968

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD BAEZ, DEFENDANT-APPELLANT.

PAUL B. WATKINS, FAIRPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Thomas R. Morse, A.J.), rendered September 29, 2016. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault (two counts), predatory sexual assault against a child (two counts), rape in the first degree, rape in the third degree, criminal sexual act in the third degree and sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of rape in the first degree and dismissing count one 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, rape in the first degree (Penal Law § 130.35 [1]), and two counts each of predatory sexual assault against a child (§ 130.96) and predatory sexual assault (§ 130.95 [2]). We reject defendant's contention that he was subjected to custodial interrogation by Rochester police investigators who did not provide *Miranda* warnings and that County Court (Ciaccio, J.) therefore erred in refusing to suppress the statements that he made to them. "In determining whether a defendant was in custody for *Miranda* purposes, '[t]he test is not what the defendant thought, but rather what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position' " (*People v Kelley*, 91 AD3d 1318, 1318 [4th Dept 2012], *lv denied* 19 NY3d 963 [2012], quoting *People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]; *see People v Thomas*, 166 AD3d 1499, 1500 [4th Dept 2018], *lv denied* 32 NY3d 1178 [2019]). Here, upon review of the relevant factors (*see People v Lunderman*, 19 AD3d 1067, 1068-1069 [4th Dept 2005], *lv denied* 5 NY3d 830 [2005]) and giving due deference to the hearing court's credibility determinations (*see People v Clark*, 136 AD3d 1367, 1368 [4th Dept 2016], *lv denied* 27 NY3d 1130 [2016]), we conclude that "the evidence at the *Huntley* hearing establishes that

defendant was not in custody when he made the statements, and thus *Miranda* warnings were not required" (*People v Bell-Scott*, 162 AD3d 1558, 1559 [4th Dept 2018], *lv denied* 32 NY3d 1169 [2019]; *see People v Rounds*, 124 AD3d 1351, 1352 [4th Dept 2015], *lv denied* 25 NY3d 1077 [2015]). Specifically, the evidence establishes, inter alia, that defendant was told at the start of the interview that he was not under arrest and would be going home that day (*see Bell-Scott*, 162 AD3d at 1559; *People v Cordato*, 85 AD3d 1304, 1309 [3d Dept 2011], *lv denied* 17 NY3d 815 [2011]), and the recording of the interview belies defendant's contention that he was in handcuffs when he was placed in the interview room. Defendant concedes that he indeed was not arrested at the time of the interview, and that he was given a ride home later that day. We reject defendant's contention that, because a police officer testified that defendant was not free to leave during transport to the police station, the court erred in concluding that defendant was not in custody. A police officer's subjective belief " 'has no bearing on the question whether a suspect was in custody at a particular time . . . [and] the subjective intent of the officer . . . is irrelevant' where, as here, there is no evidence that such subjective intent was communicated to the defendant" (*Thomas*, 166 AD3d at 1500). Contrary to defendant's further contention, *Miranda* warnings were not required before the investigators asked pointed questions. It is well settled that "both the elements of police 'custody' and police 'interrogation' must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by *Miranda*" (*People v Huffman*, 41 NY2d 29, 33 [1976]; *see People v Anthony*, 85 AD3d 1634, 1635 [4th Dept 2011], *lv denied* 17 NY3d 813 [2011]), and the element of custody was absent here. We have considered defendant's remaining contentions with respect to the statements that he gave to the police, and we conclude that they lack merit.

We also reject defendant's contention that reversal is required based on the actions of the trial court (Morse, A.J.) with respect to the expert who testified for the People regarding the child sexual abuse accommodation syndrome (CSAAS). Assuming, arguendo, that defense counsel signed and filed a motion seeking an adjournment of the trial due to the untimely nature of the People's notice of intent to offer that expert testimony, we note that defense counsel "did nothing to call the court's attention to its failure to rule on such application[], and thus he abandoned the issue" (*People v Ramos*, 35 AD3d 247, 247 [1st Dept 2006], *lv denied* 8 NY3d 926 [2007]; *see People v Green*, 19 AD3d 1075, 1075 [4th Dept 2005], *lv denied* 5 NY3d 828 [2005]; *see also People v Graves*, 85 NY2d 1024, 1027 [1995]). Defendant's challenge to the court's instructions to the jury during that witness's testimony is not preserved for our review inasmuch as the court "provided [] curative instruction[s] that, in the absence of an objection or a motion for a mistrial, 'must be deemed to have corrected the error to the defendant's satisfaction' " (*People v Szatanek*, 169 AD3d 1448, 1449 [4th Dept 2019], *lv denied* 33 NY3d 981 [2019], quoting *People v Heide*, 84 NY2d 943, 944 [1994]; *see People v Marvin*, 162 AD3d 1744, 1745 [4th Dept 2018], *lv denied* 32 NY3d 1066 [2018]). Defendant also failed to preserve his contention that the court erred in curtailing defense counsel's questioning of that

witness. Although the court sustained the prosecutor's objection to one of defense counsel's questions of that witness and provided an immediate and thorough instruction to the jury, it then informed defense counsel that it was "not saying you can't ask the exact same question again." The issue was abandoned by defendant's failure to pursue the line of questioning (*see generally Graves*, 85 NY2d at 1027; *People v Carrasquillo*, 85 AD3d 1618, 1619 [4th Dept 2011], *lv denied* 17 NY3d 814 [2011]). We further conclude that defendant failed to preserve for our review his contention that the court interfered unnecessarily during the questioning of certain witnesses, thereby depriving him of a fair trial (*see People v Paulk*, 107 AD3d 1413, 1415 [4th Dept 2013], *lv denied* 21 NY3d 1076 [2013], *reconsideration denied* 22 NY3d 1157 [2014]; *People v Zeito*, 302 AD2d 923, 924 [4th Dept 2003], *lv denied* 99 NY2d 634 [2003]). Contrary to defendant's contention, his CPL 330.30 motion did not preserve his contentions for our review (*see generally People v Malave*, 52 AD3d 1313, 1314 [4th Dept 2008], *lv denied* 11 NY3d 790 [2008]), and 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]).

Defendant further contends that the rape in the first degree count should be dismissed because it is an inclusory concurrent count of the predatory sexual assault counts. The People correctly concede that rape in the first degree is an inclusory concurrent count of predatory sexual assault, and thus that part of the judgment convicting defendant of rape in the first degree must be reversed and count one of the indictment dismissed (*see People v Russell*, 71 AD3d 1589, 1590 [4th Dept 2010], *lv denied* 15 NY3d 756 [2010]). We therefore modify the judgment accordingly. Contrary to defendant's additional contention, however, that dismissal does not require dismissal of the predatory sexual assault against a child counts. Penal Law § 130.96 requires that the defendant commit the crime of rape in the first degree, not that he or she be convicted of it, and thus a defendant may be convicted of predatory sexual assault against a child regardless of whether he or she is convicted of the underlying offense (*see e.g. People v Lawrence*, 81 AD3d 1326, 1326 [4th Dept 2011], *lv denied* 17 NY3d 1326 [2011]).

Defendant also failed to preserve his contention that the court failed to respond properly to a jury note requesting further instructions on the first three counts of the indictment, because the court did not read the instructions on the lesser included offenses regarding those counts. In any event, there is no error "in denying a[n] instruction on [a lesser included offense] in the supplemental charge to the jury inasmuch as the jury did not ask for reinstruction on that issue but only on the elements of the crime[s] charged" (*People v Allen*, 69 NY2d 915, 916 [1987]).

Contrary to defendant's contention, he was not deprived of effective assistance of counsel by defense counsel's failure to again seek an instruction on any lesser included offenses when the court reinstructed the jurors on the elements of the first three counts. With respect to a claim of ineffective assistance of counsel, "it is

incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Benevento*, 91 NY2d 708, 712 [1998]). The determination whether to seek a jury charge on a lesser included offense is a quintessentially tactical determination (*see generally People v Tineo-Santos*, 160 AD3d 465, 466-467 [1st Dept 2018], *lv denied* 31 NY3d 1088 [2018]), and defendant failed to show the absence of a strategic basis for defense counsel's choice not to again demand an instruction regarding the lesser charges (*see People v Collins*, 167 AD3d 1493, 1498 [4th Dept 2018], *lv denied* 32 NY3d 1202 [2019]; *People v Trotman*, 154 AD3d 1332, 1333 [4th Dept 2017], *lv denied* 30 NY3d 1109 [2018]). We also reject defendant's contention that he was otherwise denied effective assistance of counsel. Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, including defendant's acquittal on numerous counts in the indictment, we conclude that defendant received meaningful representation (*see generally People v Flores*, 84 NY2d 184, 186-187 [1994]; *People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant failed to preserve for our review his contention that his conviction of rape in the first degree is not supported by legally sufficient evidence with respect to the element of forcible compulsion (*see* Penal Law § 130.35 [1]; *People v Hryckewicz*, 221 AD2d 990, 990 [4th Dept 1995], *lv denied* 88 NY2d 849 [1996]), inasmuch as defendant failed to set forth that specific ground in his general motion for a trial order of dismissal (*see generally People v Gray*, 86 NY2d 10, 19 [1995]). In any event, we reject defendant's contention (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Defendant's contentions are based on the credibility of the two victims, and we conclude that the "[i]ssues of credibility . . . , including the weight to be given the backgrounds of the People's witnesses and inconsistencies in their testimony, were properly considered by the jury and there is no basis for disturbing its determinations" (*People v Garrick*, 11 AD3d 395, 396 [1st Dept 2004], *lv denied* 4 NY3d 744 [2004], *reconsideration denied* 4 NY3d 798 [2005]).

Defendant further contends that the court erred in relying on materially untrue information in imposing sentence, i.e., an incorrect statement of the age of one victim and a misstatement of the charges in the presentence report. With respect to the court's statement that one victim was several months younger than her actual age at the time of one offense, defendant failed to establish that the discrepancy, which was no more than a few months and had no statutory impact on the sentence, was material. Defendant therefore failed to establish that he was "sentenced on the basis of materially untrue assumptions or misinformation" (*People v Naranjo*, 89 NY2d 1047, 1049 [1997] [internal quotation marks omitted]). Furthermore, even assuming, arguendo, that

the presentence report contained " 'materially untrue' facts or misinformation" (*People v Hansen*, 99 NY2d 339, 345 [2003]), we conclude that the record, including the court's statements during resentencing when it reimposed the same sentence after discovering an error regarding postrelease supervision, establishes that the sentence was not based upon that misinformation.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

585

KA 19-00136

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JAMES BALL, DEFENDANT-RESPONDENT.

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

MICHAEL SPANO, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Onondaga County Court (Thomas J. Miller, J.), dated July 10, 2018. The order granted defendant's motion to dismiss the indictment.

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

Memorandum: This appeal arises from an incident during which defendant shot and killed his brother-in-law (decedent). During the People's grand jury presentation, defendant's wife testified regarding the events leading up to the decedent's death. According to that testimony, on the night of the incident, defendant's wife had been sleeping in the home that she shared with defendant when she awoke to noise coming from the basement. Upon entering the basement, she observed defendant holding his ear and heard him say that the decedent had attacked him. Defendant's wife told the decedent to sleep on a couch, and she and defendant went upstairs to their bedroom. There, defendant again stated that the decedent had attacked him, and he also said that the decedent had damaged the basement. Defendant and his wife then went back downstairs, where the decedent attacked defendant, placed him in a headlock, and threatened to kill him. Defendant's wife told the decedent to stop, asking him to "do it for your niece," at which point the decedent relented.

Defendant's wife then escorted the decedent out of the home and into the front yard, urging him to get into her car. During that time, defendant went upstairs inside the home and retrieved a firearm. Meanwhile, the decedent, despite being instructed by defendant's wife not to do so, stepped around her and walked back toward defendant's home. Defendant's wife then heard several gunshots and saw the decedent lying across the threshold of the home.

During a recess in the grand jury proceeding, defendant asked the People to deliver to the grand jury foreperson a letter requesting,

among other things, that the grand jurors be charged with respect to the justifiable use of physical force in defense of a person pursuant to Penal Law § 35.15 and the justifiable use of physical force in defense of premises and in defense of a person in the course of a burglary pursuant to § 35.20 (3). The People did not deliver the letter to the foreperson.

The People instructed the grand jury on the law with respect to murder in the second degree (Penal Law § 125.25 [1]), manslaughter in the first degree (§ 125.20 [1]), and the justification defense pursuant to Penal Law § 35.15; however, the People did not instruct the grand jury with respect to the justification defense pursuant to § 35.20 (3). The grand jury returned an indictment charging defendant with both murder in the second degree and manslaughter in the first degree.

Defendant subsequently moved to dismiss the indictment on the ground that, inter alia, the grand jury proceeding was defective because the People failed to deliver the letter to the foreperson and thereafter failed to instruct the grand jury on the justification defense pursuant to Penal Law § 35.20 (3), as requested in the letter. County Court agreed with defendant on, inter alia, that ground and issued an order dismissing the indictment. The People now appeal from that order and request that we reverse the order and reinstate the indictment.

Contrary to the People's contention, however, we conclude that the court properly dismissed the indictment based on the People's failure to instruct the grand jury on the justification defense pursuant to Penal Law § 35.20 (3), as requested in the letter. A court may dismiss an indictment on the ground that a grand jury proceeding is defective where, inter alia, the proceeding is so irregular "that the integrity thereof is impaired and prejudice to the defendant may result" (CPL 210.35 [5]; *see* CPL 210.20 [1] [c]). With respect to grand jury instructions, CPL 190.25 (6) provides, as relevant here, that, "[w]here necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it." "If the prosecutor fails to instruct the grand jury on a defense that would eliminate a needless or unfounded prosecution, the proceeding is defective, mandating dismissal of the indictment" (*People v Graham*, 148 AD3d 1517, 1519 [4th Dept 2017]; *see People v Valles*, 62 NY2d 36, 38-39 [1984]). Under the circumstances of this case, we conclude that an instruction regarding the justification defense pursuant to Penal Law § 35.20 (3) was warranted, and the prosecutor's failure to provide that instruction impaired the integrity of the grand jury proceeding (*see* CPL 210.35 [5]). Furthermore, we conclude that the error was not cured by the instruction regarding the justification defense under Penal Law § 35.15 (*see generally People v Deis*, 97 NY2d 717, 719-720 [2002]). We therefore affirm the court's order dismissing the indictment.

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

All concur except NEMOYER and CURRAN, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent, and vote to reverse the order and reinstate the indictment, because we disagree with the majority's conclusion that the People should have instructed the grand jury with respect to the justifiable use of physical force in defense of premises and in defense of a person in the course of a burglary pursuant to Penal Law § 35.20 (3).

A court may dismiss an indictment where the grand jury proceeding is defective (*see* CPL 210.20 [1] [c]), i.e., where the proceeding is so irregular "that the integrity thereof [was] impaired and prejudice to the defendant may [have] result[ed]" (CPL 210.35 [5]). Further, "[d]ismissal of [the] indictment[] under CPL 210.35 (5) should . . . be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice[d] the ultimate decision reached by the [g]rand [j]ury. The likelihood of prejudice turns on the particular facts of each case, including the weight and nature of the admissible proof adduced to support the indictment and the degree of inappropriate prosecutorial influence or bias" (*People v Huston*, 88 NY2d 400, 409 [1996]).

We agree with the People that the evidence adduced before the grand jury did not support an instruction for justification in defense of premises under Penal Law § 35.20 (3) (*see People v Mitchell*, 82 NY2d 509, 514 [1993]; *People v Almeida*, 128 AD3d 1451, 1451 [4th Dept 2015], *lv denied* 26 NY3d 1006 [2015]; *People v Mills*, 291 AD2d 844, 844 [4th Dept 2002], *lv denied* 98 NY2d 678 [2002], *reconsideration denied* 99 NY2d 538 [2002]). In reaching that conclusion, we are mindful that, "[g]iven th[e] functional difference between the two bodies, it would be unsound to measure the adequacy of the legal instructions given to the [g]rand [j]ury by the same standards that are utilized in assessing a trial court's instructions to a petit jury" (*People v Calbud, Inc.*, 49 NY2d 389, 394 [1980]).

It follows that "a [g]rand [j]ury need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law" (*id.*). Rather, "it [is] sufficient if the District Attorney provides the [g]rand [j]ury with enough information to enable it intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime" (*id.* at 394-395). "This does not mean, however, that the [g]rand [j]ury must be charged with *every potential defense* suggested by the evidence" (*People v Valles*, 62 NY2d 36, 38 [1984] [emphasis added]). Indeed, the Court of Appeals has eschewed a bright-line rule requiring that the grand jury be instructed on *all* "exculpatory" defenses, rather than merely "mitigating" ones, explaining that "*Valles* does not require that every complete defense suggested by the evidence be charged to the [g]rand [j]ury" (*People v Lancaster*, 69 NY2d 20, 27 [1986]). Instead, " 'whether a particular defense need be charged depends upon its potential for eliminating a needless or unfounded prosecution' " (*id.*; *see Mitchell*, 82 NY2d at 514; *People v Angona*, 119 AD3d 1406, 1407 [4th Dept 2014], *lv denied* 25 NY3d 987 [2015]).

We discern no potential for prejudice to defendant in the People's failure to instruct the grand jury on justification in defense of premises because the grand jury rejected the instruction that was given regarding justification in defense of a person pursuant to Penal Law § 35.15 (1) and (2) (*see generally People v Waddell*, 78 AD3d 1325, 1327 [3d Dept 2010], *lv denied* 16 NY3d 837 [2011]; *People v Mujahid*, 45 AD3d 1184, 1186 [3d Dept 2007], *lv denied* 10 NY3d 814 [2008]). We disagree with the majority that the operative facts adduced at the grand jury proceeding, if believed, would have resulted in a finding of no criminal liability based on a defense-of-premises charge. Any reasonable fear that defendant would have had with respect to whether the decedent was going to burglarize his home was the same fear that he would have felt with respect to whether decedent was going to harm his person. Based on the operative facts, we highly doubt that, in the moments leading up to decedent's death, defendant was concerned with defending his *home* from burglary by a family member who would otherwise be presumed to have permission to enter the home.

Under the unique circumstances of this case (*see Huston*, 88 NY2d at 409), therefore, we discern no basis upon which the grand jury would have credited the theory of defense of premises where it had already rejected the defense-of-a-person theory. Thus, absent evidence of "prosecutorial wrongdoing, fraudulent conduct or [prejudicial] error[]" (*id.*), we cannot conclude that defendant met the "very precise and very high" statutory test to show that the grand jury proceeding was impaired by the People's failure to include an instruction for justification in defense of premises (*People v Darby*, 75 NY2d 449, 455 [1990]).

Finally, we note our concern that the majority's approach creates a new and burdensome precedent that injects the courts too deeply into the grand jury process, effectively requiring the People to always charge every complete defense that is potentially plausible, irrespective of the People's view of the evidence, which vitiates their "wide discretion in presenting their case to the [g]rand [j]ury" (*Lancaster*, 69 NY2d at 25). We decline to engage in that endeavor.

Mark W. Bennett

Entered: August 22, 2019

Clerk of the Court

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

588

CA 19-00122

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

PETER MITCHELL AND PARKER'S GRILLE, INC.,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF GENEVA AND CITY OF GENEVA INDUSTRIAL
DEVELOPMENT AGENCY, DEFENDANTS-RESPONDENTS.

PETER J. CRAIG & ASSOCIATES, P.C., PITTSFORD (PETER J. CRAIG OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (AARON FRAZIER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a final order and judgment (one paper) of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered June 26, 2018. The final order and judgment, inter alia, granted the motion of defendants to dismiss the complaint.

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

Memorandum: Plaintiff Peter Mitchell operates plaintiff Parker's Grille, Inc. (Parker's Grille), a restaurant in Geneva, New York. This action arises from defendants' grant of public funds to the owner of a nearby building for the purposes of refurbishing the building and opening a restaurant in it. In their complaint, plaintiffs alleged that defendants' support of the competing business caused them lost profits and diminished the value of Parker's Grille, and they asserted causes of action for de facto appropriation/inverse condemnation, misrepresentation, and tortious interference with business relations. Defendants moved to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7) or, in the alternative, to convert the motion to one for summary judgment dismissing the complaint pursuant to CPLR 3212. Plaintiffs opposed the motion and cross-moved for leave to amend the complaint. Supreme Court denied plaintiffs' cross motion for leave to amend the complaint, granted defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) and, in the alternative, granted defendants summary judgment dismissing the complaint pursuant to CPLR 3212. We affirm.

Contrary to plaintiffs' contention, the complaint fails to state a cause of action for de facto appropriation or inverse condemnation because it does not allege a physical invasion or restraint on the use

of plaintiffs' property (*see City of Buffalo v Clement Co.*, 28 NY2d 241, 253 [1971], *rearg denied* 29 NY2d 640 [1971]; *Fisher v City of Syracuse*, 46 AD2d 216, 217 [4th Dept 1974], *lv denied* 36 NY2d 642 [1975], *cert denied* 423 US 833 [1975]; *cf. Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 783-786 [2012], *rearg denied* 19 NY3d 937 [2012]).

Plaintiffs likewise failed to state a cause of action for misrepresentation. As limited by their brief on appeal, plaintiffs contend that they stated a claim for negligent misrepresentation. The complaint alleges conduct arising from defendants' use and designation of public funds and thus concerns the governmental, rather than proprietary, function of defendants (*see generally Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]). "In a negligence-based claim against a municipality, a plaintiff must allege that a special duty existed between the municipality and the plaintiff" (*Kirchner v County of Niagara*, 107 AD3d 1620, 1623 [4th Dept 2013]). There are three ways in which a special duty may be formed: "(1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition" (*Applewhite*, 21 NY3d at 426; *see McLean v City of New York*, 12 NY3d 194, 199 [2009]). Here, plaintiffs' complaint fails to allege the existence of any special duty, and therefore their cause of action for negligent misrepresentation was properly dismissed (*see Spring v County of Monroe*, 151 AD3d 1694, 1696 [4th Dept 2017]).

Plaintiffs likewise failed to state a cause of action for tortious interference with business relations, misdescribed in the complaint as tortious interference with business operations, because plaintiffs failed to allege that defendants acted " 'with the sole purpose of harming the plaintiff[s] or by using unlawful means' " (*Zetes v Stephens*, 108 AD3d 1014, 1020 [4th Dept 2013]; *see also Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]). Moreover, plaintiffs failed to allege that defendants' allegedly tortious conduct was directed "at the party with which the plaintiff[s] ha[ve] or seek[] to have a relationship" (*Carvel Corp.*, 3 NY3d at 192).

The court also properly denied plaintiffs' cross motion seeking leave to amend the complaint to allege a special duty and to correct the misdescribed tortious interference cause of action. Plaintiffs' proposed amendment with respect to a special duty does not adequately allege the existence of such a duty, as required for the misrepresentation claim, and neither proposed amendment states a cause of action (*see generally Matter of DeCarr v Zoning Bd. of Appeals for Town of Verona*, 154 AD3d 1311, 1314 [4th Dept 2017]; *Pink v Ricci*, 100 AD3d 1446, 1448-1449 [4th Dept 2012]; *J.K. Tobin Constr. Co., Inc. v David J. Hardy Constr. Co., Inc.*, 64 AD3d 1206, 1209 [4th Dept 2009]).

In light of our determination that the court properly dismissed plaintiffs' complaint pursuant to CPLR 3211 (a) (7), we do not address whether the court properly converted the motion to dismiss into a motion for summary judgment pursuant to CPLR 3211 (c) or whether the

court properly granted summary judgment pursuant to CPLR 3212.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

589

CA 18-01336

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF ARBITRATION BETWEEN
JOHN BENDER, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

LANCASTER CENTRAL SCHOOL DISTRICT,
RESPONDENT-APPELLANT.

HARRIS BEACH PLLC, BUFFALO (VICTORIA A. GRAFFEO OF COUNSEL), FOR RESPONDENT-APPELLANT.

PERSONIUS MELBER LLP, BUFFALO (BRIAN M. MELBER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Dennis Ward, J.), entered June 7, 2018 in a proceeding pursuant to CPLR article 75. The judgment, insofar as appealed from, vacated in part an arbitration award.

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

Memorandum: Petitioner, a tenured assistant principal employed by respondent at Lancaster Middle School (school), commenced this proceeding under Education Law § 3020-a (5) and CPLR 7511 challenging his termination following a disciplinary hearing before a hearing officer and seeking to vacate the arbitration award. Thereafter, respondent cross-moved to, inter alia, confirm the arbitration award. Supreme Court, in effect, granted in part the petition, denied in part the cross motion, vacated certain charges and specifications and certain factual findings of the Hearing Officer and found the penalty to be shocking to the conscience. Respondent appeals from the judgment to that extent, and we reverse the judgment insofar as appealed from.

The following events gave rise to this appeal. On June 10, 2015, petitioner was scheduled to host an award ceremony but he arrived at the school admittedly under the influence of alcohol. Petitioner disregarded the instructions of his principal, left the school in his car, and was thereafter arrested for driving while intoxicated. His arrest was reported in the local media and was discussed by parents and students on social media. Because he had been a well-regarded

teacher and administrator, respondent did not initiate termination proceedings, but instead offered petitioner a last chance agreement, which petitioner executed. The last chance agreement required petitioner to satisfy various counseling and reporting requirements and also provided that if, in the future, petitioner tested positive for alcohol on school grounds or was convicted of an alcohol-related offense, he would be terminated without a hearing under Education Law § 3020-a, which petitioner agreed to prospectively waive under those circumstances.

On September 11, 2015, faculty and staff reported that petitioner appeared to be intoxicated at a school dance at which he was the administrator in charge. Respondent took no disciplinary action then because it was unable to verify those suspicions by administering a blood alcohol test on petitioner. On October 2, 2015, petitioner was arrested for driving while intoxicated after he refused a breathalyzer test. At that time, petitioner also attempted to improperly dissuade the police officer from arresting him by asking the arresting officer if he could make the incident go away by "dropp[ing] some names." That arrest was again the subject of media attention.

Because the last chance agreement provided for petitioner's immediate termination without a hearing only if he tested positive for alcohol or was convicted of an alcohol-related offense, respondent initiated disciplinary proceedings under Education Law § 3020-a. Respondent asserted seven charges against petitioner that were based upon petitioner's failure to comply with the last chance agreement, his violation of school policies by keeping empty alcohol bottles in his desk at school, his intoxicated appearance on September 11, 2015 at the school dance, and his October 2, 2015 arrest. After a three-day disciplinary hearing, the Hearing Officer sustained all seven charges and accepted respondent's recommendation that petitioner be terminated.

In vacating the arbitration award in part, the court determined that the parties "mutually rescinded" the last chance agreement when they proceeded to arbitration, thus rendering that agreement void. The court also determined that respondent elected its remedy by proceeding to arbitration, thereby foregoing any prospective disciplinary action against petitioner under the last chance agreement. The court therefore vacated charge one and specifications two, three and four of charge two, which were based on petitioner's violations of the last chance agreement (LCA findings). The court also vacated charge five, specification five of charge two and certain findings regarding petitioner's actions on June 10, 2015 as being unsupported by the evidence or based on uncharged conduct (conduct findings). Finally, the court found that the Hearing Officer's recommendation of termination was shockingly disproportionate to petitioner's misconduct inasmuch as that misconduct did not occur on school grounds. Thus, the court remitted the matter to a different hearing officer to conduct a hearing on the appropriate sanction for the charges sustained.

We agree with respondent that, contrary to the court's determination, there is no evidence in the record that, by proceeding to arbitration, the parties intended to cancel or mutually rescind the last chance agreement (*see generally Dolansky v Frisillo*, 92 AD3d 1286, 1287 [4th Dept 2012]; *Strychalski v Mekus*, 54 AD2d 1068, 1068 [4th Dept 1976]). Indeed, at the disciplinary hearing, both parties agreed that the last chance agreement remained valid and enforceable.

We also agree with respondent that the court erred in its determination that the last chance agreement was rendered unenforceable under the election of remedies doctrine inasmuch as that doctrine has no application to the last chance agreement or to the facts of this case (*cf. Simon v Boyer*, 51 AD2d 879, 880 [4th Dept 1976], *affd* 41 NY2d 822 [1977]; *Lewyt-Patchogue Co. v Cantor*, 82 AD2d 911, 912 [2d Dept 1981]). If it was the intent of the parties to preclude respondent from seeking a penalty for petitioner's failure to comply with the last chance agreement if respondent "employed the procedures set forth by [Education Law § 3020-a], it was incumbent upon them to have specifically so stated" in the agreement (*Matter of Phillips v York*, 135 AD3d 1231, 1232 [3d Dept 2016] [internal quotation marks omitted]). The plain language of the last chance agreement provided that petitioner would forego his right to a disciplinary hearing if he tested positive for alcohol while on school property or was convicted of an alcohol-related offense. However, nothing in the unambiguous language of that agreement indicated that respondent was limited to disciplining petitioner under the last chance agreement for future misconduct or that respondent could not initiate a disciplinary hearing with respect to petitioner's violations of the last chance agreement itself (*see generally Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 559-560 [2014]). Thus, we conclude that the court erred in vacating the LCA findings, and in denying the cross motion insofar as it sought to confirm those findings.

As respondent correctly contends, the court also erred in vacating the Hearing Officer's conduct findings and in denying the cross motion with respect thereto. Education Law § 3020-a (5) permits judicial review of a hearing officer's decision but expressly provides that "the court's review shall be limited to grounds set forth in" CPLR 7511. "An arbitration award may not be vacated unless it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of Board of Educ. of Arlington Cent. School Dist. v Arlington Teacher's Assn.*, 78 NY2d 33, 37 [1991]; *see Matter of Board of Educ. of Dundee Cent. School Dist. [Coleman]*, 96 AD3d 1536, 1538 [4th Dept 2012]). Where, as here, the parties are "subject to compulsory arbitration, the award must satisfy an additional layer of judicial scrutiny—it 'must have evidentiary support and cannot be arbitrary and capricious' " (*City School Dist. of the City of N.Y. v McGraham*, 17 NY3d 917, 919 [2011], quoting *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]), and "it must be in accord with due process" (*Matter of Powell v New York City Dept. of Educ.*, 144 AD3d 920, 921 [2d Dept 2016]). Here, petitioner failed to

meet his burden to show that the conduct findings were invalid (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 568 [1st Dept 2008]). Indeed, the record establishes that those findings were rational, had evidentiary support, and were not arbitrary and capricious, impermissibly based on uncharged conduct, or otherwise improper (*see Motor Veh. Acc. Indem. Corp.*, 89 NY2d at 223-224; *cf. Matter of Collins v Parishville-Hopkinton Cent. School Dist.*, 256 AD2d 700, 701 [3d Dept 1998]).

Finally, we agree with respondent that the court erred in vacating the penalty and in denying the cross motion with respect thereto. "Unless an irrationality appears or the punishment shocks one's conscience, sanctions imposed by an administrative agency should be upheld" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 241 [1974]). Respondent gave petitioner an opportunity under the last chance agreement to avoid further discipline, but petitioner immediately thereafter squandered that opportunity by committing another serious alcohol-related driving offense. Given the seriousness of petitioner's offenses and his position as a role model for young adults, we cannot conclude that the Hearing Officer's penalty of termination was shocking to the conscience. In vacating the penalty, the court inappropriately substituted its judgment for that of the Hearing Officer (*see generally Matter of Bolt v New York City Dept. of Educ.*, 30 NY3d 1065, 1069-1071 [2018]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

591

CA 19-00098

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF THE ARBITRATION BETWEEN
JEFFERSON COUNTY, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

JEFFERSON COUNTY LOCAL OF THE CIVIL SERVICE
EMPLOYEES ASSOCIATION, INC., RESPONDENT-RESPONDENT.

DAVID J. PAULSEN, COUNTY ATTORNEY, WATERTOWN (JOHN L. SABIK OF COUNSEL), FOR PETITIONER-APPELLANT.

DAREN J. RYLEWICZ, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., ALBANY (JEREMY GINSBURG OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered July 10, 2018 in a proceeding pursuant to CPLR article 75. The order, inter alia, denied the application for a permanent 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 article 75, petitioner appeals from an order that denied its application to permanently stay arbitration and granted the cross motion of respondent, a labor organization that represents employees of petitioner, to compel arbitration. We affirm.

The Court of Appeals recognizes a two-step process for a court to determine when a particular public sector grievance is subject to arbitration (*see Matter of Board of Educ. of Watertown City School Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 137-138 [1999] [*Watertown*]). "We first ask whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance" (*Matter of City of Johnstown [Johnstown Police Benevolent Assn.]*, 99 NY2d 273, 278 [2002] [*Johnstown*]; *see Matter of Onondaga-Cortland-Madison Bd. of Coop. Educ. Servs. [Onondaga-Cortland-Madison BOCES Fedn. of Teachers]*, 136 AD3d 1289, 1290 [4th Dept 2016]). "[W]e then examine the [collective bargaining agreement (CBA)] to determine if the parties have agreed to arbitrate the dispute at issue" (*Johnstown*, 99 NY2d at 278; *see Onondaga-Cortland-Madison Bd. of Coop. Educ. Servs.*, 136 AD3d at 1290).

Here, respondent filed demands for arbitration on behalf of eight of its members, each of whom had filed a grievance claiming that he or she had been required to work an 11:15 a.m. to 7:15 p.m. shift on either January 18 or 25, 2018 in violation of the parties' CBA. Petitioner does not dispute that there is no statutory, constitutional or public policy impediment to arbitration, and therefore our analysis is limited to the second step (*see Matter of County of Herkimer v Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO*, 124 AD3d 1370, 1371 [4th Dept 2015] [*Herkimer*]).

The relevant CBA provides that, "[i]n the event the grievance is not resolved after the final step in the grievance procedure described above, [respondent] or [petitioner] may submit to arbitration in accordance with the procedure listed below within ten (10) days of the close of the Stage Three review." A grievance is defined as "any claimed violation, misinterpretation, or inequitable application of the terms and conditions of this contract." That type of broad arbitration clause encompasses matters where there exists a reasonable relationship between the CBA and the matter to be arbitrated (*see Johnstown*, 99 NY2d at 277 n 2; *Matter of Lewis County [CSEA Local 1000, AFSCME, AFL-CIO, Lewis County Sheriff's Empls. Unit #7250-03, Lewis County Local 825]*, 153 AD3d 1575, 1576-1577 [4th Dept 2017]; *Matter of Cortland County [CSEA, Inc., Local 1000 AFSCME, AFL-CIO]*, 140 AD3d 1344, 1345 [3d Dept 2016]). Here, the CBA includes terms and conditions of employment, including a provision that "[o]ffice hours for [petitioner's o]ffices, other than the Sheriff's Department, Highway Department, selected Buildings Department employees, and the County Home, shall be from 8:00 a.m. to 5:00 p.m. Monday through Friday." Thus, a reasonable relationship exists between the subject matter of the grievances and the general subject matter of the CBA, and the matter is arbitrable (*see Watertown*, 93 NY2d at 143; *Herkimer*, 124 AD3d at 1371).

We reject petitioner's contention that there is no valid agreement to arbitrate because the grievants' claims pertain to a 1995 Memorandum of Agreement (MOA) between the parties and not the CBA. Unlike the cases on which petitioner relies, here the grievants have alleged a violation of the CBA and not the separate MOA (*cf. Matter of Niagara Frontier Transp. Auth.*, 275 AD2d 894, 894 [4th Dept 2000]; *see also Matter of Sherwood [Kirkpatrick]*, 108 AD3d 979, 981 [3d Dept 2013]). Thus, whether there is merit to petitioner's contention that there is no violation of the CBA because the MOA remains enforceable and permits the 11:15 a.m. to 7:15 p.m. shift is an issue for arbitration (*see generally Matter of Alden Cent. Sch. Dist. [Alden Cent. Schs. Administrators' Assn.]*, 115 AD3d 1340, 1340 [4th Dept 2014]).

Contrary to petitioner's further contention, the record does not establish that arbitration is barred by CPLR 7502 (b). That section provides, in relevant part, that "[i]f, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may

assert the limitation as a bar to the arbitration" (CPLR 7502 [b]; *see Matter of Smith Barney, Harris Upham & Co. v Luckie*, 85 NY2d 193, 201-202 [1995], *rearg denied* 85 NY2d 1033 [1995], *cert denied* 516 US 811 [1995]). We reject petitioner's contention that the six-year statute of limitations applicable to a breach of contract action has expired because the claims sought to be arbitrated here accrued in 1995 with the execution of the MOA. Initially, respondent has never asserted that the MOA itself violated the CBA; instead, it disputes only the continued validity of the MOA following the parties' enactment of a new CBA. In addition, petitioner submitted no evidence that the individual grievants had worked a nonconforming shift prior to the January 2018 dates grieved, much less evidence that those grievants were working such shifts more than six years prior to the April 4, 2018 demand for arbitration. Petitioner therefore failed to meet its "initial burden of demonstrating, prima facie, that the time within which to commence the cause of action has expired" (*Collins Bros. Moving Corp. v Pierleoni*, 155 AD3d 601, 603 [2d Dept 2017]).

Finally, contrary to petitioner's contention, the CBA does not contain an express provision requiring strict compliance with the contractual grievance procedures as a condition precedent to arbitration (*cf. Matter of Niagara Frontier Transp. Auth. v Computer Sciences Corp.*, 179 AD2d 1037, 1038 [4th Dept 1992]). Instead, the CBA provides that the arbitrator will consider whether grievance "procedures have not been followed" in determining whether to deny the grievance. Thus, respondent's compliance with the CBA's grievance procedures is a matter for the arbitrator to determine (*see Matter of City School Dist. of City of Poughkeepsie [Poughkeepsie Pub. School Teachers Assn.]*, 35 NY2d 599, 607 [1974]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

594

CA 18-01433

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

THE PEOPLE OF THE STATE OF NEW YORK, BY ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF STATE OF NEW YORK, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

IVYBROOKE EQUITY ENTERPRISES, LLC, RESPONDENT-RESPONDENT.

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

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (DAVID E. GUTOWSKI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 27, 2018. The order and judgment, among other things, vacated an injunction issued May 17, 2017.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying respondent's cross motion in part, reinstating the petition insofar as it sought a permanent injunction, granting the petition to that extent and reinstating the permanent injunction issued May 17, 2017 to the extent that it enjoined and restrained respondent from violating section 71-3 (A) of the West Seneca Fair Housing Code, and as modified the order and judgment is affirmed without costs.

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 63 (12) seeking, inter alia, an injunction prohibiting respondent—a landlord who owns a residential apartment building—from violating West Seneca Fair Housing Code (WSFHC) § 71-3 (A), which prohibits discrimination based on, inter alia, a person's "source of income." Specifically, petitioner alleged that respondent was engaging in impermissible "source of income" discrimination by refusing to accept as rent payment rent subsidies, i.e., vouchers, that were received pursuant to section 8 of the United States Housing Act of 1937 (hereinafter, Section 8) (*see* 42 USC § 1437f). Petitioner appeals from an order and judgment that, insofar as appealed from, granted respondent's cross motion for a summary determination, dismissed the petition, and vacated a permanent injunction compelling respondent to comply with WSFHC § 71-3. As a preliminary matter, we note that Supreme Court failed to set forth its reasons for its

determination, thus making it difficult for this Court to review this case (*see generally McMillian v Burden*, 136 AD3d 1342, 1343 [4th Dept 2016]).

We agree with petitioner that the court erred in granting that part of respondent's cross motion seeking to vacate the permanent injunction insofar as it compelled respondent to comply with WSFHC § 71-3 (A), and we therefore modify the order and judgment accordingly. Under Executive Law § 63 (12), petitioner is invested with "broad authority to investigate 'repeated . . . illegal acts' . . . 'in the carrying on, conducting or transaction of business' " (*Matter of Roemer v Cuomo*, 67 AD3d 1169, 1170 [3d Dept 2009], quoting § 63 [12]; *see People v Greenberg*, 21 NY3d 439, 446 [2013]). In the course of such an investigation, petitioner may "obtain permanent injunctive relief under . . . Executive Law § 63 (12) upon a showing of a reasonable likelihood of a continuing violation based on the totality of the circumstances" (*People v Greenberg*, 27 NY3d 490, 496-497 [2016]).

Here, petitioner's entitlement to an injunction depends on whether the WSFHC's prohibition of source of income discrimination requires landlords to accept Section 8 vouchers. "[W]here the . . . language [of a statute or ordinance] is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976]). "The . . . text [of a statute or ordinance] is the clearest indicator of legislative intent and the courts should construe unambiguous language to give effect to its plain meaning" (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006]; *see Matter of Monroe County Pub. School Dists. v Zyra*, 51 AD3d 125, 130 [4th Dept 2008]).

WSFHC § 71-3 (A) provides that "[i]t shall be unlawful . . . [t]o refuse to sell or rent or refuse to negotiate for the sale or deny a dwelling to any person because of race, color, religion, sex, age, marital status, handicap, national origin, *source of income* or because the person has a child or children" (emphasis added). Remedial legislation such as WSFHC § 71-3 (A) " 'should be liberally construed to carry out the reforms intended and to promote justice' " (*Kimmel v State of New York*, 29 NY3d 386, 396 [2017]). " 'A liberal construction . . . is one [that] is in the interest of those whose rights are to be protected, and if a case is within the beneficial intention of a remedial act it is deemed within the statute [or ordinance], though actually it is not within the letter of the law' " (*Matter of Dewine v State of N.Y. Bd. of Examiners of Sex Offenders*, 89 AD3d 88, 92 [4th Dept 2011], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 321, Comment at 491 [1971 ed]).

We conclude—as respondent correctly concedes—that Section 8 vouchers constitute a "source of income" under WSFHC § 71-3 (A). Such vouchers are plainly a recurrent benefit, measured in terms of money, that constitute financial gain to the recipient. Although the term "source of income" is undefined in the WSFHC, similar ordinances enacted in other local codes have expressly included Section 8

vouchers as a source of income (*see e.g. Tapia v Successful Mgt. Corp.*, 79 AD3d 422, 423 [1st Dept 2010]; *see also* Administrative Code of City of NY §§ 8-102 [25]; 11-243 [k]), which suggests that such vouchers are a "source of income" under the broad language of the WSFHC.

We reject respondent's contention that the WSFHC merely requires consideration of Section 8 vouchers as an income source, and does not also require a landlord to accept such vouchers as a form of payment. Our reading of the WSFHC's prohibition against source of income discrimination is that it includes a prohibition against refusing to accept that form of income as rent payment. In our view, it would be illogical to conclude that a landlord complies with the WSFHC by including the value of a prospective tenant's Section 8 vouchers for purposes of ascertaining whether the tenant satisfies a threshold income level to afford renting the apartment, while concomitantly refusing to accept that income as payment of rent. We are generally mindful not to read ordinances in a manner that would render the ordinance "absurd" (McKinney's Cons Laws of NY, Book 1, Statutes § 145), or that would "lead to objectionable and unreasonable consequences" (*Dewine*, 89 AD3d at 92; *see* McKinney's Cons Laws of NY, Book 1, Statutes §§ 141, 143; *Long v State of New York*, 7 NY3d 269, 273 [2006]). To accept respondent's interpretation would negate the underlying purpose of this remedial ordinance—which, as we noted above, ought to be liberally construed to achieve its legislative purpose (*see Kimmel*, 29 NY3d at 396; *Dewine*, 89 AD3d at 92).

Supporting our interpretation, we note the recent enactment by the New York State Legislature of amendments to the State Human Rights Law prohibiting discrimination based on "lawful source of income" (L 2019, ch 56 [amending, inter alia, Executive Law §§ 292, 296]). That legislation specifically includes Section 8 vouchers as a "lawful source of income" (L 2019, ch 56). We further note that those amendments to the State Human Rights Law do not render this proceeding moot or preempt WSFHC § 71-3 (A) because "[t]he State Human Rights Law was not intended to preempt the field of antidiscrimination legislation" (*Bracker v Cohen*, 204 AD2d 115, 115 [1st Dept 1994]), and nothing in the WSFHC "prohibits what would be permissible under State law []or imposes . . . additional restrictions on rights granted under State law" (*id.* at 116).

To the extent respondent argues that it is improper to read the WSFHC in a way that compels it to participate in the voluntary federal Section 8 program, we note that "[d]espite the voluntary nature of the section 8 program at the federal level, state and local law may properly provide additional protections for recipients of section 8 rent subsidies even if these protections could limit an owner's ability to refuse to participate in the otherwise voluntary program" (*Kosoglyadov v 3130 Brighton Seventh, LLC*, 54 AD3d 822, 824 [2d Dept 2008]; *see also Rosario v Diagonal Realty, LLC*, 8 NY3d 755, 764 n 5 [2007], *cert denied* 552 US 1141 [2008]; 24 CFR 982.53 [d]).

We have considered petitioner's remaining contentions and find that they do not warrant further modification or reversal of the order

and judgment.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

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KA 13-01006

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBBIE C. ELMORE, SR., DEFENDANT-APPELLANT.

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered July 13, 2012. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree (two counts), attempted criminal sexual act in the first degree, criminal sexual act in the second degree (two counts), criminal sexual act in the third degree (two counts), incest in the third degree (two counts) and intimidating a victim or witness in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of attempted criminal sexual act in the first degree (Penal Law §§ 110.00, 130.50 [1]), intimidating a victim or witness in the third degree (§ 215.15), and two counts each of criminal sexual act in the first degree (§ 130.50 [1]), criminal sexual act in the second degree (§ 130.45 [1]), criminal sexual act in the third degree (§ 130.40 [3]), and incest in the third degree (§ 255.25).

We reject defendant’s contention that County Court abused its discretion in its *Molineux* ruling. It is well established that “[e]vidence of a defendant’s prior bad acts may be admissible when it is relevant to a material issue in the case other than defendant’s criminal propensity” (*People v Dorm*, 12 NY3d 16, 19 [2009]). Here, the victim of the charged crimes was defendant’s family member, and testimony from the victim upon redirect examination about uncharged acts of defendant’s prior abuse of other family members was properly admitted in evidence for the purposes of completing the narrative and providing relevant background information of the family dynamic, and was relevant to the element of forcible compulsion with respect to the

charges of criminal sexual act in the first degree (*see People v Washington*, 122 AD3d 1406, 1408 [4th Dept 2014], *lv denied* 25 NY3d 1173 [2015]; *People v Ennis*, 107 AD3d 1617, 1618 [4th Dept 2013], *lv denied* 22 NY3d 1040 [2013], *reconsideration denied* 23 NY3d 1036 [2014]; *People v Higgins*, 12 AD3d 775, 777-778 [3d Dept 2004], *lv denied* 4 NY3d 764 [2005]). Contrary to defendant's contention, the probative value of that evidence was not outweighed by its potential for prejudice (*see generally People v Alvino*, 71 NY2d 233, 242 [1987]) and, moreover, the court's prompt limiting instructions ameliorated any prejudice (*see People v Larkins*, 153 AD3d 1584, 1587 [4th Dept 2017], *lv denied* 30 NY3d 1061 [2017]).

Defendant's contention that the evidence is legally insufficient with respect to his conviction of the counts of criminal sexual act in the first degree and attempted criminal sexual act in the first degree is preserved for our review because, in his motion for a trial order of dismissal, he specifically argued that the People did not meet their burden of establishing the element of forcible compulsion. His sufficiency contention with respect to the remaining counts of which he was convicted, however, is unpreserved because defendant made a general, unspecific motion to dismiss those counts, arguing merely that the People failed to meet their prima facie burden (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Streeter*, 166 AD3d 1509, 1510 [4th Dept 2018], *lv denied* 32 NY3d 1210 [2019]).

With respect to the counts of criminal sexual act in the first degree and attempted criminal sexual act in the first degree, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction. There was ample evidence that, during each of the separate instances at issue, defendant used violence, or threatened to use violence, to get the victim to, or attempt to make her, perform oral sex on him (*see* Penal Law §§ 130.00 [8]; 130.50 [1]). The victim testified that, during one such incident, based on her prior experience living with defendant she feared that defendant would subject her to physical abuse if she did not comply with his demand for oral sex (*see People v Bailey*, 178 AD2d 846, 847 [3d Dept 1991], *lv denied* 79 NY2d 943 [1992]). The victim further testified that, during another such incident, defendant made an implied threat that he would hurt her if she did not comply (*see People v O'Donnell*, 138 AD2d 896, 897 [3d Dept 1988], *lv denied* 72 NY2d 864 [1988]).

Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude " 'that the jury failed to give the evidence the weight it should be accorded' " (*People v Ray*, 159 AD3d 1429, 1430 [4th Dept 2018], *lv denied* 31 NY3d 1086 [2018]; *see generally Bleakley*, 69 NY2d at 495). To the extent that defendant contends that the victim's testimony was not credible, "the jury was

in the best position to assess [her] credibility" (*People v Chelley*, 121 AD3d 1505, 1506 [4th Dept 2014], *lv denied* 24 NY3d 1218 [2015], *reconsideration denied* 25 NY3d 1070 [2015] [internal quotation marks omitted]), and we perceive no reason to reject the jury's credibility determination. Moreover, we "note that [the victim's] testimony was not so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018] [internal quotation marks omitted]).

Although we agree with defendant that certain of the prosecutor's comments during his opening statement and summation were improper—such as, inter alia, his characterization of defendant as a "monster"—we nevertheless conclude that, viewing the opening statement and summation as a whole, those comments "were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Black*, 124 AD3d 1365, 1366 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015] [internal quotation marks omitted]; *see People v Jones*, 114 AD3d 1239, 1241 [4th Dept 2014], *lv denied* 23 NY3d 1038 [2014], *lv denied* 25 NY3d 1166 [2015]). Thus, contrary to defendant's further contention, we also conclude that defense counsel's failure to object to all but one of these comments did not constitute ineffective assistance of counsel (*see Black*, 124 AD3d at 1366; *People v Williams*, 98 AD3d 1279, 1280 [4th Dept 2012], *lv denied* 20 NY3d 1066 [2013]).

We further reject defendant's remaining contentions that he was denied effective assistance of counsel at trial (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). To the extent he contends that defense counsel was ineffective for allegedly not seeking to admit certain evidence about other sexual abuse allegedly suffered by the victim, we conclude that counsel did, in fact, seek to admit that evidence and that the court denied that request.

We also conclude that defense counsel was not ineffective for failing to call an expert witness at trial. Defendant failed to demonstrate the absence of strategic or other legitimate explanations for that alleged deficiency (*see generally People v Howie*, 149 AD3d 1497, 1499-1500 [4th Dept 2017], *lv denied* 29 NY3d 1128 [2017]). The People did not call their own expert to testify at trial, and it is likely that, had defendant sought to introduce expert testimony, it would have opened the door for testimony from the People's expert (*see generally People v Rodriguez*, 159 AD3d 631, 632 [1st Dept 2018], *lv denied* 31 NY3d 1121 [2018]).

Defendant's contention that the court should have conducted a hearing concerning certain purported errors in the presentence report is unpreserved because, despite objecting to several of these errors at sentencing, defendant never specifically requested a hearing (*see Jones*, 114 AD3d at 1242). In any event, that contention is without merit, inasmuch as defendant clearly apprised the court of the complained-of errors in the presentence report, and there is no indication in the record that the court relied on any of these alleged errors in imposing sentence (*see People v McManus*, 150 AD3d 762, 764 [2d Dept 2017], *lv denied* 29 NY3d 1093 [2017]; *People v Gibbons*, 101

AD3d 1615, 1616 [4th Dept 2012]).

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

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

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CAF 18-00372

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

IN THE MATTER OF SHEILA ANN JORDAN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER D. REED, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered January 26, 2018 in a proceeding pursuant to Family Court Act article 4. The order, among other things, committed respondent to jail for a term of six months upon a determination that respondent willfully violated a prior order.

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

Memorandum: Respondent father appeals from an order committing him to jail for six months upon a determination that he willfully violated a prior order to pay child support. We affirm.

Initially, we agree with the father that, although he has completed serving the term of six months in jail, the appeal is not moot because of the "enduring consequences [that] potentially flow from an order adjudicating a party in civil contempt" (*Matter of Bickwid v Deutsch*, 87 NY2d 862, 863 [1995]; *see Matter of Jasco v Alvira*, 107 AD3d 1460, 1460 [4th Dept 2013]; *cf. Matter of McGrath v Healey*, 158 AD3d 1069, 1069-1070 [4th Dept 2018]).

We reject the father's contention that Family Court erred in determining that he willfully failed to comply with the order of support. The "failure to pay support, as ordered, shall constitute prima facie evidence of a willful violation" (Family Ct Act § 454 [3] [a]; *see Matter of Powers v Powers*, 86 NY2d 63, 69 [1995]; *Matter of Mandile v Deshotel*, 136 AD3d 1379, 1379-1380 [4th Dept 2016]), shifting to the father the burden to "offer some competent, credible evidence of his inability to make the required payments" (*Powers*, 86 NY2d at 69-70; *see Mandile*, 136 AD3d at 1380). The father's contention that he failed to make the child support payments because he was not financially able to do so is raised for the first time on appeal and thus is not preserved for appellate review (*see generally Matter of Commissioner of Social Servs. v Turner*, 99 AD3d 1244, 1245

[4th Dept 2012]). In any event, that contention is belied by the father's representations to the court and the Support Magistrate, including that he had "just made a payment today . . . across the street," that he had just "mailed . . . in" a payment, and that he was employed and could pay $150 "today." The father also told the court and Support Magistrate, inter alia, that he was working "under the table" fixing houses and cutting lawns, that he made a support payment of $25 and would make another payment of $25 on the following Monday, that he was working and had "just made a payment" of $50, and that he had $100 "on [him] right now." Thus, the court did not err in determining that the "father failed to satisfy his burden of demonstrating that his failure to pay was not willful" (*Matter of Pitka v Pitka*, 121 AD3d 1521, 1523 [4th Dept 2014]; *see Matter of Grill v Genitrini*, 168 AD3d 731, 732-733 [2d Dept 2019]; *Matter of Brooks v Brooks*, 163 AD3d 554, 556 [2d Dept 2018]).

The father's further contention that the Support Magistrate miscalculated the amount of support that he owed is "improperly raised for the first time on appeal" (*Matter of Davis v Williams*, 133 AD3d 1354, 1355 [4th Dept 2015]; *see Matter of Kasprowicz v Osgood*, 101 AD3d 1760, 1761 [4th Dept 2012], *lv denied* 20 NY3d 863 [2013]; *Turner*, 99 AD3d at 1245).

Finally, we have considered the father's remaining contention and conclude that it is without merit.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

610

CA 18-01950

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

NOWELLE B., INDIVIDUALLY, AND AS PARENT AND NATURAL GUARDIAN OF RYAN D.R., II, AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HAMILTON MEDICAL, INC., ET AL., DEFENDANTS, AND HAMILTON MEDICAL, A.G., DEFENDANT-APPELLANT.

LANDMAN CORSI BALLAINE & FORD, P.C., NEW YORK CITY (JAMES M. WOOLSEY, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered June 28, 2018. The order denied the motion of defendant Hamilton Medical, A.G. to dismiss the complaint against it.

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

Memorandum: Plaintiff commenced this action against several defendants, including Hamilton Medical, A.G. (HMAG) and Hamilton Medical, Inc. (HMI), seeking damages for injuries sustained by her infant son after he suffered from bilateral pneumothoraxes that resulted in a severe brain injury. Plaintiff alleged that the child was on a ventilator, which was defectively designed or improperly manufactured by HMAG, and that the defective ventilator caused the child to suffer the bilateral pneumothoraxes. There is no dispute that HMAG is a Swiss corporation organized and existing under the laws of Switzerland with its principal place of business in Switzerland. HMAG designed and manufactured ventilators, which were sold in the United States by HMI, a wholly-owned subsidiary of HMAG that is organized and based in Nevada. HMAG appeals from an order that denied its motion pursuant to CPLR 3211 (a) (8) to dismiss the complaint against it based on lack of personal jurisdiction. We affirm.

"In determining whether the exercise of personal jurisdiction over a nondomiciliary defendant is proper, a court must assess whether the requirements of New York's long-arm statute have been met and, if so, whether a finding of personal jurisdiction comports with federal due process" (*Williams v Beemiller, Inc.*, 159 AD3d 148, 152 [4th Dept

2018], *affd* — NY3d —, 2019 NY Slip Op 03656 [2019]). "The conferral of jurisdiction under [CPLR 302 (a) (3) (ii)] rests on five elements: First, that defendant committed a tortious act outside the State; second, that the cause of action arises from that act; third, that the act caused injury to a person or property within the State; fourth, that defendant expected or should reasonably have expected the act to have consequences in the State; and fifth, that defendant derived substantial revenue from interstate or international commerce" (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]). Here, HMAG does not explicitly challenge Supreme Court's determination with respect to any of those five elements and, in any event, we conclude that plaintiff made the requisite prima facie showing that HMAG was subject to long-arm jurisdiction pursuant to CPLR 302 (a) (3) (ii) (*see Halas v Dick's Sporting Goods*, 105 AD3d 1411, 1412-1413 [4th Dept 2013]).

Having concluded that HMAG's relationship with New York comes within the terms of CPLR 302 (a) (3) (ii), we must next determine whether the exercise of personal jurisdiction comports with federal due process (*see Williams*, 159 AD3d at 152). "It is well established that the [e]xercise of personal jurisdiction under the long-arm statute must comport with federal constitutional due process requirements . . . First, a defendant must have minimum contacts with the forum state such that the defendant should reasonably anticipate being haled into court there . . . and, second, the maintenance of the suit against the defendant in New York must comport with traditional notions of fair play and substantial justice" (*id*. at 156 [internal quotation marks omitted]). We conclude that HMAG has the requisite minimum contacts with New York (*cf. id.* at 157-158). HMAG was formed in 1983 and HMI was formed a year later in 1984. Since that time, HMI has been the exclusive distributor of HMAG products in the United States. The sale of the ventilator at issue was not an isolated occurrence inasmuch as nine ventilators manufactured by HMAG were sold to the New York hospital that treated plaintiff's infant, and, in New York, HMAG's ventilators grossed sales of $522,000 from 2003 to 2005 and $928,000 from 2012 to 2014. Also of particular importance is the relationship between HMAG and HMI, i.e., HMI has only one shareholder: HMAG. Furthermore, HMAG provided marketing materials to HMI, held annual training for HMI employees, and shared an international website with HMI. The distributorship agreement between HMAG and HMI required that HMI market, sell, install, and service HMAG's products in the United States. HMAG offered a service desk contact that could be used by purchasers and end-users of the ventilators, or by an HMI servicer. End-users were provided with an operator's manual that included, inter alia, contact information for the manufacturer — HMAG. Under these circumstances, inasmuch as HMAG targeted New York consumers through a United States distributor that it owned and with which it shared, inter alia, executive leadership that "rendered it likely that its products would be sold in New York, it is not unreasonable to subject it to suit in [this state] if its allegedly defective merchandise has . . . been the source of injury to [a New York resident]" (*Darrow v Hetronic Deutschland*, 119 AD3d 1142, 1145 [3d Dept 2014] [internal quotation marks omitted]; *see Halas*, 105 AD3d at 1413).

We further conclude that the exercise of personal jurisdiction over HMAG comports with "traditional notions of 'fair play and substantial justice' " (*LaMarca*, 95 NY2d at 217, quoting *Burger King Corp. v Rudzewicz*, 471 US 462, 476 [1985]). Plaintiff is "a New York resident [whose infant] was injured in New York and may be entitled to relief under New York law" (*id.* at 218); it would be "orderly to allow plaintiff to sue all named defendants in New York" (*id.* at 218-219); and "[a] single action would promote the interstate judicial system's shared interests in obtaining the most efficient resolution of the controversy" (*id.* at 219). Thus, we conclude that, "[w]hen a company of [HMAG's] size and scope profits from sales to New Yorkers, it is not at all unfair to render it judicially answerable for its actions in [New York]" (*id.*).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

611

CA 18-02081

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

ALFRED-ALMOND CENTRAL SCHOOL DISTRICT, ET AL.,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

NY44 HEALTH BENEFITS PLAN TRUST, JOHN POPE, DEBORAH PIATEK, SCOTT DECKER, ROB GOTTSCHALL, DONNA WALTERS, JAMES FREGELETTE, MELODY JASON, JUSTIN DEMARTIN, MICHELLE OKAL-FRINK, CANDACE REIMER, AND ERIE 1 BOARD OF COOPERATIVE EDUCATIONAL SERVICES, DEFENDANTS-RESPONDENTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (CHRISTOPHER M. MILITELLO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

NIXON PEABODY LLP, BUFFALO (ERIK A. GOERGEN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NY44 HEALTH BENEFITS PLAN TRUST, JOHN POPE, DEBORAH PIATEK, SCOTT DECKER, ROB GOTTSCHALL, DONNA WALTERS, JAMES FREGELETTE, MELODY JASON, JUSTIN DEMARTIN, MICHELLE OKAL-FRINK, AND CANDACE REIMER.

JACKSON LEWIS, P.C., ALBANY (BENJAMIN F. NEIDL OF COUNSEL), FOR DEFENDANT-RESPONDENT ERIE 1 BOARD OF COOPERATIVE EDUCATIONAL SERVICES.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered October 4, 2018. The order, among other things, granted the motion of defendant Erie 1 Board of Cooperative Educational Services to dismiss the complaint as against it and granted the motion of the remaining defendants to dismiss the second, fourth, fifth, sixth, tenth and eleventh causes of action against them.

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

Memorandum: Plaintiffs, several public school districts and boards of cooperative education services, were members of defendant NY44 Health Benefits Plan Trust (Trust), which is an employee welfare fund created by defendant Erie 1 Board of Cooperative Educational Services (Erie 1 BOCES). The individual defendants are members of the Trust's Board of Trustees (Trustees). Plaintiffs commenced this action seeking, inter alia, damages related to defendants' alleged imposition of inequitable contribution rates for plaintiffs.

Plaintiffs appeal from an order that, inter alia, granted the pre-answer motion of Erie 1 BOCES to dismiss the complaint against it in its entirety; granted the motion of the Trust and the Trustees (collectively, Trust defendants) to dismiss the 2nd, 4th through 6th, 10th and 11th causes of action against them; and denied those parts of plaintiffs' cross motion seeking leave to amend the 2nd, 4th though 6th, and 9th though 11th causes of action and seeking partial summary judgment with respect to the fifth cause of action. We dismiss plaintiffs' appeal with respect to the fifth cause of action as moot and otherwise affirm.

Contrary to plaintiffs' contention, Supreme Court properly granted the Trust defendants' motion insofar as it sought to dismiss the second and fourth causes of action, for breach of fiduciary duty, as duplicative of the causes of action for breach of contract. We conclude that the Trust defendants' fiduciary duty, if it existed at all, arose from the terms of the contract by which plaintiffs became members of the Trust (Trust Agreement), and was not "independent of" or " 'extraneous to' " the contract (*LaBarte v Seneca Resources Corp.*, 285 AD2d 974, 976 [4th Dept 2001]; *see Kaminsky v FSP Inc.*, 5 AD3d 251, 252 [1st Dept 2004]). There are no allegations, "apart from the terms of the contract . . . [that would have] created a relationship of higher trust than would arise from the [contract] alone" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 20 [2005]).

Although plaintiffs contend that the court erred in denying that part of their cross motion for partial summary judgment with respect to the fifth cause of action, we conclude that the appeal from the order insofar as it concerns the fifth cause of action must be dismissed as moot. In the fifth cause of action, plaintiffs sought a declaration that certain provisions of the Trust Agreement violate the term limits rule, which "prohibits one municipal body from contractually binding its successors in areas relating to governance unless specifically authorized by statute or charter provision to do so" (*Matter of Karedes v Collela*, 100 NY2d 45, 50 [2003]). Ten of the plaintiffs already terminated their participation in the Trust. Thus, those 10 plaintiffs are no longer subject to the terms of the Trust Agreement, and therefore the cause of action based on allegations that the Trust Agreement violated the term limits rule with respect to those plaintiffs is moot (*see generally Matter of Bailey v Village of Lyons Bd. of Trustees*, 117 AD3d 1593, 1593 [4th Dept 2014]). Two of the plaintiffs, Delaware-Chenango-Madison-Otsego Board of Cooperative Education Services and Otselic Valley Central School District, gave notice of their intent to withdraw from the Trust in June 2018, and were scheduled to depart from the Trust on June 30, 2019. Thus, there is no violation of the term limits rule with respect to those two plaintiffs because they will no longer be bound by the terms of the Trust. The remaining three plaintiffs–Cooperstown Central School District, Schenevus Central School District, and Otego-Unadilla Central School District–became eligible to give notice of intent to withdraw from the Trust on July 1, 2018. Therefore, those three plaintiffs have the option to serve their notice of withdrawal at any time and to be released from their obligations under the Trust no more

than a year thereafter, and thus the successors of those municipal bodies are not contractually bound to remain in the Trust (*see generally Karedes*, 100 NY2d at 50). As such, the appeal from the order insofar as it concerns the fifth cause of action must be dismissed as moot as plaintiffs' rights are not "actually controverted" by that part of the order (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]; *see Bailey*, 117 AD3d at 1593).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

612

CA 18-01361

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

ONE FLINT ST., LLC AND DHD VENTURES NEW YORK, LLC, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, DEFENDANTS-RESPONDENTS, GENESEE SCRAP & TIN BALING CO., INC., LOUIS ATKIN, 15 FLINT STREET, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (GRETA K. KOLCON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

MCCUSKER, ANSELMI, ROSEN & CARVELLI, P.C., NEW YORK CITY (LAURA A. SICLARI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered February 7, 2018. The order, insofar as appealed from, granted the motions of plaintiffs and defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation for partial summary judgment, determined that defendants Louis Atkin, 15 Flint Street, Inc., and Genesee Scrap & Tin Baling Co., Inc., are strictly liable as dischargers under the Navigation Law and denied the cross motion of said defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motions of plaintiffs and defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation insofar as they sought a determination that defendant Genesee Scrap & Tin Baling Co., Inc. is strictly liable as a discharger under Navigation Law § 181 (1), and granting in part the cross motion of defendants Genesee Scrap & Tin Baling Co., Inc., Louis Atkin, and 15 Flint Street, Inc. and dismissing the second amended complaint and all cross claims against defendant Genesee Scrap & Tin Baling Co., Inc., and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action pursuant to Navigation Law article 12, seeking indemnification or contribution from defendants for the environmental response conducted by plaintiffs

to remediate two parcels of property on Flint Street in the City of Rochester that were part of the former oil refinery operations of a predecessor of Exxon Mobil Corporation and ExxonMobil Oil Corporation (Exxon defendants). In 1992, defendant Louis Atkin inherited both parcels of property and defendant Genesee Scrap & Tin Baling Co., Inc. (Genesee Scrap), a scrap company that operated on Steel Street in Rochester. In 1993, Atkin transferred ownership and title of the property to a corporation that he owned, defendant 15 Flint Street, Inc. (15 Flint), and 15 Flint owned the property until 2007. Defendant Marvin Shelton, doing business as Flint Auto Wreckers (Shelton), occupied and leased the property for 40 years beginning in the mid-1960s. Shelton dismantled cars on the property, resold parts, and sold the scrap metal to Genesee Scrap. Atkin, Genesee Scrap and 15 Flint (collectively, Atkin defendants) appeal from an order that, insofar as appealed from, granted the motions of plaintiffs and the Exxon defendants for partial summary judgment seeking a determination that the Atkin defendants are strictly liable under Navigation Law § 181 (1) for the discharge of petroleum products on the property, and denied the Atkin defendants' cross motion for summary judgment dismissing the second amended complaint and all cross claims against them.

In a prior appeal, we determined, inter alia, that the Exxon defendants are contributing "dischargers" pursuant to Navigation Law § 172 (8) and thus are strictly liable under Navigation Law § 181 (1) for the cleanup and removal costs associated with the discharge of petroleum products at the property, "despite the fact that the parcels subsequently were the sites for various commercial operations that also may have contributed to the contamination of the properties, including a scrap yard" (*One Flint St., LLC v Exxon Mobil Corp.*, 112 AD3d 1353, 1354 [4th Dept 2013], *lv dismissed* 23 NY3d 998 [2014]).

We agree with the Atkin defendants that Supreme Court erred in granting the motions of plaintiffs and the Exxon defendants insofar as they sought a determination that Genesee Scrap is strictly liable as a discharger, and we therefore modify the order accordingly. Plaintiffs and the Exxon defendants failed to meet their initial burden on their motions of establishing that Genesee Scrap owned or controlled the property, and thus failed to establish that it was liable for any petroleum products discharged on the property (*see generally State of New York v Speonk Fuel, Inc.*, 3 NY3d 720, 723-724 [2004], *rearg denied* 4 NY3d 740 [2004]; *State of New York v Green*, 96 NY2d 403, 405 [2001]). Genesee Scrap's acceptance of scrap metal at a discounted rate from Shelton did not make Genesee Scrap a landowner or give Genesee Scrap the authority to control the property or the activities conducted thereon (*cf. Green*, 96 NY2d at 407).

We also agree with the Atkin defendants that they met their burden on their cross motion by establishing that Genesee Scrap did not own the property or control the property (*cf. Speonk Fuel, Inc.*, 3 NY3d at 724; *see generally Green*, 96 NY2d at 405). Although a defendant need not hold legal title of land at the time of discharge of petroleum in order for Navigation Law liability to attach (*see*

Speonk Fuel, Inc., 3 NY3d at 722, 724), the evidence submitted by the Atkin defendants established that Genesee Scrap, unlike Atkin and 15 Flint, had no authority to control the activities at the property. Thus, the Atkin defendants met their prima facie burden on their cross motion of establishing that Genesee Scrap is not a discharger for the purposes of the Navigation Law (*see* § 181 [1]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Inasmuch as plaintiffs and the Exxon defendants failed to raise a question of fact in opposition (*see generally Alvarez*, 68 NY2d at 324), we conclude that the court erred in denying that part of the Atkin defendants' cross motion seeking the dismissal of the second amended complaint and all cross claims against Genesee Scrap, and we therefore further modify the order accordingly.

We reject the contention of the Atkin defendants that the court erred in granting the motions of plaintiffs and the Exxon defendants with respect to Atkin's liability as discharger, and in denying the cross motion insofar as it sought summary judgment dismissing the second amended complaint and cross claims against Atkin. Plaintiffs and the Exxon defendants met their initial burden on their motions with respect to Atkin by submitting evidence that Atkin personally owned the property from January 1992 until at least January 1993, when he transferred the title to 15 Flint, that petroleum discharge occurred during that year of Atkin's ownership, and that Atkin was aware of and was able to control Shelton's conduct on the property during that time period (*see Green*, 96 NY2d at 405). Inasmuch as the environmental reports and expert affidavits submitted by the Atkin defendants in opposition to the motions failed to exclude as a cause or contributor to the contamination of the property Shelton's operations of dismantling vehicles on the property, of which Atkin was aware and over which he had control during his ownership of the property from January 1992 until at least January 1993 (*see id.* at 407), we further conclude that the Atkin defendants failed to raise a triable issue of fact (*see generally Alvarez*, 68 NY2d at 324). Thus, the court properly granted the motions of plaintiffs and the Exxon defendants insofar as they sought a determination that Atkin is strictly liable as a discharger. For the same reasons, we conclude that the court properly denied the Atkin defendants' cross motion insofar as they sought to dismiss the second amended complaint and all cross claims against Atkin.

Contrary to the Atkin defendants' further contention, plaintiffs and the Exxon defendants established their entitlement to partial summary judgment determining that 15 Flint is strictly liable as a discharger, and the Atkin defendants failed to raise a triable issue of fact. Plaintiffs and the Exxon defendants established that 15 Flint owned the property from 1993 to 2007 and, during 15 Flint's ownership of the property, Shelton occupied and operated his business on the property, and continued to discharge petroleum. Although 15 Flint had the knowledge and the authority to do so, it did not address the petroleum discharge by Shelton (*see Speonk Fuel, Inc.*, 3 NY3d at 724; *Green*, 96 NY2d at 405). To the extent that the Atkin defendants allege that Shelton discharged only de minimis amounts of oil, we note that there is no such defense to liability under Navigation Law § 181

(1) (*see Guidice v Patterson Oil*, 51 Misc 3d 313, 315-320 [Sup Ct, NY County 2016]).

The Atkin defendants contend that the summary judgment motions of plaintiffs and the Exxon defendants should be denied as premature pursuant to CPLR 3212 (f) because further discovery is necessary. We reject that contention. The Atkin defendants failed to establish "that the discovery sought would produce evidence sufficient to defeat the motion[s] . . . , and that facts essential to oppose the motion[s] were in [the movants'] exclusive knowledge and possession and could be obtained by discovery" (*Resetarits Constr. Corp. v Elizabeth Pierce Olmsted, M.D. Center for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1456 [4th Dept 2014] [internal quotation marks omitted]; *see Feldmeier v Feldmeier Equip., Inc.*, 164 AD3d 1093, 1097 [4th Dept 2018]).

We have considered the Atkin defendants' remaining contentions and conclude that they lack merit.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

616

CA 18-01520

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

GLORIA ODIORNE AND DAVID ODIORNE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JASCOR, INC., DEFENDANT-RESPONDENT.

BOTTAR LEONE, PLLC, SYRACUSE, D.J. & J.A. CIRANDO, PLLC (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, SYRACUSE (HEATHER ZIMMERMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Daniel J. Doyle, J.), entered June 7, 2018. The order granted the motion of defendant for summary judgment, dismissed the complaint and denied the cross motion of plaintiffs to strike defendant's answer.

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

Memorandum: Plaintiffs commenced this action seeking to recover damages for injuries that Gloria Odiorne (plaintiff) sustained when she allegedly slipped and fell on a wet condition on the recently-mopped floor in a restaurant owned and maintained by defendant. Plaintiffs appeal from an order that granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiffs' cross motion to strike the answer for failure to provide certain discovery. We affirm.

Initially, we reject plaintiffs' contention that Supreme Court erred in denying their cross motion to strike the answer pursuant to CPLR 3126 based on defendant's alleged failure to provide certain discovery. We conclude that the court properly denied the cross motion because plaintiffs did not file a motion to compel discovery pursuant to CPLR 3124 (*see J.N.K. Mach. Corp. v TBW, LTD.*, 155 AD3d 1611, 1614 [4th Dept 2017]).

We further conclude that the court properly granted defendant's summary judgment motion. Defendant satisfied its initial burden of establishing that it maintained the premises in a reasonably safe condition (*see Roros v Oliva*, 54 AD3d 398, 399 [2d Dept 2008]; *see generally Leone v County of Monroe*, 284 AD2d 975, 975 [4th Dept 2001]). The evidence submitted in support of the motion established

that defendant's employee was following "a reasonable cleaning routine" in mopping a floor that had been strewn with rock salt (*Kelly v Roza 14W LLC*, 153 AD3d 1187, 1188 [1st Dept 2017]). Plaintiffs' contention that defendant failed to meet its initial burden because the employee used the wrong mop and created an excessively slippery condition—i.e., like "greased glass"—is entirely speculative and not based on any evidence in the record (*see Brandefine v National Cleaning Contr.*, 265 AD2d 441, 442 [2d Dept 1999]). We further conclude that plaintiffs' submissions did not raise an issue of fact in opposition on the issue whether the premises were maintained in a reasonably safe condition. Although, generally speaking, whether a condition is dangerous is a question for the fact-finder, "summary judgment in favor of a defendant is appropriate where[, as here,] a plaintiff fails to submit *any evidence* that a particular condition is *actually defective or dangerous*" (*Langgood v Carrols, LLC*, 148 AD3d 1734, 1735 [4th Dept 2017] [emphasis added]).

In addition, we conclude that defendant also satisfied its burden of establishing that it provided plaintiff with adequate warning of a potentially dangerous slippery condition. The unrefuted evidence showed that plaintiff was aware that the area of the floor where she fell was wet and potentially slippery because she admitted in her deposition testimony that she saw the employee mopping the area, as well as the wet floor sign that he had set up in the area (*see McMullin v Martin's Food of S. Burlington, Inc.*, 122 AD3d 1103, 1105 [3d Dept 2014]). Thus, defendant made a prima facie case by submitting evidence that "plaintiff acknowledged that prior to her fall, she observed [the mopping and the wet floor sign], which led her to suspect that the [floor] was wet, but she proceeded to [traverse the area] in any event" (*Brown v New York Marriot Marquis Hotel*, 95 AD3d 585, 586 [1st Dept 2012]). We conclude that, in opposition, plaintiffs failed to raise an issue of fact with respect to whether defendant provided adequate warning of the allegedly slippery condition.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

617

CA 18-01137

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

TAMMY A. CLEVELAND, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF MICHAEL E. CLEVELAND, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GREGORY C. PERRY, M.D., FDR MEDICAL SERVICES, P.C., KALEIDA HEALTH AND KALEIDA HEALTH/DEGRAFF MEMORIAL HOSPITAL, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

BURKWIT LAW FIRM, PLLC, ROCHESTER (CHARLES F. BURKWIT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS GREGORY C. PERRY, M.D., AND FDR MEDICAL SERVICES, P.C.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS KALEIDA HEALTH AND KALEIDA HEALTH/DEGRAFF MEMORIAL HOSPITAL.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.) entered May 4, 2018. The order granted defendants' motions seeking to enjoin and prohibit all parties and their attorneys from making extrajudicial statements about the action or the underlying facts in a public forum or in front of the media.

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

Memorandum: Plaintiff Tammy A. Cleveland, individually and as administratrix of the estate of Michael E. Cleveland, deceased, commenced this action against defendants Gregory C. Perry, M.D. and FDR Medical Services, P.C. (FDR) (collectively, FDR defendants) and Kaleida Health and Kaleida Health/DeGraff Memorial Hospital (DeGraff) (collectively, Kaleida defendants), seeking damages for, inter alia, medical malpractice and intentional and negligent infliction of emotional distress arising from decedent's death. Decedent, who was plaintiff's husband, suffered cardiac arrest while grocery shopping with his son. Upon being transported to DeGraff, decedent was taken to a code room and intubated. CPR, which had been performed by

paramedics prior to decedent's arrival at DeGraff, was continued and Perry, an FDR employee and emergency physician at DeGraff, detected a faint pulse, which lasted only briefly. Treatment continued until Perry pronounced decedent dead at 8:29 p.m. Thereafter, Perry notified plaintiff that decedent had died, and plaintiff, along with decedent's son and several other family members, was brought into the code room. Plaintiff alleges that, for the next two hours and 40 minutes, decedent was breathing, making eye contact, and moving around, which prompted her and the coroner to urge Perry and the nursing staff to examine decedent, but they refused to do so. When Perry examined decedent at 11:10 p.m. at plaintiff's insistence, he observed that decedent was, in fact, alive. Decedent was transferred to another hospital, where he underwent heart surgery and subsequently died.

In appeal No. 1, plaintiff appeals from an order that granted the motions of defendants seeking to enjoin and prohibit all parties and their attorneys from making extrajudicial statements about the action or the underlying facts in a public forum or in front of the media. In appeal No. 2, plaintiff appeals and defendants cross-appeal from an order that granted in part defendants' motions for summary judgment dismissing the complaint and dismissed the fifth and seventh causes of action, for intentional infliction of emotional distress (IIED), and dismissed plaintiff's claims for punitive damages. The order in appeal No. 2 denied defendants' motions insofar as they sought summary judgment dismissing, inter alia, the first through fourth causes of action, for medical malpractice, and the sixth and eighth causes of action, for negligent infliction of emotional distress (NIED).

In appeal No. 1, we agree with plaintiff that Supreme Court erred in granting defendants' motions for an order enjoining and prohibiting the parties and their attorneys from making extrajudicial statements about the action or the underlying facts in a public forum or in front of the media. Although defendants met their burden of "demonstrat[ing] that such statements present a 'reasonable likelihood' of a serious threat to [defendants'] right to a fair trial" (*Matter of National Broadcasting Co. v Cooperman*, 116 AD2d 287, 292 [2d Dept 1986]; *see also Sheppard v Maxwell*, 384 US 333, 363 [1966]), there is no evidence in the record "that less restrictive alternatives would not be just as effective in assuring the defendant[s] a fair trial" (*National Broadcasting Co.*, 116 AD2d at 293, citing *Nebraska Press Assn. v Stuart*, 427 US 539, 562 [1976]; *see Coggins v County of Nassau*, 2014 WL 495646, *1 [ED NY, Feb. 6, 2014, No. 07-CV-3624 (JFB) (AKT)]). Absent "the requisite showing of a necessity for such restraints," a court may not impose prior restraints on First Amendment rights (*National Broadcasting Co.*, 116 AD2d at 293). Inasmuch as alternative remedies such as a "searching voir dire" and "emphatic jury instructions" (*In re Application of Dow Jones & Co., Inc.*, 842 F2d 603, 611 [2d Cir 1988], *cert denied* 488 US 946 [1988]) would be sufficient to mitigate the prejudice to defendants and protect their right to a fair trial (*see In re General Motors LLC Ignition Switch Litig.*, 2015 WL 4522778, *5 [SD NY, July 24, 2015, Nos. 14-MD-2543 (JMF), 14-MC-2543 (JMF)]; *Coggins*, 2014 WL 495646, at *1; *see also Munoz v City of New York*, 2013 WL 1953180, *1

[SD NY, May 10, 2013, No. 11 Civ. 7402 (JMF)]), we conclude that the court erred in granting defendants' motions and we therefore reverse the order in appeal No. 1.

In appeal No. 2, we reject plaintiff's contention on her appeal that the court erred in granting defendants' motions to the extent that they sought summary judgment dismissing the fifth and seventh causes of action, for IIED. " 'The tort [of IIED] has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress' " (*Zane v Corbett*, 82 AD3d 1603, 1607 [4th Dept 2011], quoting *Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). Here, defendants met their respective burdens on their motions with respect to the first element of IIED inasmuch as it is undisputed that Perry and members of the emergency department nursing staff at DeGraff believed that decedent was dead, and thus defendants' conduct, considered in that context, cannot be deemed "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community" (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 56 [2016] [internal quotation marks omitted]; *see generally Gilewicz v Buffalo Gen. Psychiatric Unit*, 118 AD3d 1298, 1299 [4th Dept 2014]; *Dobisky v Rand*, 248 AD2d 903, 904-905 [3d Dept 1998]). In opposition, plaintiff failed to raise a material issue of fact (*see generally Gilewicz*, 118 AD3d at 1299).

We also reject plaintiff's contention in appeal No. 2 that the court erred in granting defendants' motions with respect to her claims for punitive damages. Punitive damage awards "serve[] the dual purpose of punishing the offending party for wrongful conduct and deterring others from engaging in similar conduct" (*Gomez v Cabatic*, 159 AD3d 62, 72 [2d Dept 2018]). "The standard for an award of punitive damages is that a defendant manifest evil or malicious conduct beyond any breach of professional duty" (*Dupree v Giugliano*, 20 NY3d 921, 924 [2012], *rearg denied* 20 NY3d 1045 [2013]). Thus, punitive damages are awarded in "circumstances of aggravation or outrage, such as spite or malice, or a fraudulent or evil motive on the part of the defendant, or such conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" (*Prozeralik v Capital Cities Communications*, 82 NY2d 466, 479 [1993] [internal quotation marks omitted]). Here, viewing the facts in the light most favorable to plaintiff, we cannot conclude that defendants' conduct constituted "a reckless indifference equivalent to wilful or intentional misdoing" (*Frenya v Champlain Val. Physicians' Hosp. Med. Ctr.*, 133 AD2d 1000, 1000 [3d Dept 1987]; *see Brooking v Polito*, 16 AD3d 898, 899 [3d Dept 2005]).

We agree with defendants on their cross appeals in appeal No. 2 that the court erred in denying their motions insofar as they sought summary judgment dismissing the sixth and eighth causes of action, for NIED, and we modify the order in appeal No. 2 accordingly. "A breach of the duty of care 'resulting directly in emotional harm is

compensable even though no physical injury occurred' (*Kennedy v McKesson Co.*, 58 NY2d 500, 504 [1983]) when the mental injury is 'a direct, rather than a consequential, result of the breach' (*id*. at 506) and when the claim possesses 'some guarantee of genuineness' (*Ferrara v Galluchio*, 5 NY2d 16, 21 [1958])" (*Ornstein v New York City Health & Hosps. Corp*., 10 NY3d 1, 6 [2008]). Here, defendants met their respective burdens of establishing as a matter of law that plaintiff and decedent's son did not suffer mental and emotional injuries causally related to Perry's erroneous pronouncement of decedent's death, and plaintiff failed to raise a triable issue of fact by demonstrating the requisite " 'guarantee of genuineness' " with respect to her claims of mental or emotional injuries (*Johnson v State of New York*, 37 NY2d 378, 384 [1975]; *see Karin K. v Four Winds Hosp*., 64 AD3d 686, 687 [2d Dept 2009], *lv denied* 13 NY3d 711 [2009]).

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

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

618

CA 18-01138

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

TAMMY A. CLEVELAND, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MICHAEL E. CLEVELAND, DECEASED,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY C. PERRY, M.D., FDR MEDICAL SERVICES, P.C., KALEIDA HEALTH AND KALEIDA HEALTH/DEGRAFF MEMORIAL HOSPITAL,
DEFENDANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

BURKWIT LAW FIRM, PLLC, ROCHESTER (CHARLES F. BURKWIT OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS GREGORY C. PERRY, M.D., AND FDR MEDICAL SERVICES, P.C.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS KALEIDA HEALTH AND KALEIDA HEALTH/DEGRAFF MEMORIAL HOSPITAL.

Appeal and cross appeals from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered May 8, 2018. The order granted in part defendants' motions for summary judgment dismissing plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motions of defendants seeking summary judgment dismissing the sixth and eighth causes of action, and as modified the order is affirmed without costs.

Same memorandum as in *Cleveland v Perry* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

619

CAF 17-01440

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

IN THE MATTER OF JOSE M. VALENTIN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEYDA R. MENDEZ, RESPONDENT-RESPONDENT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR PETITIONER-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR RESPONDENT-RESPONDENT.

CHRISTINE F. REDFIELD, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Thomas Polito, R.), entered July 10, 2017 in a proceeding pursuant to Family Court Act article 6. The appeal was held by this Court by order entered October 5, 2018, decision was reserved and the matter was remitted to Family Court, Monroe County, for further proceedings (165 AD3d 1643 [4th Dept 2018]). The proceedings were held and completed.

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

Memorandum: Petitioner father appeals from an order modifying the parties' existing custody arrangement by awarding sole legal custody of the subject child to respondent mother and directing that the father's visitation with the child be supervised. We previously held the case, reserved decision and remitted the matter to Family Court to set forth its factual findings supporting the award of sole legal custody to the mother (*Matter of Valentin v Mendez*, 165 AD3d 1643, 1644 [4th Dept 2018]). Upon remittal, the court issued a written decision in which it set forth its findings of fact, and the court again concluded that it was in the best interests of the child to award sole legal custody of the child to the mother.

Contrary to the father's contention, there is now a sound and substantial basis in the record to support the court's determination that it was in the child's best interests to award sole legal custody to the mother (*see generally Matter of Christopher J.S. v Colleen A.B.*, 43 AD3d 1350, 1350-1351 [4th Dept 2007]). In determining whether modification of a custody arrangement is in the child's best interests, a court must consider all the "factors that could impact

the best interests of the child, including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of each parent to provide for the child's emotional and intellectual development and the wishes of the child" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]). Furthermore, "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" (*Marino*, 90 AD3d at 1695 [internal quotation marks omitted]). Here, upon reviewing the relevant factors, including the court's finding that joint custody was no longer feasible because the mother and the father have an acrimonious relationship and an inability to communicate with each other in a civil manner (*see Matter of Kleinbach v Cullerton*, 151 AD3d 1686, 1687 [4th Dept 2017]; *Matter of Moredock v Conti*, 130 AD3d 1472, 1474 [4th Dept 2015]; *Matter of Gelster v Burns*, 122 AD3d 1294, 1296 [4th Dept 2014], *lv denied* 24 NY3d 915 [2015]), we perceive no basis upon which to set aside the court's award of sole legal custody of the child to the mother.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

627

KA 16-00034

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EARL HOWARD, DEFENDANT-APPELLANT.

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

EARL HOWARD, DEFENDANT-APPELLANT PRO SE.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Erie County Court (Michael L. D'Amico, J.), dated December 1, 2015. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Erie County Court for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: Defendant appeals from an order that denied without a hearing his CPL 440.10 motion to vacate the judgment convicting him, following a nonjury trial, of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). We affirmed the judgment of conviction on direct appeal (*People v Howard*, 101 AD3d 1749 [4th Dept 2012], *lv denied* 21 NY3d 944 [2013]) and denied defendant's subsequent motion for a writ of error coram nobis and "other relief," i.e., reargument and reconsideration (*People v Howard*, 112 AD3d 1385 [4th Dept 2013]). Defendant made the motion herein to vacate the judgment on the grounds of newly discovered evidence and ineffective assistance of counsel. We conclude that defendant is entitled to a hearing with respect to his claim of ineffective assistance of counsel.

We reject defendant's contention in his main and pro se supplemental briefs that he was entitled to a hearing on his claim of newly discovered evidence. Defendant's claim is based on the notarized but unsworn statement of an eyewitness in which she recanted her trial testimony and contended that she did not observe defendant shoot the murder victim. On a motion to vacate a judgment of conviction pursuant to CPL 440.10 (1) (g), the defendant must

establish that "there is newly discovered evidence: (1) which will probably change the result if a new trial is granted; (2) which was discovered since the trial; (3) which could not have been discovered prior to trial; (4) which is material; (5) which is not cumulative; and[ ] (6) which does not merely impeach or contradict the record evidence" (*People v Smith*, 108 AD3d 1075, 1076 [4th Dept 2013], *lv denied* 21 NY3d 1077 [2013] [internal quotation marks omitted]; *see People v Salemi*, 309 NY 208, 215-216 [1955], *cert denied* 350 US 950 [1956]).

In recognition of the fact that "[t]here is no form of proof so unreliable as recanting testimony" (*People v Shilitano*, 218 NY 161, 170 [1916], *rearg denied* 218 NY 702 [1916]; *see People v Jenkins*, 84 AD3d 1403, 1407 [2d Dept 2011], *lv denied* 19 NY3d 1026 [2012]), courts have set forth a list of factors to be considered where, as here, the newly discovered evidence is recantation evidence, i.e., "(1) the inherent believability of the substance of the recanting testimony; (2) the witness's demeanor both at trial and at the evidentiary hearing; (3) the existence of evidence corroborating the trial testimony; (4) the reasons offered for both the trial testimony and the recantation; (5) the importance of facts established at trial as reaffirmed in the recantation; and (6) the relationship between the witness and defendant as related to a motive to lie" (*People v Wong*, 11 AD3d 724, 725-726 [3d Dept 2004], citing *Shilitano*, 218 NY at 170-172; *see People v Pringle*, 155 AD3d 1660, 1660 [4th Dept 2017], *lv denied* 31 NY3d 986 [2018]; *People v Simmons*, 20 AD3d 813, 815 [3d Dept 2005], *lv denied* 6 NY3d 758 [2005]). Another relevant factor is "whether the recantation refutes the eyewitness testimony of another witness" (*People v Lane*, 100 AD3d 1540, 1541 [4th Dept 2012], *lv denied* 20 NY3d 1063 [2013]).

Here, as County Court determined, the witness's recantation was "not inherently believable" inasmuch as it contradicted not only her own trial testimony but also that of two other eyewitnesses who testified that they were in the witness's company when they all observed defendant shoot the victim (*People v Avery*, 80 AD3d 982, 985 [3d Dept 2011], *lv denied* 17 NY3d 791 [2011]). Moreover, the witness subsequently retracted her recantation in an interview with members of the District Attorney's Office. During that interview, the witness explained that she initially recanted her trial testimony because she had been threatened by associates of defendant and had been offered a substantial amount of money to recant. In our view, the court properly determined that the witness's recantation was " 'totally unreliable' " (*Pringle*, 155 AD3d at 1661; *see Lane*, 100 AD3d at 1540-1542; *Simmons*, 20 AD3d at 815; *People v Cintron*, 306 AD2d 151, 152 [1st Dept 2003], *lv denied* 100 NY2d 641 [2003]) and that there was "no probability that if such evidence had been received at the trial the verdict would have been more favorable to . . . defendant" (*People v Backus*, 129 AD3d 1621, 1625 [4th Dept 2015], *lv denied* 27 NY3d 991 [2016]).

Defendant further contends in his main and pro se supplemental briefs that the court erred in denying without a hearing that part of

his motion claiming ineffective assistance of counsel based on defense counsel's failure to investigate and secure the testimony of witnesses who would have corroborated the alibi evidence presented at trial by defendant and his mother. We agree.

It is well settled that "[a] defendant's right to effective assistance of counsel includes defense counsel's reasonable investigation and preparation of defense witnesses" (*People v Conway*, 118 AD3d 1290, 1291 [4th Dept 2014]; *see People v Mosley*, 56 AD3d 1140, 1140-1141 [4th Dept 2008]). Here, defendant's CPL 440.10 motion was supported by notarized but unsworn statements of two previously unknown individuals who claimed that they would have corroborated the trial testimony of defendant and his mother that defendant was at a party at his mother's home for the entire evening of the shooting. One of those witnesses specifically stated that she was at all times willing to "make [a] statement" but was never contacted by defense counsel. Two additional witnesses stated that they observed defendant at that party some time after the shooting. While those witnesses do not provide a technical alibi for defendant because they did not discuss defendant's location at the time of the shooting (*see People v West*, 118 AD3d 1450, 1451 [4th Dept 2014], *lv denied* 24 NY3d 1048 [2014]), they tend to support the alibi evidence that defendant could not have been the shooter because he was at a party at his mother's house for the entire evening (*see People v Pottinger*, 156 AD3d 1379, 1380 [4th Dept 2017]; *Jenkins*, 84 AD3d at 1409; *cf. People v Ozuna*, 7 NY3d 913, 915 [2006]).

"While a hearing may ultimately reveal that 'counsel made reasonably diligent efforts to locate the [alibi] witness[es]' and present their testimony at trial" (*Pottinger*, 156 AD3d at 1380) or that there was a strategic reason for counsel's failure to do so (*see Conway*, 118 AD3d at 1291), defendant's submissions from those witnesses raised factual issues requiring a hearing (*see generally People v Frazier*, 87 AD3d 1350, 1351 [4th Dept 2011]). We thus reverse the order and remit the matter to County Court to conduct a hearing pursuant to CPL 440.30 (5) on defendant's claim of ineffective assistance of counsel.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

639

CA 19-00036

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

KAREN L. BATTAGLIA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MDC CONCOURSE CENTER, LLC, MCGUIRE DEVELOPMENT COMPANY, LLC, MCGUIRE MANAGEMENT COMPANY, LLC, AND R.D. TRUCKING & TRANSPORTATION, INC., DEFENDANTS-APPELLANTS.

GOERGEN, MANSON & MCCARTHY, BUFFALO (JOSEPH G. GOERGEN, II, OF COUNSEL), FOR DEFENDANTS-APPELLANTS MDC CONCOURSE CENTER, LLC, MCGUIRE DEVELOPMENT COMPANY, LLC, AND MCGUIRE MANAGEMENT COMPANY, LLC.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANT-APPELLANT R.D. TRUCKING & TRANSPORTATION, INC.

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

Appeals from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered June 26, 2018. The order denied the motion of defendants MDC Concourse Center, LLC, McGuire Development Company, LLC, and McGuire Management Company, LLC, for summary judgment and granted that part of the motion of defendant R.D. Trucking & Transportation, Inc., for summary judgment dismissing the amended complaint against it.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion of defendant R.D. Trucking & Transportation, Inc. in its entirety and by granting the motion of defendants MDC Concourse Center, LLC, McGuire Development Company, LLC, and McGuire Management Company, LLC insofar as it sought summary judgment dismissing the amended complaint against them and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell on ice in the parking lot of property owned or managed by defendants MDC Concourse Center, LLC, McGuire Development Company, LLC, and McGuire Management Company, LLC (collectively, McGuire defendants). Defendant R.D. Trucking & Transportation, Inc. (RD Trucking) contracted with the McGuire defendants to maintain that parking lot. RD Trucking moved for summary judgment dismissing the amended complaint and all cross claims against it, and the McGuire defendants separately moved for, inter

alia, summary judgment dismissing the amended complaint against them and, in the alternative, for an order granting them conditional indemnification against RD Trucking. Supreme Court granted that part of RD Trucking's motion seeking summary judgment dismissing the amended complaint against it on the ground that RD Trucking did not owe a duty to plaintiff (*see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138-140 [2002]). The court otherwise denied that motion and denied the motion of the McGuire defendants. Defendants appeal.

As a preliminary matter, we note that, although no cross claim was asserted in the sole answer of the McGuire defendants that is contained in the record on appeal, the parties and the court treated the McGuire defendants' request for conditional indemnification as, in essence, a cross claim. Indeed, as noted, RD Trucking moved for, inter alia, summary judgment dismissing "all cross claims." Similarly, after denying the McGuire defendants' motion insofar as it sought contractual indemnification as premature based on its finding that "[q]uestions remain[ed] concerning" whether any action or inaction of RD Trucking "would warrant indemnification," the court concluded that the McGuire defendants' "cross claims as and against [RD Trucking] remain" and denied that part of RD Trucking's motion with respect to those purported cross claims. Even though there are no cross claims, the parties have charted their course on the underlying motions and in these appeals, and no party has been "misled to its prejudice" inasmuch as RD Trucking has "fully defended itself" against the motion of the McGuire defendants (*Torrioni v Unisul, Inc.*, 214 AD2d 314, 315 [1st Dept 1995]; *see Rubenstein v Rosenthal*, 140 AD2d 156, 158-159 [1st Dept 1988]).

Addressing the merits of the contentions raised by the parties, we conclude that defendants established as a matter of law "that a storm was in progress at the time of the accident and, thus, that [they] 'had no duty to remove the snow [or] ice until a reasonable time ha[d] elapsed after cessation of the storm' " (*Witherspoon v Tops Mkts., LLC*, 128 AD3d 1541, 1541 [4th Dept 2015]; *see Johnson v Pixley Dev. Corp.* 169 AD3d 1516, 1520-1521 [4th Dept 2019]; *Gilbert v Tonawanda City School Dist.*, 124 AD3d 1326, 1327 [4th Dept 2015]; *Quill v Churchville-Chili Cent. Sch. Dist.*, 114 AD3d 1211, 1212 [4th Dept 2014]; *Glover v Botsford*, 109 AD3d 1182, 1183 [4th Dept 2013]; *cf. Schult v Pyramid Walden Co., L.P.*, 167 AD3d 1577, 1577 [4th Dept 2018]; *see also Wrobel v Tops Mkts., LLC*, 155 AD3d 1591, 1592 [4th Dept 2017]; *Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1187 [4th Dept 2008]).

Where, as here, a defendant's own submissions do not raise an issue of fact whether the icy condition existed before the storm, the burden shifts to the plaintiff "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 had actual or constructive notice of the preexisting condition' " (*Alvarado v Wegmans Food Mkts., Inc.*, 134 AD3d 1440, 1441 [4th Dept 2015]; *see e.g. Gilbert*, 124 AD3d at 1327; *Quill*, 114 AD3d

at 1212).

Contrary to plaintiff's contentions, nothing in her deposition testimony, which was submitted by defendants in support of their respective motions, raised a triable issue of fact whether the ice she allegedly observed existed before the storm (*cf. Gervasi v Blagojevic*, 158 AD3d 613, 614 [2d Dept 2018]; *Guzman v Broadway 922 Enters., LLC*, 130 AD3d 431, 431 [1st Dept 2015]; *Candelier v City of New York*, 129 AD2d 145, 148-149 [1st Dept 1987]), and the evidence that plaintiff submitted in opposition to the motions also did not raise a triable issue of fact.

Plaintiff's expert stated that "*whatever* snow was on the ground during or fell on the area during and after [the days preceding the storm], would have created a liquid base on surfaces where the ice would have formed" (emphasis added). Inasmuch as the certified weather records submitted by both defendants and plaintiff established that there was virtually no precipitation in the seven days preceding the major, two-day winter storm that resulted in record snowfall for Buffalo, "[t]he record is devoid of competent evidence that any . . . snow . . . existed . . . near the area of the parking lot where plaintiff fell that had melted and had then refrozen prior to the storm" (*Hanifan v COR Dev. Co., LLC*, 144 AD3d 1569, 1570 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]). We thus conclude that, "[t]o say that 'old' ice caused the subject ice patch as opposed to the storm in progress would require a jury to resort to conjecture and speculation in order to determine the cause of the incident" (*Small v Coney Is. Site 4A-1 Houses, Inc.*, 28 AD3d 741, 742 [2d Dept 2006], *lv dismissed* 7 NY3d 887 [2006]; *see Pankratov v 2935 OP, LLC*, 160 AD3d 757, 758-759 [2d Dept 2018]; *Harvey v Laz Parking Ltd, LLC*, 128 AD3d 1203, 1205 [3d Dept 2015]). We therefore modify the order by granting the motion of RD Trucking in its entirety and granting the motion of the McGuire defendants insofar as it sought summary judgment dismissing the amended complaint against them.

Based on our determination, we do not address the McGuire defendants' alternative contention.

All concur except WHALEN, P.J., and CENTRA, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent inasmuch as we would affirm the order of Supreme Court. Although we agree with the majority that defendants established that there was a storm in progress at the time of plaintiff's accident, we reject defendants' contention that they were not required, in order to establish their prima facie entitlement to summary judgment, to affirmatively establish that the storm in progress caused the icy condition that precipitated plaintiff's fall.

It is axiomatic that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see generally Clause v Globe Metallurgical, Inc.*, 160 AD3d 1463, 1463 [4th Dept 2018]). The Court of Appeals

directs that the storm-in-progress doctrine applies only where a "plaintiff's injuries [were] sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter" (*Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735 [2005]; *see Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1020-1021 [2016]; *see also Mosley v State of New York*, 150 AD3d 1659, 1660 [4th Dept 2017]). Thus, "in order to establish a prima facie entitlement to judgment on the 'storm in progress' doctrine, [a defendant] must establish that [a] plaintiff's fall was precipitated by a hazardous snow or ice-related condition caused by an ongoing storm" (*Howard v J.A.J. Realty Enters*, 283 AD2d 854, 855 [3d Dept 2001]; *see Solazzo*, 6 NY3d at 735; *Stalker v Crestview Cadillac Corp.*, 284 AD2d 977, 978 [4th Dept 2001]).

Here, defendants failed to establish as a matter of law that plaintiff's alleged injuries resulted from "an icy condition *occurring during* an ongoing storm" (*Solazzo*, 6 NY3d at 735 [emphasis added]; *see Stalker*, 284 AD2d at 978; *Howard*, 283 AD2d at 855). Contrary to the conclusion of the majority, plaintiff's deposition testimony, which defendants submitted in support of their respective motions, raises a triable issue of material fact whether the icy condition existed prior to the storm occurring at the time of her accident. Plaintiff testified that she fell due to "very thick ice," approximately one to two inches thick, underneath a snow covering (*see Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188 [4th Dept 2008]; *see also Stalker*, 284 AD2d at 978). The affidavit of defendants' expert meteorologist addresses only the snowfall that occurred on the date of plaintiff's accident and offers his opinion that "a storm was in progress at the time of the plaintiff's slip and fall." The expert fails to address whether the conditions existing at that time would have resulted in the accumulation of the thick ice underneath a layer of snow that plaintiff testified caused her fall (*cf. Harvey v Laz Parking Ltd, LLC*, 128 AD3d 1203, 1204 [3d Dept 2015]). Inasmuch as it was defendants' initial burden to establish as a matter of law that this icy condition occurred during the storm and was not a preexisting condition (*see Solazzo*, 6 NY3d at 735; *Stalker*, 284 AD2d at 978; *Howard*, 283 AD2d at 855), defendants failed to establish their prima facie entitlement to summary judgment. Thus, "regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see Walter*, 56 AD3d at 1188), the court properly denied the motion of defendants MDC Concourse Center, LLC, McGuire Development Company, LLC, and McGuire Management Company, LLC (collectively, McGuire defendants) insofar as it sought summary judgment dismissing the amended complaint against them and that part of the motion of defendant RD Trucking & Transportation, Inc. (RD Trucking) for summary judgment dismissing the McGuire defendants' purported cross claim for contractual indemnification.

Finally, we reject the contention of the McGuire defendants that the court erred in denying as premature their motion insofar as it sought an order of conditional indemnification. We agree with the court that there are triable issues of fact "whether there were acts, omissions, a breach or default of [RD Trucking] concerning its

performance of any snow/ice removal that would warrant indemnification" under the terms of the contract between defendants. We would therefore affirm the order in its entirety.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

642.1

KA 14-00320

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAVON BOYD, DEFENDANT-APPELLANT.

DONALD R. GERACE, UTICA, FOR DEFENDANT-APPELLANT.

JAVON BOYD, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered June 25, 2013. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree (three counts), rape in the first degree, strangulation in the second degree, criminal obstruction of breathing or blood circulation (two counts) and assault 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 by reducing the sentences imposed for criminal sexual act in the first degree under counts 1 through 3 of the indictment to determinate terms of incarceration of six years and a period of postrelease supervision of 20 years, reducing the sentence imposed for rape in the first degree under count 11 of the indictment to a determinate term of incarceration of seven years and a period of postrelease supervision of 20 years, and directing that the sentences in counts 1 through 3 and count 11 run consecutively to each other but concurrently with the sentences imposed on the remaining counts, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, three counts of criminal sexual act in the first degree (Penal Law § 130.50 [1]) and one count of rape in the first degree (§ 130.35 [1]). Contrary to defendant's contention in his main brief, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). 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, . . . the jury was

justified in finding the defendant guilty beyond a reasonable doubt" (*id.*; *see People v Romero*, 7 NY3d 633, 642-643 [2006]). " '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 [4th Dept 2002], *lv denied* 98 NY2d 697 [2002]; *see People v Holmes*, 37 AD3d 1042, 1043 [4th Dept 2007], *lv denied* 8 NY3d 986 [2007]), and we perceive no reason to disturb the jury's credibility determinations here.

Contrary to defendant's further contention in his main brief, County Court did not err in imposing consecutive sentences for the three counts of criminal sexual act in the first degree and the count of rape in the first degree. Consecutive sentences are appropriate where, as here, "the 'acts or omissions' committed by defendant were separate and distinct acts" (*People v Laureano*, 87 NY2d 640, 643 [1996]; *see People v Stiles*, 78 AD3d 1570, 1570 [4th Dept 2010], *lv denied* 16 NY3d 863 [2011]). We agree with defendant, however, that the aggregate sentence of 60 years, which is statutorily reduced to 50 years (*see* Penal Law § 70.30 [1] [c], [e] [vi]), is unduly harsh and severe. Defendant has no prior felony convictions. In addition, the People offered, and the court committed to, a plea deal pursuant to which defendant would plead guilty to one count of criminal sexual act in the first degree and be sentenced to a determinate term of 10 years' incarceration with 20 years' postrelease supervision, which was thereafter reduced to a determinate term of nine years' incarceration with 20 years' postrelease supervision. The court nevertheless sentenced defendant upon his conviction to determinate terms of 15 years of incarceration with 20 years' postrelease supervision for the three counts of criminal sexual act in the first degree and the count of rape in the first degree, all to run consecutively. That aggregates to a sentence that is more than six times longer than that of the most recent plea offer, and we conclude that it is unduly harsh and severe (*see generally People v Morales*, 160 AD3d 1414, 1420 [4th Dept 2018], *lv denied* 32 NY3d 939 [2018]). We therefore modify the sentence as a matter of discretion in the interest of justice by reducing the sentences imposed for the three counts of criminal sexual act in the first degree to determinate terms of six years' incarceration with 20 years' postrelease supervision and by reducing the sentence imposed for rape in the first degree to a determinate term of seven years' incarceration with 20 years' postrelease supervision, all to run consecutively to each other but concurrently with the remaining counts, for an aggregate sentence of 25 years' incarceration (*see* CPL 470.15 [6] [b]; Penal Law §§ 70.02 [1] [a]; [3] [a]; 70.45 [2-a] [f]; 70.80 [6]).

In his pro se supplemental brief, defendant contends that the indictment should be dismissed because it was multiplicitous. That contention is not preserved for our review (*see People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]), and it is without merit in any event. An indictment is multiplicitous "when a single offense is charged in more than one count" (*People v Alonzo*, 16 NY3d 267, 269 [2011]). Defendant was charged with three counts of criminal sexual act in the first degree (Penal Law § 130.50

[1]) but, as noted earlier, each count was based on a separate and distinct act and thus the counts were not multiplicitous (*see People v Hernandez [Marlon]*, 171 AD3d 791, 792-793 [2d Dept 2019]; *People v Brandel*, 306 AD2d 860, 860 [4th Dept 2003]). Contrary to defendant's further contention in his pro se supplemental brief, he received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Defendant's remaining contention in his pro se supplemental brief is that the court should have dismissed a juror who had fallen asleep during the trial. Defendant never moved to discharge that juror, and thus his contention is not preserved for our review (*see People v Armstrong*, 134 AD3d 1401, 1401 [4th Dept 2015], *lv denied* 27 NY3d 962 [2016]; *People v Phillips*, 34 AD3d 1231, 1231 [4th Dept 2006], *lv denied* 8 NY3d 848 [2007]). 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]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

643

TP 18-02320

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

IN THE MATTER OF DARNELL DAVISON, PETITIONER,

V MEMORANDUM AND ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered December 12, 2018) to review two determinations of respondent. The determinations found after two separate tier III hearings that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination rendered December 15, 2017 is unanimously annulled on the law without costs, the petition is granted in part, the recommended loss of good time is vacated, and respondent is directed to expunge from petitioner's institutional record all references to the violation of inmate rule 116.10 (7 NYCRR 270.2 [B] [17] [i]), and the determination rendered February 7, 2018 is modified by annulling that part of the determination finding that petitioner violated inmate rule 104.10 (7 NYCRR 270.2 [B] [5] [i]) and vacating the recommended loss of good time, and as modified such determination is confirmed without costs, respondent is directed to expunge from petitioner's institutional record all references to the violation of inmate rule 104.10, and the matter is remitted to respondent for further proceedings in accordance with the following memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul two determinations of respondent, following two separate tier III hearings, that petitioner violated various inmate rules. With respect to the first determination, which was rendered on December 15, 2017 and found petitioner guilty of violating inmate rule 116.10 (7 NYCRR 270.2 [B] [17] [i] [property damage]), respondent correctly concedes that the determination of guilt is not supported by substantial evidence. Therefore, we grant the petition in part by annulling that determination and by vacating the recommended loss of good time imposed by that determination, and we direct respondent to

expunge from petitioner's institutional record all references to the violation of inmate rule 116.10.

With respect to the second determination rendered February 7, 2018, respondent also correctly concedes that there is not substantial evidence supporting that part of the determination finding petitioner guilty of violating inmate rule 104.10 (7 NYCRR 270.2 [B] [5] [i] [rioting]). We therefore grant the petition in further part and modify the second determination by annulling that part of the determination finding that petitioner violated inmate rule 104.10, and we direct respondent to expunge from petitioner's institutional record all references thereto. Contrary to petitioner's contention, substantial evidence supports those parts of the second determination finding that he violated inmate rules 102.10 (7 NYCRR 270.2 [B] [3] [i] [threats]), 104.11 (7 NYCRR 270.2 [B] [5] [ii] [violent conduct]), 106.10 (7 NYCRR 270.2 [B] [7] [i] [direct order]) and 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference]) (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 140 [1985]).

There is no need to remit the matter to respondent for reconsideration of those parts of the penalty that petitioner has served (*see Matter of Rodriguez v Fischer*, 96 AD3d 1374, 1375 [4th Dept 2012]). The Hearing Officer in the second determination also recommended loss of good time, however, and the record does not reflect the relationship between any specific violation and that recommendation. We therefore further modify the second determination by vacating the recommended loss of good time, and we remit the matter to respondent for reconsideration of that recommendation in light of our decision with respect to inmate rule 104.10 (*see Matter of Williams v Annucci*, 133 AD3d 1362, 1363-1364 [4th Dept 2015]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

645

KA 17-00615

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAURICE M. MAHONEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Oswego County (James W. McCarthy, J.), rendered September 29, 2016. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of sexual abuse in the first degree (Penal Law § 130.65 [3]), defendant contends that Supreme Court deprived him of his right to a fair trial and an impartial jury by failing to excuse four prospective jurors. Inasmuch as the record does not establish that defendant exhausted his peremptory challenges, he is not entitled to reversal based on the alleged errors during jury selection (*see* CPL 270.20 [2]). We reject defendant's contention that he was denied effective assistance of counsel based upon defense counsel's failure to challenge the relevant prospective jurors inasmuch as defendant failed to establish that defense counsel lacked a legitimate strategy in choosing not to challenge those prospective jurors (*see People v Slack*, 137 AD3d 1568, 1570 [4th Dept 2016], *lv denied* 27 NY3d 1139 [2016]; *People v Boykins*, 134 AD3d 1542, 1542 [4th Dept 2015], *lv denied* 27 NY3d 1066 [2016]; *People v Swan*, 126 AD3d 1527, 1527 [4th Dept 2015], *lv denied* 26 NY3d 972 [2015]). Contrary to defendant's related contention, defense counsel was not ineffective for failing to move for a mistrial or to have a new panel of jurors seated after the charges pertaining to a second victim were dismissed. There is no basis for concluding that the dismissal of those charges resulted in the jury being prejudiced against defendant, and thus any such motion had "little or no chance of success" (*People v Nuffer*, 70 AD3d 1299, 1300 [4th Dept 2010]). Furthermore, "[i]t is well settled that the jury is presumed to have followed . . . curative instruction[s]" (*People v Spears*, 140 AD3d 1629, 1630 [4th Dept 2016], *lv denied* 28

NY3d 974 [2016] [internal quotation marks omitted]), and here the court instructed the jury that it was "not to speculate and consider [the dismissed charges] whatsoever in one way or the other to [the] betterment or detriment of the prosecution or the defendant."

Defendant failed to preserve for our review his contention related to the testimony of an expert witness with respect to child sexual abuse accommodation syndrome (*see People v Ennis*, 107 AD3d 1617, 1618-1619 [4th Dept 2013], *lv denied* 22 NY3d 1040 [2013], *reconsideration denied* 23 NY3d 1036 [2014]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's alternative contention that defense counsel was ineffective in his cross-examination of the expert and for failing to otherwise challenge the expert's testimony or qualifications (*see generally People v Lathrop*, 171 AD3d 1473, 1473-1474 [4th Dept 2019]; *Ennis*, 107 AD3d at 1618-1619).

By failing to object to certain remarks made by the prosecutor during summation, defendant failed to preserve his further contention that he was deprived of a fair trial by prosecutorial misconduct on summation (*see People v Lewis*, 154 AD3d 1329, 1330 [4th Dept 2017], *lv denied* 30 NY3d 1106 [2018]). In any event, that contention lacks merit. While it was improper for the prosecutor to discuss her own personal experiences as a child during summation (*see generally People v Grice*, 100 AD2d 419, 422 [4th Dept 1984]), the court immediately interjected and told the prosecutor that her conduct was improper and that the jury should "[d]isregard it." Under these circumstances, the prosecutor's isolated comment, which was met with an immediate curative instruction, was not so egregious as to deprive defendant of a fair trial (*see People v Greene*, 13 AD3d 991, 993 [3d Dept 2004], *lv denied* 5 NY3d 789 [2005]). Additionally, the further challenged comments made by the prosecutor during summation were within "the broad bounds of rhetorical comment permissible during summation" (*People v McEathron*, 86 AD3d 915, 916 [4th Dept 2011], *lv denied* 19 NY3d 975 [2012] [internal quotation marks omitted]; *see People v Jones*, 155 AD3d 1547, 1548 [4th Dept 2017], *amended on rearg* 156 AD3d 1493 [4th Dept 2017], *lv denied* 32 NY3d 1205 [2019]). Contrary to defendant's related contention, we conclude that, inasmuch as defendant was not denied a fair trial by any of the alleged instances of prosecutorial error, defense counsel's failure to object to those instances did not constitute ineffective assistance of counsel (*see People v Swan*, 126 AD3d 1527, 1527 [4th Dept 2015], *lv denied* 26 NY3d 972 [2015]).

Defendant's contention that defense counsel was ineffective for allegedly failing to instruct defendant about his right to testify, to call defendant's daughter as a witness, and to investigate another perpetrator are based on facts dehors the record and should be raised by way of a CPL article 440 motion (*see generally People v Carrasquillo*, 170 AD3d 1592, 1594 [4th Dept 2019], *lv denied* 33 NY3d 1029 [2019]; *People v Williams*, 48 AD3d 1108, 1109 [4th Dept 2008], *lv denied* 10 NY3d 872 [2008]).

Finally, with respect to defendant's remaining allegations of ineffective assistance of counsel, we note that the constitutional right to effective assistance of counsel "does not guarantee a perfect trial, but assures the defendant a fair trial" (*People v Flores*, 84 NY2d 184, 187 [1994]). Having examined the record before us, 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 [1981]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

647

KA 18-00499

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JORGE SUAREZ, ALSO KNOWN AS BEBE/SUARE,
DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered December 21, 2017. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Defendant's conviction arises from a fatal shooting at a bar. We reject defendant's contentions that the evidence is legally insufficient to support the conviction and that the verdict is against the weight of the evidence. The People presented evidence establishing every element of the crimes charged and defendant's commission thereof (*see generally People v Moore*, 78 AD3d 1658, 1659 [4th Dept 2010]). The fact that none of the witnesses testified as to seeing defendant fire the shot that killed the victim " 'does not render the evidence legally insufficient, inasmuch as there was ample circumstantial evidence establishing defendant's identity as the shooter' " (*People v Clark*, 142 AD3d 1339, 1341 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]). Additionally, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Agee*, 129 AD3d 1559, 1560 [4th Dept 2015]).

Finally, we conclude that the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of

justice (*see* CPL 470.15 [6] [b]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

651

KA 16-02251

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AMY DELL, DEFENDANT-APPELLANT.

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

AMY DELL, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered July 11, 2016. The judgment convicted defendant, upon a jury verdict, of aggravated vehicular homicide (two counts) 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 her upon a jury verdict of two counts of aggravated vehicular homicide (Penal Law § 125.14 [1], [3]) and one count of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a]). Defendant failed to preserve her contention in her pro se supplemental brief that County Court should have suppressed the chemical test results measuring her blood alcohol content from two blood samples (*see generally People v Holland*, 126 AD3d 1514, 1514 [4th Dept 2015], *lv denied* 25 NY3d 1165 [2015]). In any event, that contention lacks merit because both samples were properly obtained by law enforcement; the first sample was obtained by warrant after it had been collected by medical personnel for medical purposes, and the second sample was drawn from defendant pursuant to a court order (*see People v Elysee*, 12 NY3d 100, 105 [2009]). We likewise reject defendant's contention in her main brief that the court erred in admitting the chemical test results at trial based on purported gaps in the chain of custody. "Where, as here, the circumstances provide reasonable assurances of the identity and unchanged condition of the evidence, any deficiencies in the chain of custody go to the weight of the evidence and not its admissibility" (*People v Joseph*, 75 AD3d 1080, 1081 [4th Dept 2010], *lv denied* 15 NY3d 853 [2010] [internal

quotation marks omitted]). Contrary to defendant's further contention in her main brief, her Sixth Amendment right of confrontation was not violated under *Bullcoming v New Mexico* (564 US 647, 652 [2011]), where the People called as witnesses both crime laboratory analysts who tested the blood samples.

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that an acquittal would have been unreasonable given the two chemical test results, video evidence, witness testimony, and accident reconstruction (*see id.* at 348). Thus, we reject defendant's contention in her main brief that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant also contends in her pro se supplemental brief that the evidence is legally insufficient to establish that her driver's license had either been suspended or revoked and that she had previously been convicted under Vehicle and Traffic Law § 1192. Defendant waived that contention by admitting to those facts prior to trial (*see generally People v Lawrence*, 141 AD3d 1079, 1082-1083 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]; *People v Ward*, 57 AD3d 582, 583 [2d Dept 2008], *lv denied* 12 NY3d 789 [2009]).

Defendant contends in her main brief that the court erred in admitting testimony regarding her refusals to consent to blood draws for purposes of chemical testing because the police violated her limited right to counsel (*see generally People v Gursey*, 22 NY2d 224, 227 [1968]). We agree. Defendant requested her attorney before deciding whether to consent to a blood draw and, upon such a request, the police " 'may not, without justification, prevent access between the [defendant] and his [or her] lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand' " (*People v Smith*, 18 NY3d 544, 549 [2012], quoting *Gursey*, 22 NY2d at 227). Here, the record establishes that, despite defendant's requests, the police made no effort to either contact or to facilitate defendant's contact with her attorney, and there is no evidence that a limited delay in testing to allow defendant an opportunity to consult with her attorney would have unduly interfered with law enforcement's efforts to collect a sample (*cf. People v Horsey*, 45 AD3d 1378, 1379 [4th Dept 2007], *lv denied* 10 NY3d 766 [2008]). Under these circumstances, where defendant was in a hospital bed and had no apparent ability to contact her attorney without assistance, we conclude that her limited right to counsel was violated, and thus her resulting statements refusing chemical testing should have been suppressed (*see generally Smith*, 18 NY3d at 549-550). Nevertheless, we conclude that the error was harmless (*see People v Warren*, 160 AD3d 1132, 1137 [3d Dept 2018], *lv denied* 31 NY3d 1154 [2018]; *cf. Smith*, 18 NY3d at 552). We further conclude that any error in admitting defendant's statements invoking her right to counsel was also harmless (*see generally People v Daniels*, 115 AD3d 1364, 1365 [4th Dept 2014], *lv denied* 23 NY3d 1019 [2014]).

We reject defendant's contention in her pro se supplemental brief that the court erred in refusing to suppress statements that she made during her arraignment, to law enforcement, and to others, which were

spontaneous and were not the result of a custodial interrogation (*see People v Gonzales*, 75 NY2d 938, 939-940 [1990], *cert denied* 498 US 833 [1990]).

Defendant's contentions in her pro se supplemental brief with respect to the grand jury proceedings "are not reviewable on appeal because the grand jury minutes are not included in the record on appeal" (*People v Barill*, 120 AD3d 951, 952 [4th Dept 2014], *lv denied* 24 NY3d 1042 [2014], *reconsideration denied* 25 NY3d 949 [2015] [internal quotation marks omitted]). We reject defendant's contention in her main brief that the sentence is unduly harsh and severe (*see generally People v Drouin*, 115 AD3d 1153, 1156 [4th Dept 2014], *lv denied* 23 NY3d 1019 [2014]). We have reviewed defendant's remaining contentions in her pro se supplemental brief and conclude that none warrants modification or reversal of the judgment.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

655

CAF 17-01458

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

IN THE MATTER OF LEONARD S. EDMONDS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

HANEEFAH LEWIS, RESPONDENT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR RESPONDENT-APPELLANT.

PAUL B. WATKINS, FAIRPORT, FOR PETITIONER-RESPONDENT.

MARK A. SCHLECHTER, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered July 13, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner sole custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph to the extent that it delegates authority to determine the duration and frequency of respondent's supervised visitation and as modified the order is affirmed without costs and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: In this Family Court Act article 6 proceeding, respondent mother appeals from an order that, inter alia, granted after a hearing the petition of petitioner father seeking to modify a prior joint custody order by granting him sole custody of the subject child with supervised visitation to the mother. The parties are the parents of a child born in 2012. In October 2015, they stipulated to a joint custody order that granted primary physical residence of the child to the father and visitation to the mother. The mother's visitation was suspended in May 2016, following the child's disclosure of sexual abuse by the mother's boyfriend. After the mother agreed to keep her boyfriend away from the child, Family Court granted the mother supervised visitation. In December 2016, however, the court temporarily suspended that visitation and, although a referral was thereafter made to a supervising agency for supervision of the mother's visits with the child, there was a nine-month waiting list. As of March 2017, the mother's visitation had not resumed.

On appeal, the mother contends that the Attorney for the Child (AFC) improperly substituted her judgment for that of the child by advocating a position that was contrary to the child's express wishes.

As the mother correctly concedes, however, her contention is not preserved for our review because she made no motion to remove the AFC (*see Matter of Mason v Mason*, 103 AD3d 1207, 1207-1208 [4th Dept 2013]; *Matter of Swinson v Dobson*, 101 AD3d 1686, 1687 [4th Dept 2012], *lv denied* 20 NY3d 862 [2013]). In any event, the mother's contention lacks merit. An AFC "must zealously advocate the child's position . . . even if the [AFC] believes that what the child wants is not in the child's best interests," unless the AFC "is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child" (22 NYCRR 7.2 [d] [2], [3]). Here, the record supports a finding that the child, who was five years old at the time of the hearing, "lack[ed] the capacity for knowing, voluntary and considered judgment" (22 NYCRR 7.2 [d] [3]; *see Matter of Eastman v Eastman*, 118 AD3d 1342, 1343 [4th Dept 2014], *lv denied* 24 NY3d 910 [2014]) and that another outcome would have placed the child at risk (*see Matter of Isobella A. [Anna W.]*, 136 AD3d 1317, 1320 [4th Dept 2016]).

We reject the mother's additional contention that there is not a sound and substantial basis in the record to support the court's determination that it was in the child's best interests to award the father sole custody. In making a custody determination, " 'the court must consider all factors that could impact the best interests of the child, including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of [the parties] to provide for the child's emotional and intellectual development and the wishes of the child . . . No one factor is determinative because the court must review the totality of the circumstances' " (*Sheridan v Sheridan*, 129 AD3d 1567, 1568 [4th Dept 2015]; *see Eschbach v Eschbach*, 56 NY2d 167, 171-172 [1982]). A court's evaluation of a child's best interests is entitled to great deference and will not be disturbed as long as it is supported by a sound and substantial basis in the record (*see Sheridan*, 129 AD3d at 1568; *Matter of Thillman v Mayer*, 85 AD3d 1624, 1625 [4th Dept 2011]).

Although the court did not specify the factors it relied on in conducting its best interests analysis (*see Matter of Howell v Lovell*, 103 AD3d 1229, 1231 [4th Dept 2013]), "[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 [4th Dept 2007]; *see Howell*, 103 AD3d at 1231; *see also Matter of Butler v Ewers*, 78 AD3d 1667, 1667 [4th Dept 2010]; *see generally Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]).

Here, there is a sound and substantial basis in the record to support the court's determination that it was in the child's best interests to award sole custody of the child to the father (*see generally Matter of Jeremy J.A. v Carley A.*, 48 AD3d 1035, 1036 [4th Dept 2008]). The mother's refusal to believe the child's disclosure

of sexual abuse and her continued commitment to the alleged abuser rendered her unfit to have custody of the child (*see generally Matter of Kairis v Kairis*, 98 AD3d 1281, 1282 [4th Dept 2012], *lv denied* 20 NY3d 853 [2012]; *Matter of Peet v Parker*, 23 AD3d 940, 941 [3d Dept 2005]). Additionally, the record establishes that the quality of the home environment of the father is superior to that of the mother inasmuch as the mother resides in a one-bedroom apartment with the alleged abuser (*see Matter of Braga v Bell*, 151 AD3d 1924, 1925-1926 [4th Dept 2017], *lv denied* 30 NY3d 905 [2017]). The record also establishes that the father, who was attentive to the child's disclosures of abuse, is better able to provide for the child's emotional and intellectual development (*see generally Matter of Caughill v Caughill*, 124 AD3d 1345, 1347 [4th Dept 2015]) and that the court's determination aligns with the child's desires.

We further reject the mother's contention that the court erred in directing that her visitation be supervised. "Supervised visitation is a matter left to the sound discretion of the court and will not be disturbed where . . . there is a sound and substantial basis in the record to support such visitation" (*Matter of Vieira v Huff*, 83 AD3d 1520, 1521 [4th Dept 2011]). Here, the record establishes that the mother repeatedly put the child at risk by violating court orders (*see generally Matter of Rosario WW. v Ellen WW.*, 309 AD2d 984, 986 [3d Dept 2003]) and by permitting the alleged abuser to have access to the child (*see Matter of Cory O. v Katie P.*, 162 AD3d 1136, 1138-1139 [3d Dept 2018]). Thus, we conclude that there is a sound and substantial basis in the record for the court's determination to impose supervised visitation (*see generally Matter of Joyce S. v Robert W.S.*, 142 AD3d 1343, 1344 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]; *Vieira*, 83 AD3d at 1521).

Nevertheless, the court failed to set a supervised visitation schedule and it is unclear from the order whether the court intended to delegate its authority to set such a schedule to the parties or to the supervising agency (*see generally Matter of Bonthu v Bonthu*, 67 AD3d 906, 907 [2d Dept 2009], *lv dismissed* 14 NY3d 852 [2010]). Under either interpretation, we conclude that the court erred inasmuch as the record demonstrates that an order directing supervised visitation as mutually agreed by the parties would be untenable under the circumstances (*see generally Matter of Kelley v Fifield*, 159 AD3d 1612, 1613-1614 [4th Dept 2018]; *Matter of Pierce v Pierce*, 151 AD3d 1610, 1611 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]) and delegation of the court's authority to set a visitation schedule to a supervising agency is improper (*see Matter of Ordona v Cothern*, 126 AD3d 1544, 1545-1546 [4th Dept 2015]; *Matter of Green v Bontzolakes*, 111 AD3d 1282, 1284 [4th Dept 2013]). We therefore modify the order accordingly and remit the matter to Family Court to fashion an appropriate schedule for supervised visitation in accordance with the best interests of the child.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

658

CA 18-01604

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

CAROL ROBERSON ALMALAHI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NFT METRO SYSTEMS, INC., DEFENDANT-RESPONDENT.

LAW OFFICE OF BARRY J. DONOHUE, TONAWANDA (BARRY J. DONOHUE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

VICKY-MARIE BRUNETTE, DEPUTY GENERAL COUNSEL, BUFFALO, GOLDBERG SEGALLA LLP (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 8, 2018. The order, insofar as appealed from, granted the motion of defendant to compel plaintiff to provide certain medical authorizations.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when she fell on one of defendant's fixed-route buses and appeals from an order that, inter alia, granted defendant's motion to compel plaintiff to provide certain unrestricted medical authorizations. We affirm.

According to plaintiff, she had rung the bell for the bus to stop, and she fell when the bus began moving again, before she could disembark. According to the driver of the bus, after he heard the bell for a stop, he stopped the bus and checked his mirror. When he did not see anyone moving to disembark, he thought that the bell had been sounded by mistake, and he slowly pulled away from the curb. As he did so, he heard the "thud" of plaintiff falling.

In her complaint, as amplified by her bill of particulars, plaintiff alleged a serious injury within the meaning of Insurance Law § 5102 (d) with respect to her cervical spine and left shoulder. Plaintiff sought damages for past, present, and future pain and suffering, medical expenses, and loss in excess of basic economic loss. In response to defendant's discovery demands, plaintiff executed authorizations for defendant to obtain her medical records, but only with respect to her cervical spine, left shoulder, and lumbar spine. Defendant eventually moved to compel plaintiff to execute additional unrestricted authorizations covering other health

conditions in plaintiff's medical history, including prior injuries to her left and right knees; a replacement of her right knee; injuries to her hip, buttock, elbow, hands and left upper arm as a result of two prior falls in 2014 and 2015; a carpal tunnel surgery five days before her fall on the bus; diabetes; and high blood pressure (collectively, disputed health conditions). The record establishes that some of those disputed health conditions, among others, had rendered plaintiff permanently disabled since the 1990s and required her to use a walker outside the home since the year 2000. Notably, plaintiff was using a rolling walker on the bus at the time of her fall, although she was holding onto it with only her right hand because her left hand was still in a cast due to her carpal tunnel surgery.

We conclude that Supreme Court did not abuse its discretion in granting the motion (*see generally Rivera v Rochester Gen. Health Sys.*, 144 AD3d 1540, 1541 [4th Dept 2016]; *Marable v Hughes*, 38 AD3d 1344, 1345 [4th Dept 2007]). We agree with plaintiff that she waived her physician-patient privilege only with respect to the physical conditions that she has affirmatively placed in controversy (*see Castro v Admar Supply Co., Inc.* [appeal No. 2], 159 AD3d 1616, 1619 [4th Dept 2018]). Contrary to plaintiff's contention, however, she has affirmatively placed in controversy her disputed health conditions by her allegation that defendant's negligence was the sole cause of her accident and injuries, and we note that defendant challenged that allegation in its answer with the affirmative defense of plaintiff's comparative negligence (*see generally id.*). Defendant submitted evidence in support of its motion that plaintiff had registered in 2013 for defendant's Paratransit Access Line (PAL) service, which afforded plaintiff transportation from her residence to her destination without having to use defendant's fixed-route bus service and also provided plaintiff assistance in boarding, seating, and disembarking. Defendant had also approved, at no extra cost to plaintiff, a personal care assistant to accompany her on her PAL trips. Defendant submitted the affidavit of one of its employees, who averred that plaintiff's PAL application had been approved based on the representations of plaintiff and her medical provider regarding plaintiff's disabilities and her inability to navigate defendant's fixed-route bus service. Plaintiff was still registered for the PAL service at the time of her fall on the fixed-route bus. In light of those undisputed facts, we agree with defendant that the medical records covering plaintiff's disputed health conditions—which involve her ability to stand, steady herself, and ambulate—may contain relevant information that is material and necessary to the defense of the action with respect to the element of causation or to defendant's related affirmative defense of comparative negligence (*see* CPLR 3101 [a]; *see also Geraci v National Fuel Gas Distrib. Corp.*, 255 AD2d 945, 946 [4th Dept 1998]).

We further agree with defendant that plaintiff's medical records covering the disputed health conditions may contain information that is material and necessary to the defense of the action on the issue of serious injury. Despite a demand from defendant to do so, plaintiff failed to particularize the duration and permanency of the injuries she sustained from her fall on the bus, and the record is therefore

unclear concerning the category or categories of serious injury under which plaintiff claims she is entitled to damages (*see generally* Insurance Law § 5102 [d]). In light of that open question, we cannot conclude that the court abused its discretion in ordering plaintiff to execute the broad authorizations sought by defendant (*see generally Rivera*, 144 AD3d at 1541; *Marable*, 38 AD3d at 1345).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

660

CA 19-00271

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

AMBER N. SNYDER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TRACEY L. DAW AND ANDREW C. DAW,
DEFENDANTS-APPELLANTS.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (BARNEY BILELLO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WILLIAM MATTAR, P.C., ROCHESTER (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Yates County (William F. Kocher, A.J.), dated July 30, 2018. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries that she sustained when a vehicle driven by defendant Andrew C. Daw and owned by defendant Tracey L. Daw struck a vehicle in which plaintiff was a passenger. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury under the categories alleged by her, i.e., the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories (*see* Insurance Law § 5102 [d]). Supreme Court granted that part of defendants' motion with respect to the 90/180-day category. Defendants appeal, and we affirm.

We reject defendants' contention that the court erred in denying their motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury. Defendants submitted, in support of their motion, plaintiff's deposition testimony, in which she testified, inter alia, that she lost consciousness during the accident and thereafter began to experience frequent, severe headaches, occasionally accompanied by double vision and lightheadedness, in addition to memory loss, which had persisted for more than two years. Defendants also submitted plaintiff's hospital records, which established that a CT scan performed at the hospital after the accident revealed "[h]yperattenuation within the posterior left frontal lobe" of plaintiff's brain. Due to the treating doctor's concern "for

parenchymal hemorrhage," plaintiff was transferred to another hospital so that she could receive a higher level of care. Plaintiff's imaging studies at the second hospital revealed "a small amount of traumatic subarachnoid blood in the left frontal [lobe] area." Thus, contrary to defendants' contention, her claims of serious injury are not premised entirely on " 'subjective complaints of pain . . . devoid of any independent objective medical evidence of a serious injury' " (*O'Brien v Bainbridge*, 89 AD3d 1511, 1512 [4th Dept 2011]). Furthermore, defendants also submitted a report from plaintiff's primary care physician indicating that plaintiff had complained of frequent headaches accompanied by double vision since the accident and that, following an examination, plaintiff's physician treated plaintiff for a concussion. We therefore conclude that defendants' own submissions raised questions of fact and that, consequently, defendants failed to meet their initial burden of " 'presenting competent evidence establishing that the injuries do not meet the [serious injury] threshold' " (*Goodwin v Walter*, 165 AD3d 1596, 1596 [4th Dept 2018]).

We also reject defendants' contention that they met their initial burden of establishing that plaintiff's injuries did not limit her in any significant or consequential manner. Although plaintiff testified at her deposition that she was able to perform her job as a cashier without restriction, plaintiff also testified that she was unable to sit through college classes and had continued to experience "[v]ery bad migraines" that lingered for hours and caused dizziness and lightheadedness (*cf. Licari v Elliott*, 57 NY2d 230, 238-239 [1982]). In addition, as noted above, plaintiff testified that she experienced memory loss. It is well settled that "postconcussion syndrome, posttraumatic headaches, and cognitive dysfunction" as a result of a collision *can* constitute a significant limitation (*Armprester v Erickson*, 148 AD3d 1645, 1645 [4th Dept 2017]; *see Jackson v Mungo One*, 6 AD3d 236, 236 [1st Dept 2004]). Moreover, plaintiff testified that she continued to suffer from her accident-related injuries two years after the accident. Thus, we conclude that an issue of fact exists whether plaintiff's injuries are permanent (*see Courtney v Hebeler*, 129 AD3d 1627, 1628 [4th Dept 2015]; *Hawkins v Foshee*, 245 AD2d 1091, 1091 [4th Dept 1997]). Inasmuch as defendants "failed to meet their initial burden" on their motion for summary judgment, "we do not consider the sufficiency of plaintiff['s] opposing papers" (*Gonyou v McLaughlin*, 82 AD3d 1626, 1627 [4th Dept 2011]; *see Goodwin*, 165 AD3d at 1596).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

661

CA 18-02305

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

IN THE MATTER OF THE FORECLOSURE OF TAX LIENS BY PROCEEDING IN REM PURSUANT TO ARTICLE 11 OF THE REAL PROPERTY TAX LAW BY CITY OF UTICA. MEMORANDUM AND ORDER

CITY OF UTICA, PETITIONER-APPELLANT;

KERRY G. MARTIN, RESPONDENT-RESPONDENT.

WILLIAM M. BORRILL, CORPORATION COUNSEL, UTICA (MERIMA SMAJIC OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered August 8, 2018. The order conditionally granted respondent's motion to vacate a default judgment of foreclosure.

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

Memorandum: Petitioner commenced this in rem tax foreclosure proceeding pursuant to RPTL article 11 seeking to foreclose delinquent tax liens on property owned by respondent. Petitioner obtained a default judgment of foreclosure, and respondent thereafter moved to vacate the default judgment and for sufficient time to pay the outstanding taxes. Petitioner appeals from an order that, in effect, granted the motion by directing that the judgment of foreclosure be vacated, and title of the property be transferred to respondent, if respondent paid the outstanding taxes by a certain date. We agree with petitioner that Supreme Court erred in granting the motion, and we therefore reverse.

A motion to reopen a default judgment of tax foreclosure "may not be brought later than one month after entry of the judgment" (RPTL 1131; *see Matter of County of Wayne [Schenk]*, 169 AD3d 1501, 1502 [4th Dept 2019]; *Matter of County of Ontario [Helser]*, 72 AD3d 1636, 1637 [4th Dept 2010]). Here, respondent's motion was brought outside that time limitation, and there is no basis to conclude that respondent was not required to bring the motion within the applicable time period. Respondent contended in the motion court that his failure to bring a timely motion was excusable because he was denied due process by petitioner's failure to provide him with adequate notice of the pending foreclosure. The record, however, establishes that petitioner afforded respondent due process, which "is satisfied by notice

reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*Matter of County of Seneca [Maxim Dev. Group]*, 151 AD3d 1611, 1612 [4th Dept 2017] [internal quotation marks omitted]).

In addition, the court erred in determining that it had discretion to grant the motion seeking to vacate the underlying judgment of foreclosure "for sufficient reason and in the interests of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; *see Matter of County of Genesee [Spicola]*, 125 AD3d 1477, 1477 [4th Dept 2015], *lv denied* 25 NY3d 904 [2015]). RPTL 1131 "provides, in unambiguous and prohibitory language, that '[a] motion to reopen any such default *may not* be brought later than one month after entry of the judgment' " (*Schenk*, 169 AD3d at 1503; *see Matter of County of Ontario [Duvall]*, 169 AD3d 1508, 1508 [4th Dept 2019]), and thus "the exercise of such discretion [is] available to the courts only upon consideration of a timely motion" (*Schenk*, 169 AD3d at 1502-1503; *see e.g. Matter of County of Genesee [Butlak]*, 124 AD3d 1330, 1331 [4th Dept 2015], *lv denied* 25 NY3d 904 [2015]; *Matter of County of Livingston [Mort]*, 101 AD3d 1755, 1755-1756 [4th Dept 2012], *lv denied* 20 NY3d 862 [2013]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

662

CA 19-00101

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

JODY C. BEST, INDIVIDUALLY, AND AS THE ADMINISTRATOR OF THE ESTATE OF DONALD L. BEST, ALSO KNOWN AS DONNIE L. BEST, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GUTHRIE MEDICAL GROUP, P.C., ET AL., DEFENDANTS, GUTHRIE ROBERT PACKER HOSPITAL, SILVIU MARICA, M.D., AHMED ABDELBAKI, M.D., ALEXANDER JOHNSTON, M.D., AND DAVID BERTSCH, M.D., DEFENDANTS-RESPONDENTS.

WELCH, DONLON & CZARPLES PLLC, CORNING (ANNA CZARPLES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN G. FELTER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered July 6, 2018. The order, among other things, granted in part the motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking summary judgment dismissing the complaint against defendant Guthrie Robert Packer Hospital and reinstating the complaint against that defendant, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, individually and as the administrator of the estate of Donald L. Best (decedent), commenced this medical malpractice and wrongful death action seeking damages for the alleged negligent treatment provided to the decedent at defendant Guthrie Robert Packer Hospital (hospital), a facility located in Sayre, Pennsylvania, by Silviu Marica, M.D., Ahmed Abdelbaki, M.D., Alexander Johnston, M.D., and David Bertsch, M.D. (individual defendants). On defendants' motion for summary judgment pursuant to CPLR 3212, Supreme Court dismissed the complaint against the hospital and the individual defendants (collectively, defendants) on the ground of lack of personal jurisdiction.

As an initial matter, we reject plaintiff's contention that the court should have decided the motion under the standard applicable to

motions brought under CPLR 3211 (a). The court applied the correct standard to the motion, which was brought after service of the answers (*see* CPLR 3211 [e]; 3212 [a]; *see generally Williams v Beemiller, Inc.*, 159 AD3d 148, 152 [4th Dept 2018], *affd* — NY3d —, 2019 NY Slip Op 03656 [2019]).

Contrary to plaintiff's further contention, the hospital did not consent to the general jurisdiction of New York courts by registering as a foreign corporation with the New York State Department of State (*see Aybar v Aybar*, 169 AD3d 137, 147-152 [2d Dept 2019], *lv dismissed* 33 NY3d 1044 [2019]; *Wilderness USA, Inc. v DeAngelo Bros. LLC*, 265 F Supp 3d 301, 312-314 [WD NY 2017]). We likewise reject plaintiff's contention that defendants Marica and Bertsch consented to New York personal jurisdiction solely based on their becoming licensed to practice medicine in New York (*see generally Ingraham v Carroll*, 90 NY2d 592, 600 [1997]; *Chambers v Weinstein*, 44 Misc 3d 1224[A], 2014 NY Slip Op 51331[U], *12 [Sup Ct, NY County 2014], *affd* 135 AD3d 450 [1st Dept 2016]).

We also reject plaintiff's contention that defendants waived an objection to personal jurisdiction when general counsel for The Guthrie Clinic, the parent company of the hospital, agreed to accept service of the complaint on behalf of certain defendants. The acceptance of service, standing alone, does not constitute an appearance or otherwise waive an objection to personal jurisdiction where, as here, counsel agrees to accept service as a courtesy without taking any additional action that could be construed as either a formal or informal appearance (*cf. HSBC Bank USA, N.A. v Taub*, 170 AD3d 1128, 1130 [2d Dept 2019]). Further, defendants preserved their objection to personal jurisdiction by raising that objection in their answers without having previously made a motion to dismiss on a ground set forth in CPLR 3211 (a) (*see* CPLR 3211 [e]).

We agree with plaintiff, however, that the court erred in granting the motion insofar as it sought summary judgment dismissing the complaint against the hospital without first granting jurisdictional discovery. We therefore modify the order accordingly. Although defendants met their initial burden on the motion (*see generally Williams*, 159 AD3d at 152), plaintiff made a "sufficient start" in establishing personal jurisdiction over the hospital pursuant to CPLR 301 and 302 (a) (1) to be entitled to disclosure pursuant to CPLR 3212 (f) (*cf. Robins v Procure Treatment Ctrs., Inc.*, 157 AD3d 606, 607 [1st Dept 2018]; *Williams v Beemiller, Inc.*, 100 AD3d 143, 152-153 [4th Dept 2012]). The record "is not clear whether [the hospital's] 'affiliations with the State [of New York] are so continuous and systematic as to render [it] essentially at home in the . . . State' " as required for general jurisdiction (*Robins*, 157 AD3d at 607, quoting *Daimler AG v Bauman*, 571 US 117, 139 [2014]; *see* CPLR 301) or whether its activities in New York are " 'purposeful and [whether] there is a substantial relationship between the transaction and the claim asserted' " as required for long-arm jurisdiction (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], *cert denied* 549 US 1095 [2006]; *see* CPLR 302 [a] [1]). However, the record contains evidence that the hospital advertises to

prospective New York patients and has at least some relationship with New York providers, New York insurers, and defendant Guthrie Medical Group, P.C., which owns New York offices. The record also contains evidence that the hospital derives substantial revenue from New York residents. Based on that initial showing, we conclude that plaintiff has made a "sufficient start" by establishing that facts "*may exist* to exercise personal jurisdiction" over the hospital, warranting jurisdictional discovery (*see Williams*, 100 AD3d at 153).

We reject plaintiff's contention, however, that the court erred in granting the motion insofar as it sought summary judgment dismissing the complaint against the individual defendants without first granting jurisdictional discovery. The individual defendants are not subject to general jurisdiction under CPLR 301 because none of them are domiciled in New York, and there is no evidence that the individual defendants made sufficient contact with New York in their individual capacities (*see Laufer v Ostrow*, 55 NY2d 305, 313 [1982]; *IMAX Corp. v Essel Group*, 154 AD3d 464, 465-466 [1st Dept 2017]). Regarding long-arm jurisdiction under CPLR 302 (a) (1), assuming, arguendo, that the individual defendants purposefully availed themselves of the privilege of conducting activity in New York, we conclude that there is no evidence that there was a " 'substantial relationship' " between that alleged activity and " 'the claim asserted' " by plaintiff (*Deutsche Bank Sec., Inc.*, 7 NY3d at 71). Under these circumstances, plaintiff failed to make a nonfrivolous showing that facts may exist to exercise personal jurisdiction over the individual defendants, and thus further discovery as to them was not warranted (*see Glazer v Socata, S.A.S.*, 170 AD3d 1685, 1687 [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

663

CA 18-02121

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

BLACK RIVER PLUMBING, HEATING AND AIR CONDITIONING, INC., PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION THOUSAND ISLANDS CENTRAL SCHOOL DISTRICT, AND THOUSAND ISLANDS CENTRAL SCHOOL DISTRICT, DEFENDANTS-RESPONDENTS-APPELLANTS.

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (JORDAN R. PAVLUS OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

TABNER, RYAN & KENIRY, LLP, ALBANY (BRIAN M. QUINN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered January 23, 2018. The order denied plaintiff's motion for partial summary judgment and denied defendants' cross motion for summary judgment on the first counterclaim.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiff's motion in part with respect to liability on the first cause of action and with respect to the first counterclaim and dismissing that counterclaim, and as modified the order is affirmed without costs.

Memorandum: Plaintiff entered into a contract to install a pellet boiler heating system in a school owned and operated by defendant Thousand Islands Central School District and thereafter commenced this action when defendants terminated the contract and refused to make the remaining payments. Defendants answered and asserted three counterclaims, including one seeking a determination that plaintiff substantially breached the contract and that defendants properly terminated plaintiff (first counterclaim). Plaintiff moved for partial summary judgment on liability on its breach of contract cause of action and for summary judgment dismissing defendants' counterclaims, and defendants cross-moved for summary judgment on their first counterclaim. Supreme Court denied the motion and cross motion, and now plaintiff appeals, and defendants cross-appeal.

Addressing the appeal and the cross appeal, we conclude that plaintiff met its initial burden of establishing that defendants

failed to follow the termination for cause procedures in the contract when they, inter alia, did not provide plaintiff seven days to cure deficiencies before terminating the contract, and defendants failed to raise a triable issue of fact with respect thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Where a contract provides that a party must fulfill specific conditions precedent before it can terminate the agreement, those conditions are enforced as written and the party must comply with them" (*O'Brien & Gere, Inc. of N. Am. v G.M. McCrossin, Inc.*, 148 AD3d 1804, 1805 [4th Dept 2017] [internal quotation marks omitted]). Here, defendants' failure to allow plaintiff the requisite time to cure before terminating the contract rendered defendants' termination wrongful, and therefore the court erred in denying that part of plaintiff's motion with respect to liability on the breach of contract cause of action (*cf. MCK Bldg. Assoc. v St. Lawrence Univ.*, 301 AD2d 726, 728 [3d Dept 2003], *lv dismissed* 99 NY2d 651 [2003]; *see generally Allied-Lynn Assoc., Inc. v Alex Bro, LLC*, 34 AD3d 1247, 1248 [4th Dept 2006]). For the same reason, we conclude that the court properly denied defendants' cross motion and erred in denying that part of plaintiff's motion seeking summary judgment dismissing the first counterclaim. We therefore modify the order accordingly.

We reject plaintiff's contention on appeal, however, that defendants' second and third counterclaims must necessarily be dismissed because defendants failed to properly terminate the contract. The subject contract did not contain a provision stating that an improper termination for cause shall be deemed a termination for convenience (*cf. O'Brien & Gere, Inc. of N. Am.*, 148 AD3d at 1805). Additionally, contrary to plaintiff's contention, *Paragon Restoration Group, Inc. v Cambridge Sq. Condominiums* (42 AD3d 905, 906 [4th Dept 2007]) does not support an automatic conversion of an improper termination for cause into one for convenience; indeed, the contract in that matter was terminated "without cause, pursuant to a termination for convenience clause" (*id.*). Where, as here, the termination is for cause, and not for convenience, a defendant may seek an offset for payments made to third parties to correct the contractor's defaults (*see generally General Supply & Constr. Co. v Goelet*, 241 NY 28, 34-37 [1925], *mot to amend remittitur granted* 241 NY 507 [1925]). Inasmuch as defendants may be entitled to an offset, we decline to dismiss their second and third counterclaims.

We have considered the remaining contentions of the parties and conclude that none warrants reversal or further modification of the order.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

664

CA 19-00052

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

THOMAS CUYLER, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY,
DEFENDANT-RESPONDENT-APPELLANT.

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

LAW OFFICE OF JOHN TROP, ROCHESTER (TIFFANY L. D'ANGELO OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered October 25, 2018. The order denied that part of the motion of plaintiff for partial summary judgment on the issue of serious injury and denied the cross motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action to recover damages pursuant to an uninsured motorist provision of an automobile insurance policy for injuries that he allegedly sustained as a result of a motor vehicle accident. Plaintiff now appeals from an order that, inter alia, denied that part of his motion for partial summary judgment on the issue of serious injury, and defendant cross-appeals from that order insofar as it denied defendant's cross motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as a result of the accident. We affirm.

Contrary to plaintiff's contention, Supreme Court properly denied that part of his motion seeking partial summary judgment on the issue of serious injury. Even assuming, arguendo, that plaintiff met his initial burden of demonstrating his entitlement to judgment as a matter of law (*see DeAngelis v Martens Farms, LLC*, 104 AD3d 1125, 1126-1127 [4th Dept 2013]), we conclude that defendant raised an issue of fact whether plaintiff's spinal injuries were causally related to the accident or the result of a preexisting injury to his cervical spine (*see Cicco v Durolek*, 147 AD3d 1487, 1488 [4th Dept 2017]; *see generally Pommells v Perez*, 4 NY3d 566, 580 [2005]).

We likewise reject defendant's contention that the court erred in

denying its cross motion. Contrary to defendant's contention, we conclude that defendant is not entitled to summary judgment dismissing the complaint on the ground that plaintiff's injuries are not causally related to the accident (*see Mays v Green*, 165 AD3d 1619, 1620 [4th Dept 2018]).

We further conclude that defendant is not entitled to summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of the three categories alleged by plaintiff in his bill of particulars (*see* Insurance Law § 5102 [d]). Initially, we note that defendant did not seek summary judgment on that ground with respect to the 90/180-day category of serious injury, and thus defendant's contention concerning that category, which was not a subject of plaintiff's motion, is not properly before us (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). Additionally, we conclude that defendant failed to meet its initial burden on that ground with respect to the significant limitation of use and permanent consequential limitation of use categories inasmuch as defendant's own submissions "raise triable issues of fact whether plaintiff's alleged limitations and injuries are significant or consequential" (*Monterro v Klein*, 160 AD3d 1459, 1460 [4th Dept 2018] [internal quotation marks omitted]; *see Crewe v Pisanova*, 124 AD3d 1264, 1264-1265 [4th Dept 2015]). One of defendant's experts examined plaintiff and acknowledged that he exhibited radiculopathy (*see Crewe*, 124 AD3d at 1265), and defendant's other expert measured limitations in the range of motion in plaintiff's cervical spine (*see Monterro*, 160 AD3d at 1460). Although the latter expert opined that plaintiff was feigning those limitations, the expert provided no factual basis for that opinion (*see Thomas v Huh*, 115 AD3d 1225, 1226 [4th Dept 2014]; *Busljeta v Plandome Leasing, Inc.*, 57 AD3d 469, 469 [2d Dept 2008]).

Finally, even assuming, arguendo, that defendant met its initial burden with respect to the permanent consequential limitation of use category, we conclude that plaintiff raised an issue of fact through the affidavit of his expert, who opined that plaintiff had not responded to treatment, that he would require surgery, and that his injuries are permanent (*see Edwards v Devine*, 111 AD3d 1370, 1372 [4th Dept 2013]; *Garza v Taravella*, 74 AD3d 1802, 1803 [4th Dept 2010]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

665.1

CA 18-01583

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

AMERICAN TAX FUNDING, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DRUCKMAN LAW GROUP PLLC, DEFENDANT-RESPONDENT.

CAMARDO LAW FIRM, P.C., AUBURN (JUSTIN T. HUFFMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DRUCKMAN LAW GROUP PLLC, WESTBURY (MARIA SIDERIS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered February 14, 2018. The order granted the motion of defendant for a change of venue.

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

Memorandum: Plaintiff appeals from an order granting defendant's motion for a change of venue from Monroe County to Nassau County. Contrary to plaintiff's contention, Supreme Court properly determined that defendant's motion was timely and in compliance with the procedure set forth in CPLR 511. We agree with defendant that the court's prior order granting it leave to serve a late answer pursuant to CPLR 3012 (d) effectively extended the time for it to serve its written demand for a change of venue (*see North County Communications Corp. v Verizon N.Y.*, 196 Misc 2d 149, 152-153 [Sup Ct, Albany County 2003]; *see also Valley Psychological, P.C. v Government Empls. Ins. Co.*, 95 AD3d 1546, 1547 [3d Dept 2012]). Defendant timely served its written demand on May 9, 2017, "before the answer [was] served" on May 15, 2017 (CPLR 511 [a]). In its subsequent motion for a change of venue (*see* CPLR 511 [b]), defendant established that Nassau County is, and Monroe County is not, a proper venue for trial of the action, and the court therefore properly granted the motion as a matter of right (*see Agway, Inc. v Kervin*, 188 AD2d 1076, 1077 [4th Dept 1992]; *see generally* Siegel NY Prac § 123 at 223 [5th ed 2011]).

In light of our determination, plaintiff's remaining contentions are academic.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

665

CA 18-02122

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

KYLIE F. KESHAV, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

KESHAV F. SINGH, DEFENDANT-RESPONDENT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (SHARI JO REICH OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

MATTINGLY CAVAGNARO LLP, BUFFALO (CHRISTOPHER S. MATTINGLY OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Supreme Court, Erie County (James H. Dillon, J.), entered June 23, 2017. The judgment, inter alia, awarded plaintiff maintenance.

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

Memorandum: Plaintiff wife appeals and defendant husband cross-appeals from a decision that, inter alia, distributed the parties' marital property and awarded plaintiff maintenance. Although "[n]o appeal lies from a mere decision" (*Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]), we nevertheless exercise our discretion to treat the notices of appeal and cross appeal as valid and deem the appeal and cross appeal as taken from the judgment of divorce (*see* CPLR 5520 [c]; *Ponzi v Ponzi*, 45 AD3d 1327, 1327 [4th Dept 2007]; *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]).

Contrary to the parties' contentions on appeal and cross appeal, we conclude that Supreme Court did not abuse its discretion in setting the amount and duration of plaintiff's maintenance award. "Although the authority of this Court in determining issues of maintenance is as broad as that of the trial court" (*D'Amato v D'Amato*, 132 AD3d 1424, 1425 [4th Dept 2015]), "[a]s a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court" (*Gately v Gately*, 113 AD3d 1093, 1093 [4th Dept 2014], *lv dismissed* 23 NY3d 1048 [2014] [internal quotation marks omitted]). Here, the court properly "considered plaintiff's reasonable needs and predivorce standard of living in the context of the other enumerated statutory factors set forth in the statute" (*Peck v Peck*, 167 AD3d 1518, 1519 [4th Dept 2018] [internal quotation marks omitted]; *see* Domestic Relations Law § 236 [B] [former (6) (a)]), including that plaintiff's disability prevented her from working (*see* § 236 [B]

[former (6) (a) (8)]), that the equitable distribution of marital property alone would be insufficient to support her needs (*see* § 236 [B] [former (6) (a) (15)]; *see generally Zufall v Zufall*, 109 AD3d 1135, 1136 [4th Dept 2013], *lv denied* 22 NY3d 859 [2014]), and that defendant's present and future earning capacity, for the most part, remained consistent (*see* § 236 [B] [former (6) (a) (1)]; *see generally Morrissey v Morrissey*, 259 AD2d 472, 473 [2d Dept 1999]). We decline to substitute our discretion for that of the court.

Plaintiff further contends on appeal that the court erred in using a 2014 appraisal, rather than a 2016 appraisal, in determining the value of the marital residence. Here, the judgment provided defendant the option of purchasing plaintiff's interest in the marital residence (*cf. Lamparillo v Lamparillo*, 130 AD3d 580, 582 [2d Dept 2015]), and the 2014 appraisal was used only for the limited purpose of calculating the amount defendant would be required to pay if he exercised that option (buyout amount). Although defendant provided the requisite notice of his intent to exercise the option, he failed to comply with the requirement in the judgment that he pay plaintiff the buyout amount within 90 days. Thus, pursuant to the judgment, the marital residence was required to be immediately listed for sale. We therefore conclude that plaintiff's contention regarding the use of the 2014 appraisal is moot.

We have examined the remaining contentions raised on the appeal and the cross appeal and conclude that they are without merit.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

669

KA 18-01799

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH KOWAL, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered June 13, 2018. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is 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.*). On appeal, defendant contends that County Court erred in assessing him 15 points under risk factor 11 and 10 points under risk factor 12.

Risk factor 11 applies "where the offender had a history of alcohol or drug abuse or where the offender consumed sufficient quantities of these substances such that the offender can be shown to have abused alcohol or drugs" (*People v Palmer*, 20 NY3d 373, 378 [2013]). A " 'history' " of substance " 'abuse' " within the meaning of risk factor 11 exists only when there is a "pattern of drug or alcohol use in [the] defendant's history" (*People v Leach*, 106 AD3d 1387, 1388 [3d Dept 2013]). Thus, "[e]vidence of social or occasional use of drugs or alcohol 'does not establish a history of drug or alcohol abuse by [the requisite] clear and convincing evidence' " (*People v Saunders*, 156 AD3d 1138, 1139 [3d Dept 2017]; *see People v Coger*, 108 AD3d 1234, 1235-1236 [4th Dept 2013]; *People v Faul*, 81 AD3d 1246, 1247-1248 [4th Dept 2011]).

Here, the People did not establish by clear and convincing evidence that defendant had the requisite pattern of drug use, and there is no "indication in the record that drugs . . . played a role in the instant offense" (*People v Davis*, 135 AD3d 1256, 1256 [3d Dept

2016], *lv denied* 27 NY3d 904 [2016]). Indeed, the case summary prepared by the Board of Examiners of Sex Offenders (Board) in 2018 states only that defendant once tested positive for marijuana in 2006, and that he once admitted to using marijuana before committing an unrelated, nonsexual crime in 2007. Such evidence establishes only social or occasional drug usage, not the history of drug abuse necessary to assess points under risk factor 11 (*see Saunders*, 156 AD3d at 1140; *Coger*, 108 AD3d at 1235-1236; *cf. People v Merkley*, 125 AD3d 1479, 1479 [4th Dept 2015]). Our conclusion regarding risk factor 11 is further supported by the fact that the Department of Corrections and Community Supervision (DOCCS) declined to enroll defendant in a prison-based drug treatment program after determining, during its intake screening process, that he was not a substance abuser and did not need substance abuse treatment (*see People v Arotin*, 19 AD3d 845, 848 [3d Dept 2005]).

Contrary to the People's contention, the hearsay statement by defendant's ex-wife that he is a "marijuana addict" is entitled to no weight. Not only is that statement conclusory and unsupported by any other evidence, nothing in the record suggests that defendant's ex-wife is qualified to diagnose addiction. The ex-wife's statement is also particularly suspect because it contradicts the conclusion of DOCCS's substance-abuse screening process. In any event, given defendant's denial of a substance abuse problem, his ex-wife's hearsay statement is insufficient to constitute clear and convincing evidence of its truth (*see generally People v Warrior*, 57 AD3d 1471, 1472 [4th Dept 2008]). Indeed, courts have rejected the assessment of points under risk factor 11 that were based on conclusory hearsay with far greater indicia of reliability than the statement by defendant's ex-wife in this case (*see e.g. Coger*, 108 AD3d at 1235; *People v Madera*, 100 AD3d 1111, 1112 [3d Dept 2012]).

We further agree with defendant that the court erred in assessing him 10 points under risk factor 12, for failure to accept responsibility, given that he "pleaded guilty, admitted his guilt, appeared remorseful when interviewed in connection with the preparation of a presentence report, and apologized" for his conduct (*People v Chiu*, 123 AD3d 896, 896 [2d Dept 2014]; *see also People v Munafo*, 119 AD3d 1102, 1103 [3d Dept 2014]). Defendant never thereafter denied engaging in the charged conduct and, although he told various officials that he was unaware of the victim's age when he first had sexual contact with her, he also admitted that he continued engaging in such conduct after discovering her true age. Thus, "[i]n context, [defendant's] description of how his relationship with the underage victim commenced was not an attempt to shift blame or minimize his guilt" (*Chiu*, 123 AD3d at 896; *cf. People v Lerch*, 66 AD3d 1088, 1088 [3d Dept 2009], *lv denied* 13 NY3d 715 [2010]; *People v Baker*, 57 AD3d 1472, 1473 [4th Dept 2008], *lv denied* 12 NY3d 706 [2009]). Indeed, pointing out a mitigating aspect of one's conduct is not necessarily inconsistent with accepting responsibility for that conduct.

The remaining statements upon which the court relied in determining that defendant failed to accept responsibility cannot be

reliably attributed to defendant himself. As the Board noted in declining to assess any points under risk factor 12, "it is unclear if [defendant] genuinely accepts responsibility for his actions in the instant offense" and, in light of that uncertainty, the People failed to meet their burden of proof with respect to that risk factor (*see generally People v Mingo*, 12 NY3d 563, 571 [2009]).

Subtracting the 15 points erroneously assessed under risk factor 11 and the 10 points erroneously assessed under risk factor 12 renders defendant a presumptive level two sex offender. We therefore modify the order accordingly.

Finally, although defendant correctly contends, and the People correctly concede, that the court should have applied a preponderant evidence standard rather than a clear and convincing evidence standard to his request for a downward departure (*see People v Gillotti*, 23 NY3d 841, 860-861 [2014]), we need not remit the matter because the record is sufficient for us to review defendant's request under the proper standard (*see Merkley*, 125 AD3d at 1479). Applying the proper standard, and even assuming, arguendo, that defendant satisfied his burden at the first and second steps of the downward departure analysis (*see generally Gillotti*, 23 NY3d at 861), at the third step of that analysis we have "weigh[ed] the aggravating and mitigating factors [and] determin[ed that] the totality of the circumstances" do not warrant a downward departure to level one (*id.*; *see People v Green*, 137 AD3d 498, 498 [1st Dept 2016]; *People v Belile*, 108 AD3d 890, 891 [3d Dept 2013], *lv denied* 22 NY3d 853 [2013]; *cf. People v Weatherley*, 41 AD3d 1238, 1238-1239 [4th Dept 2007]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

673

KA 18-00285

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOMINICK CRUZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered December 2, 2016. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, attempted murder in the second degree, assault in the first degree and 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 murder in the second degree (Penal Law § 125.25 [1]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and criminal possession of a weapon in the second degree (§ 265.03 [3]). The conviction stems from an incident in a parking lot near a bar where defendant and two of his friends had a physical altercation with three other men. The altercation resulted in one man being fatally shot, and another being injured by a gunshot. Defendant admitted firing those shots, but argued during trial that he acted in self-defense.

We reject defendant's contention that the verdict is against the weight of the evidence with respect to the justification defense (*see People v Johnson*, 103 AD3d 1226, 1226-1227 [4th Dept 2013], *lv denied* 21 NY3d 944 [2013]). Defendant testified that during the altercation he observed a "glint" and heard one of his friends say that "there was a knife." The People established, however, that the two victims were unarmed, and the jury could have reasonably determined that the other man was unarmed based on the testimony of eyewitnesses, who did not observe any weapons during the fight. Thus, "the jury could reasonably have concluded that 'the predicate for the use of deadly force[, that is,] the reasonable belief that one is under deadly attack[, was] lacking' " (*People v Every*, 146 AD3d 1157, 1162 [3d Dept

2017], *affd* 29 NY3d 1103 [2017]). Even assuming, arguendo, that defendant saw a knife, we conclude that the jury could have reasonably determined that the People proved beyond a reasonable doubt that "defendant did not believe deadly force was necessary or that a reasonable person in the same situation would not have perceived that deadly force was necessary" (*People v Umali*, 10 NY3d 417, 425 [2008], *rearg denied* 11 NY3d 744 [2008], *cert denied* 556 US 1110 [2009]). Based on defendant's own trial testimony, the three men had run away from him and towards a wooded area by the time defendant retrieved the gun. Even if we were to credit defendant's version of events that the three men descended upon him after he retrieved the gun, defendant admitted that he did not shoot the man with the knife. Furthermore, defendant acknowledged that he "had time to take off towards [his] car," but opted to retrieve his gun and re-engage with the victims' group, rather than retreat from the fight, and therefore "the jury could reasonably have found that 'defendant could have safely retreated without killing [one victim and injuring another]' " (*People v Estrada*, 1 AD3d 928, 928-929 [4th Dept 2003], *lv denied* 1 NY3d 627 [2004]). Thus, we conclude that, although a different verdict would not have been unreasonable, when viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), including the charge on the defense of justification, the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]), and the jury did not fail to give the evidence the weight it should be accorded (*see People v Kaba*, 166 AD3d 1566, 1567 [4th Dept 2018], *lv denied* 32 NY3d 1206 [2019]).

Defendant failed to object to County Court's charge to the jury on the justification defense and thus failed to preserve for our review his contention that the charge was insufficient because the jury was not instructed that they must assess the situation from defendant's point of view (*see People v Heatley*, 116 AD3d 23, 25-26 [4th Dept 2014], *appeal dismissed* 25 NY3d 933 [2015]). In any event, defendant's contention is without merit inasmuch as the language used by the court mirrored the language of the Criminal Jury Instructions and " 'the justification charge, viewed in its entirety, was a correct statement of the law' " (*People v Ford*, 114 AD3d 1221, 1221 [4th Dept 2014], *lv denied* 23 NY3d 962 [2014]; *see* CJI2d[NY] Defense, Justification: Use of Deadly Physical Force in Defense of a Person). Contrary to defendant's related contention, the court did not err in its instruction with respect to the count of criminal possession of a weapon in the second degree inasmuch as the court did not instruct the jury that the justification defense applied to that count (*see People v Tyler*, 147 AD3d 1441, 1442 [4th Dept 2017], *lv denied* 29 NY3d 1037 [2017]).

Contrary to defendant's contention, the court did not abuse its discretion when it precluded defendant from recalling a prosecution witness (*see People v Comerford*, 70 AD3d 1305, 1306 [4th Dept 2010]; *People v Wegman*, 2 AD3d 1333, 1335 [4th Dept 2003], *lv denied* 2 NY3d 747 [2004]). "Defendant previously had been afforded a full and fair opportunity to cross-examine the witness concerning [that witness's] statements [to the police at the crime scene] but failed to avail

himself of that opportunity" (*Comerford*, 70 AD3d at 1306). We reject defendant's further contention that the court abused its discretion in precluding defendant from testifying that he "could just tell that" one of the victims was drunk and high inasmuch as defendant's opinion lacked a sufficient basis (*cf. People v Casco*, 77 AD3d 848, 849 [2d Dept 2010], *lv denied* 16 NY3d 742 [2011]).

Defendant further contends that he was denied a fair trial by prosecutorial misconduct during the cross-examination of defendant and during summation. Most of the instances of alleged impropriety are not preserved for our review (*see* CPL 470.05 [2]). In any event, in the instances where defendant did object, the court issued curative instructions (*see People v Hunt*, 172 AD3d 1888, 1889 [4th Dept 2019]; *People v Wallace*, 59 AD3d 1069, 1071 [4th Dept 2009], *lv denied* 12 NY3d 861 [2009]), and the prosecutor's cross-examination of defendant was not improper and the prosecutor's summation was "a fair response to defense counsel's summation or fair comment on the evidence" (*People v McEathron*, 86 AD3d 915, 916 [4th Dept 2011], *lv denied* 19 NY3d 975 [2012]; *see Hunt*, 172 AD3d at 1889; *Wallace*, 59 AD3d at 1071). Inasmuch as we conclude that there was no prosecutorial misconduct, we reject defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to object to the alleged improprieties (*see People v Townsend*, 171 AD3d 1479, 1481 [4th Dept 2019]). Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, the sentence is not unduly harsh or severe.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

682

CA 19-00240

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

SALVATORE PELONERO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STURM ROOFING, LLC, DEFENDANT-APPELLANT.

HOPKINS SORGI & ROMANOWSKI PLLC, BUFFALO (PETER J. SORGI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF ROBERT D. BERKUN, BUFFALO (JOSH SCRIVANI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered August 2, 2018. The order granted the motion of plaintiff for 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 denied.

Memorandum: Plaintiff commenced this Labor Law §§ 200, 240 (1) and 241 (6) and common-law negligence action seeking damages for injuries that he allegedly sustained due to a fall at a roofing work site. Defendant appeals from an order granting plaintiff's motion for partial summary judgment on the issue of liability. We agree with defendant that the order must be reversed.

It is well settled that Labor Law § 240 (1) protects a worker who is injured as the result of an elevation-related risk where the failure to provide sufficient safety devices to protect the worker from such a risk is a proximate cause of such injury (*see Striegel v Hillcrest Hgts. Dev. Corp.*, 100 NY2d 974, 978 [2003]). Thus, in a Labor Law § 240 (1) cause of action, a worker seeking summary judgment will meet " 'his [or her] initial burden by establishing that [the] injury was proximately caused by the failure of a safety device to afford . . . proper protection from an elevation-related risk' " (*Gimeno v American Signature, Inc.*, 67 AD3d 1463, 1464 [4th Dept 2009], *lv dismissed* 14 NY3d 785 [2010]). Here, the evidence submitted by plaintiff failed to meet that burden in several respects.

A defendant is not liable on a Labor Law § 240 (1) cause of action unless it is an owner or "a general contractor or an agent of an owner or general contractor with the authority to supervise and control the work of . . . the injured plaintiff" (*Bennett v Hucke*, 131

AD3d 993, 995 [2d Dept 2015], *affd* 28 NY3d 964 [2016]; *see generally Sheridan v Albion Cent. School Dist.*, 41 AD3d 1277, 1278 [4th Dept 2007]) and, in order for the statute to apply, "a plaintiff must demonstrate that he [or she] was both permitted or suffered to work on a building or structure and that he [or she] was hired by someone, be it owner, contractor or . . . agent [thereof]" (*Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]; *see Fuller v Spiesz*, 53 AD3d 1093, 1094 [4th Dept 2008]). Here, in support of his motion, plaintiff submitted his deposition testimony that he was working as an assistant to a roofer employed by defendant. Plaintiff also submitted the deposition testimony of defendant's owner, however, who testified that plaintiff was not working for defendant in any capacity, and that defendant was not the contractor on the job on which plaintiff allegedly was injured. We reject plaintiff's contention that Supreme Court properly accepted his testimony concerning his employment and rejected the testimony of defendant's owner to the contrary. It is well settled that, " '[o]n a motion for summary judgment, . . . self-serving statements of an interested party which refer to matters exclusively within that party's knowledge create an issue of credibility which should not be decided by the court but should be left for the trier of facts' " (*Mills v Niagara Frontier Transp. Auth.*, 163 AD3d 1435, 1438 [4th Dept 2018]) and, moreover, "[i]t is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]; *see Rew v County of Niagara*, 115 AD3d 1316, 1318 [4th Dept 2014]). Thus, plaintiff failed to eliminate all triable issues of fact whether he was a worker and whether defendant was an owner or contractor within the meaning of the statute.

Furthermore, even assuming, arguendo, that plaintiff met his initial burden on the motion, defendant raised an issue of fact regarding how the accident occurred. Plaintiff introduced his deposition testimony that he fell off a pick on which he was walking. In opposition to the motion, however, defendant introduced evidence that plaintiff sought medical treatment and told the providers that he fell from a ladder. Defendant would not be liable under Labor Law § 240 (1) if plaintiff merely lost his balance and fell off a ladder (*see e.g. Kopasz v City of Buffalo*, 148 AD3d 1686, 1687 [4th Dept 2017]; *Davis v Brunswick*, 52 AD3d 1231, 1232 [4th Dept 2008]). Consequently, "there are conflicting versions of how the accident occurred, including plaintiff's own conflicting statements. Because the conflicting versions raise an issue of fact concerning liability pursuant to Labor Law § 240 (1), plaintiff's motion should have been denied" (*Woodworth v American Ref-Fuel*, 295 AD2d 942, 942 [4th Dept 2002]).

With respect to the common-law negligence and Labor Law § 200 claims, insofar as plaintiff seeks to recover under a theory that there was a dangerous condition on the premises, the general contractor "may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and [has created or has] actual or constructive notice of the dangerous condition" (*Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1416 [4th Dept 2011] [internal quotation marks omitted]; *see Bannister v LPCiminelli, Inc.*, 93 AD3d

1294, 1295 [4th Dept 2012]), and for the reasons discussed above, plaintiff failed to establish as a matter of law either that defendant had control over the work site or that it created or had actual or constructive notice of the dangerous condition. With respect to the parts of those claims in which plaintiff alleged his accident resulted from the manner in which the work was performed, for the same reasons discussed above, plaintiff failed to meet his initial burden on the motion inasmuch as he failed to establish that defendant had the authority to supervise and control the methods and manner of plaintiff's work, and that it in fact exercised such supervisory control (*see generally Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Consequently, inasmuch as plaintiff failed to meet his burden on the motion with respect to the common-law negligence and section 200 claims, the court was required to deny that part of the motion without regard to the sufficiency of the opposing papers (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The court also erred in granting plaintiff's motion for partial summary judgment with respect to liability under the Labor Law § 241 (6) claim. "Recovery under section 241 (6) must be based upon the violation of a provision of the Industrial Code (*see generally Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 504-505 [1993]), and neither the complaint nor [a] bill of particulars sets forth any specific Industrial Code provisions allegedly violated by defendant" (*Brunette v Time Warner Entertainment Co., L.P.*, 32 AD3d 1170, 1171 [4th Dept 2006]; *see Rivera v Santos*, 35 AD3d 700, 702 [2d Dept 2006]).

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

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

685

CA 19-00252

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

JAY FELLI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CATHOLIC CHARITIES OF STEUBEN COUNTY, CATHOLIC CHARITIES OF THE DIOCESE OF ROCHESTER, KINSHIP FAMILY AND YOUTH SERVICES, INC., HEATHER MEEHAN AND SHERRY GATES, DEFENDANTS-RESPONDENTS.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., ROCHESTER (DAVID KAGLE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, ROCHESTER (SCOTT P. ROGOFF OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered June 25, 2018. The order granted defendants' motion to dismiss plaintiff's amended complaint.

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

Memorandum: Plaintiff was a resident of a residential treatment facility for people trying to recover from substance abuse that was operated by defendant Catholic Charities of Steuben County (*see generally* 14 NYCRR part 800 *et seq*.). Upon entering the facility, plaintiff signed a Resident and Staff Responsibilities Contract (RSR contract), an initial tobacco free/smoking contract, and a form acknowledging the facility's disciplinary procedures. Pursuant to the RSR contract, plaintiff agreed that the facility staff could enter his room without permission "to make routine maintenance checks and at any other time there [was] a concern for health or safety . . . or whe[n] there [was] a concern that [plaintiff was] not complying with program expectations," and plaintiff further agreed to make arrangements and make it known if he was away overnight; to certain visitor restrictions; to work toward the goal of abstinence; and to participate in developing and following a service plan, i.e., by "[m]eet[ing] with [his] primary counselor on a regularly scheduled basis (at least once a week) to discuss [the] plan, services, progress, any changes in [the] plan and any other concerns that need to be shared." Plaintiff was discharged from the facility for, inter alia, breaching the confidentiality rights of other residents. Plaintiff thereafter commenced this action and asserted causes of action for unlawful eviction in violation of RPAPL article 7, and for

deprivation of property without due process of law in violation of the Civil Rights Act of 1871 (42 USC § 1983). Supreme Court granted defendants' motion to dismiss the amended complaint pursuant to CPLR 3211 (a) (7), and plaintiff appeals. We affirm.

Accepting as true the facts set forth in the amended complaint and according plaintiff the benefit of all favorable inferences arising therefrom, as we must in the context of the instant motion (*see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that the amended complaint failed to state a cause of action for unlawful eviction inasmuch as plaintiff was not a tenant under the RPAPL, but rather was a licensee (*see David v #1 Mktg. Serv., Inc.*, 113 AD3d 810, 811 [2d Dept 2014]; *Coppa v LaSpina*, 41 AD3d 756, 759 [2d Dept 2007], *lv denied* 13 NY3d 706 [2009]; *Andrews v Acacia Network*, 59 Misc 3d 10, 11-12 [App Term, 2d Dept, 2d, 11th, & 13th Jud Dists 2018]), and thus defendants were not required to use the eviction procedures set forth in RPAPL article 7 before removing plaintiff from the premises (*see Coppa*, 41 AD3d at 759; *Soto v Pitkin Junius Holdings, LLC*, 58 Misc 3d 153[A], 2018 NY Slip Op 50156[U], *1 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2018]; *see generally Tantaro v Common Ground Community Hous. Dev. Fund, Inc.*, 147 AD3d 684, 684 [1st Dept 2017], *lv dismissed in part and denied in part* 30 NY3d 1016 [2017]).

We further conclude that the court properly granted the motion with respect to plaintiff's cause of action for deprivation of property without due process of law pursuant to 42 USC § 1983 inasmuch as a "licensee acquires no possessory interest in property" (*P & A Bros. v City of New York Dept. of Parks & Recreation*, 184 AD2d 267, 269 [1st Dept 1992]). As a licensee, "[p]laintiff enjoyed no legally cognizable or constitutionally protected possessory right to the [residency at the facility]," and he therefore failed to state a cause of action for deprivation of property without due process (*Pelt v City of New York*, 2013 WL 4647500, *9 [ED NY, Aug. 28, 2013, No. 11-CV-5633 (KAM)(CLP)]; *see Smith v County of Nassau*, 2015 WL 1507767, at *8 [ED NY, Mar. 31, 2015, No. 10-CV-4874 (MKB)], *affd* 643 Fed Appx 28 [2d Cir 2016]; *see generally Rosendale v Iuliano*, 63 Fed Appx 52, 53 [2d Cir 2003]).

We have reviewed plaintiff's remaining contentions and conclude that none warrants reversal or modification of the order.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

688

CA 18-01211

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

J. PATRICK BARRETT,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTINE R. BARRETT,
DEFENDANT-APPELLANT-RESPONDENT.

HEISMAN NUNES & HULL, ROCHESTER (RONALD G. HULL OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

MACK & ASSOCIATES, PLLC, ALBANY (BARRETT D. MACK OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Supreme Court, Onondaga County (Ferris D. Lebous, J.), entered April 2, 2018 in a divorce action. The judgment, among other things, dissolved the parties' marriage.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by awarding plaintiff the entirety of his membership interest in PEG Enterprises, LLC, together with the loan receivable in connection therewith, awarding defendant a one-half remainder interest in the parties' Lake Placid property subject to plaintiff's life estate therein and directing that plaintiff execute a quitclaim deed conveying that interest in the Lake Placid property to defendant, and awarding defendant a $24,513.58 credit for the pension payments to which she was entitled but did not receive as maintenance, and as modified the judgment is affirmed without costs.

Memorandum: In this matrimonial action, defendant wife appeals and plaintiff husband cross-appeals from a judgment of divorce that, inter alia, dissolved the parties' marriage and distributed the marital assets. Initially, we conclude that Supreme Court did not properly consider the relevant factors in Domestic Relations Law § 236 (B) (5) (d) when conducting the equitable distribution of the parties' marital assets (*see* § 236 [B] [5] [g]; *Holterman v Holterman*, 3 NY3d 1, 7-8 [2004]). Although the "factors do not have to be specifically cited when the factual findings of the court otherwise adequately articulate that the relevant statutory factors were considered" (*Rachimi v Rachimi*, 57 AD3d 277, 278 [1st Dept 2008], *lv denied* 12 NY3d 706 [2009] [internal quotation marks omitted]), here, the court made no effort in its written decisions to articulate that it specifically considered the relevant statutory factors in conducting

the equitable distribution. Any apparent reflection of the statutory factors in the court's equitable distribution award does not vitiate the court's statutory responsibility to "set forth the factors that it considered and the reasons for its decision" (§ 236 [B] [5] [g]).

We agree with defendant on her appeal that, given the sufficiency of the record before us, we are able to make the necessary findings and conduct the equitable distribution with consideration of the relevant statutory factors (*see Hendershott v Hendershott*, 299 AD2d 880, 880 [4th Dept 2002]; *Ferlo v Ferlo*, 152 AD2d 980, 980 [4th Dept 1989]). Initially, with respect to factor 12—which concerns "the wasteful dissipation of assets by either spouse" (Domestic Relations Law § 236 [B] [5] [d] [12])—we reject defendant's contention that plaintiff dissipated or secreted any marital assets. Rather, the record establishes that the parties' net worth began to decline due to plaintiff's partial retirement, the conduct of the parties' children, and the global financial crisis—all while the parties maintained the lavish lifestyle to which they were accustomed.

Further, we reject defendant's contention that the parties' property located in Skaneateles, New York should not be sold as a marital asset, inasmuch as her argument ignores the fact that the home equity line of credit that the parties took out on this property was a marital asset subject to equitable distribution (*see generally Johnston v Johnston*, 156 AD3d 1181, 1183-1184 [3d Dept 2017], *appeal dismissed* 31 NY3d 1126 [2018], *lv denied* 32 NY3d 1053 [2018]). Several factors in Domestic Relations Law § 236 (B) justify the sale of this property—i.e., defendant is not a custodial parent, the parties' probable future financial circumstances warrant the sale of the property, and there is no evidence of wasteful dissipation of marital assets (*see* § 236 [B] [5] [d] [3], [9], [12]).

We agree with defendant, however, that the court erred to the extent that it ordered the sale of plaintiff's membership interest in a partnership enterprise of which he was a one-third member, PEG Enterprises, LLC (PEG). The evidence in the record establishes that any transfer of membership interest in PEG requires the consent of all members of the partnership. That restriction on transfer of plaintiff's membership interest, coupled with the unprofitable nature of PEG, suggests that liquidation of that asset is highly unlikely (*see* Domestic Relations Law § 236 [B] [5] [d] [8], [10]). Thus, we conclude that plaintiff should be awarded the entirety of his interest in PEG, including the loan receivable in connection therewith. To represent defendant's one-half interest in PEG, we further conclude that she should be awarded a one-half remainder interest in the parties' Lake Placid property, subject to plaintiff's life estate therein. We therefore modify the judgment accordingly.

With respect to defendant's half interest in plaintiff's pension and annuity, we agree with defendant that she was entitled to a retroactive award in the form of a credit for $24,513.58. Although she was credited with that amount in calculating the maintenance award as of January 2017, plaintiff did not receive the benefit of that income after that date, and she is therefore entitled to the pension

payments to which she was entitled, but did not receive (*cf. Tedesco v Tedesco*, 41 AD3d 1246, 1247 [4th Dept 2007]). We therefore further modify the judgment accordingly.

With respect to the equitable distribution of the remaining marital assets, we conclude that, after considering the relevant statutory factors, the approximately even split of the parties' remaining assets is equitable—especially in light of the parties' 35-year marriage (*see* Domestic Relations Law § 236 [B] [5] [d] [2]).

We further conclude that the court did not abuse its discretion in declining to award defendant attorneys' fees, despite being the "less monied spouse" (Domestic Relations Law § 237 [a]), inasmuch as she will receive a significant monetary award as a result of the equitable distribution (*see Bennett v Bennett*, 13 AD3d 1080, 1083 [4th Dept 2004], *lv denied* 6 NY3d 708 [2006]; *Filkins v Filkins* [appeal No. 3], 303 AD2d 934, 935 [4th Dept 2003]).

Plaintiff's contention on his cross appeal that the court erred in awarding defendant nondurational spousal support is not preserved because it is advanced for the first time on appeal (*see Zacharek v Zacharek*, 116 AD2d 1004, 1005 [4th Dept 1986]; *see also Matter of Corr v Corr*, 3 AD3d 567, 567 [2d Dept 2004]). In any event, we would conclude that plaintiff is estopped from challenging the nondurational nature of the award, inasmuch as, in a posttrial submission to the court, plaintiff expressly conceded that defendant was entitled to nondurational maintenance, and plaintiff is " 'precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in [this] same proceeding' " (*Nestor v Britt*, 270 AD2d 192, 193 [1st Dept 2000]; *see Zito v Zito*, 43 Misc 3d 1236[A], 2014 NY Slip Op 50939[U], *3 [Sup Ct, Kings County 2014]).

Finally, we have considered the parties' remaining contentions and conclude that they do not require reversal or further modification of the judgment.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

695

CAF 18-01398

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

IN THE MATTER OF MONICA LITTLE,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

SCOTT LITTLE,
RESPONDENT-PETITIONER-RESPONDENT.

VICTORIA L. KING, ATTORNEY FOR THE
CHILDREN, APPELLANT.
(APPEAL NO. 1.)

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

VICTORIA L. KING, CANANDAIGUA, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR RESPONDENT-PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered May 31, 2018 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of respondent-petitioner insofar as it sought to dismiss the amended petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion insofar as it seeks to dismiss the amended petition is denied, the amended petition is reinstated, and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following memorandum: Petitioner-respondent mother and respondent-petitioner father are the parents of two children and were divorced by a judgment entered on December 1, 2017. The judgment provided that the parties shall have joint legal and equal shared physical custody and residency of the children in accordance with the parties' September 2017 settlement agreement. Shortly thereafter, on December 7, 2017, the mother filed a family offense petition, alleging that the father committed offenses against her that constituted harassment in the first or second degree. In February 2018, the mother filed an amended petition seeking to modify the custody agreement and an order to show cause to modify the custody agreement. The mother and the Attorney for the Children (AFC) now appeal from orders granting the father's motion insofar as it sought to dismiss the amended petition

(appeal No. 1) and vacate the order to show cause (appeal No. 2). They also appeal from an order granting the father's separate motion insofar as it sought to dismiss the family offense petition (appeal No. 3).

Initially, with respect to appeal Nos. 1 and 2, we reject the contention of the mother and the AFC that the father waived his contention that the mother had not alleged a sufficient change in circumstances warranting an inquiry into whether modification of the custody agreement is in the children's best interests. Although the father filed a cross petition seeking modification of the custody agreement and alleged a change in circumstances, that cross petition was filed only in the alternative in the event that Family Court did not grant his motion to, inter alia, dismiss the amended petition and vacate the order to show cause (*cf. Matter of Rice v Wightman*, 167 AD3d 1529, 1530 [4th Dept 2018], *lv denied* 33 NY3d 903 [2019]).

" 'To survive a motion to dismiss, a petition seeking to modify a prior order of custody and visitation must contain factual allegations of a change in circumstances warranting modification to ensure the best interests of the child' " (*Matter of Gelling v McNabb*, 126 AD3d 1487, 1487 [4th Dept 2015]). "When faced with such a motion, 'the court must give the pleading a liberal construction, accept the facts alleged therein as true, accord the nonmoving party the benefit of every favorable inference, and determine only whether the facts fit within a cognizable legal theory' " (*Matter of Kriegar v McCarthy*, 162 AD3d 1560, 1560 [4th Dept 2018]).

Contrary to the contention of the mother and the AFC, the court properly granted the father's motion insofar as it sought to vacate the order to show cause, and we therefore affirm the order in appeal No. 2. By that order to show cause, the mother sought to modify the custody agreement based on the father's alleged violation of that agreement as a result of an incident that occurred on February 5, 2018. Even accepting the allegations in the mother's affidavit in support of the order to show cause as true, we conclude that they did not establish a violation of the custody agreement or a change in circumstances, and there was therefore no basis to modify the custody agreement (*see Carney v Carney*, 151 AD3d 1912, 1912-1913 [4th Dept 2017], *lv dismissed* 30 NY3d 1012 [2017]; *Matter of McIntosh v Clary*, 129 AD3d 1392, 1392 [3d Dept 2015]).

With respect to appeal No. 1, however, we agree with the mother and the AFC that the court erred in granting the father's motion insofar as it sought to dismiss the amended petition. We conclude that the mother adequately alleged a change in circumstances warranting an inquiry into whether the children's best interests would be served by modifying the custody agreement, i.e., that the children's performance at school had deteriorated (*see Matter of Brewer v Soles*, 111 AD3d 1403, 1403-1404 [4th Dept 2013]; *Matter of Hagans v Harden*, 12 AD3d 972, 973 [3d Dept 2004], *lv denied* 4 NY3d 705 [2005]) and that increased animosity between the mother and the father made the shared custody arrangement unworkable (*see Matter of Mattice v Palmisano*, 159 AD3d 1407, 1408 [4th Dept 2018], *lv denied* 31 NY3d

909 [2018]; *Leonard v Leonard*, 109 AD3d 126, 128 [4th Dept 2013]). We therefore reverse the order in appeal No. 1, deny the father's motion insofar as it sought to dismiss the amended petition, reinstate that amended petition, and remit the matter to Family Court for a hearing on the amended petition and the cross petition (*see Kriegar*, 162 AD3d at 1561; *Matter of Mayer v Londraville*, 26 AD3d 758, 758 [4th Dept 2006]).

Finally, with respect to appeal No. 3, we reject the contention of the mother and the AFC that the court erred in granting the father's motion and dismissing the family offense petition. "[L]iberally construing the allegations of the family offense petition and giving it the benefit of every possible favorable inference, the petition failed to allege acts which, if committed by the [father], would constitute the family offenses of harassment in the first or second degree" (*Matter of Lashlee v Lashlee*, 161 AD3d 865, 866 [2d Dept 2018]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

696

CAF 18-01399

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

IN THE MATTER OF MONICA LITTLE,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

SCOTT LITTLE,
RESPONDENT-PETITIONER-RESPONDENT.

VICTORIA L. KING, ATTORNEY FOR THE
CHILDREN, APPELLANT.
(APPEAL NO. 2.)

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

VICTORIA L. KING, CANANDAIGUA, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR RESPONDENT-PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered May 31, 2018 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of respondent-petitioner insofar as it sought to vacate an order to show cause filed by petitioner-respondent to modify the parties' custody agreement.

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

Same memorandum as in *Matter of Little v Little* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

697

CAF 18-01466

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

IN THE MATTER OF MONICA LITTLE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SCOTT LITTLE, RESPONDENT-RESPONDENT.

VICTORIA L. KING, ATTORNEY FOR THE
CHILDREN, APPELLANT.
(APPEAL NO. 3.)

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

VICTORIA L. KING, CANANDAIGUA, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeals from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered June 1, 2018 in a proceeding pursuant to Family Court Act article 8. The order granted the motion of respondent insofar as it sought to dismiss the petition.

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

Same memorandum as in *Matter of Little v Little* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

699

CA 18-01718

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

VLADIMIR JEANTY, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 127665.)

VLADIMIR JEANTY, CLAIMANT-APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Christopher J. McCarthy, J.), entered April 21, 2017. The order granted the motion of defendant to dismiss the claim and dismissed the claim.

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

Memorandum: Claimant commenced this action for wrongful conviction and imprisonment pursuant to Court of Claims Act § 8-b following the vacatur of a judgment convicting him of, inter alia, criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]) (hereinafter, judgment). The Court of Claims granted the motion of defendant, State of New York (State), to dismiss the claim pursuant to CPLR 3211 (a) (7), reasoning that the evidence submitted in support of the motion established that the judgment was vacated on grounds not eligible for relief under Court of Claims Act § 8-b. We affirm.

Preliminarily, we reject claimant's contention that the court erred in considering, inter alia, an affidavit from the Oneida County Court Judge who vacated the judgment, which the State submitted in support of its motion to dismiss the claim. It is well established that affidavits and other evidentiary materials are admissible to support a motion to dismiss pursuant to CPLR 3211 (a) (7) (*see Liberty Affordable Hous., Inc. v Maple Ct. Apts.*, 125 AD3d 85, 88-91 [4th Dept 2015]), and it is equally well established that such affidavits and materials will warrant dismissal under that provision if they " 'establish *conclusively* that [the] plaintiff has no cause of action' " (*id.* at 89, quoting *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *see generally Warney v State of New York*, 16 NY3d 428, 434-435 [2011]).

On the merits, we agree with the State that its evidentiary submissions in support of its motion, including the County Court Judge's affidavit, establish conclusively that claimant has no cause of action for wrongful conviction and imprisonment. "The Legislature enacted Court of Claims Act § 8-b in 1984 to allow innocent persons to recover damages from the [S]tate where they can prove by clear and convincing evidence that they were unjustly convicted and imprisoned" (*Long v State of New York*, 7 NY3d 269, 273 [2006]). To recover under Court of Claims Act § 8-b in the absence of an acquittal upon retrial, however, the criminal judgment must have been reversed or vacated on one or more statutorily enumerated grounds (*see* § 8-b [3] [b] [ii]; *Long*, 7 NY3d at 274). The only provisions of CPL 440.10 (1) that so qualify are paragraphs (a), (b), (c), (e), and (g) thereof (*see* § 8-b [3] [b] [ii] [A]). As a waiver of the State's sovereign immunity from suit, the "requirements of [section 8-b] are to be strictly construed" (*Gioeli v State of New York*, 39 AD3d 815, 816 [2d Dept 2007]; *see Long*, 7 NY3d at 276), and a wrongful conviction and imprisonment claim therefore cannot be maintained if the criminal judgment was vacated on a non-enumerated ground, such as CPL 440.10 (1) (f) or (h) (*see Baba-Ali v State of New York*, 19 NY3d 627, 633 n 5 [2012]).

Here, the County Court Judge averred that he vacated claimant's judgment pursuant to CPL 440.10 (1) (f) "and/or" CPL 440.10 (1) (h). More specifically, the County Court Judge determined that the People had committed a *Rosario* violation, which falls under CPL 440.10 (1) (f) (*see People v Jackson*, 78 NY2d 638, 645 [1991]), "and/or" a *Brady* violation, which falls under CPL 440.10 (1) (h) (*see People v Baxley*, 84 NY2d 208, 211-213 [1994], *rearg dismissed* 86 NY2d 886 [1995]). The transcript of the hearing at which the County Court Judge vacated the judgment fully corroborates his sworn account of his rationale for overturning claimant's conviction, and the transcript likewise supports the County Court Judge's averment that he effectively denied claimant's CPL article 440 motion to the extent predicated on any provision of CPL 440.10 (1) other than paragraphs (f) or (h). Thus, because paragraphs (f) and (h) of CPL 440.10 (1) "are not enumerated in Court of Claims Act § 8-b (3) (b) (ii), the [court] properly dismissed the claim" (*Dickan v State of New York*, 300 AD2d 257, 257 [1st Dept 2002]; *see Leka v State of New York*, 16 AD3d 557, 558 [2d Dept 2005], *lv denied* 5 NY3d 704 [2005]).

Contrary to claimant's contention, a *Brady* claim does not fall under CPL 440.10 (1) (g), which both authorizes the vacatur of a criminal judgment on grounds of newly discovered evidence and constitutes an enumerated ground for a wrongful conviction and imprisonment claim (*see Leka*, 16 AD3d at 557-558). Indeed, the Court of Appeals has explicitly emphasized the conceptual distinction between a *Brady* claim and a newly discovered evidence claim, and it has instructed reviewing courts to analyze *Brady* claims under CPL 440.10 (1) (h), not CPL 440.10 (1) (g) (*see Baxley*, 84 NY2d at 211-213). Thus, as the Court of Appeals explicitly held in *Baba-Ali*, a successful *Brady* claim cannot authorize a recovery under Court of Claims Act § 8-b (*see Baba-Ali*, 19 NY3d at 636).

It is possible, as claimant notes, that the facts underlying a successful *Brady* claim under CPL 440.10 (1) (h) could also give rise to a viable claim of newly discovered evidence under CPL 440.10 (1) (g). That, however, is irrelevant for purposes of Court of Claims Act § 8-b, which allows recovery only where the criminal court actually vacated the judgment on an enumerated ground, and not where the criminal court might have vacated the judgment on an enumerated ground, but did not do so (*see Baba-Ali*, 19 NY3d at 636-637). As the Court of Appeals held in *Baba-Ali*, the statute looks only to the actual basis for the vacatur of the underlying criminal judgment, not to the alternative potential grounds for vacatur (*see id.*). Thus, where, as here, the judgment is vacated only on a non-enumerated ground, i.e., CPL 440.10 (1) (f) or CPL 440.10 (1) (h), there is no need to consider whether vacatur would have been warranted on an enumerated ground, i.e., CPL 440.10 (1) (b) or CPL 440.10 (1) (g).

Contrary to claimant's further contention, the prosecutor's statement that he "consent[ed] to the relief requested by [claimant]" does not warrant denial of the State's motion pursuant to CPLR 3211 (a) (7). Court of Claims Act § 8-b authorizes recovery only when the criminal judgment "*was* reversed or vacated" on an enumerated ground (§ 8-b [3] [b] [ii] [emphasis added]), and because only courts—not prosecutors—are empowered to vacate criminal judgments, the statute is necessarily concerned only with *the court's* rationale for vacatur. In any event, as the State points out, the prosecutor in this case "consent[ed]" only to the "relief" sought by claimant, i.e., the vacatur of the challenged judgment. The prosecutor's expression of consent does not elucidate the legal grounds that prompted him to consent to vacatur, and it therefore lends no support to claimant's assertion that the prosecutor joined in each ground asserted in the CPL article 440 motion.

Claimant's remaining contention is academic in light of our determination.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

706

CA 18-01405

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

IN THE MATTER OF JAMES LIEBEL, DOING BUSINESS
AS FINGER LAKES WOODWORKS, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, RESPONDENT-RESPONDENT,
AND EDWARD D'AMICO, RESPONDENT.

KNAUF SHAW LLP, ROCHESTER (JONATHAN R. TANTILLO OF COUNSEL), FOR PETITIONER-APPELLANT.

TIMOTHY R. CURTIN, CORPORATION COUNSEL, ROCHESTER (PATRICK N. BEATH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered August 7, 2018 in a CPLR article 78 proceeding. The judgment, inter alia, denied and dismissed the petition.

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

Memorandum: Following petitioner's failure to pay taxes on certain real property, respondent City of Rochester (City) obtained a judgment of foreclosure authorizing it to sell the property at public auction. Petitioner did not challenge the judgment of foreclosure, and the City sold the property at auction. Petitioner thereafter commenced this CPLR article 78 proceeding seeking, among other things, to annul the sale of the property. Following a hearing, Supreme Court, inter alia, granted the City's motion for summary judgment and denied and dismissed the petition. Petitioner appeals, and we affirm.

Petitioner contends that alleged irregularities in the sale, including a one-hour weather delay and the brief posting of a cancellation notice, resulted in the presence of fewer potential bidders at the auction and a reduced sale price for the property, thereby depriving petitioner of his rights and also mandating cancellation of the sale. We reject that contention. Where, as here, "a valid tax lien exists, and the taxing authority followed all proper procedures in foreclosing the lien, the taxpayer's property interests are 'lawfully extinguished as of the expiration of the[ ] right to redemption and the entry of the judgment of foreclosure' " (*Matter of Johnstone v Treasurer of Wayne County*, 118 AD3d 1378, 1380 [4th Dept 2014]). Further, although the auction was delayed by one hour due to

heavy snowfall during the overnight hours, 27 bidders attended the auction and 35 properties were sold, including petitioner's former property. The property sold for $70,000, a price that was significantly in excess of the tax arrears owed and not so low as to shock the conscience (*see Long Is. Sav. Bank of Centereach v Jean Valiquette, M.D., P.C.*, 183 AD2d 877, 878 [2d Dept 1992]). Petitioner's contention that a higher bid could have been obtained for the property, which was classified as having a risk of environmental problems, is speculative (*cf. Wayman v Zmyewski*, 218 AD2d 843, 844 [3d Dept 1995]), and the "mere inadequacy of price" obtained at an auction "does not furnish sufficient grounds for vacating a sale" (*Guardian Loan Co. v Early*, 47 NY2d 515, 521 [1979]). We thus conclude that the court did not abuse its discretion in determining that the alleged irregularities in the sale did not render the sale of the property unjust (*see generally id.* at 520-521; *Wayman*, 218 AD2d at 844).

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

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

709

CA 18-02156

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

IN THE MATTER OF THE APPLICATION FOR THE APPOINTMENT OF A GUARDIAN OF THE PROPERTY OF RALPH C., AN ALLEGED INCAPACITATED PERSON.

---------- MEMORANDUM AND ORDER

CATHOLIC FAMILY CENTER, APPELLANT;

ROBERT CAVIGLIANO, MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES AND JOHN M. SCATIGNO, COURT EXAMINER, RESPONDENTS.

DUTCHER & ZATKOWSKY, ROCHESTER (YOLANDA RIOS OF COUNSEL), FOR APPELLANT.

Appeal from an order and judgment of the Supreme Court, Monroe County (Joan S. Kohout, J.), entered April 25, 2018. The order and judgment, insofar as appealed from, denied that part of the application of appellant seeking an award of counsel fees.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs and that part of the application seeking an award of counsel fees is granted, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Appellant was appointed as the guardian of a now-deceased incapacitated person (IP). Following the IP's death, the guardian filed its final accounting and applied to discharge the guardianship. As part of its application, the guardian sought permission to disburse guardianship property that it had retained to cover its counsel fees in connection with the guardianship. As limited by its brief, the guardian now appeals from an order that, inter alia, denied its request for counsel fees and directed it to return the funds retained for that purpose to the IP's estate (*see* Mental Hygiene Law § 81.44 [d]).

Preliminarily, we note that the interlocutory order appealed from was subsumed in a final order and judgment, the entry of which terminated the guardian's right to appeal from the interlocutory order (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). We nevertheless exercise our discretion under CPLR 5520 (c) to treat the notice of appeal as valid, and we deem the appeal to have been taken from the final order and judgment (*see Teitelbaum v North Shore-Long Is. Jewish Health Sys., Inc.*, 160 AD3d 1009, 1010 [2d Dept 2018]; *People ex rel. Johnson v O'Flynn*, 141 AD3d 1107, 1107-1108 [4th Dept 2016]).

On the merits, we agree with the guardian that Mental Hygiene Law § 81.44 (e) authorizes its retention of a reasonable amount of guardianship property for the purpose of paying its counsel fees in connection with the guardianship. Section 81.44 (e) provides, in relevant part, that a guardian may retain "guardianship property equal in value to the claim for administrative costs, liens and debts," and we have held that the "administrative expenses" of a guardianship—i.e., the administrative costs, liens and debts referenced in the statute—include reasonable "counsel fees incurred in providing services to [the guardian]" (*Matter of Banks [Charlie B.H.]*, 108 AD3d 1055, 1056 [4th Dept 2013]; *see also Matter of Karl*, 266 AD2d 392, 393 [2d Dept 1999]; *see generally Matter of Shannon*, 25 NY3d 345, 347-353 [2015]). We therefore reverse the order and judgment insofar as appealed from, and we remit the matter to Supreme Court to fix a reasonable award of counsel fees (*see Banks*, 108 AD3d at 1055-1056).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

711

CA 18-01697

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

GRANT TALLEY, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 122733.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Court of Claims (Renee Forgensi Minarik, J.), entered April 4, 2018. The judgment awarded claimant money damages.

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

Memorandum: Claimant commenced this action seeking, inter alia, damages for injuries he sustained when he was assaulted by a fellow inmate while incarcerated in a correctional facility. In the claim, claimant asserted causes of action for, inter alia, medical malpractice and medical negligence. The Court of Claims determined, after a trial, that defendant was liable for medical negligence based on evidence establishing that approximately 17 days passed before X rays of claimant's injured ankle were obtained. The court awarded claimant damages in the amount of $500 for his pain and suffering, plus interest and filing fees. We reverse.

We agree with defendant that the court should have dismissed the claim based upon claimant's failure to present any expert medical evidence. Inasmuch as claimant's allegations of medical negligence "substantially related to medical diagnosis and treatment," the cause of action they "give[] rise to is by definition one for medical malpractice rather than for simple negligence" (*McDonald v State of New York*, 13 AD3d 1199, 1200 [4th Dept 2004] [internal quotation marks omitted]; *see Russo v Shah*, 278 AD2d 474, 475 [2d Dept 2000]). Furthermore, "[i]ssues concerning whether the treatment deviated from the accepted standard of care and whether it caused injuries are not 'matters within the ordinary experience and knowledge of laypersons' " (*Sachs v State of New York*, 143 AD3d 1291, 1291 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017], quoting *Mosberg v Elahi*, 80 NY2d 941, 942 [1992]).

Here, the evidence established that, after claimant was assaulted, he received medical attention and was provided with anti-inflammatory medication and ice. Thereafter, claimant was evaluated by a physician and X rays were eventually performed. Claimant, however, offered no expert medical evidence to demonstrate that such treatment deviated from acceptable medical practice. Thus, the claim must be dismissed.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

716

CAF 17-01976

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND CURRAN, JJ.

IN THE MATTER OF MICHAEL E. DINUNZIO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CHARLENE N. ZYLINSKI, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

HOGANWILLIG, PLLC, AMHERST (REBECCA M. KUJAWA OF COUNSEL), FOR PETITIONER-RESPONDENT.

KELLY L. BALL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered January 25, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

It is hereby ORDERED that said appeal is dismissed except insofar as Charlene N. Zylinski challenges the validity of her waiver of the right to counsel, and the order is affirmed without costs.

Memorandum: Petitioner-respondent father commenced this proceeding pursuant to Family Court Act article 6 seeking, inter alia, an order granting him sole custody of the subject child, and respondent-petitioner mother thereafter filed several petitions seeking various forms of relief, including sole custody of the child. Between the commencement of these proceedings and the beginning of the hearing on the petitions, the mother was represented by a succession of attorneys. During the hearing on the petitions, the mother discharged her final attorney and ultimately proceeded pro se. Later in the hearing, the mother failed to return to the courtroom following a recess and did not appear for the remainder of the hearing. In appeal No. 1, the mother appeals from an order entered upon her default that, inter alia, granted the father sole custody of the child. In appeal Nos. 2-5, the mother appeals from orders, entered upon her default, dismissing her petitions. In appeal No. 6, the mother appeals from an order denying her motion to vacate the order in appeal No. 1.

The mother contends in appeal Nos. 1-5 that Family Court erred in failing to ensure, in response to her request to proceed pro se, that

her waiver of the right to counsel was knowing, intelligent, and voluntary. Initially, we conclude that the mother's contention is reviewable on appeal from the orders in appeal Nos. 1-5 despite her default. CPLR 5511 provides, in relevant part, that "[a]n aggrieved party . . . may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party." Thus, in general, "[n]o appeal lies from an order [or judgment] entered upon an aggrieved party's default" (*Matter of Anita L. v Damon N.*, 54 AD3d 630, 631 [1st Dept 2008]; *see Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]). Nevertheless, "notwithstanding the prohibition set forth in CPLR 5511 against an appeal from an order or judgment entered upon the default of the appealing party, the appeal from [such an] order [or judgment] brings up for review those 'matters which were the subject of contest' before the [trial court]" (*Tun v Aw*, 10 AD3d 651, 652 [2d Dept 2004], quoting *James v Powell*, 19 NY2d 249, 256 n 3 [1967], *rearg denied* 19 NY2d 862 [1967]; *see Heavenly A.*, 173 AD3d at 1622).

The question here is whether the validity of the mother's waiver of her right to counsel constitutes a matter that was the subject of contest before the court. New York State law recognizes that "[p]ersons involved in certain family court proceedings may face the infringements of fundamental interests and rights, including the loss of a child's society . . . , and therefore have a constitutional right to counsel in such proceedings" (Family Ct Act § 261; *see Carney v Carney*, 160 AD3d 218, 224 [4th Dept 2018]). Parties entitled to counsel include, as pertinent here, any person seeking custody of his or her child or "contesting the substantial infringement of his or her right to custody of such child" (§ 262 [a] [v]). When determining whether a party may properly waive the right to counsel in favor of proceeding pro se, the trial court, "[i]f a timely and unequivocal request has been asserted, . . . is obligated to conduct a 'searching inquiry' to ensure that the [party's] waiver is knowing, intelligent, and voluntary" (*Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 385 [2011]; *see e.g. Martinez v Gomez-Munoz*, 154 AD3d 1085, 1085 [3d Dept 2017]; *Matter of Girard v Neville*, 137 AD3d 1589, 1590 [4th Dept 2016]). In other words, such a request for relief triggers the obligation of the court, which is permitted to grant the relief only upon "a showing on the record of a knowing, voluntary and intelligent waiver of the [right to counsel]" (*Matter of Storelli v Storelli*, 101 AD3d 1787, 1788 [4th Dept 2012] [internal quotation marks omitted]). For that reason, we conclude that such a request by a party to waive the right to counsel and proceed pro se, as the mother made here, places in issue whether the court fulfilled its obligation to ensure a valid waiver. Even beyond that, the record here supports the conclusion that whether the mother validly waived her right to counsel was a contested issue before the court. Specifically, the day after the court initially allowed the mother to proceed pro se, the father's attorney questioned whether the mother should be representing herself, and the court—making a record of its prior consideration of that issue—determined that it had appropriately warned the mother and that, despite the warning, the mother knowingly opted for self-representation. Based on the foregoing, we conclude that "[t]he issue of the mother's waiver of the right to counsel was the subject

of contest before . . . [the c]ourt and, therefore, may be reviewed by this Court in [appeal Nos. 1-5]" (*Matter of Graham v Rawley*, 140 AD3d 765, 766-767 [2d Dept 2016], *lv dismissed in part and denied in part* 28 NY3d 955 [2016]).

The criticism of our conclusion in the first dissent (Curran, J.) is flawed. The central assertion of the first dissent is that the mother's challenge to the validity of her waiver of the right to counsel is not reviewable on appeal from the orders in appeal Nos. 1-5 because the mother "received precisely the relief she sought," i.e., permission to proceed pro se, and therefore is not aggrieved. That assertion misconstrues the issue on appeal. The mother, of course, does not and could not contend on appeal that the court erroneously denied the requested relief of proceeding pro se. Rather, she contends that the court erred in failing to ensure, in response to her request, that her waiver of the right to counsel was knowing, voluntary, and intelligent. Although the mother certainly requested to proceed pro se and received such relief, we have previously explained that "a showing on the record of a knowing, voluntary and intelligent waiver of the [right to counsel]" was a prerequisite to the court's grant of that relief (*Storelli*, 101 AD3d at 1788). The first dissent's assertion that the mother is not aggrieved because she was permitted to represent herself as she requested *assumes* that the mother made "a knowing, voluntary and intelligent choice" in obtaining that relief (*Girard*, 137 AD3d at 1590). *That issue*, for the reasons previously stated, was the subject of contest before the court and is therefore reviewable on appeal from the orders in appeal Nos. 1-5 (*see James*, 19 NY2d at 256 n 3; *Heavenly A.*, 173 AD3d at 1622; *Graham*, 140 AD3d at 766-767). We also note that the first dissent ignores that the issue whether the mother validly waived her right to counsel was raised on the record and the court articulated its determination on that issue. Based on the foregoing, we are unpersuaded by the first dissent's assertions that the rule stated in *James* and its progeny is not a "proper channel[]" through which we may review the mother's challenge to the validity of her waiver of the right to counsel in appeal Nos. 1-5 and that we are improperly "circumventing the default."

We likewise reject the reading of the rule in *James* advocated by the second dissent (Carni, J.). The second dissent's narrow reading conflates the language setting forth the rule with that describing the particular procedural and factual posture of the case (*see James*, 19 NY2d at 256 n 3).

We nonetheless conclude upon review of the mother's challenge to the validity of her waiver of the right to counsel that it lacks merit. As previously stated, "[w]here a party unequivocally and timely asserts the right to self-representation, the court must conduct a searching inquiry to ensure that the waiver of the right to counsel is knowing, intelligent, and voluntary" (*Matter of Aleman v Lansch*, 158 AD3d 790, 792 [2d Dept 2018]; *see Kathleen K.*, 17 NY3d at 385; *Martinez*, 154 AD3d at 1085). "A 'searching inquiry' does not have to be made in a formulaic manner" (*Kathleen K.*, 17 NY3d at 386). Importantly, "there is no rigid formula to be followed in such an

inquiry, and the approach is flexible," although "the record must demonstrate that the party was aware of the dangers and disadvantages of proceeding without counsel" (*Matter of Pitkanen v Huscher*, 167 AD3d 901, 902 [2d Dept 2018] [internal quotation marks omitted]).

Here, the mother was repeatedly advised by the court of the right to counsel, including assigned counsel, and was represented by several attorneys throughout the proceedings. Yet she discharged or consented to the withdrawal of each of those attorneys for her own reasons and ultimately opted to represent herself, even after she was advised that proceeding without the assistance of trained and qualified counsel might be difficult or detrimental and that she would be required to follow the rules of evidence. The mother also demonstrated the ability and preparedness to proceed pro se by, among other things, issuing subpoenas to various witnesses and filing exhibits. The record thus establishes that the court's inquiry was sufficient to ensure that the mother's waiver of the right to counsel was knowing, intelligent, and voluntary (*see e.g. Martinez*, 154 AD3d at 1086; *Matter of Angela C. v Harris K.*, 102 AD3d 588, 589 [1st Dept 2013]; *Matter of Jazmone S.*, 307 AD2d 320, 321-322 [2d Dept 2003], *lv dismissed* 100 NY2d 615 [2003], *lv dismissed* 1 NY3d 584 [2004]; *Matter of Francisco v Francisco*, 298 AD2d 925, 926 [4th Dept 2002], *lv denied* 99 NY2d 504 [2003]).

The mother further contends in appeal Nos. 1-5 that the court erred in failing to grant her an adjournment after she did not return to the courtroom following a recess and instead notified the court by email that she was attending to an unspecified emergency. Inasmuch as the mother's email indicated that she no longer wanted to participate in the "illegal" and "[u]nlawful" proceeding, expressed an anticipation on her part that the hearing would proceed in her absence, and failed to advise that she would attend at a later date if the hearing was postponed to accommodate her purported emergency, we conclude that the mother never requested an adjournment (*see generally Matter of Jaydalee P. [Codilee R.]*, 156 AD3d 1477, 1477 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]). Therefore, this issue is not reviewable on appeal from the orders entered upon her default in appeal Nos. 1-5 because it was not a subject of contest before the court (*cf. Matter of Cameron B. [Nicole C.]*, 149 AD3d 1502, 1503 [4th Dept 2017]; *Tun*, 10 AD3d at 651-652).

We reject the mother's contention in appeal No. 6 that the court abused its discretion in denying her motion to vacate the order entered upon her default in appeal No. 1. The mother failed to meet her burden of establishing a reasonable excuse for her failure to appear for the remainder of the hearing and a meritorious defense (*see Matter of Strumpf v Avery*, 134 AD3d 1465, 1466 [4th Dept 2015]; *Matter of Lastanzea L. [Lakesha L.]*, 87 AD3d 1356, 1356 [4th Dept 2011], *lv dismissed in part and denied in part* 18 NY3d 854 [2011]).

Finally, we have reviewed the mother's remaining contention and conclude that, to the extent that it is properly before us, it lacks merit.

WHALEN, P.J., PERADOTTO and LINDLEY, JJ., concur; CURRAN, J., dissents and votes to dismiss appeal Nos. 1-5 in the following memorandum: I must respectfully dissent and would dismiss the appeals from the orders in appeal Nos. 1-5 in their entirety because those orders were entered upon respondent-petitioner mother's default and no appeal lies therefrom (*see* CPLR 5511; *Matter of Rottenberg v Clarke*, 144 AD3d 1627, 1627 [4th Dept 2016]).

I agree with the majority to the extent that it concludes that the mother's default precludes our review of her contention in appeal Nos. 1-5 that Family Court erred in failing to grant an adjournment. With respect to appeal No. 6, I also agree that the court did not abuse its discretion in denying her motion to vacate the order entered upon her default in appeal No. 1. I depart from the majority's rationale with respect to its review, in appeal Nos. 1-5, of the mother's contention that the court erred in failing to ensure that the mother's waiver of the right to counsel—and her request to proceed pro se—was knowing, intelligent, and voluntary. Although the majority acknowledges that the orders in those appeals were entered on the mother's default, it nevertheless concludes that this Court may review the mother's contention because the issue was the " 'subject of contest' " before the trial court (*Tun v Aw*, 10 AD3d 651, 652 [2d Dept 2004], quoting *James v Powell*, 19 NY2d 249, 256 n 3 [1967], *rearg denied* 19 NY2d 862 [1967]; *see Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]). The problems with applying that purported exception to this case are legion.

There is no dispute that, under CPLR 5511, a party may not appeal from an order or judgment unless the party is aggrieved thereby. For example, we routinely dismiss appeals from orders entered on consent because a party is not aggrieved by that to which he or she has agreed (*see e.g. Adams v Genie Indus., Inc.*, 14 NY3d 535, 540-541 [2010]; *Dumond v New York Cent. Mut. Fire Ins. Co.*, 166 AD3d 1554, 1555 [4th Dept 2018]; *Matter of Caiden G. [Walter G.]*, 162 AD3d 1497, 1498 [4th Dept 2018], *lv dismissed in part and denied in part* 32 NY3d 1034 [2018]). As noted above, CPLR 5511 also expressly precludes our review of an order or judgment "entered upon the default of the aggrieved party." In essence, the entry of an order or judgment upon default is the equivalent of a party's consent to the relief because in both circumstances the party appealing from such an order is not aggrieved (*see e.g. Miller v Tyler*, 58 NY 477, 480 [1874]; *Matter of Fotiades*, 6 AD3d 612, 612-613 [2d Dept 2004]; *Brown v Chase*, 3 Misc 3d 129[A], 2004 NY Slip Op 50371[U], *1 [App Term, 2d Dept, 2d & 11th Jud Dists 2004]).

"[T]he concept of aggrievement is about whether relief was granted or withheld, and not about the reasons therefor" (*Benedetti v Erie County Med. Ctr. Corp.*, 126 AD3d 1322, 1323 [4th Dept 2015] [internal quotation marks omitted]). I would add that, in civil matters like this case, which do not involve an issue of constitutional proportion (*cf. Matter of Stephen Daniel A. [Sandra M.]*, 87 AD3d 735, 736 [2d Dept 2011]), the aggrievement concept is relational in the sense that the contest must exist between or among

the parties—not as the majority appears to perceive, between the court and a party.

The fact that aggrievement lies at the center of the rule in CPLR 5511 is supported by authoritative secondary sources, which note that it is precisely the "[l]ack of aggrievement [that] precludes [an] appeal from a judgment or order entered on a default. The party does not become aggrieved until he [or she] has moved to vacate the default and the motion has been denied" (Siegel, NY Prac § 525 at 922 [5th ed 2011]; *see also* Richard C. Reilly, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5511:1 at 296 [2014 ed] [hereafter Reilly, Practice Commentaries]).

In recognition of this concept, the legislature has provided for vacatur as the means by which a party may obtain review of an order or judgment entered on default (*see* Reilly, Practice Commentaries, at 296). Thus, it is plain that the mother had a remedy by which she could challenge a perceived inadequacy in the court's colloquy concerning her waiver of the right to counsel. In fact, she made use of that remedy when she moved to vacate the default order challenged in appeal No. 1, and the denial of that motion forms the basis for appeal No. 6. Significantly, however, nowhere in her motion to vacate did the mother challenge the waiver of her right to counsel. There is no dispute, and the majority does not argue to the contrary, that the mother may not raise this contention in appeal No. 6 inasmuch as she did not raise it in her motion to vacate the default order at issue in appeal No. 1 (*see e.g. Matter of Deryck V.J. [Deryck T.J.]*, 159 AD3d 411, 411 [1st Dept 2018]; *Matter of Anastashia S. [Tonya R.]*, 96 AD3d 1442, 1442-1443 [4th Dept 2012]; *Matter of Kimberly Carolyn J.*, 37 AD3d 174, 175 [1st Dept 2007], *lv dismissed* 8 NY3d 968 [2007]). In short, because the majority cannot reach the issue of the mother's waiver of counsel through the proper channels, i.e., its review of the order denying her motion to vacate, it is forced to argue that the issue was the subject of contest under *James*.

In the course of these proceedings, the mother was represented by several different attorneys, at least one of whom was assigned to her pursuant to statute (*see generally* Family Ct Act § 262). She consented to the withdrawal of the last attorney shortly before the hearing commenced. At that point, the mother elected to proceed pro se because none of her attorneys would do as she wanted. She was concerned that she would be assigned an attorney that she previously found inadequate and complained that she would agree to representation if she "had a lawyer representing [her] properly." The majority concludes that the mother is aggrieved by the court's decision to allow her to proceed pro se. In my view, that conclusion vitiates the statutory aggrievement requirement (*see* CPLR 5511). As the foregoing lays bare, the mother received precisely the relief she sought and therefore is not aggrieved (*see T.D. v New York State Off. of Mental Health*, 91 NY2d 860, 862 [1997]; *Benedetti*, 126 AD3d at 1323; *Mixon v TBV, Inc.*, 76 AD3d 144, 148-149 [2d Dept 2010]).

The majority recognizes that the statutory aggrievement requirement normally would preclude our consideration of an order or

judgment "entered upon the default of an aggrieved party"—i.e., the orders in appeal Nos. 1-5. In circumventing the default, however, the majority relies on a purported exception that permits this Court to review issues that were the subject of contest before the appealing party's default (*see James*, 19 NY2d at 256 n 3; *Heavenly A.*, 173 AD3d at 1622; *Tun*, 10 AD3d at 652). I do not agree that *James* created, via a mere footnote, such a broad exception to the aggrievement requirement, and I see nothing in that case to suggest otherwise. As I read it, the relevant footnote in *James* did nothing more than appropriately apply the aggrievement requirement to the facts of that case.

The majority's reliance on *James* as the progenitor of this exception not only is misplaced but also ignores crucial context. Although the relevant footnote in that case uses the words "notwithstanding that such judgment was based in part on what was, in effect, a default" to describe the posture of the case (*James*, 19 NY2d at 256 n 3), the record in *James* makes clear that an inquest on damages—the key issue raised on appeal—was *fully contested* by the defendant, who appeared by counsel, and the determination as to damages was therefore appealable under CPLR 5511 (*see James*, 19 NY2d at 255). In fact, rather than being an exemplar of the broad exception envisioned by the majority, *James* is precisely the type of aggrievement envisioned by Professor Siegel in explaining the concept of an "aggrieved" party and what may be raised on appeal from a default. There, he stated that "[i]f there has been a contest on the question of damages, however, even though liability has been established through a default, appeal does lie from the contested damages result" (Siegel, NY Prac § 525 at 922).

This case is not comparable to *James* because there is no dispute that the orders in appeal Nos. 1-5 were entered on default after the mother absented herself from the proceedings. In contrast, the judgment entered upon the damages inquest in *James* was not entered on default because, as noted, the defendants' lawyer appeared at and actually contested the inquest. Thus, in my view, the footnote in *James* does nothing more than recount the existing law permitting appellate review of contested damages inquests and of intermediate orders (*see e.g. McClelland v Climax Hoisery Mills*, 252 NY 347, 353-354 [1930]; *Jay-Washington Realty Corp. v Koondel*, 268 App Div 116, 120 [1st Dept 1944]).

Even if *James* created an exception as held by the majority, I would conclude that it is inapplicable here. First, an issue may properly be considered the subject of contest where a party requests relief from a court, that request is opposed by another party, and the court denies the request for relief (*see e.g. Matter of Kieara N. [Shasha F.]*, 167 AD3d 620, 621 [2d Dept 2018], *lv denied* 33 NY3d 906 [2019]; *Matter of Harmony M.E. [Andre C.]*, 121 AD3d 677, 679 [2d Dept 2014]). Second, an issue has also been the subject of contest where a party requests relief from a court and, although there is no opposition by another party, the court *denies* the request for relief (*see Tun*, 10 AD3d at 652). In both examples, there was an actual

dispute—a contest or challenge—to the relief sought by the appealing party. Under those circumstances, although the party subsequently defaulted, it made sense to review matters that actually were litigated prior to that occurrence.

In contrast, this case presents a third variation on the theme: a party has requested relief, it is not opposed by another party, and the court grants the requested relief such that there has been no contest at all. In the third variation, unlike the first two, there is no aggrievement. I note that all of this Court's cases reviewing an issue that was the subject of contest involved situations in which the appealing party was actually *aggrieved* by the issue raised on appeal (*see e.g. Heavenly A.*, 173 AD3d at 1621; *Matter of King v King*, 145 AD3d 1613, 1614 [4th Dept 2016]; *Rottenberg*, 144 AD3d at 1627-1628; *Matter of Atwood v Pridgen*, 142 AD3d 1278, 1279 [4th Dept 2016], *lv denied* 28 NY3d 945 [2016]; *Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1402-1403 [4th Dept 2016]; *Britt v Buffalo Mun. Hous. Auth.*, 109 AD3d 1195, 1196 [4th Dept 2013]).

The majority's approach in concluding that the mother's request to proceed pro se is the subject of contest can be summarized thusly: because a court has an affirmative duty to ensure that the waiver of the right to counsel was knowing, intelligent, and voluntary, the issue whether that court actually met its obligation is *always* the subject of contest, even absent a dispute and even where the party requesting that relief obtained what he or she sought. To accept that an issue is contested whenever the court has an *affirmative obligation* to act invites litigants to successfully obtain an uncontested waiver and then proceed to default—all the while knowing that the matter may still be appealed under the majority's theory.

I note that there is an interesting question whether the majority's approach could be invoked to allow us to reach other issues not involving the waiver of the right to counsel where there has been a default. For example, in the summary judgment context, it appears that a court has the *obligation* to evaluate whether the movant met his or her initial burden on the motion regardless of whether any opposition was interposed (*see e.g. Citibank, N.A. v Cabrera*, 130 AD3d 861, 861 [2d Dept 2015]; *Liberty Taxi Mgt., Inc. v Gincherman*, 32 AD3d 276, 277 n [1st Dept 2006]). Thus, if the opposing party defaults on the motion and submits no opposition, does the majority's approach permit the conclusion that the opposing party is still aggrieved and does not have to move to vacate the default to permit this Court to review whether the movant met his or her initial burden? In my view, this example demonstrates the sea change in the law that the majority's approach creates.

The majority also relies on *Matter of Graham v Rawley* (140 AD3d 765 [2d Dept 2016], *lv dismissed in part and denied in part* 28 NY3d 955 [2016]) to support its conclusion that the adequacy of the court's colloquy with respect to the mother's waiver of the right counsel was the subject of contest. Although superficially on point because it involved the same issue, I note that the sparse and conclusory memorandum in that case does not make clear why the adequacy of the

court's colloquy on the waiver of counsel was the subject of contest such that the issue could be reached despite the mother's default (*id.* at 766-767). Thus, I would decline to follow the Second Department's approach here because it is unclear whether the facts of that case are in accord with this case.

Ultimately, I can hardly fathom the floodgates that would be opened by the majority's approach, which would entirely eliminate the need for parties to make use of the vacatur procedure, i.e., the statutorily prescribed mechanism for reviewing a default on appeal (*see* CPLR 5015, 5511; *see also* Siegel, NY Prac § 525 at 922; Reilly, Practice Commentaries at 296). Thus, I would hold that the mother is not aggrieved by the court's resolution of this issue—the court granted her unoppposed request to proceed pro se—and that the appeals from the orders in appeal Nos. 1-5 should accordingly be dismissed in their entirety.

CARNI, J., dissents and votes to dismiss appeal Nos. 1-5 in the following memorandum: I respectfully dissent and would dismiss the appeals from the orders in appeal Nos. 1-5 in their entirety on the ground that no appeal lies from those orders inasmuch as they were entered upon respondent-petitioner mother's default (*see* CPLR 5511).

The majority reaches the mother's contention in appeal Nos. 1-5 that Family Court failed to ensure that her waiver of the right to counsel was knowing, intelligent, and voluntary—avoiding what would otherwise be dismissal on CPLR 5511 grounds—by concluding that this issue was the subject of contest before the court. The genesis of the "subject of contest" exception to CPLR 5511 is a footnote in the Court of Appeals' decision in *James v Powell*, which held that the default order in that case did not foreclose appellate review insofar as the defendants there "ask[ed] [the Court] to review only matters which were the subject of contest below" (19 NY2d 249, 256 n 3 [1967], *rearg denied* 19 NY2d 862 [1967]). The Court in *James* specifically noted that "on an appeal from a final determination based in part on a default, review may be had of the proceedings on a contested inquest . . . as well as of an intermediate order 'necessarily affecting' the final determination" (*id.*).

Unlike the majority, I read that footnote to apply narrowly, encompassing only those circumstances where an order is entered "in part on a default" and where review of that order is sought with respect to a "contested inquest" or "an intermediate order 'necessarily affecting' the final determination" (*id.*). The relevant orders in this case were entered entirely on the mother's default, and the mother is not seeking review of either a contested inquest or an intermediate order. Thus, I do not read the footnote in *James* to apply here and would not extend its narrow language to allow us to review the mother's contention despite her default. We are thus left with the mandate of CPLR 5511, which prohibits an appeal from those orders entered on the mother's default.

The majority criticizes this reading of *James*, asserting that it conflates the Court of Appeals' language setting forth the rule with

that describing the procedural and factual posture of the case. I disagree. The Court of Appeals in *James* recognized in its footnote that, although CPLR 5511 would typically bar the subject appeal, it did not bar defendants' appeal in that case "since they ask[ed] [the Court] to review only matters which were the subject of contest below" (19 NY2d at 256 n 3). The Court then explained, based on its prior decisions, that a matter becomes the "subject of contest" where the final determination is based "in part on a default" and the review sought regards either a "contested inquest" or an "intermediate order necessarily affecting the final determination" (*id.* [internal quotation marks omitted]). Thus, the Court of Appeals did not—by a mere footnote—create a new rule or exception to CPLR 5511; rather, it relied on precedent to explain why it could reach an issue that it otherwise, by statute, could not. By reading the "subject of contest" language in isolation and eschewing the discussion that immediately follows that language, however, the majority asserts a much broader exception to CPLR 5511 that would apply regardless of whether the relevant order was entered entirely on default and regardless of whether the issue that was the subject of contest was ever memorialized in an order. I simply do not read the Court of Appeals' decision in *James* as creating that broad exception by footnote; instead, I read it in its entirety as recognizing a narrow exception based on then-existing precedent.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

717

CAF 17-01977

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND CURRAN, JJ.

IN THE MATTER OF CHARLENE N. ZYLINSKI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL E. DINUNZIO, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

HOGANWILLIG, PLLC, AMHERST (REBECCA M. KUJAWA OF COUNSEL), FOR RESPONDENT-RESPONDENT.

KELLY L. BALL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered January 26, 2017 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

It is hereby ORDERED that said appeal is dismissed except insofar as Charlene N. Zylinski challenges the validity of her waiver of the right to counsel, and the order is affirmed without costs.

Same memorandum as in *Matter of DiNunzio v Zylinski* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

WHALEN, P.J., PERADOTTO and LINDLEY, JJ., concur; CURRAN, J., dissents and votes to dismiss appeal Nos. 1-5 in the same dissenting memorandum as in *Matter of DiNunzio v Zylinski* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]); CARNI, J., dissents and votes to dismiss appeal Nos. 1-5 in the same dissenting memorandum as in *Matter of DiNunzio v Zylinski* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

718

CAF 17-01978

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND CURRAN, JJ.

IN THE MATTER OF CHARLENE N. ZYLINSKI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL E. DINUNZIO, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

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

HOGANWILLIG, PLLC, AMHERST (REBECCA M. KUJAWA OF COUNSEL), FOR RESPONDENT-RESPONDENT.

KELLY L. BALL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered January 26, 2017 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is dismissed except insofar as Charlene N. Zylinski challenges the validity of her waiver of the right to counsel, and the order is affirmed without costs.

Same memorandum as in *Matter of DiNunzio v Zylinski* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

WHALEN, P.J., PERADOTTO and LINDLEY, JJ., concur; CURRAN, J., dissents and votes to dismiss appeal Nos. 1-5 in the same dissenting memorandum as in *Matter of DiNunzio v Zylinski* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]); CARNI, J., dissents and votes to dismiss appeal Nos. 1-5 in the same dissenting memorandum as in *Matter of DiNunzio v Zylinski* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

719

CAF 17-01979

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND CURRAN, JJ.

IN THE MATTER OF CHARLENE N. ZYLINSKI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL E. DINUNZIO, RESPONDENT-RESPONDENT.
(APPEAL NO. 4.)

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

HOGANWILLIG, PLLC, AMHERST (REBECCA M. KUJAWA OF COUNSEL), FOR RESPONDENT-RESPONDENT.

KELLY L. BALL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered January 26, 2017 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is dismissed except insofar as Charlene N. Zylinski challenges the validity of her waiver of the right to counsel, and the order is affirmed without costs.

Same memorandum as in *Matter of DiNunzio v Zylinski* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

WHALEN, P.J., PERADOTTO and LINDLEY, JJ., concur; CURRAN, J., dissents and votes to dismiss appeal Nos. 1-5 in the same dissenting memorandum as in *Matter of DiNunzio v Zylinski* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]); CARNI, J., dissents and votes to dismiss appeal Nos. 1-5 in the same dissenting memorandum as in *Matter of DiNunzio v Zylinski* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

720

CAF 17-01980

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND CURRAN, JJ.

IN THE MATTER OF CHARLENE N. ZYLINSKI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL E. DINUNZIO, RESPONDENT-RESPONDENT.
(APPEAL NO. 5.)

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

HOGANWILLIG, PLLC, AMHERST (REBECCA M. KUJAWA OF COUNSEL), FOR RESPONDENT-RESPONDENT.

KELLY L. BALL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered January 26, 2017 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is dismissed except insofar as Charlene N. Zylinski challenges the validity of her waiver of the right to counsel, and the order is affirmed without costs.

Same memorandum as in *Matter of DiNunzio v Zylinski* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

WHALEN, P.J., PERADOTTO and LINDLEY, JJ., concur; CURRAN, J., dissents and votes to dismiss appeal Nos. 1-5 in the same dissenting memorandum as in *Matter of DiNunzio v Zylinski* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]); CARNI, J., dissents and votes to dismiss appeal Nos. 1-5 in the same dissenting memorandum as in *Matter of DiNunzio v Zylinski* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

721

CAF 18-00299

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND CURRAN, JJ.

IN THE MATTER OF MICHAEL E. DINUNZIO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CHARLENE N. ZYLINSKI, RESPONDENT-APPELLANT.
(APPEAL NO. 6.)

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

HOGANWILLIG, PLLC, AMHERST (REBECCA M. KUJAWA OF COUNSEL), FOR PETITIONER-RESPONDENT.

KELLY L. BALL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered January 16, 2018. The order denied respondent's motion to vacate a prior order entered on January 25, 2017.

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

Same memorandum as in *Matter of DiNunzio v Zylinski* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

723

CA 18-01647

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND CURRAN, JJ.

SUZANNE P., ADMINISTRATRIX OF THE ESTATE OF
MITCHELL P., DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOINT BOARD OF DIRECTORS OF ERIE-WYOMING COUNTY
SOIL CONSERVATION DISTRICT, ALSO KNOWN AS
ERIE-WYOMING JOINT WATERSHED BOARD,
DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

WALSH, ROBERTS & GRACE, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered March 29, 2018. The order denied the motion of defendant Joint Board of Directors of Erie-Wyoming County Soil Conservation District for summary judgment.

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

Memorandum: Plaintiff commenced this action against defendants Joint Board of Directors of Erie-Wyoming County Soil Conservation District, also known as Erie-Wyoming Joint Watershed Board (Board), Erie County Soil & Water Conservation District (ECSWCD), Wyoming County Soil & Water Conservation District (WCSWCD), Town of West Seneca (Town), and County of Erie (County) seeking damages for the death of her son (decedent). Decedent initially entered Buffalo Creek, at a location in the Town, with several friends to clean off after getting muddy while engaged in recreation along nearby trails. As the group waded and swam in the creek, decedent went over a waterfall created by a low head dam, was submerged, and sustained drowning injuries that ultimately proved fatal. The subject dam, part of a project to control creek flow and flooding, was one of several designed and constructed in the 1950s by a federal agency now known as the Natural Resources Conservation Service (NRCS) and subsequently operated and maintained by the Board pursuant to certain contracts with the NRCS, including the governing operation and maintenance agreement (agreement).

The Board appeals in appeal No. 1 from an order denying its motion for summary judgment dismissing the complaint against it. In appeal Nos. 2, 3, and 4, plaintiff appeals from orders granting the respective motions of ECSWCD, WCSWCD, and the Town for summary judgment dismissing the complaint against them. In appeal No. 5, plaintiff appeals from an order that granted the motion of the County for leave to reargue its prior motion for summary judgment dismissing the complaint against it and, upon reargument, granted the prior motion. We affirm in each appeal.

The Board contends in appeal No. 1 that Supreme Court erred in denying its motion for summary judgment inasmuch as it established as a matter of law that it did not owe decedent a duty of care. We reject that contention.

It is well established that, "[b]ecause a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). "Liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control, or special use of the property . . . Liability can also be imposed upon a party that creates a dangerous condition on the property" (*McManamon v Rockland County Ancient Order of Hibernians*, 166 AD3d 955, 957 [2d Dept 2018]; *see Rubin v Port Auth. of N.Y. & N.J.*, 49 AD3d 422, 422 [1st Dept 2008]; *Phillips v Seril*, 209 AD2d 496, 496 [2d Dept 1994]). Conversely, "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal*, 98 NY2d at 138) although, as relevant here, the third exception to that rule applies where the contracting party has "entirely displaced the other party's duty to maintain the premises safely" (*id.* at 140).

Here, we agree with the Board at the outset that, assuming its potential liability is premised solely on its obligations under the agreement, the court erred in determining that the third exception in *Espinal* applies in this case. Although the agreement provides the Board with some discretion in fulfilling its operation and maintenance obligations, it requires that the Board obtain from the NRCS prior approval of "all plans, designs, and specifications for maintenance work" and "plans and specifications for any alteration or improvement to the structural measures," and further provides the NRCS with oversight powers that include the ability to inspect the project at any reasonable time, review maintenance and financial records that the Board is required to keep, and have free access to the project at any reasonable time for the purpose of carrying out the terms of the agreement (*see Lingenfelter v Delevan Terrace Assoc.*, 149 AD3d 1522, 1524 [4th Dept 2017]). We thus conclude that "the contract between [the Board] and the [NRCS] was not so comprehensive and exclusive that it entirely displaced the [NRCS's] duty to maintain the premises safely, such that [the Board] owed a duty to [decedent]" (*Eisleben v Dean*, 136 AD3d 1306, 1307 [4th Dept 2016]; *see Espinal*, 98 NY2d at 141; *Hutchings v Garrison Lifestyle Pierce Hill, LLC*, 157 AD3d 1034, 1035-1036 [3d Dept 2018]).

Contrary to the Board's contention, however, it failed to eliminate triable issues of fact regarding ownership of the subject dam. While the Board established that it did not own the creek or the banks adjacent thereto (*see generally Knapp v Hughes*, 19 NY3d 672, 674 [2012]; *Douglaston Manor v Bahrakis*, 89 NY2d 472, 480-481 [1997]), its submissions are insufficient to establish as a matter of law that it did not own the subject dam, which allegedly constituted and created the dangerous condition (*see Smith v City of Syracuse*, 298 AD2d 842, 842 [4th Dept 2002]). The Board asserts that the deposition testimony of ECSWCD's district field manager establishes that, under the agreement, the Board was a contractor only and not an owner. That assertion lacks merit, however, because the district field manager specifically testified that he did not know who owned the dams. Moreover, the language of the agreement, which was submitted by the Board in support of its motion, indicates that ownership of the dams may have been transferred to the Board, and the Board failed to establish as a matter of law that no such transfer could or did occur. We thus conclude on that basis that the court properly denied the Board's motion for summary judgment.

The Board nonetheless further contends that the court erred in denying its motion for summary judgment dismissing the complaint against it on the ground of assumption of the risk. That contention is devoid of merit. The Court of Appeals has made clear that, "[a]s a general rule, application of assumption of the risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues" (*Custodi v Town of Amherst*, 20 NY3d 83, 89 [2012]). Here, decedent was not engaging in a sporting event or recreative activity that was sponsored or otherwise supported by the Board, nor was he wading and swimming at a designated venue (*see id.*; *Sasso v WCA Hosp.*, 130 AD3d 1546, 1548 [4th Dept 2015]; *Redmond v Redmond*, 126 AD3d 1476, 1476-1477 [4th Dept 2015]). The court thus properly determined that assumption of the risk does not apply.

Plaintiff contends in appeal Nos. 2 and 3, respectively, that the court erred in granting the motions for summary judgment of ECSWCD and WCSWCD (collectively, Districts). Plaintiff reasons that the Districts may be held liable for the actions of the Board because the Board has no separate existence and cannot act independently of the Districts. We reject that contention.

The Board was created by an act of the New York State Legislature (L 1949, ch 374) from the directors of the Districts to serve as the local sponsor for the project in the Buffalo Creek watershed funded under the federal 1944 Flood Control Act. The legislative history establishes that the United States Department of Agriculture, which was cooperating with the conservation districts in the flood control project, had authorized an expenditure of nearly $2 million for stream bank erosion control, contingent on the State or local government assuming annual maintenance costs after the control measures were installed (*see* Letter from St Conservation Dept, February 24, 1949, Bill Jacket, L 1949, ch 374 at 13; Mem of Div of Budget, Bill Jacket,

L 1949, ch 374 at 19; *see also* Board of Supervisors' Res in Support, Bill Jacket, L 1949, ch 374 at 8-9). To fulfill that purpose, the legislature empowered the Board to engage in stream bank maintenance work within the Buffalo Creek watershed and to receive monies available from the federal or state government or any other source and expend such monies in its discretion on any portion of the watershed (L 1949, ch 374, § 1). In addition, the record establishes, and plaintiff does not dispute, that the Board is capable of entering into contracts and being sued. We thus conclude that, although there is necessarily some degree of relationship between the Board and the Districts, the legislation creating the Board and the abovementioned powers and capabilities of the Board establish that it exists as an entity that is separate and distinct from the Districts (*see generally John Grace & Co. v State Univ. Constr. Fund*, 44 NY2d 84, 88 [1978]; *Facilities Dev. Corp. v Miletta*, 246 AD2d 869, 870 [3d Dept 1998], *lv dismissed* 92 NY2d 843 [1998], *rearg denied* 92 NY2d 921 [1998]). To the extent that plaintiff further contends that ECSWCD may otherwise be liable, we conclude that her contention lacks merit.

Contrary to plaintiff's contention in appeal No. 4, we conclude that the court properly granted the Town's motion for summary judgment. The Town established that it did not own, occupy, control, or make special use of the creek or the dam and that it did not create the allegedly dangerous condition, and plaintiff failed to raise an issue of fact in opposition (*see McManamon*, 166 AD3d at 957).

Finally, contrary to plaintiff's contentions in appeal No. 5, we conclude that the court, upon reargument, properly granted the prior motion of the County for summary judgment.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

724

CA 18-01648

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND CURRAN, JJ.

SUZANNE P., ADMINISTRATRIX OF THE ESTATE OF
MITCHELL P., DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOINT BOARD OF DIRECTORS OF ERIE-WYOMING COUNTY
SOIL CONSERVATION DISTRICT, ALSO KNOWN AS
ERIE-WYOMING JOINT WATERSHED BOARD, ET AL.,
DEFENDANTS,
AND ERIE COUNTY SOIL & WATER CONSERVATION DISTRICT,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered April 10, 2018. The order granted the motion of defendant Erie County Soil & Water Conservation District for summary judgment.

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

Same memorandum as in *Suzanne P. v Joint Bd. of Directors of Erie-Wyoming County Soil Conservation Dist.* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

725

CA 18-01589

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND CURRAN, JJ.

SUZANNE P., ADMINISTRATRIX OF THE ESTATE OF MITCHELL P., DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOINT BOARD OF DIRECTORS OF ERIE-WYOMING COUNTY SOIL CONSERVATION DISTRICT, ALSO KNOWN AS ERIE-WYOMING JOINT WATERSHED BOARD, ET AL., DEFENDANTS, AND WYOMING COUNTY SOIL & WATER CONSERVATION DISTRICT, DEFENDANT-RESPONDENT. (APPEAL NO. 3.)

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

BARTH SULLIVAN BEHR, LLP, BUFFALO (DOMINIC M. CHIMERA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered April 16, 2018. The order granted the motion of defendant Wyoming County Soil & Water Conservation District for summary judgment.

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

Same memorandum as in *Suzanne P. v Joint Bd. of Directors of Erie-Wyoming County Soil Conservation Dist.* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

726

CA 18-01649

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND CURRAN, JJ.

SUZANNE P., ADMINISTRATRIX OF THE ESTATE OF MITCHELL P., DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOINT BOARD OF DIRECTORS OF ERIE-WYOMING COUNTY SOIL CONSERVATION DISTRICT, ALSO KNOWN AS ERIE-WYOMING JOINT WATERSHED BOARD, ET AL., DEFENDANTS,
AND TOWN OF WEST SENECA, DEFENDANT-RESPONDENT.
(APPEAL NO. 4.)

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

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

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered April 26, 2018. The order granted the motion of defendant Town of West Seneca for summary judgment.

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

Same memorandum as in *Suzanne P. v Joint Bd. of Directors of Erie-Wyoming County Soil Conservation Dist.* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

727

CA 18-02015

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND CURRAN, JJ.

SUZANNE P., ADMINISTRATRIX OF THE ESTATE OF MITCHELL P., DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOINT BOARD OF DIRECTORS OF ERIE-WYOMING COUNTY SOIL CONSERVATION DISTRICT, ALSO KNOWN AS ERIE-WYOMING JOINT WATERSHED BOARD, ET AL., DEFENDANTS,
AND COUNTY OF ERIE, DEFENDANT-RESPONDENT.
(APPEAL NO. 5.)

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

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

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered October 10, 2018. The order granted the motion of defendant County of Erie for leave to reargue and, upon reargument, granted the motion of defendant County of Erie for summary judgment.

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

Same memorandum as in *Suzanne P. v Joint Bd. of Directors of Erie-Wyoming County Soil Conservation Dist.* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

728

CA 18-01753

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND CURRAN, JJ.

IN THE MATTER OF MILBURN MCFADDEN AND THERESA MCFADDEN, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF WESTMORELAND ZONING BOARD, RESPONDENT-RESPONDENT.

MILBURN MCFADDEN, PETITIONER-APPELLANT PRO SE.

THERESA MCFADDEN, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Erin P. Gall, J.), entered June 29, 2018 in a CPLR article 78 proceeding. The judgment denied the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul respondent's determination granting petitioners' application for a use variance permitting them to lease a portion of their property to a third party for the operation of a dog training business. Petitioners contended that respondent acted improperly in requiring the variance and in imposing the conditions that the business could entertain a maximum of six dogs at one time and could not provide overnight boarding. Supreme Court denied the petition in its entirety, and we affirm.

On appeal, petitioners contend that respondent violated lawful procedure by requiring a use variance and by imposing conditions on the proposed business even though the proposed use purportedly conformed with the existing zoning code. Initially, we reject petitioners' contention that the court did not consider whether respondent illegally required a use variance for an already conforming use. The court explicitly rejected petitioners' contention that a use variance was not required by holding that the relevant zoning code classified petitioners' property as R-2 residential and that "the uses delineated in [the] town code for an R[-]2 district do not include a dog training facility."

We also reject petitioners' contention on the merits. The Town of Westmoreland Zoning Ordinance (Ordinance) does not allow dog training businesses in R-2 districts (*see* Ordinance art IV). Further, we conclude that the proposed dog training business does not qualify as a "customary home occupation" permitted in an R-2 district (*see* § 180-16 [B]) inasmuch as it is not "[a]n occupation or a profession which . . . [i]s customarily carried on in a dwelling unit or in a building or other structure accessory to a dwelling unit" as set forth in the Ordinance (§ 180-2 ["Home Occupation"]). We note that, on appeal, petitioners do not dispute that the proposed dog training business is not the sort of occupation customarily carried on in a dwelling unit, and our conclusion is further justified by the fact that petitioners here are not attempting to carry on a typical home occupation but instead propose to lease a portion of their property, but not the dwelling, for use by others (*see generally Matter of Criscione v City of Albany Bd. of Zoning Appeals*, 185 AD2d 420, 421 [3d Dept 1992]). Given that the proposed dog training business fails to satisfy one of three required elements of a home occupation, petitioners' contentions regarding the applicability of the remaining requirements are academic.

Because the proposed business is not permitted in an R-2 district, respondent properly required petitioners to obtain a use variance and was authorized to place on that variance such "reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property[,] . . . consistent with the spirit and intent of the zoning ordinance or local law, . . . [and] imposed for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community" (Town Law § 267-b [4]). We conclude that the conditions placed upon petitioners' variance fell within respondent's authority and were not illegal, arbitrary, or an abuse of discretion (*see Matter of May v Town of Lafayette Zoning Bd. of Appeals*, 43 AD3d 1427, 1428 [4th Dept 2007]).

We reject petitioners' contention that the conditions placed on their use variance are improper because the zoning code allows one "animal unit" per 40,000 square feet of "open, unused land" in R-2 districts (Ordinance § 180-16 [D] [2]). The zoning code's allowance for a certain ratio of "animal units" to "unused land" explicitly applies to "customary agricultural operations," and thus does not apply to petitioners' proposed dog training business (*id.*). In any event, petitioners' ability to keep certain personal animals on their property as either pets or livestock does not address the fact that a commercial dog training business is not allowed in an R-2 district.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

730

CA 18-01971

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND CURRAN, JJ.

GREATER BUFFALO ACCIDENT & INJURY CHIROPRACTIC, P.C., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GEICO CASUALTY COMPANY, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered September 28, 2018. The order, insofar as appealed from, denied in part defendant's motion to dismiss the complaint.

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

Memorandum: Plaintiff, as the assignee of certain claims for no-fault benefits, commenced this action asserting a single cause of action for prima facie tort and seeking, inter alia, punitive damages. Defendant moved to dismiss the complaint pursuant to CPLR 3211 (a) (7), and Supreme Court granted the motion with respect to the claim for punitive damages but otherwise denied the motion. Defendant appeals from the order to the extent that it denied the motion in part, and we reverse the order insofar as appealed from.

Defendant contends that the court erred in denying its motion in part because plaintiff's prima facie tort cause of action, which, in essence, alleges that defendant engaged in conduct violating 11 NYCRR 65-3.2, is really a cause of action under the unfair claim settlement practices statute, i.e., Insurance Law § 2601, or the corresponding regulations (11 NYCRR 216.0 *et seq.*), none of which, according to defendant, give rise to a private cause of action. Defendant also contends that plaintiff failed to state a cause of action for prima facie tort because the complaint did not allege particular facts or special damages.

We agree with defendant that the complaint failed to state a cause of action for prima facie tort. "Prima facie tort affords a

remedy for the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142 [1985] [internal quotation marks omitted]; *see ATI, Inc. v Ruder & Finn*, 42 NY2d 454, 458 [1977]). "The requisite elements of a cause of action for prima facie tort are (1) intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful" (*Freihofer*, 65 NY2d at 142-143).

Here, the prima facie tort cause of action cannot stand because, although the complaint alleged that defendant "acted maliciously" and "with disinterested malice," it did not allege that defendant's "sole motivation was 'disinterested malevolence' " (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]). In addition, the complaint failed to allege special damages as required (*see Freihofer*, 65 NY2d at 143; *Mancuso v Allergy Assoc. of Rochester*, 70 AD3d 1499, 1501 [4th Dept 2010]). Finally, the complaint is not "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action" (CPLR 3013; *see generally Mid-Hudson Val. Fed. Credit Union v Quartararo & Lois, PLLC*, 31 NY3d 1090, 1091 [2018]). "[A] cause of action cannot be predicated solely on mere conclusory statements . . . unsupported by factual allegations" (*Sager v City of Buffalo*, 151 AD3d 1908, 1910 [4th Dept 2017] [internal quotation marks omitted]). Here, the complaint is devoid of relevant facts, including the time period at issue, the number of forms that defendant requested plaintiff to resubmit, and the number of claims involved.

It appears from the order that the court did not rely on the affidavit of William Owens, D.C. before it ruled on defendant's motion, inasmuch as the affidavit is not among the papers recited in the order as "used on the motion" (CPLR 2219 [a]). The affidavit was not included among the documents originally submitted by plaintiff in opposition to defendant's motion and was only filed with the court the day before the order was entered and, therefore, was not a document "upon which the . . . order was founded" (CPLR 5526; *see Gustafson v Dippert*, 68 AD3d 1678, 1680 [4th Dept 2009]). " '[A]ppellate review is limited to the record made at the nisi prius court and, absent matters [that] may be judicially noticed, new facts may not be injected at the appellate level' " (*Tuchrello v Tuchrello*, 233 AD2d 917, 918 [4th Dept 1996]; *see Block v Magee*, 146 AD2d 730, 732 [2d Dept 1989]). Thus, the Owens affidavit is not properly before this Court.

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

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

732

CA 19-00146

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND CURRAN, JJ.

IN THE MATTER OF JONATHAN T. FOGEL, M.D.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, ET AL., RESPONDENTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (ROBERT J. LANE, JR., OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

RICHARD T. SULLIVAN PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), AND ZDARSKY, SAWICKI & AGOSTINELLI LLP, FOR PETITIONER-RESPONDENT.

Appeal from an order and judgment of the Supreme Court, Erie County (Mark A. Montour, J.), entered January 3, 2019 in a CPLR article 78 proceeding. The order and judgment denied the motion of respondents to dismiss the petition and granted the relief requested in the petition.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the CPLR article 78 proceeding is converted into an action for injunctive relief, the motion is granted and the petition as converted into a complaint is dismissed without prejudice.

Memorandum: Respondents appeal from an order and judgment that, inter alia, denied their pre-answer motion to dismiss the petition, in which petitioner alleges that respondents improperly suspended and then revoked his medical privileges at respondent Kaleida Health. We agree with respondents that Supreme Court erred in denying their motion and in granting the relief requested in the petition. As a preliminary matter, inasmuch as petitioner challenges respondents' determination to suspend and then to revoke his medical privileges and seeks reinstatement of those privileges, his petition, in effect, asserts a claim of improper practices under Public Health Law § 2801-b (1). As we have held, "[a]n injunction action under Public Health Law § 2801-c is the exclusive remedy for an alleged violation of section 2801-b (1)" (*Farooq v Fillmore Hosp.*, 172 AD2d 1063, 1063 [4th Dept 1991]; *see Matter of Tabrizi v Faxton-St. Luke's Health Care*, 66 AD3d 1421, 1421 [4th Dept 2009], *lv denied* 13 NY3d 717 [2010]; *Matter of Chong-Hwan Wee v City of Rome*, 233 AD2d 876, 876-877 [4th Dept 1996]). We therefore exercise our discretion to convert this purported CPLR article 78 proceeding into an action for injunctive relief (*see* CPLR 103 [c]; *Matter of Fritz v Huntington Hosp.*, 39 NY2d 339, 347 [1976];

Matter of Shapiro v Central Gen. Hosp., 220 AD2d 516, 517 [2d Dept 1995]).

Where, as here, a physician challenges a determination to terminate or diminish that physician's professional privileges in a hospital, Public Health Law § 2801-b (2) "provides the allegedly aggrieved physician with a procedural avenue through which he [or she] can present his [or her] claim of a wrongful denial of professional privileges to the Public Health Council" (*Guibor v Manhattan Eye, Ear & Throat Hosp.*, 46 NY2d 736, 737 [1978]), which must then investigate the allegations of the complaint (*see* § 2801-b [3]). Inasmuch as petitioner seeks reinstatement and did not file a complaint with the Public Health Council (*see Indemini v Beth Israel Med. Ctr.*, 4 NY3d 63, 66 [2005]; *Gelbard v Genesee Hosp.*, 211 AD2d 159, 165 [4th Dept 1995], *affd* 87 NY2d 691 [1996]), we lack jurisdiction to consider the petition (*see Gelbard v Genesee Hosp.*, 87 NY2d 691, 696 [1996]; *Guibor*, 46 NY2d at 737-738; *Eden v St. Luke's-Roosevelt Hosp. Ctr.*, 39 AD3d 215, 216 [1st Dept 2007], *lv denied in part and dismissed in part* 9 NY3d 944 [2007]; *Farooq*, 172 AD2d at 1063).

Contrary to petitioner's contention, the exceptions to Public Health Law § 2801-b (2) do not apply to this case (*see Tassy v Brunswick Hosp. Ctr., Inc.*, 296 F3d 65, 67-70 [2d Cir 2002]; *see generally Johnson v Nyack Hosp.*, 964 F2d 116, 122-123 [2d Cir 1992]). That is because petitioner seeks reinstatement (*cf. Meyer v North Shore-Long Is. Jewish Health Sys., Inc.*, 137 AD3d 878, 878-879 [2d Dept 2016], *lv denied* 28 NY3d 909 [2016]; *Johnson*, 964 F2d at 121) and respondents contend that petitioner's termination related, in part, to issues of patient care, i.e., the purported misconduct occurred during a medical procedure and "had the potential to be detrimental to patient care" (*cf. Tassy*, 296 F3d at 67-70).

We therefore reverse the order and judgment, convert the CPLR article 78 proceeding into an action for injunctive relief, grant the motion and dismiss the petition as converted into a complaint without prejudice to refile following review of this matter by the Public Health Council.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

733.1

CA 18-01699

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

DEAHANN HARRIS, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF RODNEY HARRIS, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION, DEFENDANT, RIFFAT SADIQ, M.D., JANICE M. VALENCOURT, RNFA, WNY MEDICAL, P.C., AND GERIATRIC ASSOCIATES, LLP, ALSO KNOWN AS ACUTE GERIATRIC SERVICES, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

GIBSON MCASKILL & CROSBY, LLP, BUFFALO (MELISSA L. ZITTEL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered February 22, 2018. The order, among other things, denied that part of the motion of defendants-appellants seeking to disqualify counsel for plaintiff.

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

Same memorandum as in *Harris v Erie County Med. Ctr. Corp.* ([appeal No. 2] — AD3d — [Aug. 22, 2019] [4th Dept 2019])

Mark W. Bennett

Entered: August 22, 2019

Clerk of the Court

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

733.2

CA 19-00042

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

DEAHANN HARRIS, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF RODNEY HARRIS, DECEASED,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION,
DEFENDANT,
RIFFAT SADIQ, M.D., JANICE M. VALENCOURT, RNFA, WNY MEDICAL, P.C., AND GERIATRIC ASSOCIATES, LLP, ALSO KNOWN AS ACUTE GERIATRIC SERVICES,
DEFENDANTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 2.)

GIBSON MCASKILL & CROSBY, LLP, BUFFALO (MELISSA L. ZITTEL OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 2, 2019. The order, inter alia, granted the motion of defendants-appellants-respondents for leave to renew a prior motion and, upon renewal, precluded any further testimony by a nonparty witness.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion of defendants Riffat Sadiq, M.D., Janice M. Valencourt, RNFA, WNY Medical, P.C. and Geriatric Associates, LLP, also known as Acute Geriatric Services, that sought preclusion of further testimony of the nonparty witness and by directing that the deposition of the nonparty witness may be retaken upon notice to all parties and the attorney for the witness, that the cost of the transcript associated with that deposition be borne by plaintiff's attorney, and that costs in the amount of $100 are to be paid by plaintiff's attorney to those defendants and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for alleged medical malpractice in the diagnosis and treatment of her husband, Rodney Harris (decedent), who died three days after having ankle surgery. During discovery proceedings, plaintiff's attorney sought to depose a nonparty witness, a board certified nurse

practitioner who was part of the "rapid response" medical team that treated decedent the day he died. In attempting to locate the witness, plaintiff's attorney contacted an insurance company and was told that "this matter is going to be handled by [another attorney]," who would contact plaintiff's attorney once he received the assignment. When that other attorney subsequently provided plaintiff's attorney with the witness's address, plaintiff's attorney informed the other attorney that the witness had contacted plaintiff's attorney that day.

Although he had been informed that the other attorney would "handle" the matter for the witness, plaintiff's attorney nevertheless engaged in two conversations directly with the witness and deposed that witness outside the presence of the attorney assigned to "handle" the matter by the insurance company. During that deposition, the witness stated that her former employer had contacted her and informed her that she could request legal representation. She further testified that she had "declined legal representation."

Defendants Riffat Sadiq, M.D., Janice M. Valencourt, RNFA, WNY Medical, P.C., and Geriatric Associates, LLP, also known as Acute Geriatric Services, (collectively, defendants) moved pursuant to CPLR 3103 to, among other things, disqualify plaintiff's attorney and strike the deposition of the witness. The witness also joined in defendants' request to strike her testimony. Upon finding that plaintiff's attorney had violated rules 4.2 (a) and 4.4 of the Rules of Professional Conduct (22 NYCRR 1200.0), Supreme Court, in the order in appeal No. 1, granted the motion in part by striking the deposition testimony of the witness, directing plaintiff's attorney to pay for the cost of the transcript associated with a new deposition of the witness, directing plaintiff's attorney to disclose all documents related to any conversations or communications with the witness, and ordering plaintiff's attorney to pay costs to defendants. Defendants thereafter appealed.

In accordance with the order in appeal No. 1, plaintiff's attorney disclosed certain notes relating to his conversations with the witness. Six months later, plaintiff's attorney disclosed additional notes summarizing a conversation he had with the witness the day before her deposition regarding the substance of her upcoming deposition testimony. Thereafter, the witness's attorney and defendants each moved for leave to renew the earlier motion, contending that the delayed disclosure and the new evidence of substantive conversations between plaintiff's attorney and the witness justified disqualifying plaintiff's attorney and precluding any further testimony from the witness. In the order in appeal No. 2, the court, inter alia, granted the motions to renew and, upon renewal, precluded any further testimony from the witness. Defendants appeal from that part of the order denying their motion to disqualify plaintiff's attorney, and plaintiff cross-appeals from that part of the order precluding any further testimony from the nonparty witness.

As a preliminary matter, we note that the order in appeal No. 2, insofar as appealed from, "superseded the original order on this

appeal, and the appeal from the original order must be dismissed" (*Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]). We therefore dismiss the appeal from the order in appeal No. 1.

Contrary to defendants' contention in appeal No. 2, we conclude that the court did not err in denying defendants' renewed request to disqualify plaintiff's attorney. "Disqualification of a party's chosen counsel . . . is a severe remedy which should only be done in cases where counsel's conduct will probably 'taint the underlying trial' " (*Mancheski v Gabelli Group Capital Partners, Inc.*, 22 AD3d 532, 534 [2d Dept 2005]; *see S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 443-445 [1987]; *Roberts v Corwin*, 118 AD3d 571, 573 [1st Dept 2014]). Here, although plaintiff's attorney improperly engaged in conversations with an allegedly represented nonparty witness, delayed in providing notes regarding one of those conversations, and allegedly misrepresented the nature of one of the conversations, we reject defendants' contentions that plaintiff's attorney has gained any unfair advantage requiring his disqualification.

Generally, a violation of the Rules of Professional Conduct, while relevant to the issue whether the attorney's continued participation will taint a case, is not, in and of itself, sufficient to warrant disqualification (*see Morin v Trupin*, 728 F Supp 952, 956-957 [SD NY 1989]; *Matter of Essex Equity Holdings USA, LLC [Lehman Bros. Inc.]*, 29 Misc 3d 371, 375 [Sup Ct, NY County 2010]). Based on our review of the records in appeal Nos. 1 and 2, we cannot conclude that plaintiff's attorney obtained any information that he could not have otherwise obtained in the ordinary course of discovery (*see e.g. Coast to Coast Energy, Inc. v Gasarch*, 77 AD3d 589, 589 [1st Dept 2010]; *Radder v CSX Transp., Inc.*, 68 AD3d 1743, 1746 [4th Dept 2009]; *Levy v Grandone*, 8 AD3d 630, 631 [2d Dept 2004], *lv dismissed* 5 NY3d 746 [2005], *rearg denied* 5 NY3d 850 [2005]; *cf. Lipin v Bender*, 84 NY2d 562, 570-571 [1994], *rearg denied* 84 NY2d 1027 [1995]). Any improper testimony from the witness at her first deposition would be inadmissible at trial, and we doubt that any knowledge plaintiff's attorney acquired regarding the witness's inadmissible opinions would lead the attorney to develop a novel theory of the case or to uncover otherwise undiscovered information. We thus conclude that disqualification of plaintiff's attorney was not "necessary in order to rectify the situation and to prevent the offending [attorney] from realizing any unfair advantage" from his conduct (*Matter of Kochovos*, 140 AD2d 180, 181-182 [1st Dept 1988]; *see Curanovic v Cordone*, 140 AD3d 823, 824 [2d Dept 2016]; *Roberts*, 118 AD3d at 574; *cf. Matter of Beiny [Weinberg]*, 129 AD2d 126, 143-144 [1st Dept 1987], *lv dismissed* 71 NY2d 994 [1988]).

We agree with plaintiff, however, that the court abused its discretion in precluding further testimony from this highly relevant witness (*see generally Radder*, 68 AD3d at 1745). Assuming, arguendo, that the witness was represented by counsel despite her statement that she "declined legal representation," we conclude that defendants'

claims of prejudice are exaggerated. Any prejudice relating to the purportedly new evidence—i.e., evidence that plaintiff's attorney discussed the substance of the witness's testimony *before* the deposition—will be alleviated by the original remedy of striking the initial deposition. Moreover, it does not appear that the witness divulged privileged information, and most, if not all, of her testimony would have been obtained in the normal course of discovery (*see DiMarco v Sparks*, 212 AD2d 965, 965 [4th Dept 1995]; *see also Gutierrez v Dudock*, 276 AD2d 746, 746 [2d Dept 2000]). Defendants have "failed to demonstrate prejudice to a substantial right" warranting preclusion of the witness's testimony (*Matter of Jones*, 47 AD3d 931, 933 [2d Dept 2008]) and have not established that the remedy fashioned by the court in the order in appeal No. 1 was insufficient "to restore the status quo prior to the unauthorized disclosure" (*Beiny*, 129 AD2d at 138; *see Kirby v Kenmore Mercy Hosp.*, 122 AD3d 1284, 1285 [4th Dept 2014]) or "to preserve the integrity of the judicial process" (*Cippitelli v Town of Niskayuna*, 203 AD2d 632, 633 [3d Dept 1994]; *cf. Beiny*, 129 AD2d at 141). We thus conclude that it would be "improper in the circumstances presented to impose upon plaintiff the sanction of preclusion for an alleged violation by her attorney of the [Rules] of Professional Conduct" (*Martin v County of Monroe*, 115 AD2d 990, 991-992 [4th Dept 1985]).

We therefore modify the order in appeal No. 2 by denying that part of defendants' motion seeking to preclude further testimony from the nonparty witness and by directing that the deposition of the nonparty witness may be retaken upon notice to all parties and the attorney for the witness, that the cost of the transcript associated with that deposition be borne by plaintiff's attorney, and that costs in the amount of $100 be paid by plaintiff's attorney to defendants.

Mark W. Bennett

Entered: August 22, 2019

Clerk of the Court

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

733

CA 18-001108

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND CURRAN, JJ.

MARK A. REGAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD MILLARD, DEFENDANT-RESPONDENT,
AND LAWRENCE CHAMPOUX, DEFENDANT.

MARK A. REGAN, PLAINTIFF-APPELLANT PRO SE.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (ERICKA B. ELLIOTT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Monroe County Court (Victoria M. Argento, J.), entered March 28, 2018. The order denied the application of plaintiff for an extension of time to perfect an appeal from an order of the Rochester City Court.

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

Memorandum: Plaintiff appeals from an order of County Court that denied plaintiff's request for an extension of time to perfect his appeal to that court from a City Court order—which granted defendants' respective motions to dismiss plaintiff's malicious prosecution complaint against them for failure to state a cause of action—and, on County Court's own motion, dismissed that appeal for failure to perfect. We affirm.

Plaintiff correctly concedes that his request for an extension of time to perfect was untimely and that County Court had the authority to dismiss his appeal on its own motion (*see* Uniform Rules for County Court [22 NYCRR] § 202.55 [b]). He contends, however, that County Court abused its discretion in doing so. We reject that contention. County Court's dismissal of an appeal for lack of prosecution "is a matter committed to the sound discretion of the court upon due consideration of the reason for the delay and the relative merit of the appeal" (*Wightman v Genute*, 78 AD3d 1281, 1282 [3d Dept 2010]). Here, plaintiff has provided no reason for his failure to comply with the perfection deadline. Moreover, the relative merit of plaintiff's appeal supports dismissal because, inter alia, the complaint does not allege an essential element of malicious prosecution, i.e., that defendants played a sufficiently active role in initiating an action against plaintiff (*see Williams v CVS Pharmacy, Inc.*, 126 AD3d 890, 892 [2d Dept 2015]). Thus, we cannot conclude that County Court

abused its discretion in dismissing plaintiff's appeal from the City Court order (*see Wightman*, 78 AD3d at 1283).

Plaintiff's further contentions, which directly address the merits of City Court's order and the standard of review applied by City Court, are not properly before us on appeal from County Court's order.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

750

KA 19-00476

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

GREGORY RAWLINSON, DEFENDANT-RESPONDENT.

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

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Monroe County Court (Christopher S. Ciaccio, J.), dated November 19, 2018. The order granted that part of defendant's omnibus motion seeking to reduce the sole count of the indictment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of defendant's omnibus motion seeking to dismiss or reduce the sole count of the indictment is denied, that count of the indictment is reinstated, and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to dismiss or reduce the sole count of the indictment, on the ground of legally insufficient evidence before the grand jury, by reducing that count from attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]) to attempted robbery in the third degree (§§ 110.00, 160.05). We agree with the People that County Court erred in granting that part of defendant's omnibus motion, and we therefore reverse.

As relevant here, "[a] person is guilty of robbery in the first degree when he [or she] forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he [or she] . . . [u]ses or threatens the immediate use of a dangerous instrument" (Penal Law § 160.15 [3]). To establish the person's guilt under the statute, the People are required to prove that the person actually possessed a dangerous instrument at the time of the crime (*see People v Grant*, 17 NY3d 613, 617 [2011]; *People v Ford*, 11 NY3d 875, 877-878 [2008]; *People v Pena*, 50 NY2d 400, 407 [1980], *rearg denied* 51 NY2d 770 [1980], *cert denied* 449 US 1087 [1981]). "A person is guilty of an attempt to commit a crime when,

with intent to commit a crime, he [or she] engages in conduct which tends to effect the commission of such crime" (§ 110.00; *see People v Barbuto*, 126 AD3d 1501, 1503 [4th Dept 2015], *lv denied* 25 NY3d 1159 [2015]).

Here, the victim testified at the grand jury proceeding that a man later identified as defendant followed him as he was walking down a street at night and that, following a brief interaction, defendant threw his arms around the victim's shoulder blades, attempted to "bear hug" the victim, and told the victim that he was being robbed. After defendant dropped his right arm around the victim's waist and then pulled that arm toward the victim's stomach, the victim observed a "small silver ring" in defendant's hand. Although the victim did not see the blade of a knife at that time, he thought that defendant had a knife based upon his observation of the shiny, metal object in defendant's hand that defendant tried to press against or jab toward the victim's stomach. After the victim was able to pull away from defendant and warn him not to further approach, defendant walked away, and the victim called the police to report the crime and provide a description of the suspect. A police officer who responded a few minutes later testified that he apprehended defendant a couple blocks away carrying a Swiss Army knife with the blade extended.

Contrary to the court's determination, even to the extent the victim testified that he did not actually see a knife, we conclude that the victim's testimony regarding his observation of the object in defendant's hand during the encounter and the officer's testimony regarding defendant's apprehension close in time and place while carrying a knife is legally sufficient to support a prima facie case of robbery in the first degree with respect to defendant's actual possession of a dangerous instrument (*see Pena*, 50 NY2d at 408-409; *People v Davila*, 37 AD3d 305, 306 [1st Dept 2007], *lv denied* 9 NY3d 842 [2007]; *People v Hallums*, 157 AD2d 800, 801 [2d Dept 1990], *lv denied* 75 NY2d 919 [1990]; *People v Lawrence*, 124 AD2d 597, 597-598 [2d Dept 1986], *lv denied* 69 NY2d 713 [1986]). Defendant nonetheless challenges the sufficiency of the evidence on the ground that the victim's further testimony that he "guess[ed]" what he saw "was the edge of [defendant's] Swiss Army knife that he had" constitutes inadmissible hearsay because the victim was repeating information that he must have obtained from the police regarding the precise nature of the object in defendant's possession. Even assuming, arguendo, that such further testimony by the victim constituted inadmissible hearsay, we note that "the submission of some inadmissible evidence will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment" (*People v Huston*, 88 NY2d 400, 409 [1996]), and that is not the case here given the sufficiency of the remaining evidence previously mentioned.

Finally, to the extent that defendant contends as an alternative ground for affirmance that the proceeding was defective because the prosecutor inadequately instructed the grand jury on the law, we have no authority on this appeal by the People to consider that contention inasmuch as it does not involve an error or defect that "may have

adversely affected the appellant" (CPL 470.15 [1]; *see People v Karp*, 76 NY2d 1006, 1008-1009 [1990]; *People v Blauvelt*, 156 AD3d 1333, 1334 [4th Dept 2017], *lv denied* 31 NY3d 981 [2018]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

751

KA 19-00510

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB GERROS, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRITTANY GROME ANTONACCI OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Mark H. Fandrich, A.J.), entered November 20, 2018. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court properly assessed him 15 points under risk factor 11 for a history of drug or alcohol abuse. According to the SORA Risk Assessment Guidelines and Commentary (2006) (Guidelines), that factor "focuses on the offender's history of [substance] abuse and the circumstances at the time of the offense" (*id.* at 15). "[T]he fact that alcohol was not a factor in the underlying offense is not dispositive inasmuch as the [G]uidelines further provide that [a]n offender need not be abusing alcohol or drugs at the time of the instant offense to receive points in this category" (*People v Cathy*, 134 AD3d 1579, 1579 [4th Dept 2015] [internal quotation marks omitted]; *see* Guidelines at 15). As defendant correctly notes, that risk factor is not meant to include occasional social drinking, and a court may choose to score zero points for that risk factor in instances where the offender abused alcohol in the distant past, but his or her more recent history is one of prolonged abstinence (*see People v Madonna*, 167 AD3d 1488, 1489 [4th Dept 2018]). Nevertheless, we conclude that, here, the assessment of points under that risk factor was justified inasmuch as the People presented evidence that defendant had been previously diagnosed with alcohol dependence and that he had been convicted of driving while ability impaired in 2011, and defendant admitted to continuing to consume alcohol in social settings (*see generally People v Carlberg*, 145 AD3d 1646, 1647 [4th

Dept 2016]).

Contrary to defendant's further contention, the court did not err in denying his request for a downward departure from his presumptive risk level. Initially, the alleged mitigating factors or circumstances asserted by defendant concerning the nature of his conduct are adequately taken into account by the Guidelines, and thus they are improperly asserted as mitigating factors (*see People v Reber*, 145 AD3d 1627, 1627-1628 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]; *see generally People v Gillotti*, 23 NY3d 841, 861 [2014]). In addition, "[a]lthough a defendant's response to treatment, if exceptional . . . , may constitute a mitigating factor to serve as the basis for a downward departure," we conclude that, here, defendant failed to establish by a preponderance of the evidence that his response to treatment was exceptional (*People v Bernecky*, 161 AD3d 1540, 1541 [4th Dept 2018], *lv denied* 32 NY3d 901 [2018] [internal quotation marks omitted]; *see People v Santiago*, 137 AD3d 762, 764 [2d Dept 2016], *lv denied* 27 NY3d 907 [2016]). Finally, even assuming, arguendo, that defendant established that there are personal factors that might warrant a downward departure, we conclude, upon examining all of the relevant circumstances, that the court did not abuse its discretion in denying defendant's request for a downward departure (*see People v Uerkvitz*, 171 AD3d 1491, 1492 [4th Dept 2019]; *see generally People v Clark*, 126 AD3d 1540, 1541 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

752

KA 18-02008

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

IN THE MATTER OF MAY/JUNE 2018 ONEIDA COUNTY GRAND JURY REPORT.

---------- MEMORANDUM AND ORDER

JOHN DOE #1, A PUBLIC SERVANT, JOHN DOE #2, A PUBLIC SERVANT, AND JOHN DOE #3, A PUBLIC SERVANT, APPELLANTS;

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT.
(APPEAL NO. 1.)

DAVID A. LONGERETTA, UTICA, FOR APPELLANT JOHN DOE #1, A PUBLIC SERVANT.

JOHN G. LEONARD, ROME, FOR APPELLANT JOHN DOE #2, A PUBLIC SERVANT.

REBECCA L. WITTMAN, UTICA, FOR APPELLANT JOHN DOE #3, A PUBLIC SERVANT.

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

Appeals from an order of the Oneida County Court (Michael L. Dwyer, J.), dated August 3, 2018. The order, insofar as appealed from, accepted the grand jury reports with respect to John Doe #1, John Doe #2 and John Doe #3.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law and the three grand jury reports that accused each appellant respectively of misconduct, nonfeasance, or neglect are sealed.

Memorandum: We agree with appellants, three public officials in Oneida County, that County Court erred in directing the public filing of three grand jury reports that accused each appellant respectively of misconduct, nonfeasance, or neglect in office (*see generally* CPL 190.85 [1] [a]). We note that the court also accepted a fourth report that is not challenged on appeal.

"It is 'incumbent upon the prosecutor to instruct the [g]rand [j]ury regarding the duties and responsibilities of the public servant . . . target[ed by] the probe' " (*Matter of Second Report of Seneca County Special Grand Jury of Jan. 2007*, 59 AD3d 1079, 1080 [4th Dept 2009]; *see Morgenthau v Cuttita*, 233 AD2d 111, 113 [1st Dept 1996], *lv*

denied 89 NY2d 1042 [1997]; *Matter of October 1989 Grand Jury of Supreme Ct. of Ulster County*, 168 AD2d 737, 738 [3d Dept 1990]). "Without a charge as to the substantive aspects of the official's duties, it [is] not only impossible for the [g]rand [j]ury to determine that the public servant was guilty of misconduct, nonfeasance or neglect, but impermissible as well, for it allow[s] the [g]rand [j]ury to simply substitute its judgment for that of the public servant" (*Matter of June 1982 Grand Jury of Supreme Ct. of Rensselaer County*, 98 AD2d 284, 285 [3d Dept 1983]; *see Second Report of Seneca County Special Grand Jury of Jan. 2007*, 59 AD3d at 1080). Here, the prosecutor failed to provide the grand jury with any instructions regarding appellants' substantive duties in office. We therefore reverse the order insofar as appealed from and seal the three reports at issue on appeal (*see Second Report of Seneca County Special Grand Jury of Jan. 2007*, 59 AD3d at 1079-1080; *June 1982 Grand Jury of Supreme Ct. of Rensselaer County*, 98 AD2d at 285-286). Appellants' remaining contentions are academic in light of our determination.

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

753

KA 18-02009

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

IN THE MATTER OF MAY/JUNE 2018 ONEIDA COUNTY GRAND JURY REPORT.

ORDER

JOHN DOE #1, A PUBLIC SERVANT, JOHN DOE #2, A PUBLIC SERVANT, AND JOHN DOE #3, A PUBLIC SERVANT, APPELLANTS;

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT.
(APPEAL NO. 2.)

DAVID A. LONGERETTA, UTICA, FOR APPELLANT JOHN DOE #1, A PUBLIC SERVANT.

JOHN G. LEONARD, ROME, FOR APPELLANT JOHN DOE #2, A PUBLIC SERVANT.

REBECCA L. WITTMAN, UTICA, FOR APPELLANT JOHN DOE #3, A PUBLIC SERVANT.

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

Appeals from an order of the Oneida County Court (Michael L. Dwyer, J.), dated September 20, 2018. The order, inter alia, directed that the grand jury reports remain sealed pending resolution of these appeals.

It is hereby ORDERED that said appeal is unanimously dismissed (*see* CPLR 5511; *Liberty Mut. Ins. Co. v Raia Med. Health, P.C.*, 140 AD3d 1029, 1030 [2d Dept 2016]; *Ficus Invs., Inc. v Private Capital Mgt., LLC*, 61 AD3d 1, 12 [1st Dept 2009]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

755

KA 17-01097

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TREVIS D. BAKER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

TREVIS D. BAKER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered May 15, 2017. 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 in his main brief that his waiver of the right to appeal is invalid. We reject that contention. We conclude that "the plea colloquy here was sufficient because the right to appeal was adequately described without lumping it into the panoply of rights normally forfeited upon a guilty plea" (*People v Sanders*, 25 NY3d 337, 341 [2015]; *see People v Lopez*, 6 NY3d 248, 257 [2006]). Contrary to defendant's contention, "[a]ny nonwaivable issues purportedly encompassed by the waiver 'are excluded from the scope of the waiver [and] the remainder of the waiver is valid and enforceable' " (*People v Neal*, 56 AD3d 1211, 1211 [4th Dept 2008], *lv denied* 12 NY3d 761 [2009]; *see People v Gibson*, 147 AD3d 1507, 1508 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]; *People v Weatherbee*, 147 AD3d 1526, 1526 [4th Dept 2017], *lv denied* 29 NY3d 1038 [2017]). Defendant's valid waiver encompasses his challenge in his main brief to the severity of his sentence (*see Lopez*, 6 NY3d at 255). Insofar as defendant in his pro se supplemental brief challenges the geographic jurisdiction of County Court, that contention is actually a challenge to venue in Orleans County, which is also encompassed by his valid waiver of the right to appeal (*see People v Parker*, 151 AD3d 1876, 1876 [4th Dept 2017], *lv denied* 30

NY3d 982 [2017]), and is forfeited as a result of his plea of guilty (*see People v Williams*, 14 NY2d 568, 570 [1964]; *People v De Alvarez*, 59 AD3d 732, 732-733 [2d Dept 2009], *lv denied* 12 NY3d 852 [2009]).

Finally, defendant's contention in his pro se supplemental brief that he was denied effective assistance of counsel survives his plea and valid waiver of the right to appeal "only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]). To the extent that defendant contends that his attorney's failure to investigate a particular witness infected the plea process, that contention "involve[s] matters outside the record on appeal and therefore must be raised by way of a motion pursuant to CPL article 440" (*People v Bethune*, 21 AD3d 1316, 1316 [4th Dept 2005], *lv denied* 6 NY3d 752 [2005]; *see also People v Kaminski*, 109 AD3d 1186, 1186 [4th Dept 2013], *lv denied* 22 NY3d 1088 [2014]). To the extent that defendant's contention is reviewable on direct appeal, we conclude that it lacks merit inasmuch as he "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Booth*, 158 AD3d 1253, 1255 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018] [internal quotation marks omitted]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

756

CAF 18-00935

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

IN THE MATTER OF EDWARD T.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SALVADOR T., RESPONDENT,
AND MARIA T., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

SCOTT T. GODKIN, WHITESBORO, FOR RESPONDENT-APPELLANT.

JOHN A. HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

SHARON P. O'HANLON, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered February 23, 2018 in a proceeding pursuant to Family Court Act article 10. The order determined the subject child to be neglected.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order of fact-finding determining, following a hearing, that she and respondent father neglected the subject child (*see* Family Ct Act § 1012 [f] [i] [B]). In appeal No. 2, the mother appeals from an order of disposition entered on consent of the parties that continued the placement of the subject child with petitioner, Oneida County Department of Social Services (DSS). Inasmuch as the order at issue in appeal No. 2 was entered upon the consent of the parties, appeal No. 2 must be dismissed (*see Matter of Annabella B.C. [Sandra L.C.]*, 129 AD3d 1550, 1550-1551 [4th Dept 2015]; *see also Matter of Cherilyn P.*, 192 AD2d 1084, 1084 [4th Dept 1993], *lv denied* 82 NY2d 652 [1993]) because the mother is not an aggrieved party (*see* CPLR 5511; Family Ct Act § 1118).

In appeal No. 1, the mother contends that Family Court erred in finding that she neglected the subject child because DSS failed to prove that the child was in imminent danger and because she acted as any reasonably prudent parent would have acted under the circumstances. We reject those contentions. DSS established by a preponderance of the evidence that the child's physical, mental, or emotional condition was in imminent danger of becoming impaired, and

that the actual or threatened harm to the child was a consequence of the mother's failure to exercise a minimum degree of care in providing the child with proper supervision or guardianship (*see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *Matter of Justin M.F. [Randall L.F.]*, 170 AD3d 1514, 1515 [4th Dept 2019]).

Here, the subject child, who has autism and is nonverbal, was left alone in the home for multiple hours with the mother's teenage daughter, who also has autism. The daughter acknowledged that she could not care for the subject child, and the father, along with the family's caseworker from DSS and a service coordinator from Family Advocacy Center, Inc. (FAC), confirmed that the daughter was not capable of caring for the subject child. The daughter's own individual service plan with FAC specified that she was not to be left home alone, much less left alone to supervise the subject child. When staff from FAC and DSS arrived at the home, the subject child and the daughter were observed alone without supervision, a second-floor window was found open, and the subject child was seen attempting to turn on the stove. Thus, we conclude that DSS established that the danger to the subject child was "near or impending" and thus imminent (*Nicholson*, 3 NY3d at 369; *cf. Matter of Lacey-Sophia T.-R. [Ariela (T.)W.]*, 125 AD3d 1442, 1444-1445 [4th Dept 2016]).

Furthermore, contrary to the mother's contention, the neglectful conduct that exposed the subject child to imminent danger was the mother's failure to prevent the subject child from being left in the care of the daughter. The record demonstrates that the mother knew she needed help caring for the subject child long before the situation in question arose, and she had years to complete and submit the necessary paperwork to secure appropriate services for the child. The mother, however, failed to do that which was necessary to obtain the assistance needed to prevent such a situation from arising. By not taking the steps to have the services in place, she failed to exercise a minimum degree of care (*see generally Nicholson*, 3 NY3d at 370).

Finally, we reject the mother's contention that the court should have continued placement of the child without adjudicating the neglect petition. "[T]he dispositional remedies provided for in Family Court Act §§ 1052 through 1059 are available to the court only after a child is found by the court to be abused or neglected" (*Matter of Rasha B.*, 139 AD2d 962, 963 [4th Dept 1988]; *see generally Matter of Jamie J. [Michelle E.C.]*, 30 NY3d 275, 284-285 [2017]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

757

CAF 18-00936

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

IN THE MATTER OF EDWARD T.

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

SALVADOR T., RESPONDENT,
AND MARIA T., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

SCOTT T. GODKIN, WHITESBORO, FOR RESPONDENT-APPELLANT.

JOHN A. HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

SHARON P. O'HANLON, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered April 30, 2018 in a proceeding pursuant to Family Court Act article 10. The order continued placement of the subject child with petitioner.

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

Same memorandum as in *Matter of Edward T. [Maria T.]* ([appeal No. 1] — AD3d — [Aug. 22, 2019] [4th Dept 2019]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court

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

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KA 19-00391

PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAVON NICHOLS, DEFENDANT-APPELLANT.

FRANK MELLACE, II, ROME, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered October 19, 2018. 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: 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]). We affirm.

Defendant contends that it was error for County Court to refuse to suppress physical evidence obtained during a search of a vehicle in which he was a passenger for reasons other than those raised by the People. We reject that contention. Initially, there is no evidence that the People expressly limited their rationale for the legal justification of the search to the theory that it was a lawful inventory search. In any event, we conclude that the court was entitled to consider legal justifications that were supported by the evidence, even if they were not raised explicitly by the People (*see* CPL 710.60 [6]; *see also People v Pacifico*, 95 AD2d 215, 219 [1st Dept 1983]; *People v Casado*, 83 AD2d 385, 386 [1st Dept 1981]). "By presenting evidence sufficient to support the court's findings, the People met their burden of going forward . . . and the court may rely on any legal justification for police conduct for which there is factual support in the record" (*Pacifico*, 95 AD2d at 219).

We further conclude that, contrary to defendant's contention, the court properly declined to suppress the evidence in question. At the time the police approached the vehicle, its occupants were seized for constitutional purposes (*see People v De Bour*, 40 NY2d 210, 216 [1976]; *see also People v Cantor*, 36 NY2d 106, 111 [1975]). We

conclude, however, that the officers who approached the vehicle had probable cause to believe that defendant had committed a narcotics offense and, therefore, his seizure was constitutional under the circumstances of this case (*see De Bour*, 40 NY2d at 224).

Specifically, before defendant's seizure, an officer observed defendant conduct what, based on his training and experience, appeared to be a hand-to-hand drug transaction, even though he "couldn't tell" what "items" he had seen during the exchange other than money. Additionally, that officer was in the area conducting surveillance on an unrelated narcotics investigation, raising the inference that the transaction occurred in a drug-prone area. Furthermore, once two other officers approached the vehicle based on the above observations, one officer saw packaging material of the kind used to store narcotics, and the other officer observed that the driver of the vehicle engaged in "furtive" behavior. Based on the totality of those factors, we conclude that the police had probable cause to believe that defendant engaged in a narcotics offense justifying the stop of the vehicle and his arrest (*see People v Jones*, 90 NY2d 835, 837 [1997]; *see also People v McRay*, 51 NY2d 594, 601-602 [1980]).

We also conclude that, contrary to defendant's contention, the search of the vehicle was justified by the automobile exception to the warrant requirement. That exception "permits police officers to 'search a vehicle without a warrant when they have probable cause to believe that evidence or contraband will be found there' " (*People v Johnson*, 159 AD3d 1382, 1383 [4th Dept 2018], *lv denied* 31 NY3d 1083 [2018], quoting *People v Galak*, 81 NY2d 463, 467 [1993]). "The exception requires 'both probable cause to search the automobile generally and a nexus between the probable cause to search and the crime for which the arrest is being made' " (*id.*, quoting *People v Langen*, 60 NY2d 170, 181 [1983], *cert denied* 465 US 1028 [1984]). Based on the foregoing, at the time of the search, the police had probable cause to believe that narcotics or packaging materials used in the sale and possession of narcotics were present in the vehicle (*see Johnson*, 159 AD3d at 1383). Thus, inasmuch as there was a nexus between the probable cause to search the vehicle and the crime for which defendant was being arrested, we conclude that the police were not required to obtain a warrant (*see id.*).

Finally, contrary to defendant's contention, we further conclude that the police conducted a lawful inventory search. "Following a lawful arrest of the driver of an automobile that must then be impounded, the police may conduct an inventory search of the vehicle" (*People v Johnson*, 1 NY3d 252, 255 [2003]; *see People v Padilla*, 21 NY3d 268, 272 [2013], *cert denied* 571 US 889 [2013]). "While incriminating evidence may be a consequence of an inventory search, it should not be its purpose" (*Johnson*, 1 NY3d at 256). Here, the suppression hearing testimony established that it is the policy of the Syracuse Police Department to tow the vehicle and conduct an inventory search when, following a vehicle stop, there is no licensed driver present. Defendant does not contend that his codefendant's license was valid or that he had his own, valid, license on his person at the

time of the stop. Thus, we conclude that the inventory search and towing of the vehicle were valid (*see People v Huddleston*, 160 AD3d 1359, 1360-1361 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]).

Entered: August 22, 2019

Mark W. Bennett
Clerk of the Court