SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 13, 2015

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

3

KA 11-00690

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL W. LEWIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Stephen T. Miller, A.J.), rendered January 28, 2011. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of rape in the second degree (Penal Law § 130.30 [1]), defendant contends that County Court erred in issuing an order of protection on behalf of an individual who was the complainant with respect to an uncharged sexual offense that was satisfied by defendant's plea. Defendant's contention is unpreserved for our review inasmuch as he "failed to challenge the issuance of the order of protection at sentencing or to seek vacatur of the final order of protection" (*People v Morris*, 82 AD3d 908, 909, *lv denied* 17 NY3d 808; *see People v Reynolds*, 85 AD3d 825, 825-826 *lv denied* 18 NY3d 927). We reject defendant's related contention that his challenge to the order of protection need not be preserved because it renders his sentence illegal. Although an order of protection is issued at sentencing, it is not a part of a defendant's sentence (*see People v Nieves*, 2 NY3d 310, 316; *People v Lilley*, 81 AD3d 1448, 1448, *lv denied* 17 NY3d 860). In any event, defendant waived his challenge by agreeing to the order of protection when he pleaded guilty (*see generally People v Farewell*, 90 AD3d 1502, 1503, *lv denied* 18 NY3d 957).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

5

KA 10-01790

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONNELL JEFFERSON, DEFENDANT-APPELLANT.

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

DONNELL JEFFERSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered July 21, 2010. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault (two counts), kidnapping in the second degree, and robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of predatory sexual assault (Penal Law § 130.95 [1] [b]; [3]), and one count each of kidnapping in the second degree (§ 135.20) and robbery in the first degree (§ 160.15 [3]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The evidence against defendant is based largely on the testimony of prosecution witnesses, and we afford deference to the jury's ability "to view the witnesses, hear the testimony and observe demeanor" (*id.*; *see People v Gay*, 105 AD3d 1427, 1428).

We further reject defendant's contention that County Court erred in permitting a witness to testify that defendant had called her on the night of the incident and indicated that he might be "going to jail." That testimony was admissible because defendant's statement was relevant with respect to his consciousness of guilt, and the probative value of the testimony outweighs any potential prejudice (*see People v Bennett*, 79 NY2d 464, 469-470; *People v Case*, 113 AD3d 872, 873, *lv denied* 23 NY3d 961). We likewise reject defendant's

contention that the court erred in admitting in evidence both the phone cord found in the victim's vehicle and the results of the DNA testing from the cord, based on a gap in the chain of custody. "The People provided sufficient assurances of the identity and unchanged condition of the [cord] . . . , and any alleged gaps in the chain of custody went to the weight of the evidence and not its admissibility" (*People v Johnson*, 121 AD3d 1578, 1578; *see People v Julian*, 41 NY2d 340, 342-343; *People v Howard*, 2 AD3d 1323, 1323-1324, *lv denied* 2 NY3d 800). In any event, any error in admitting the cord and the DNA results in evidence is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Defendant failed to preserve for our review his contention that the indictment is multiplicitous with respect to the two counts of predatory sexual assault (*see People v Sponburgh*, 61 AD3d 1415, 1416, *lv denied* 12 NY3d 929; *People v Brandel*, 306 AD2d 860, 860) and, in any event, that contention is without merit. Although the two counts concern the same victim, they require, respectively, proof that defendant used or threatened the immediate use of a dangerous instrument and proof that defendant committed a prior felony under Penal Law article 130. "An indictment is not multiplicitous if each count requires proof of an additional fact that the other does not" (*People v Kindlon*, 217 AD2d 793, 795, *lv denied* 86 NY2d 844). We further conclude that the sentence is not unduly harsh or severe.

Defendant contends in his main and pro se supplemental briefs that he was deprived of effective assistance of counsel because, inter alia, defense counsel waived certain pretrial hearings, waived an opening statement at trial, and did not cross-examine all of the prosecution witnesses. To the extent that defendant's contention "involve[s] matters outside the record on appeal, . . . the proper procedural vehicle for raising [that] contention[] is a motion pursuant to CPL 440.10" (*People v Archie*, 78 AD3d 1560, 1562, *lv denied* 16 NY3d 856). To the extent that defendant's contention is properly before us, we conclude that defendant received meaningful assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant further contends in his pro se supplemental brief that he was deprived of a fair trial based on alleged *Brady* violations. Those parts of defendant's contention concerning the prosecutor's alleged failure to disclose his ex-girlfriend's prior exculpatory statements made on his behalf and the victim's ex-boyfriend's prior written statement involve matters outside the record, and thus must be raised by a motion pursuant to CPL article 440 (*see People v DeJesus*, 110 AD3d 1480, 1482, *lv denied* 22 NY3d 1155). To the extent that defendant's contention is reviewable, we conclude that it lacks merit.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

8

KA 13-00072

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN N. MAY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie county (Deborah A. Haendiges, J.), rendered December 19, 2012. The judgment convicted defendant, upon a jury verdict, of assault in the third degree, and, upon a plea of guilty, of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the third degree (Penal Law § 120.00 [1]) and upon a guilty plea of criminal possession of a weapon in the third degree (§ 265.02 [1]). Viewing the evidence in the light most favorable to the People (*see People v Williams*, 84 NY2d 925, 926), we reject defendant's contention that the evidence is legally insufficient to support the conviction of assault (*see generally People v Bleakley*, 69 NY2d 490, 495). While there were some inconsistencies in the testimony of the victim, she was steadfast in her testimony that defendant, her long-term boyfriend, assaulted her, and the jury was entitled to credit that testimony (*see People v Kelly*, 34 AD3d 1341, 1342, *lv denied* 8 NY3d 847). Viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we likewise conclude that, although an acquittal would not have been unreasonable, the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495). We note that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]), and we perceive no reason to disturb the jury's resolution of those issues in this case.

Contrary to defendant's contention, reversal is not required on the ground that the victim testified beyond the scope of Supreme Court's *Ventimiglia* ruling. The victim volunteered that information, and the court issued a curative instruction to the jurors, directing them not to consider that testimony (*see People v Holton*, 225 AD2d 1021, 1021, *lv denied* 88 NY2d 986; *see also People v Thigpen*, 30 AD3d 1047, 1048, *lv denied* 7 NY3d 818). The court did not abuse its discretion in allowing the victim to testify regarding prior bad acts that occurred during the assault on the victim inasmuch as that testimony "was inextricably interwoven with the evidence of the charged crime, it was necessary to comprehend that evidence . . . and its probative worth exceeded its prejudicial effect" (*People v Robb*, 23 AD3d 1116, 1117, *lv denied* 6 NY3d 780 [internal quotation marks omitted]).

We reject defendant's contention that the court erred in refusing to allow prior inconsistent statements of the victim in evidence. "The substance of th[ose] prior statement[s] was admitted in evidence through defense counsel's cross-examination of that witness" (*People v Lewis*, 277 AD2d 1022, 1022, *lv denied* 96 NY2d 802; *see People v Hendrix*, 270 AD2d 958, 958, *lv denied* 95 NY2d 853). The court properly denied defendant's request for a missing witness instruction inasmuch as he failed to demonstrate that the witnesses " 'would naturally be expected to provide noncumulative testimony favorable to the [prosecution]' " (*People v Williams*, 202 AD2d 1004, 1004, quoting *People v Kitching*, 78 NY2d 532, 536; *see People v Edwards*, 14 NY3d 733, 735).

Contrary to defendant's contention, the court properly denied his *Batson* challenge with respect to two prospective jurors. Defendant failed to meet his prima facie burden of establishing that the prosecutor exercised the peremptory challenges in a discriminatory manner (*see generally People v Smocum*, 99 NY2d 418, 421). Defendant's assertions "that the prospective jurors 'indicated no reason why they could not serve fairly' are, standing alone, generally insufficient to establish a prima facie case of discrimination" (*People v MacShane*, 11 NY3d 841, 842). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

11

CAF 13-00872

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

IN THE MATTER OF JENNIFER RICE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LORI COLE, RESPONDENT,
AND MICHAEL WIGHTMAN, RESPONDENT-APPELLANT.

TYSON BLUE, MACEDON, FOR RESPONDENT-APPELLANT.

M. KATHLEEN CURRAN, ATTORNEY FOR THE CHILD, CANANDAIGUA.

Appeal from an order of the Family Court, Ontario County (Stephen D. Aronson, A.J.), entered April 9, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, directed that respondent Michael Wightman have supervised visitation with the parties' child.

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

Memorandum: In this proceeding under Family Court Act article 6, respondent father appeals from an order modifying the existing custody/visitation arrangement by directing that he have supervised visitation with the parties' child. We conclude that petitioner mother established a sufficient " 'change in circumstances that reflects a genuine need for the modification so as to ensure the best interests of the child' " (*Matter of Frisbie v Stone*, 118 AD3d 1471, 1472). Here, the mother established that the father was engaged in an altercation with the child's grandmother in front of the child, resulting in police intervention, and that the father fired a shot from a BB gun that narrowly missed hitting the child while she was trying to set up a target (*see generally Raychelle J. v Kendall K.*, 121 AD3d 1206, 1207-1208). Furthermore, we conclude that Family Court's determination to impose supervised visitation is supported by the requisite " 'sound and substantial basis in the record' " (*Matter of Vasquez v Barfield*, 81 AD3d 1398, 1398; *see generally Frisbie*, 118 AD3d at 1472).

Although we agree with the father that the court erred in considering his 2010 mental health evaluation rather than his 2012 mental health evaluation, which was stipulated into evidence and is part of the record on appeal, we nevertheless conclude that the error is harmless. Even absent consideration of the 2010 or 2012

evaluation, there is a sound and substantial basis in the record for the court's determination to order supervised visitation (*see generally Matter of Scala v Evanson*, 78 AD3d 954, 955).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

17

CA 14-01344

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

EDWARD GAWRON, PLAINTIFF,
AND JOANNE GAWRON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered November 15, 2013 in a personal injury action. The order denied defendants' motion seeking summary judgment dismissing the complaint with respect to plaintiff Joanne Gawron.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries they sustained when their vehicle was struck by a snowplow owned by defendant Town of Cheektowaga and operated by its employee, defendant David J. Grzybek. Supreme Court properly denied defendants' motion seeking summary judgment dismissing the complaint with respect to Joanne Gawron (plaintiff) on the ground that she did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Defendants failed to make "a prima facie showing that plaintiff's alleged injuries did not satisfy [the] serious injury threshold" under the three categories alleged by plaintiff (*Pommells v Perez*, 4 NY3d 566, 574; *see Greenidge v Righton Limo, Inc.*, 43 AD3d 1109, 1109), and we therefore do not consider plaintiff's submissions in opposition to the motion (*see Greenidge*, 43 AD3d at 1110). With respect to the categories of permanent consequential limitation of use and significant limitation of use, defendants' own submissions raise triable issues of fact whether plaintiff's alleged limitations are " 'significant' or 'consequential' (i.e., important . . .)" within the meaning of the statute (*Dufel v Green*, 84 NY2d 795, 798; *see Matte v Hall*, 20 AD3d 898, 899). Defendants' own submissions also raise triable issues of fact whether plaintiff's injuries were preexisting and unrelated to the accident (*cf. Franchini v Palmieri*, 307 AD2d 1056, 1056-1057, *affd* 1 NY3d 536). In addition, defendants failed to

meet their burden of establishing that plaintiff did not sustain a serious injury under the third category alleged by plaintiff, i.e., the 90/180-day category (*see Greenidge*, 43 AD3d at 1109-1110).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

18

CA 14-01269

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

LATASHA JOHNSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WAL-MART, BG THRUWAY, LLC, DEVELOPERS
DIVERSIFIED REALTY CORPORATION,
DEFENDANTS-APPELLANTS,
EAGLE RIDGE SPECIALTY PROPERTY SERVICES, INC.,
AND JAMES BARONE,
DEFENDANTS-RESPONDENTS.

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

AMIGONE, SANCHEZ & MATTREY, LLP, BUFFALO (RICHARD S. JUDA, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered January 17, 2014. The order denied the motions of defendants for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 1, 2014,

It is hereby ORDERED that said appeal by defendants Wal-Mart, BG Thruway, LLC, and Developers Diversified Realty Corporation insofar as it concerns plaintiff's direct claims is unanimously dismissed upon stipulation and the order is affirmed without costs.

Memorandum: During the pendency of this appeal, the parties entered into a partial stipulation of discontinuance that effectively narrowed the issue on appeal to whether defendants Wal-Mart, BG Thruway, LLC, and Developers Diversified Realty Corporation (collectively, premises defendants) were entitled to indemnification from defendant Eagle Ridge Specialty Property Services, Inc. (Eagle Ridge) under their snow-removal services contract. We conclude that Supreme Court properly denied that part of the premises defendants' motion seeking summary judgment on their cross claim for contractual indemnification. The snow-removal services contract required Eagle Ridge to indemnify the premises defendants based on any negligent or intentional act or omission, and there is an issue of fact concerning the alleged culpability of Eagle Ridge (*see Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188; *Anderson v Jefferson-Utica Group, Inc.*, 26 AD3d 760, 761; *Torella v Benderson Dev. Co.*, 307 AD2d 727,

729).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

19

CA 14-01158

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

JOANN ABBO-BRADLEY, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF DYLAN J. BRADLEY, TREVOR A. BRADLEY AND CHASE Q. BRADLEY, INFANTS, ZACHARY HERR AND MELANIE HERR, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF COLETON HERR AND HEATHER HERR, INFANTS, AND NATHAN E. KORSON AND ELENA KORSON, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF LOGAN J. KORSON, AN INFANT, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, ET AL., DEFENDANTS, OP-TECH ENVIRONMENTAL SERVICES, NIAGARA FALLS WATER BOARD, GLENN SPRINGS HOLDINGS, INC., GROSS PHC LLC, AND SEVENSON ENVIRONMENTAL SERVICES, INC., DEFENDANTS-RESPONDENTS.

PHILLIPS & PAOLICELLI, LLP, NEW YORK CITY (STEPHEN J. PHILLIPS OF COUNSEL), WATERS & KRAUS, LLP, DALLAS, TEXAS, FANIZZI & BARR, P.C., NIAGARA FALLS AND CHRISTEN MORRIS, EAST AMHERST, FOR PLAINTIFFS-APPELLANTS.

PILLINGER MILLER TARALLO, LLP, ELMSFORD (JEFFREY D. SCHULMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT OP-TECH ENVIRONMENTAL SERVICES.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (JEFFREY F. BAASE OF COUNSEL), FOR DEFENDANT-RESPONDENT NIAGARA FALLS WATER BOARD.

QUINN EMANUEL URQUHART & SULLIVAN LLP, NEW YORK CITY (SHEILA L. BIRNBAUM OF COUNSEL), PHILLIPS LYTLE LLP, BUFFALO AND KLEINFELD, KAPLAN AND BECKER, LLP, WASHINGTON, DC, FOR DEFENDANT-RESPONDENT GLENN SPRINGS HOLDINGS, INC.

SCHNITTER CICCARELLI MILLS PLLC, EAST AMHERST (PATRICIA S. CICCARELLI OF COUNSEL), FOR DEFENDANT-RESPONDENT GROSS PHC LLC.

HURWITZ & FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR DEFENDANT-RESPONDENT SEVENSON ENVIRONMENTAL SERVICES, INC.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered December 4, 2013. The order granted the motion of defendant Glenn Springs Holdings, Inc., for a preliminary injunction.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the provision directing plaintiffs to afford defendants contemporaneous access to properties for environmental sampling samples and by limiting the obligation of plaintiffs' attorneys to provide notice of environmental sampling to instances "where such testing would be of assistance to the prosecution or defense of the instant lawsuit," and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: Plaintiffs, who live in an area in the periphery of the Love Canal site in Niagara Falls, commenced this toxic tort action seeking damages related to the alleged exposure of toxins from the Love Canal site. Supreme Court granted the motion of defendant Glenn Springs Holdings, Inc., joined in by other defendants, seeking a preliminary injunction prohibiting plaintiffs, or their attorneys, from conducting environmental sampling without providing defendants with written notice of 96 hours prior to such sampling; contemporaneous access to the sampling sites; and an opportunity to take split samples of all such environmental samples.

We agree with plaintiffs that the court, in issuing the preliminary injunction, abused its discretion in permitting defendants contemporaneous access to the site while the samples are collected (*see generally Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216). We therefore modify the order by vacating the provision directing contemporaneous access, and we remit the matter to Supreme Court to determine the manner in which plaintiffs are to provide split samples to defendants. Communication between plaintiffs' attorneys and their consultants is protected work product (*see Beach v Touradji Capital Mgt., LP*, 99 AD3d 167, 170), and their communication with their clients also is protected by the attorney-client privilege (*see Veras Inv. Partners, LLC v Akin Gump Strauss Hauer & Feld LLP*, 52 AD3d 370, 373-374). Although plaintiffs' claims are based upon the evidence obtained from the samples (*see generally id.* at 374), we conclude that the respective privileges are not waived. The fact "[t]hat a privileged communication contains information relevant to the issues the parties are litigating does not, without more, place the contents of the privileged communication itself at issue in the lawsuit" (*id.* [internal quotation marks omitted]).

We nevertheless conclude that the court properly determined that defendants are entitled to notice and to contemporaneous split samples of material collected by plaintiffs herein and by plaintiffs' attorneys with respect to samples taken from property of nonparties insofar as that material is of assistance to plaintiffs in this action. We note, however, that there is a discrepancy between the order and the decision in this regard. The court's decision prohibited plaintiffs' attorneys from obtaining samples from the property of their nonparty clients in "any place in the [affected] area that would be [of] assistance" to plaintiffs' action herein, without, inter alia, notice to defendants. The order, however, requires plaintiffs' attorneys to provide notice of sampling and access to defendants of *any* sample taken, and did not contain the

restriction that plaintiffs' attorneys were required to provide notice to defendants only of those samples that would assist these plaintiffs. Inasmuch as the decision controls where, as here, it conflicts with the order (*see Del Nero v Colvin*, 111 AD3d 1250, 1253), we further modify the order accordingly, to conform to the decision.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

24

CA 13-00420

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

ANN TOWNE, PLAINTIFF-APPELLANT,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

DAVID E. BURNS, M.D. AND GENESEE SURGICAL
ASSOCIATES, P.C., DEFENDANTS-RESPONDENTS.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BROWN, GRUTTADARO, GAUJEAN & PRATO, LLC, ROCHESTER (JEFFREY S. ALBANESE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered January 23, 2013. The order denied the motion of plaintiff Ann Towne to set aside the verdict and for a new trial.

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

Memorandum: In this medical malpractice action, Ann Towne (plaintiff) appeals from an order insofar as it denied her motion to set aside the verdict of no cause of action and for a new trial in the interest of justice (*see* CPLR 4404 [a]). We reject plaintiff's contention that Supreme Court erred in allowing cross-examination of her expert regarding an out-of-state conviction of contempt. That conviction was based upon lies told by the expert to a judge during the course of the expert's trial testimony. Although the conviction was in 1983, " '[c]ommission of perjury or other acts of individual dishonesty, or untrustworthiness . . . will usually have a very material relevance, whenever committed' " (*Donahue v Quikrete Cos.* [appeal No. 2], 19 AD3d 1008, 1009, quoting *People v Sandoval*, 34 NY2d 371, 377).

We agree with plaintiff, however, that the court abused its discretion in curtailing her effort to rehabilitate her expert on redirect examination by asking him to explain the facts underlying the contempt conviction (*see People v Tait*, 234 App Div 433, 439, *affd* 259 NY 599; *Sims v Sims*, 75 NY 467, 472-473). We further conclude, however, that the error is harmless, inasmuch as "[t]he excluded [testimony] would not 'have had a substantial influence in bringing about a different verdict' " (*Czerniejewski v Stewart-Glapat Corp.*, 269 AD2d 772, 773). Thus, the limitations imposed by the court on the

redirect examination of plaintiff's expert do not support setting aside the verdict in the interest of justice (*see Butler v County of Chautauqua*, 277 AD2d 964, 964).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

25

CA 14-01349

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

DANIEL WILLIAMS, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)
(CLAIM NO. 114956.)

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

DANIEL WILLIAMS, CLAIMANT-RESPONDENT PRO SE.

Appeal from a judgment of the Court of Claims (Stephen J. Lynch, J.), entered November 12, 2013. The judgment awarded the claimant money damages as against defendant.

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, an inmate at a state correctional facility, commenced this action alleging that defendant, State of New York (State), was negligent and thus was liable for injuries sustained by claimant when he was assaulted by three fellow inmates. Following a trial, the Court of Claims determined that the State was negligent and awarded claimant $12,500 in damages, plus interest. The State appeals.

We reverse, inasmuch as we conclude that the verdict in favor of claimant was not based on a fair interpretation of the evidence (*see generally Farace v State of New York*, 266 AD2d 870, 870). It is well settled that "[t]he mere occurrence of an inmate assault, without credible evidence that the assault was reasonably foreseeable, cannot establish the negligence of the State" (*Sanchez v State of New York*, 99 NY2d 247, 256). The State owes a duty to inmates to protect them from risks of which the State is actually aware as well as risks that the State "should reasonably have foreseen in the circumstances presented" (*id.*). Prior to the subject assault, claimant was involved in an altercation with an apparent gang member at Attica Correctional Facility (Attica). The gang member was not one of the subject attackers, but claimant testified that the attackers were in the same housing unit and the same "company" with that apparent gang member at Attica. On the same day, during a bus ride to Southport Correctional

Facility, the attackers brought up the earlier altercation with claimant and claimant felt threatened to some extent, but he did not alert any prison officials. Subsequently, claimant and the three subject attackers were all placed in the same holding pen during a stop at Wende Correctional Facility to change buses. Claimant was then assaulted. There is no record evidence to establish that prison officials were aware of a risk of harm to claimant posed by the three Attica inmates and, similarly, there is no evidence that the State should have foreseen the assault upon claimant (*see Melvin v State of New York*, 101 AD3d 1654, 1654-1655; *Vasquez v State of New York*, 68 AD3d 1275, 1276-1277; *Padgett v State of New York*, 163 AD2d 914, 914-915, *lv denied* 76 NY2d 711).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

26

CA 14-01376

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

DANIEL WILLIAMS, CLAIMANT-RESPONDENT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)
(CLAIM NO. 114956.)

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

DANIEL WILLIAMS, CLAIMANT-RESPONDENT PRO SE.

Appeal from a decision of the Court of Claims (Stephen J. Lynch, J.), entered October 28, 2013. The decision awarded claimant money damages.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Kuhn v Kuhn*, 129 AD2d 967, 967).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

75

KA 11-02495

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL KEARNS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered July 26, 2011. The judgment convicted defendant, upon his plea of guilty, of aggravated criminal contempt.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of aggravated criminal contempt (Penal Law § 215.52 [1]), defendant contends that his waiver of the right to appeal is unenforceable and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal was knowing, intelligent and voluntary, we agree with defendant that the waiver does not encompass his challenge to the severity of the sentence because " 'no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction' that he was also waiving his right to appeal any issue concerning the severity of the sentence" (*People v Lorenz*, 119 AD3d 1450, 1450, *lv denied* 24 NY3d 962; *see People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076). Nevertheless, we perceive no basis to exercise our discretion to modify his sentence in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

76

KA 14-00503

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL ORTH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered February 7, 2014. The judgment convicted defendant, upon his plea of guilty, of petit larceny, resisting arrest and driving while intoxicated, a misdemeanor.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the terms of imprisonment shall run concurrently, and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of petit larceny (Penal Law § 155.25), resisting arrest (§ 205.30), and driving while intoxicated (Vehicle and Traffic Law § 1192 [3]). We agree with defendant that his sentence is illegal to the extent that Supreme Court imposed consecutive definite sentences of one year each for the offenses of petit larceny and resisting arrest. "Because those offenses were committed as part of a single incident, imposition of consecutive sentences aggregating more than one year is illegal" (*People v Beckwith*, 270 AD2d 798, 798; *see* Penal Law § 70.25 [3]). We therefore modify the judgment by directing that those sentences run concurrently.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

81

CAF 14-00781

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

IN THE MATTER OF JILLIAN N. NEWMAN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. DUFFY, RESPONDENT-APPELLANT.

LAW OFFICE OF KEITH B. SCHULEFAND, WILLIAMSVILLE (ROSS S. GELBER OF COUNSEL), FOR RESPONDENT-APPELLANT.

JASON R. DIPASQUALE, BUFFALO, FOR PETITIONER-RESPONDENT.

JESSICA L. VESPER, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered July 16, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner permission to relocate with the parties' child.

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

Memorandum: Contrary to respondent father's contention, Family Court properly granted the petition pursuant to which petitioner mother sought to modify an order of custody and visitation and permitted her to relocate with the parties' child to Massachusetts. We conclude that the court properly considered the *Tropea* factors (*see Matter of Tropea v Tropea*, 87 NY2d 727, 740-741) in determining that the relocation is in the best interests of the child. Here, the mother's husband, who is in the Coast Guard, received orders transferring him to Massachusetts. "Although he chose to . . . remain in the [Coast Guard], that choice provided him with stability in employment in turbulent economic times, as well as benefits including health insurance for his family" (*Matter of Adams v Bracci*, 91 AD3d 1046, 1047, *lv denied* 18 NY3d 809). Further, both the mother and her husband testified that they expected substantial salary increases after the transfer (*see Matter of Canady v Binette*, 83 AD3d 1551, 1551-1552). "[E]conomic necessity . . . may present a particularly persuasive ground for permitting the proposed move" (*Tropea*, 87 NY2d at 739), and the mother established that the relocation was justified by such economic necessity. In addition, although the relocation will affect the frequency of the father's visitation, the mother agreed to maintain and facilitate a visitation schedule that will afford the father extensive contact with the child (*see Matter of Venus v*

Brennan, 103 AD3d 1115, 1116). Finally, even assuming, arguendo, that the court erred in admitting "largely irrelevant evidence relating to [the father's] character," we conclude that such error was harmless (*Matter of Sade B. [Scott M.]*, 103 AD3d 519, 520).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

90

CA 14-00355

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

KAREN MARKS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL ALONSO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

SPADAFORA & VERRASTRO, LLP, BUFFALO (RICHARD E. UPDEGROVE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered November 19, 2013. The order, among other things, ordered a new trial on the issues of serious injury and damages.

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

Memorandum: Plaintiff commenced this action for personal injuries arising out of a motor vehicle accident with defendant. In appeal No. 2, defendant contends that Supreme Court erred in denying his motion 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). We reject that contention. Even assuming, arguendo, that defendant met his initial burden on his motion, we conclude that plaintiff raised an issue of fact in opposition with respect to three categories of serious injury, i.e., the permanent consequential limitation of use, the significant limitation of use, and the 90/180-day categories, by "submitting objective proof of [muscle] spasm[s] in [her] cervical spine . . . , and proof showing quantitative restrictions in the range of motion in [her] cervical spine" (*Siemucha v Garrison*, 111 AD3d 1398, 1399).

Following trial, the jury issued a verdict finding that the accident was not a substantial factor in causing plaintiff's injuries. In appeal No. 1, defendant appeals from an order in which the court granted plaintiff's posttrial motion to set aside the jury verdict, found that defendant was negligent and that such negligence was a substantial factor in causing plaintiff's injuries, and ordered a new trial on the issues of serious injury and damages. Defendant contends that the proof submitted at trial established that the accident was

not a substantial factor in causing plaintiff's injuries, and that the jury's verdict should not have been disturbed. We reject that contention. "[T]he determination of the trial court to set aside a jury verdict . . . must be accorded great respect . . . and, where the court's determination is not unreasonable, we will not intervene to reverse that finding" (*American Linen Supply Co. v M.W.S. Enters.*, 6 AD3d 1079, 1080, *lv dismissed* 3 NY3d 702 [internal quotation marks omitted]). We conclude that the court's determination is not unreasonable. The proof at trial from both parties established that the accident proximately caused plaintiff to sustain at least a cervical strain. Thus, "the evidence with regard to proximate cause so preponderated in plaintiff's favor that the jury could not have reached its conclusion [of no proximate cause] based on any fair interpretation of it" (*Ernst v Khuri*, 88 AD3d 1137, 1139; *see Herbst v Marshall*, 89 AD3d 1403, 1403).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

91

CA 14-00356

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

KAREN MARKS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL ALONSO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

SPADAFORA & VERRASTRO, LLP, BUFFALO (RICHARD E. UPDEGROVE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered November 26, 2013. The order denied the motion of defendant for summary judgment.

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

Same Memorandum as in *Marks v Alonso* ([appeal No. 1] ___ AD3d ___ [Feb. 13, 2015]).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

95

CA 14-00915

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND DEJOSEPH, 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 THE COUNTY OF GENESEE RELATING TO THE 2011 TOWN AND COUNTY TAX.

COUNTY OF GENESEE, PETITIONER-APPELLANT; MEMORANDUM AND ORDER

RICHARD SPICOLA, RESPONDENT-RESPONDENT.

BANK OF AKRON, INTERESTED PARTY-RESPONDENT.

PHILLIPS LYTLE LLP, ROCHESTER (MARK J. MORETTI OF COUNSEL), FOR PETITIONER-APPELLANT.

NICHOLAS, PEROT, SMITH, BERNHARDT & ZOSH, P.C., AKRON (MICHAEL R. ZOSH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (DANIEL E. SARZYNSKI OF COUNSEL), FOR INTERESTED PARTY-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered March 14, 2014 in a proceeding pursuant to Real Property Tax Law article 11. The order, among other things, granted respondent Richard Spicola's motion to vacate a default judgment.

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

Memorandum: Supreme Court did not abuse its discretion in granting respondent's renewed motion pursuant to CPLR 5015 (a) (1) 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; *see Matter of County of Genesee [Butlak]*, ___ AD3d ___ [Jan. 2, 2015]). Respondent moved to vacate the default judgment shortly after it was obtained and, in his renewed motion, "respondent established both his ability to pay the taxes after the redemption period had ended and the lack of any prejudice to petitioner" (*Butlak*, ___ AD3d at ___).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

99

KA 11-01945

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRENT NELSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered September 20, 2011. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree and grand larceny in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the amount of restitution ordered and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the third degree (Penal Law § 140.20) and grand larceny in the fourth degree (§ 155.30 [5]). Contrary to defendant's contention, we conclude that the incarceration component of the sentence is not unduly harsh or severe. Although defendant's contention with respect to the restitution component of the sentence is not properly before us (*see People v Lawson* [appeal No. 7], ___ AD3d ___, ___ [Jan. 2, 2015]; *see generally People v Callahan*, 80 NY2d 273, 281), we nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Upon that review, we agree with defendant that "the record 'does not contain sufficient evidence to establish the amount [of restitution to be imposed]' " (*Lawson*, ___ AD3d at ___). We thus conclude that County Court " 'erred in determining the amount of restitution without holding a hearing' " (*id.*). We therefore modify the judgment by vacating the amount of restitution ordered, and we remit the matter to County Court for a hearing to determine the amount of restitution to be paid by defendant.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

100

KA 14-00564

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTIWON J. DUNMEYER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered February 26, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree and aggravated criminal contempt.

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 contempt in the first degree (Penal Law § 215.51 [b] [vi]) and aggravated criminal contempt (§ 215.52 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

101

KA 13-01803

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT MERKLEY, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Ontario County Court (Frederick G. Reed, A.J.), entered September 18, 2013. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), defendant contends that County Court erred in assessing 15 points against him under risk factor 11 based upon his history of drug and alcohol abuse. We reject that contention. The evidence admitted without objection at the SORA hearing included the case summary, prepared by the Board of Examiners of Sex Offenders, and defendant's presentence report. According to the case summary, defendant stated that he "first used mari[h]uana at age 14 and was using it on a daily basis," and that he used cocaine "every couple of days." Defendant also admitted that he used vicodin and various other narcotic drugs on a daily basis. Defendant made similar admissions to the probation officer who interviewed him in preparing the presentence report. We conclude that the "statements in the case summary and presentence report with respect to defendant's substance abuse constitute reliable hearsay supporting the court's assessment of points for history of drug or alcohol abuse" (*People v Ramos*, 41 AD3d 1250, 1250, *lv denied* 9 NY3d 809; *see People v St. Jean*, 101 AD3d 1684, 1684).

Although we agree with defendant that the court should have applied a preponderance of the evidence standard to his request for a downward departure, rather than a clear and convincing evidence standard (*see People v Gillotti*, 23 NY3d 841, 860-861), we need not

remit the matter because the record is sufficient to enable us to review defendant's contention under the proper standard (*see generally People v Urbanski*, 74 AD3d 1882, 1883, *lv denied* 15 NY3d 707). We conclude that defendant failed to meet that standard inasmuch as he did not establish the existence of any mitigating factors warranting a downward departure from his risk level (*see People v Nethercott*, 119 AD3d 918, 918, *lv denied* 24 NY3d 908; *People v Worrell*, 113 AD3d 742, 742-743).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

102

KA 11-01952

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALVONSEY MANIGUALT, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, HARRIS BEACH PLLC, PITTSFORD (ALLISON A. BOSWORTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered August 3, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: 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]). Defendant was a passenger in a vehicle stopped by the police for a traffic infraction, and the police arrested defendant upon observing the weapon in plain view when defendant exited the vehicle. Within 30 days of defendant's arrest, defense counsel obtained a subpoena for video footage from a police camera located in the vicinity of the traffic stop, but it was not supplied. Defendant moved to suppress the evidence recovered as the result of the traffic stop and, at the suppression hearing, there was no explanation for the unavailability of the video footage. Defense counsel requested an adverse inference, i.e., that the video footage would have been favorable to the defense, due to its unavailability despite a prompt subpoena. County Court denied defendant's suppression motion without mentioning whether it applied the requested adverse inference.

At the outset, we reject the People's contention that defendant's plea of guilty precludes him from challenging the denial of his suppression motion inasmuch as the record establishes that the court decided his motion before he entered his guilty plea (*see* CPL 710.70 [2]; *People v Elmer*, 19 NY3d 501, 509-510; *cf. People v Rosario*, 64 AD3d 1217, 1217-1218, *lv denied* 13 NY3d 941), and defendant conditioned his plea upon his ability to appeal the denial of his

suppression motion (*cf*. *People v Kemp*, 94 NY2d 831, 833).

Defendant failed to preserve for our review his present contention that the court erred in failing to preclude the police officers' testimony at the suppression hearing as a sanction for loss of the video footage, inasmuch as he did not request any remedy other than an adverse inference (*see People v Anonymous*, 38 AD3d 438, 438-439, *lv denied* 8 NY3d 981; *see also People v Johnson*, 114 AD3d 1132, 1133, *lv denied* 24 NY3d 961). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Defendant was entitled to a permissive adverse inference under these circumstances (*cf. People v Brown*, 92 AD3d 455, 456-457, *lv denied* 18 NY3d 955; *see generally People v Handy*, 20 NY3d 663, 669), and we conclude that the court is presumed to have rendered its decision upon that appropriate legal criteria (*see People v Lucas*, 291 AD2d 890, 890-891; *see generally People v Moreno*, 70 NY2d 403, 406). Finally, we conclude that the court did not err in nevertheless crediting the testimony of the police officers (*see generally People v Richardson*, 27 AD3d 1168, 1169).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

103

KA 13-01184

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS J. TORRES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered August 7, 2012. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class D felony, and aggravated driving while intoxicated, per se, a class D felony.

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 driving while intoxicated, a class D felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]), and aggravated driving while intoxicated, per se, a class D felony (§§ 1192 [2-a] [a]; 1193 [1] [c] [ii]), defendant contends that the verdict is contrary to the weight of the evidence with respect to the issues of intoxication, the breathalyzer test results, and the defense of justification. Inasmuch as defendant admitted during his trial testimony that he was intoxicated when he operated the vehicle, we reject his contention that the jury improperly weighed the evidence of intoxication. Defendant's contention with respect to the breathalyzer test results is without merit (*see* § 1194 [4] [c]; *People v Kulk*, 103 AD3d 1038, 1041, *lv denied* 22 NY3d 956; *see generally People v Boscic*, 15 NY3d 494, 498-500). Consequently, the only remaining issue with respect to the weight of the evidence is defendant's contention that the jury did not properly weigh the evidence with respect to the defense of justification based on an emergency, also known as the "choice of evils" defense (*see e.g. People v Craig*, 78 NY2d 616, 620 n 1). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that, under the circumstances of this case, the jury failed to give the evidence the weight it should be accorded in considering that defense (*see generally People v Bleakley*, 69 NY2d

490, 495).

The defense applies where, inter alia, the defendant's conduct "is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur" (Penal Law § 35.05 [2]). "[T]he requirement that the impending injury must be 'imminent' and 'about to occur' denotes an impending harm which constitutes a present, immediate threat—i.e., a danger that is actual and at hand, not one that is speculative, abstract or remote" (*Craig*, 78 NY2d at 624). "It was for the jury to determine whether the threat of harm that the defendant perceived had ceased to exist and if so whether defendant had sufficient time to react prior to" engaging in the illegal conduct (*People v Maher*, 79 NY2d 978, 982). Even assuming, arguendo, that defendant was initially justified within the meaning of Penal Law § 35.05 (2) in driving while intoxicated to escape an imminent threat of physical injury, we cannot conclude that the jury improperly weighed the evidence in determining that defendant was not justified in continuing to operate the vehicle for several miles, with no evidence that he was being pursued.

We reject defendant's contention that County Court erred in denying his motion to suppress all evidence arising from the allegedly improper stop of his vehicle. "The police had reasonable suspicion to stop defendant[']s vehicle based on the contents of a 911 call from [three identified citizens] and the confirmatory observations of the police. [Inasmuch as the evidence in the record establishes that the information provided by those citizens] was reliable under the totality of the circumstances, satisfied the two-pronged *Aguilar–Spinelli* test for the reliability of hearsay tips in this particular context and contained sufficient information about defendant[']s unlawful possession of a weapon to create reasonable suspicion, the lawfulness of the stop of defendant[']s vehicle is" established (*People v Argyris*, ___ NY3d ___, ___ [Nov. 25, 2014]).

We also reject defendant's contention that he was denied effective assistance of counsel. It is well settled that, "[t]o prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709; *see People v Benevento*, 91 NY2d 708, 712), and defendant failed to meet that burden. 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).

Defendant further contends that the court committed reversible error by failing to provide a meaningful response to a jury note asking for the legal definition of an adjournment in contemplation of dismissal. We reject the People's assertion that defendant's contention is not preserved for our review, inasmuch as the record establishes that "the court 'was aware of, and expressly decided, the [issue] raised on appeal' " (*People v Collins*, 106 AD3d 1544, 1546, *lv denied* 21 NY3d 1072, quoting *People v Hawkins*, 11 NY3d 484, 493). We

conclude, however, that defendant's contention is without merit. The court appropriately answered the jury's question by explaining that there was no evidence in the record concerning such a disposition (*see generally People v Esquilin*, 236 AD2d 245, 246-247, *affd* 91 NY2d 902; *People v Davis*, 223 AD2d 376, 377, *lv denied* 88 NY2d 846). Thus, "whatever questions are raised as to the phrasing of the court's response to the jury's questions, the court's answer provided the requisite 'meaningful response' " (*People v Simmons*, 66 AD3d 292, 295, *affd* 15 NY3d 728).

Defendant further contends that he was deprived of a fair trial by various instances of prosecutorial misconduct. Although defendant contends that the prosecutor engaged in misconduct by introducing evidence of defendant's invocation of his right to remain silent, we note that the prosecutor in fact did not introduce such evidence; rather, the testimony elicited by the prosecutor established that defendant merely responded to a question about his rights by stating that he would speak to the officers when he considered it appropriate to do so. "By refusing to respond to certain questions but while continuing to respond to others, defendant [did not] invoke his right to remain silent" (*People v Gibbs*, 286 AD2d 865, 867, *lv denied* 97 NY2d 704; *see People v Flowers*, 122 AD3d 1396, 1396-1397; *People v Jandreau*, 277 AD2d 998, 998, *lv denied* 96 NY2d 784) and, "thus, the prosecutor did not err in eliciting testimony on that issue" (*Gibbs*, 286 AD2d at 867).

Defendant failed to object to the majority of the remaining instances of alleged prosecutorial misconduct that he raises on appeal, and thus failed to preserve his contention for our review with respect to those instances (*see People v Ward*, 107 AD3d 1605, 1606, *lv denied* 21 NY3d 1078). In any event, with respect to the remaining alleged instances of misconduct, both preserved and unpreserved, we conclude that "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Jones*, 114 AD3d 1239, 1241, *lv denied* 23 NY3d 1038, 1039 [internal quotation marks omitted]; *see People v Smith*, 109 AD3d 1150, 1151-1152, *lv denied* 22 NY3d 1090).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contention and conclude that it is without merit.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

104

KA 11-02371

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERREN WHORLEY, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (LINDSEY LUCZKA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 16, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in determining that the police had the necessary reasonable suspicion to detain him and to frisk him for weapons because the information provided to them by the citizen informant was unreliable. The citizen informant, a bouncer at an adjacent bar, had informed the police that he felt a gun on defendant's person. Inasmuch as "that contention was not raised in defendant's pretrial omnibus motion or at the suppression hearing, it has not been preserved for our review" (*People v King*, 284 AD2d 941, 941, *lv denied* 96 NY2d 920; *see People v Turner*, 96 AD3d 1392, 1393, *lv denied* 19 NY3d 1002). In any event, that contention lacks merit. The information provided by the bouncer, an identified citizen, was based upon his personal knowledge and accused defendant of committing a specific crime, and thus it provided the officers with at least a reasonable suspicion that a crime had been, or was being, committed, thus authorizing the detention (*see People v Brito*, 59 AD3d 1000, 1000, *lv denied* 12 NY3d 814; *see generally People v De Bour*, 40 NY2d 210, 223; *People v Cantor*, 36 NY2d 106, 112-113). In addition, that information was coupled with the police officer's confirmatory observations of certain details of the information provided by the citizen informant, which further provided at least reasonable suspicion to detain defendant (*see generally People v Argyris*, ___ NY3d ___, ___ [Nov. 25, 2014]; *People v Bell*, 5 AD3d 858,

860; *People v Powell*, 234 AD2d 397, 398, *lv denied* 89 NY2d 988). Inasmuch as the information provided to the officers indicated that defendant possessed a gun, and "[a] corollary of the statutory right to temporarily detain for questioning is the authority to frisk [an individual] if the officer reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed" (*De Bour*, 40 NY2d at 223), the officers were authorized to frisk defendant once they detained him.

To the extent that defendant contends that he was denied effective assistance of counsel because of advice he received from his attorney, that contention "is based on information outside the record before us and is therefore properly raised by a CPL article 440 motion" (*People v James*, 269 AD2d 845, 846). To the extent that defendant's ineffective assistance of counsel claim otherwise survives his plea of guilty (*see People v Garner*, 86 AD3d 955, 956), we conclude that it lacks merit (*see generally People v Ford*, 86 NY2d 397, 404). We note in particular that, although defendant contends that he was denied effective assistance of counsel because defense counsel was operating under a conflict of interest, defendant has failed to demonstrate that any alleged conflict of interest affected "the conduct of his defense . . . , or that the conflict operated on [defense counsel's] representation" of defendant (*People v Konstantinides*, 14 NY3d 1, 10; *see People v Ennis*, 11 NY3d 403, 410, *cert denied* 556 US 1240).

Contrary to defendant's contention, the sentence is not unduly harsh or severe.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

105

CAF 13-00688

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

IN THE MATTER OF MICHAEL CARROLL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

AMY CARROLL, RESPONDENT-RESPONDENT.

PETER J. DIGIORGIO, JR., ESQ., ATTORNEY
FOR THE CHILD, APPELLANT.

PETER J. DIGIORGIO, JR., ATTORNEY FOR THE CHILD, UTICA, APPELLANT PRO SE.

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

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered March 26, 2013 in a proceeding pursuant to Family Court Act article 6. The order granted petitioner supervised visitation.

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

Memorandum: Petitioner father, an inmate at a correctional facility, commenced this Family Court Act article 6 proceeding seeking visitation with the child, and the Attorney for the Child (AFC) appeals from an order granting the petition. We reverse.

We note at the outset that we reject the AFC's contention that Family Court should have granted the motion to dismiss the father's petition before holding a hearing on the child's best interests (*see generally Matter of Tanner v Tanner*, 35 AD3d 1102, 1103). We agree with the AFC, however, that the court abused its discretion in granting the father's petition for visitation. "Although we recognize that the rebuttable presumption in favor of visitation applies when the parent seeking visitation is incarcerated . . . , we conclude that [the AFC] rebutted the presumption by establishing by a preponderance of the evidence that visitation with [the father] would be harmful to the [child]" (*Matter of Brown v Terwilliger*, 108 AD3d 1047, 1048, *lv denied* 22 NY3d 858).

Here, the parties married while the father was in prison, and he was still incarcerated at the time of the child's birth. The father

did not seek to establish paternity of the child until she almost was five years old (*see id.*; *Matter of Bougor v Murray*, 283 AD2d 695, 696). Although respondent mother brought the child to visit the father in prison shortly after she was born, the child has not visited the father there since (*see Matter of Ellett v Ellett*, 265 AD2d 747, 748). The father contends that he formed a relationship with the child while he was on parole for approximately three months in 2010, but we note that, when he was on parole again in 2011, he attempted to see the child only once. He conceded that he attempted to write to the child only twice since she was born, and there is no evidence that he attempted to communicate with the child by telephone. Indeed, the father admitted that he did not have a relationship with the child (*see Matter of Johnson v Williams*, 59 AD3d 445, 445). Further, while the father testified that he believed his sister or mother might be able to drive the child to the prison, the trip would require approximately three hours of driving in total, and the child does not have a relationship with those individuals (*see Ellett*, 265 AD2d at 747-748).

In addition, a history of domestic violence is a factor to consider in determining whether visitation would not be in the child's best interests (*see Matter of Leonard v Pasternack-Walton*, 80 AD3d 1081, 1081-1082; *Matter of Morelli v Tucker*, 48 AD3d 919, 920, *lv denied* 10 NY3d 709), and here the father admitted to engaging in a history of domestic violence against the mother, including engaging in fist fights with her. The mother testified that the father choked her during one such fight, when she was pregnant with the subject child. The father also admitted that he violated an order to stay away from the mother in 2011. We also note that the father admitted that he had been in a fight with another inmate while in prison, and that he went "on the run" from parole officers in 2010.

While "the propriety of visitation is generally left to the . . . discretion of Family Court[,] whose findings are accorded deference" (*Matter of Williams v Tillman*, 289 AD2d 885, 885), we conclude that the court's determination that there was "no evidence . . . that visitation would be harmful to [the child]" and that, therefore, visitation was "necessary and appropriate" lacks a sound and substantial basis in the record (*cf. Matter of Tuttle v Mateo* [appeal No. 3], 121 AD3d 1602, 1603-1604; *see generally Matter of Butler v Ewers*, 78 AD3d 1667, 1667-1668).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

111

CA 14-01212

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

GORDON H. DICK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STATE UNIVERSITY CONSTRUCTION FUND,
DEFENDANT-APPELLANT.

LAW OFFICES OF THERESA J. PULEO, SYRACUSE (P. DAVID TWICHELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (BRITTANY E. AUNGIER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered September 13, 2013. The order denied the motion of defendant to vacate an order granting plaintiff leave to file a late notice of claim.

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

Memorandum: Plaintiff was allegedly injured in January 2012, when he fell while working on a construction site owned by defendant, a public corporation. Approximately one year after the accident, plaintiff filed an application for leave to serve a late notice of claim (*see* General Municipal Law § 50-e [5]). Defendant did not oppose the application, but sought an adjournment the day before the return date on the application. Supreme Court denied defendant's request for an adjournment and, by order dated March 8, 2013, granted plaintiff's application. Thereafter, defendant moved to vacate that order pursuant to CPLR 5015 (a) (3) on the ground that, in his application, plaintiff had misrepresented that a witness to his fall was defendant's employee, thereby incorrectly imputing knowledge of the accident to defendant.

The court properly denied defendant's motion "inasmuch as the evidence establishes that defendant had knowledge of the alleged [misrepresentation] before entry of the [order]" (*Chase Lincoln First Bank, N.A. v DeHaan*, 89 AD3d 1476, 1477; *see Matter of Livingston County Support Collection Unit v Zamiara*, 309 AD2d 1259, 1260). Indeed, defendant's own submissions establish that it knew prior to the March 8 order that it did not have any employees at the construction site at the time of plaintiff's fall and that it knew the witness in question had not been its employee. We do not consider

defendant's contention that the court should have granted its request to adjourn plaintiff's application. In the context of this appeal from an order denying a motion to vacate pursuant to CPLR 5015 (a) (3), the issue before us is whether defendant was able to show that plaintiff engaged in fraud, misrepresentation, or other misconduct, of which it was unaware when the court entered its order (*see Chase Lincoln First Bank, N.A.*, 89 AD3d at 1477; *Livingston County Support Collection Unit*, 309 AD2d at 1260).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

112

CAF 14-00045

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

IN THE MATTER OF LATESHA S. MAYES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

THOMAS D. LAPLATNEY, RESPONDENT-RESPONDENT.

KELLY M. CORBETT, FAYETTEVILLE, FOR PETITIONER-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

LOURDES P. ROSARIO, ATTORNEY FOR THE CHILD, SYRACUSE.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered December 26, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded the parties joint legal and shared physical custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order awarding the parties joint legal custody and shared physical custody of their child. According to the mother, the Referee who presided over the evidentiary hearing should have awarded her sole legal custody and primary physical custody. Although the Attorney for the Child (AFC) concludes that the Referee's custody award was proper, the AFC nevertheless asks us to remit the matter for "further review" in light of events that have occurred since entry of the order. We affirm.

As a preliminary matter, we note that the mother, at the end of the trial, informed the Referee that, although she was seeking primary physical custody, she was not opposed to the parties having joint legal custody. Thus, she should not now be heard to complain that the Referee erred in failing to award her sole legal custody. In any event, there is a sound and substantial basis in the record to support the Referee's award of joint legal custody, inasmuch as, despite conflicts between them, "the parties are not so embattled and embittered as to effectively preclude joint decision making" (*Capodiferro v Capodiferro*, 77 AD3d 1449, 1450 [internal quotation marks omitted]). We similarly conclude that there is a sound and

substantial basis in the record to support the Referee's award of shared physical custody (*see generally Matter of Misty D.B. v David M.S.*, 38 AD3d 1317, 1317; *Wideman v Wideman*, 38 AD3d 1318, 1319). Although the mother had been the child's primary caregiver since birth, other factors weighed in favor of giving the father equal time with the child. In sum, the record reflects that the Referee's determination with respect to the parenting schedule was "the product of 'careful weighing of [the] appropriate factors' " (*Matter of McLeod v McLeod*, 59 AD3d 1011, 1011), and we perceive no basis to disturb it.

We agree with the mother that the Referee abused his discretion in refusing to allow the child's maternal grandmother to testify as a fact witness at trial. Although the mother failed to include her on the witness list 14 days prior to trial, as directed by Family Court's scheduling order, the father was not prejudiced by the late notice because he was informed five days prior to trial of the mother's request to call the witness, and there is no indication in the record that the mother's failure to comply with the scheduling order was willful, contumacious or motivated by bad faith (*see Matter of F/B Children*, 161 AD2d 459, 462; *see generally Breen v Laric Entertainment Corp.*, 2 AD3d 298, 300; *Halley v Winnicki*, 255 AD2d 489, 489-490). Nevertheless, we conclude that the error is harmless inasmuch as the witness in question did testify at trial, albeit on rebuttal, and the mother does not specify what testimony the witness could have given on direct examination that was not offered by the mother herself.

Finally, we decline the AFC's invitation to remit the matter for further proceedings in light of events that have taken place subsequent to entry of the order on appeal (*cf. Matter of Kennedy v Kennedy*, 107 AD3d 1625, 1626). Those events may be more properly considered by Family Court pursuant to a petition to modify custody based upon a change in circumstances.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

113

CAF 14-01297

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

IN THE MATTER OF MICHELLE FARRUGGIA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SAM FARRUGGIA, SR., RESPONDENT-APPELLANT.

SPADAFORA & VERRASTRO, LLP, BUFFALO (KELLY A. FERON OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered October 15, 2013 in a proceeding pursuant to Family Court Act article 4. The order denied the objection of respondent to the order of the Support Magistrate.

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

Memorandum: Respondent father appeals from an order denying his written objection to the order of the Support Magistrate on petitioner mother's petition to enforce an order of support. In his written objection, the father contended, inter alia, that he should not be required to pay the bills that petitioner mother submitted because "80% of the paperwork was [for bills that were] either already paid by [him] or were bills that were not even medical." The father failed, however, to identify any particular bill or receipt for which reimbursement should not be ordered, and thus his written objection lacked the requisite specificity (*see Matter of White v Knapp*, 66 AD3d 1358, 1359; *see generally Matter of Renee XX. v John ZZ.*, 51 AD3d 1090, 1092). Moreover, the father did not contend in his written objection that the mother's proof was not competent or that she had not paid the bills for which she sought reimbursement, and thus his present contentions to that effect are not properly before us (*see* Family Ct Act § 439 [e]; *White*, 66 AD3d at 1359).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

117

CA 14-01353

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

ARCELIA DEL CARMEN CUQUE, ALSO KNOWN AS ARCELIA SOTO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SABIHA AMIN, DEFENDANT-RESPONDENT.

VANDETTE PENBERTHY, LLP, BUFFALO (BRITTANYLEE PENBERTHY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN TROP, BUFFALO (TIFFANY D'ANGELO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered March 26, 2014. The order, among other things, denied plaintiff's motion for partial summary judgment.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries she allegedly sustained when she fell down a flight of stairs at an apartment she rented from defendant. According to plaintiff, her boot became caught on a protruding strip of metal that was attached to the lip of a step toward the top of the stairway. Having lost her balance, plaintiff reached for the handrail on the side of the stairway, but the railing came out of the wall, causing plaintiff to fall down the stairs. Following discovery, plaintiff moved for partial summary judgment on liability, contending that defendant negligently maintained the stairway. Supreme Court denied the motion, and we affirm.

As a preliminary matter, we reject plaintiff's contention that the court should have applied the doctrine of res ipsa loquitur to find that the stairway and handrail were defective as a matter of law. The doctrine of res ipsa loquitur applies where the plaintiff can establish, among other elements, that his or her injuries were caused by an "instrumentality within the exclusive control of the defendant" (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [internal quotation marks omitted]). Here, plaintiff failed to establish that defendant had exclusive control of the instrumentalities that allegedly caused her injuries, i.e., the stairway and the handrail (*see Kambat v St. Francis Hosp.*, 89 NY2d 489, 494; *Moore v Ortolano*, 78 AD3d 1652, 1653). In any event, as the court properly determined,

plaintiff also failed to establish as a matter of law that defendant created either of the defective conditions or had actual or constructive notice of them (*see generally Gaffney v Norampac Indus., Inc*., 109 AD3d 1210, 1211). Moreover, even assuming, arguendo, that plaintiff met her initial burden of proof, we conclude that the evidence submitted by defendant raises triable issues of fact sufficient to defeat plaintiff's motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

140

KA 14-00065

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES H. SCHOLZ, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ADAM H. VAN BUSKIRK, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered May 28, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Scholz* ([appeal No. 2] ___ AD3d ___ [Feb. 13, 2015]).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

141

KA 14-00066

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES H. SCHOLZ, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ADAM H. VAN BUSKIRK, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered May 28, 2013. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a misdemeanor, 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: In these four appeals, defendant appeals from judgments convicting him upon his plea of guilty of, inter alia, driving while intoxicated as a misdemeanor (Vehicle and Traffic Law § 1192 [3]), burglary in the third degree (Penal Law § 140.20) and criminal contempt in the second degree (§ 215.50 [3]). The charges arose from four separate indictments filed against defendant for crimes he committed over a period of approximately two years. Consistent with the terms of the plea agreement, County Court sentenced defendant to concurrent terms of imprisonment. For the driving while intoxicated conviction, the court sentenced defendant to time served along with 36 months of ignition interlock device (IID) probation, to commence upon defendant's release from prison.

We note at the outset that we dismiss the appeals from the judgments in appeal Nos. 1, 3 and 4 because defendant raises no contentions with respect thereto (*see generally People v Minemier* [appeal No. 1], ___ AD3d ___, ___ [Jan. 2, 2015]). We reject defendant's contention in appeal No. 2 that the court erred in directing that the IID probation commence upon his release from prison. Penal Law § 60.21 provides that, when a person is to be sentenced for driving while intoxicated, "the court may sentence such person to a period of imprisonment authorized by article seventy of this title and shall sentence such person to a period of probation or

conditional discharge in accordance with the provisions of section 65.00 of this title and shall order the installation and maintenance of a functioning [IID]." The statute further provides that "[s]uch period of probation or conditional discharge shall run consecutively to *any period of imprisonment* and shall commence immediately upon such person's release from imprisonment" (emphasis added). We interpret the phrase "any period of imprisonment" to mean any period of imprisonment imposed on any offense, and not, as defendant suggests, any period of imprisonment imposed for driving while intoxicated. Thus, we conclude that the court properly directed that defendant's term of IID probation for driving while intoxicated run consecutively to the sentences imposed for the other counts.

We have reviewed defendant's remaining contentions in appeal No. 2 and conclude that they lack merit.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

142

KA 14-00067

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES H. SCHOLZ, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

ADAM H. VAN BUSKIRK, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered May 28, 2013. The judgment convicted defendant, upon his plea of guilty, of issuing a bad check.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Scholz* ([appeal No. 2] ___ AD3d ___ [Feb. 13, 2015]).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

143

KA 14-00068

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES H. SCHOLZ, DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

ADAM H. VAN BUSKIRK, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered May 28, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Scholz* ([appeal No. 2] ___ AD3d ___ [Feb. 13, 2015]).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

144

KA 11-00803

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EARLWOOD ARMSTRONG, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered November 3, 2010. The judgment convicted defendant, upon a jury verdict, of gang assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the conviction to attempted gang assault in the first degree and vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Onondaga County, for sentencing.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of gang assault in the first degree (Penal Law § 120.07). The evidence presented by the People established that an escalating conflict between defendant and the victim during a party inside the victim's apartment ended in a fight outside the apartment. During the fight, the victim was kicked and punched by defendant and three other assailants, and was struck in the head with an object by one of the other assailants. After being struck in the head, the victim fell to the ground, where the attack continued. Prior to the fight, the three other assailants had agreed to help defendant fight the victim.

Defendant contends that the evidence is legally insufficient to establish that the victim sustained a serious physical injury, a necessary element of gang assault in the first degree. That term is defined as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (Penal Law § 10.00 [10]). Although defendant failed to preserve his contention for our review by failing to renew his motion for a trial order of dismissal after presenting

evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678), we nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Viewing the evidence in the light most favorable to the People, we conclude that no " 'rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt' " (*People v Contes*, 60 NY2d 620, 621).

Resolution of the issue whether the victim sustained a serious physical injury depends upon the nature of "the victim's *actual* injuries, rather than mere possibilities or what could have happened" (*People v Tucker*, 91 AD3d 1030, 1032, *lv denied* 19 NY3d 1002 [emphasis added]; *see People v Nimmons*, 95 AD3d 1360, 1360-1361, *lv denied* 19 NY3d 1028). The evidence at trial concerning the victim's injuries mainly consisted of the testimony of the victim and his treating physician, and several photographs of the victim. That evidence established that, as a result of the fight, the victim sustained a two- to three-inch laceration on the back of his head, associated swelling and a hematoma, and other superficial injuries. A CT scan revealed nothing more serious than "soft tissue swelling of the scalp," although prior to that scan, the treating physician acknowledged that the injuries could have been considered life-threatening. For treatment, staples were used to close the laceration, and the victim was prescribed antibiotics and painkillers; he was released from the hospital shortly after his arrival. The laceration left a scar on the back of the victim's head. Considering his actual injuries, we conclude that the victim's wounds were not so severe as to "create[] a substantial risk of death" within the meaning of Penal Law § 10.00 (10) (*see Tucker*, 91 AD3d at 1032; *see also People v Madera*, 103 AD3d 1197, 1198, *lv denied* 21 NY3d 1006).

We also conclude that the People failed to present evidence establishing that the victim's injuries resulted in "serious and protracted disfigurement" (Penal Law § 10.00 [10]). When "viewed in context, considering its location on the body and any relevant aspects of the victim's overall physical appearance," we cannot say that the scar on the victim's head would cause a reasonable observer to "find [his] altered appearance distressing or objectionable" (*People v McKinnon*, 15 NY3d 311, 315). The mere presence of a scar, standing alone, is insufficient to establish serious disfigurement (*see People v Stewart*, 18 NY3d 831, 832; *McKinnon*, 15 NY3d at 316; *People v Trombley*, 97 AD3d 903, 903-904). Moreover, the record does not indicate whether the jury was ever formally shown the victim's scar, and we cannot simply infer "that whatever the jury saw must have supported its verdict" (*McKinnon*, 15 NY3d at 316; *see generally People v Mazariego*, 117 AD3d 1082, 1083; *People v Brown*, 100 AD3d 1035, 1036, *lv denied* 20 NY3d 1009, *reconsideration denied* 21 NY3d 911). Moreover, the evidence did not establish that the victim's injuries resulted in "protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (Penal Law § 10.00 [10]; *see People v Phillip*, 279 AD2d 802, 803-804, *lv denied* 96 NY2d 905; *see also Stewart*, 18 NY3d at 832-833).

Nevertheless, we conclude that the evidence is legally sufficient to support a conviction of attempted gang assault in the first degree because the evidence establishes that defendant, while acting in tandem with the three assailants who were actually present, intended to inflict serious physical injury on the victim, but actually inflicted only physical injury (*see Mazariego*, 117 AD3d at 1083; *Tucker*, 91 AD3d at 1032). Contrary to defendant's contention, the People established defendant's intent to inflict serious physical injury. "The natural and probable consequences of repeatedly striking a man while he is on the ground defenseless is that he will sustain serious physical injury within the meaning of Penal Law § 10.00 (10)" (*People v Meacham*, 84 AD3d 1713, 1714, *lv denied* 17 NY3d 808). Moreover, the proof adduced at trial established that defendant came " 'dangerously near' " to committing the completed crime (*People v Kassebaum*, 95 NY2d 611, 618, *rearg denied* 96 NY2d 854, *cert denied* 532 US 1069; *see also* § 110.00). We therefore modify the judgment by reducing the conviction of gang assault in the first degree to attempted gang assault in the first degree (§§ 110.00, 120.07), and we remit the matter to Supreme Court for sentencing on that reduced count (*see* CPL 470.20 [4]; *Tucker*, 91 AD3d at 1032).

We have reviewed the remaining contentions raised by defendant and conclude that none warrants further modification or reversal.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

146

KA 10-02192

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEEVARN GRAHAM, JR., DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered August 10, 2010. The judgment convicted defendant, upon a jury verdict, of arson in the first 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 sentence imposed to an indeterminate term of imprisonment of 15 years to life and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of arson in the first degree (Penal Law § 150.20 [1]), defendant contends that he was denied effective assistance of counsel by a "litany of errors" by his trial counsel. Initially, we note that the majority of defendant's contentions "involve[] matters outside the record on appeal, and thus the proper procedural vehicle for raising [those contentions] is by way of a motion pursuant to CPL 440.10" (*People v Wilson*, 49 AD3d 1224, 1225, *lv denied* 10 NY3d 966; *see People v Russell*, 83 AD3d 1463, 1465, *lv denied* 17 NY3d 800). We reject defendant's contention with respect to those alleged instances of ineffective assistance of counsel that are properly before us (*see generally People v Baldi*, 54 NY2d 137, 147). Contrary to defendant's contention, his attorney was not ineffective in failing to make a proper motion for a trial order of dismissal or to request a jury charge on a lesser included offense. It is well settled that "[t]he failure to provide a specific basis for a trial order of dismissal that had no chance of success does not constitute ineffective assistance of counsel" (*People v Woodard*, 96 AD3d 1619, 1621, *lv denied* 19 NY3d 1030; *see generally People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702), and motions to dismiss or reduce the indictment based on the insufficiency of the evidence had virtually no

chance of success. Indeed, we note that defendant does not challenge the sufficiency or the weight of the evidence on appeal, nor does he contend that any lesser included offenses should have been charged. Defendant's contention that trial counsel was ineffective in failing to retain an expert regarding the proof that a fire occurred is unavailing because "defendant has not established that such expert 'testimony was available, that it would have assisted the jury in its determination or that he was prejudiced by its absence' " (*People v Woolson*, 122 AD3d 1353, 1354; *see People v Nelson*, 94 AD3d 1426, 1426, *lv denied* 19 NY3d 999). Defendant's contention that his counsel was ineffective by taking a position adverse to that of defendant during summation is without merit because counsel did not do so. In any event, "[t]o prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for counsel's alleged shortcomings (*People v Rivera*, 71 NY2d 705, 709; *see People v Taylor*, 1 NY3d 174, 177), and defendant failed to make such a demonstration with respect to counsel's comments during summation.

Defendant further contends that he was deprived of a fair trial by certain rulings during the trial. With respect to defendant's contention that the court erred in denying his request for an adverse inference instruction regarding the fire investigator's failure to record the interrogation of defendant, "[t]his Court has repeatedly determined . . . that the failure to record a defendant's interrogation electronically does not constitute a denial of due process . . . , and thus an adverse inference charge was not warranted" (*People v Nathan*, 108 AD3d 1077, 1078, *lv denied* 23 NY3d 966 [internal quotation marks omitted]; *see People v McMillon*, 77 AD3d 1375, 1375, *lv denied* 16 NY3d 897). Defendant's contention that he was deprived of a fair trial by the court's failure to give an intoxication charge likewise is without merit. Although such a charge may have been warranted, any error in failing to give such a charge is harmless because the proof of defendant's guilt was overwhelming, "and there is no significant probability that defendant would have been acquitted but for the error" (*People v Thomas*, 96 AD3d 1670, 1672, *lv denied* 19 NY3d 1002; *see People v Greene*, 186 AD2d 147, 147-148, *lv denied* 81 NY2d 840; *cf. People v Ressler*, 302 AD2d 921, 922).

Defendant further contends that reversal is required based on prosecutorial misconduct. Defendant did not object with respect to the prosecutor's allegedly improper elicitation of evidence, and thus failed to preserve for our review his contention concerning that alleged instance of misconduct (*see People v Alexander*, 51 AD3d 1380, 1383, *lv denied* 11 NY3d 733). Although defense counsel did object regarding one alleged instance of misconduct during the prosecutor's summation, the court sustained that objection and gave curative instructions to the jury. "Following the Trial Judge's curative instructions, defense counsel neither objected further, nor requested a mistrial. Under these circumstances, the curative instructions must be deemed to have corrected the error to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944). The prosecutor's other allegedly improper comment on summation was both fair comment on the evidence and a fair response to defense counsel's summation (*see People v*

Weaver, 118 AD3d 1270, 1271, *lv denied* 24 NY3d 965; *People v Green*, 60 AD3d 1320, 1322, *lv denied* 12 NY3d 915). In any event, we conclude with respect to both the preserved and the unpreserved contentions that any misconduct that may have occurred "was not so egregious as to deprive defendant of a fair trial" (*People v Tolliver*, 267 AD2d 1007, 1008, *lv denied* 94 NY2d 908).

We agree with defendant, however, that the sentence is unduly harsh and severe insofar as the court imposed an indeterminate term of imprisonment of 25 years to life, particularly in light of defendant's lack of prior felony convictions and the minimal damage and lack of injury that were caused by this incident. We therefore modify the judgment, as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]), by reducing the term of imprisonment to an indeterminate term of 15 years to life.

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

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

148

TP 14-01377

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF SHAWN GREEN, PETITIONER,

V MEMORANDUM AND ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT.

SHAWN GREEN, PETITIONER PRO SE.

ERIC SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered July 15, 2014) to review various determinations of respondent.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul two determinations, following tier III disciplinary hearings, that he violated various inmate rules. Contrary to petitioner's contention, the determinations are supported by substantial evidence (*see Matter of Stewart v Fischer*, 109 AD3d 1122, 1123, *lv denied* 22 NY3d 858; *see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). "Petitioner's testimony denying his guilt of all violations merely presented issues of credibility that the Hearing Officer was entitled to resolve against him" (*Matter of Britt v Evans*, 100 AD3d 1408, 1409). We have reviewed petitioner's remaining contentions and conclude that they lack merit.

Frances E. Cafarell

Entered: February 13, 2015

Clerk of the Court

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

149

CA 14-01329

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

MELISSA CLARK, PLAINTIFF-RESPONDENT,

V ORDER

AZZAHER REAL ESTATE, LLC, DEFENDANT-APPELLANT.

GANNON, ROSENFARB, & DROSSMAN, NEW YORK CITY (LISA L. GOKHULSINGH OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (DENIS J. BASTIBLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered May 30, 2014 in a personal injury action. The order denied defendant's motion for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation withdrawing appeal signed by attorneys for the parties on February 5 and 6, 2015,

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

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

150

CA 14-01064

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF ZANE T. BROWN AND JENNIFER C. BROWN, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

KIMBERLY FEEHAN, TOWN OF CORNING SUPERVISOR, DYLAN DEWERT, TOWN OF CORNING HIGHWAY SUPERINTENDENT AND TOWN BOARD OF TOWN OF CORNING, RESPONDENTS-RESPONDENTS.

ROBERT D. SIGLIN, ELMIRA, FOR PETITIONERS-APPELLANTS.

RONALD A. YORIO, TOWN ATTORNEY, PAINTED POST (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered August 21, 2013 in a CPLR article 78 proceeding. The judgment, among other things, denied petitioners' application for an award of costs and attorney's fees.

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

Memorandum: Petitioners own a parcel of property together with an easement over adjacent property, which was "for the purpose of ingress and egress to and from" a certain road. In the summer of 2012, petitioners attempted to obtain permission to construct a driveway on that easement from respondents. Following a closed session meeting, respondent Town Board of the Town of Corning (Town Board) refused to issue a determination on petitioners' driveway application and, thereafter, petitioners commenced a CPLR article 78 proceeding seeking to compel respondents to make a determination regarding petitioners' application for a driveway permit and seeking review of, inter alia, the issue whether the Town Board failed to comply with the Open Meetings Law (Public Officers Law art 7). In lieu of answering, respondents sought dismissal of the CPLR article 78 petition, contending, inter alia, that petitioners had failed to join Uwe Zink and Mechtild Zink, the owners of the servient estate, as necessary parties. Supreme Court agreed with respondents and issued an order denying, without prejudice, "[p]etitioners' motion to compel" and directing that, unless petitioners served a supplemental summons and amended complaint on all necessary parties, the "action [would] be dismissed without prejudice." Petitioners did not appeal from that order but, rather, filed and served an amended CPLR article 78

petition/declaratory judgment complaint on respondents and the Zinks.

It is undisputed that the parties resolved all issues concerning the driveway and that petitioners have since constructed a driveway on their easement. Petitioners, however, continued with that portion of the CPLR article 78 proceeding that sought costs and attorney's fees based on respondents' alleged violation of the Open Meetings Law. We conclude that the court properly refused to award petitioners costs and attorney's fees.

It is well settled that "[e]very meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with [section 105]" (Public Officers Law § 103 [a]; *see Matter of Zehner v Board of Educ. of Jordan-Elbridge Cent. Sch. Dist.*, 91 AD3d 1349, 1349-1350). While an executive session may be called to discuss, inter alia, "proposed, pending or current litigation" (§ 105 [1] [d]), the public body may do so only upon a majority vote of its membership and after "identifying the general area or areas of the subject or subjects to be considered" (§ 105 [1]). There is no dispute that section 105 (1) does not extend to communications between a town board and its counsel, but section 108 (3) provides in relevant part that "[n]othing contained in [the Open Meetings Law] shall be construed as extending the provisions hereof to . . . any matter made confidential by federal or state law." "[S]ince communications made pursuant to an attorney-client relationship are considered confidential under the [CPLR] . . . , communications between a . . . board . . . and its counsel, in which counsel advises the board of the legal issues involved in the determination of a[n] . . . application, are exempt from the provisions of the Open Meetings Law" (2 NY Jur 2d, Administrative Law § 103; *see Matter of Young v Board of Appeals of Inc. Vil. of Garden City*, 194 AD2d 796, 798; *see generally* CPLR 4503 [a] [1]). "When an exemption [under section 108] applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by § 105 (1) that relates to entry into an executive session" (Comm on Open Govt OML-AO-o2946).

It is undisputed that, several weeks before the Town Board met in closed session to discuss petitioners' driveway application, petitioners' attorney sent the Town Attorney a letter to "reach out to [him] before filing any type of lawsuit against the Town." Petitioners' attorney demanded that respondents make a determination on the pending driveway application and stated that "further indecision by [respondents] will ensure they are named in any future lawsuit." We thus agree with respondents that the attorney-client exemption applies and that the court properly determined that there was no violation of the Open Meetings Law (*see e.g.* Comm on Open Govt OML-AO-o3012, o2946, o2510).

In any event, even assuming, arguendo, that there was a technical violation of the Open Meetings Law, we conclude that the court did not abuse its discretion in refusing to award costs and attorney's fees to

petitioners. Public Officers Law § 107 (2) provides that, "[i]n any proceeding brought pursuant to this section, costs and reasonable attorney['s] fees may be awarded by the court, in its discretion, to the successful party. If a court determines that a vote was taken in material violation of this article, or that substantial deliberations relating thereto occurred in private prior to such vote, the court shall award costs and reasonable attorney's fees to the successful petitioner, unless there was a reasonable basis for a public body to believe that a closed session could properly have been held." Even if we were to assume that a vote or substantial deliberations relating to such a vote occurred during the closed session, we would nevertheless conclude that the Town Board had a reasonable basis to believe that a closed session was proper pursuant to either Public Officers Law § 105 (1) (d) or § 108 (3) (*see* § 107 [2]; *Matter of Roberts v Town Bd. of Carmel*, 207 AD2d 404, 405-406, *lv denied* 84 NY2d 811).

Petitioners failed to preserve for our review their remaining procedural contentions (*see Matter of Dailey v Allerton*, 216 AD2d 865, 867; *see also Matter of City of Buffalo v Buffalo Police Benevolent Assn.*, 280 AD2d 895, 895; *see generally* CPLR 5501 [a] [3]), and their contention that the court erred in requiring them to add the Zinks as necessary parties is moot because any judicial determination whether such action was proper "would have no practical effect on any party before the court" (*Heights 75 Owners Corp. v Smith*, 135 AD2d 680, 682; *see Matter of Mehta v New York City Dept. of Consumer Affairs*, 162 AD2d 236, 237; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714). Petitioners' contention does not fall within the exception to the mootness doctrine (*see Hearst Corp.*, 50 NY2d at 714-715; *cf. Matter of Save the Pine Bush v City of Albany*, 141 AD2d 949, 951-952, *lv denied* 73 NY2d 701; *Matter of Calabrese v Tomlinson*, 106 AD2d 843, 844).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

153

CA 14-01389

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

KAREN E. LAWRENCE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARTIN W. MCCLARY AND NANETTE C. MCCLARY,
DEFENDANTS-RESPONDENTS.

FOLEY & FOLEY, PALMYRA (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN KENT LLC, BUFFALO (BRENT C. SEYMOUR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered May 2, 2014. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained in a motor vehicle accident alleging, inter alia, she sustained a stress fracture in her left foot as a result of the accident. Following discovery, defendants 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) and, in opposing the motion, plaintiff relied exclusively on the "fracture" category of serious injury. We agree with plaintiff that Supreme Court erred in granting the motion. Although defendants met their initial burden, we conclude that plaintiff raised an issue of fact in opposition to the motion by submitting the affidavits of her primary care physician and podiatrist, both of whom opined that, based upon a reasonable degree of medical certainty, plaintiff sustained a distal left 5th metatarsal fracture in the subject motor vehicle accident (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Although defendants' expert concluded otherwise, it is well settled that " 'conflicting expert opinions may not be resolved on a motion for summary judgment' " (*Edwards v Devine*, 111 AD3d 1370, 1372; *see Pittman v Rickard*, 295 AD2d 1003, 1004). Furthermore, although defendants are correct that plaintiff's podiatrist initially diagnosed only a "possible stress fracture" when reviewing X rays of plaintiff's left foot, we note that he thereafter determined that a subsequent

bone scan showed a healing stress fracture. In any event, the alleged conflict in the podiatrist's diagnoses presents a credibility issue that cannot be resolved in the context of a motion for summary judgment (*see Rew v County of Niagara*, 115 AD3d 1316, 1318).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

154

CA 14-01237

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

NOTHNAGLE HOME SECURITIES CORP.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRUCKNER, TILLET, ROSSI, CAHILL & ASSOCIATES
AND PATRICK W. CAHILL, DEFENDANTS-APPELLANTS.

LACY KATZEN LLP, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PHETERSON SPATORICO LLP, ROCHESTER (DERRICK A. SPATORICO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered October 22, 2013. The order and judgment, insofar as appealed from, denied in part the motion of defendants to dismiss the complaint.

It is hereby ORDERED that the order and judgment 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 commenced this action alleging, inter alia, that defendants negligently appraised a parcel of real property based upon their misclassification of the structure thereon as a modular home rather than a manufactured home, and plaintiff also asserted a breach of contract cause of action. Supreme Court granted in part defendants' motion to dismiss the complaint, dismissing only the breach of contract cause of action. We agree with defendants that the court should have granted the motion in its entirety inasmuch as the negligence cause of action is time-barred. Plaintiff did not commence this action until more than six years after defendants provided plaintiff with an "FHA appraisal" of the real property, asserting in relevant part that, as a result of the misclassification, it was required to indemnify the United States Department of Housing and Urban Development (HUD) for the loss HUD suffered when the purchaser of that property defaulted on a federally insured loan that plaintiff made to the purchaser thereof in reliance upon defendants' appraisal.

We note as a preliminary matter that we agree with defendants that the applicable limitations period for the negligence cause of action is three years (*see* CPLR 214 [4], [6]; *see generally Cator v*

Bauman, 39 AD3d 1263, 1263; *Locafrance U.S. Corp. v Daley-Hodkin Corp.*, 60 AD2d 804, 805), and we further agree with defendants that the negligence cause of action accrued on August 19, 2004, the day on which plaintiff received defendants' appraisal containing the misclassification. "In most cases, . . . accrual time is measured from the day an actionable injury occurs, 'even if the aggrieved party is then ignorant of the wrong or injury' " (*McCoy v Feinman*, 99 NY2d 295, 301, quoting *Ackerman v Price Waterhouse*, 84 NY2d 535, 541; *see generally Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94; *City Store Gates Mfg. Corp. v Empire Rolling Steel Gates Corp.*, 113 AD3d 718, 719). Here, plaintiff "reasonably relie[d] on [defendants'] skill and advice [on that date] and, as a consequence of such reliance, [became] liable" for indemnifying HUD (*Ackerman*, 84 NY2d at 541; *see Locafrance U.S. Corp.*, 60 AD2d at 805). Inasmuch as plaintiff commenced this action more than six years later, the negligence cause of action is time-barred (*see Ackerman*, 84 NY2d at 541; *Locafrance U.S. Corp.*, 60 AD2d at 805). In light of our determination, we do not address defendants' remaining contentions.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

155

CA 14-01131

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

MADELINE RIVERA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOPS MARKETS, LLC, DEFENDANT-APPELLANT.

DIXON & HAMILTON, LLP, GETZVILLE (DENNIS P. HAMILTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered March 4, 2014 in a personal injury action. The order denied defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she allegedly slipped and fell on water on the floor of a grocery store owned by defendant. Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint. "As the proponent of the motion, defendant had the initial burden of establishing that it did not create the dangerous condition that caused plaintiff to fall and did not have actual or constructive notice thereof" (*Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857, 857).

We conclude that defendant failed to establish as a matter of law that it did not create the dangerous condition or have actual notice thereof. Indeed, its submissions do not address those theories of liability. As noted by the court, the store manager "was never asked [n]or did she state if any employee had seen the water prior to the [p]laintiff's fall." She also was not asked, nor did she state, whether defendant had received any prior complaints concerning that dangerous condition.

We further conclude that defendant failed to establish as a matter of law that it did not have constructive notice of the dangerous condition. "To constitute constructive notice, a defect [or dangerous condition] must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [a

defendant] to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837). In deposition testimony submitted by defendant, plaintiff stated that she observed the puddles of water only after she had fallen. Contrary to defendant's contention, "[t]he fact that plaintiff did not notice water on the floor before [s]he fell does not establish defendant[']s entitlement to judgment as a matter of law on the issue whether that condition was visible and apparent" (*Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469-1470; *see King v Sam's E., Inc.*, 81 AD3d 1414, 1415). In any event, defendant submitted the deposition testimony of a store manager, who admitted that she observed water on the floor in proximity to the area where plaintiff fell (*see Navetta*, 106 AD3d at 1470; *King*, 81 AD3d at 1415; *cf. Quinn*, 15 AD3d at 857-858). While that employee also stated that a person walking through that area would have a difficult time seeing the water on the floor, that testimony, at most, raises a triable issue of fact whether the puddles were visible and apparent (*see King*, 81 AD3d at 1415; *cf. Quinn*, 15 AD3d at 858). Defendant did not submit any evidence concerning either regular recurring inspections of the area or the specific condition of that area "in the hours prior to . . . the time of the accident" (*Austin v CDGA Natl. Bank Trust & Canandaigua Natl. Corp.*, 114 AD3d 1298, 1300; *see King*, 81 AD3d at 1415; *cf. Smith v May Dept. Store, Co.*, 270 AD2d 870, 870). Although defendant correctly contends that in moving for summary judgment it is not required to submit proof of recent inspections where such inspections would not have disclosed the dangerous condition or defect (*see Quinn*, 15 AD3d at 857-858), defendant's own submissions "raise issues of fact whether the wet floor 'was visible and apparent and existed for a sufficient length of time prior to plaintiff's fall to permit [defendant] to discover and remedy it' " (*Navetta*, 106 AD3d at 1469). We thus conclude that defendant " 'failed to establish as a matter of law that the condition was not visible and apparent or that it had not existed for a sufficient length of time before plaintiff's accident to permit employees of [defendant] to discover and remedy it' " (*Rivers v May Dept. Stores Co.*, 11 AD3d 963, 964). The failure of defendant to meet its initial burden requires denial of the motion, "regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *see Ayotte v Gervasio*, 81 NY2d 1062, 1063).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

182

KA 13-01174

PRESENT: PERADOTTO, J.P., CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY C. HARRIS, DEFENDANT-APPELLANT.

MULDOON, GETZ & RESTON, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered May 6, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a forged instrument in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a forged instrument in the second degree (Penal Law §§ 110.00, 170.25). We agree with defendant that his waiver of the right to appeal is invalid. "During the plea colloquy, County Court conflated the appeal waiver with the rights automatically waived by the guilty plea" (*People v Sanborn*, 107 AD3d 1457, 1458 [internal quotation marks omitted]; *see People v Tate*, 83 AD3d 1467, 1467).

Defendant failed to move to withdraw his guilty plea under CPL 220.60 (3) or to vacate the judgment of conviction under CPL 440.10 and, therefore, his challenge to the factual sufficiency of the plea allocution is not preserved for our review (*see People v Lopez*, 71 NY2d 662, 665; *People v McKeon*, 78 AD3d 1617, 1618, *lv denied* 16 NY3d 799). Further, this is not one of those "rare case[s]" in which, during the plea allocution, "defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" (*Lopez*, 71 NY2d at 666). In any event, we note that "no factual colloquy was required inasmuch as defendant pleaded guilty to a crime lesser than that charged in the indictment" (*People v Richards*, 93 AD3d 1240, 1240, *lv denied* 20 NY3d 1014; *see People v Neil*, 112 AD3d 1335, 1336, *lv denied* 23 NY3d 1040).

Finally, the sentence is not unduly harsh or severe.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

183

KA 13-01707

PRESENT: PERADOTTO, J.P., CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GORDIE W. WALKER, JR., DEFENDANT-APPELLANT.

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

GORDIE W. WALKER, JR., DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered August 1, 2013. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and criminal possession of stolen property in the fifth degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]) and criminal possession of stolen property in the fifth degree (§ 165.40), defendant contends that the evidence is legally insufficient to support his conviction. Defendant's contention is unpreserved for our review inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). The record establishes that defendant attended a party at the victim's apartment, that he was the last person to leave the party, and that he was alone in the apartment in the hours before the victim discovered that his property had been stolen. Further, the day after the party, defendant sold the property stolen from the victim. We thus conclude that "[d]efendant's recent and exclusive possession of the property that constituted the fruits of the burglary, and the absence of credible evidence that the crime was committed by someone else, justified the inference that defendant committed the burglary" and knowingly possessed stolen property (*People v Marshall*, 198 AD2d 907, 907, *lv denied* 82 NY2d 898; *see People v Jackson*, 66 AD3d 1415, 1416; *People v Scurlock*, 33 AD3d 366, 366, *lv denied* 7 NY3d 928). Viewing the evidence in light of the elements of the crimes as charged to the

jury (*see People v Danielson*, 9 NY3d 342, 349), we likewise conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495). We note that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]), and we see no reason to disturb the jury's resolution of those issues in this case.

Contrary to the contention of defendant in his pro se supplemental brief, we conclude that County Court properly granted the People's motion to amend the indictment to conform to the proof at trial inasmuch as "[t]he minor temporal correction did not change the theory of the prosecution or cause any prejudice to . . . defendant" (*People v Hankins*, 265 AD2d 572, 572, *lv denied* 94 NY2d 880; *see* CPL 200.70 [1]; *People v Lane*, 47 AD3d 1125, 1127, *lv denied* 10 NY3d 866; *People v Grasso*, 237 AD2d 741, 742, *lv denied* 89 NY2d 1035).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

187

KA 12-00113

PRESENT: PERADOTTO, J.P., CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYSHON DAYS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

RAYSHON DAYS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered August 24, 2011. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). We agree with defendant that County Court failed to afford him the requisite "reasonable opportunity to present his contentions" on his motion to withdraw his guilty plea (*People v Tinsley*, 35 NY2d 926, 927; *see People v Frederick*, 45 NY2d 520, 525; *People v Carter*, 144 AD2d 1034, 1035). Prior to sentencing, defendant wrote a letter to the sentencing court seeking to withdraw his plea on several grounds. Because certain of the grounds involved alleged improprieties on the part of the sentencing court, the court transferred the matter to another judge for determination of defendant's motion. It appears from the sentencing transcript, however, that the newly-assigned judge either did not have or did not review defendant's moving papers, and the judge refused defendant's repeated requests to submit his written contentions in support of the motion (*cf. People v Gaskin*, 2 AD3d 347, 347, *lv denied* 2 NY3d 740; *People v Martin*, 186 AD2d 823, 824, *lv denied* 81 NY2d 791). Although the court verbally inquired into certain of defendant's claims, we cannot conclude that the judge "was sufficiently familiar with the case to make an informed determination on defendant's motion to withdraw the plea" (*People v Thompson*, 60 AD2d 765, 765). For instance, in response to defendant's assertion regarding the justification defense, the court stated: "I don't know

what happened there. That was their point. I am just here to sentence you." We therefore conclude that, under the circumstances of this case, defendant was not "afford[ed] . . . a reasonable opportunity to advance his claims [such that] an informed and prudent determination [could] be rendered" (*Frederick*, 45 NY2d at 525). We therefore hold the case, reserve decision, and remit the matter to County Court to afford defendant a reasonable opportunity to present his contentions in support of his motion to withdraw his plea (*see People v Anderson*, 222 AD2d 515, 515-516).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

188

KA 10-02154

PRESENT: PERADOTTO, J.P., CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRELL J. GRIFFIN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Joan S. Kohout, A.J.), rendered August 16, 2010. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and as a matter of discretion in the interest of justice and a new trial is granted.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that he was deprived of a fair trial by prosecutorial misconduct. We agree. Although defendant failed to preserve his contention for our review with respect to certain alleged instances of prosecutorial misconduct (*see* CPL 470.05 [2]), we nevertheless exercise our power to review defendant's contention with respect to those instances as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We conclude that defendant is entitled to a new trial.

The prosecutor began her summation by improperly characterizing the People's case as "the truth" and denigrating the defense as a diversion (*see People v Miller*, 104 AD3d 1223, 1223-1224, *lv denied* 21 NY3d 1017; *People v Benedetto*, 294 AD2d 958, 959-960; *see also People v Mehmood*, 112 AD3d 850, 853). In addition, the prosecutor implied that defendant bore the burden of proving that the complainant had a motive to lie, thereby impermissibly shifting the burden of proof to defendant (*see People v Casanova*, 119 AD3d 976, 977-978; *People v Pagan*, 2 AD3d 879, 880; *Benedetto*, 294 AD2d at 959-960; *People v Williams*, 112 AD2d 177, 179).

Perhaps most egregiously in this one-witness case where credibility was paramount, the prosecutor repeatedly and improperly

vouched for the veracity of the complainant (*see People v Moye*, 12 NY3d 743, 744; *People v Walker*, 119 AD3d 1402, 1404; *People v Forbes*, 111 AD3d 1154, 1158). The prosecutor asked the jury "to listen carefully to the 911 call. It may not clearly state what happened, but statements that [the complainant] made like, 'I'm bugging, but I tried to catch him, that's why I left,' are examples of the ring of truth." Defense counsel objected, and the objection was sustained. Nonetheless, the prosecutor continued: "I submit to you the (complainant's statements) are truthful." The prosecutor also bolstered the complainant's credibility by making herself an unsworn witness in the case (*see People v Fisher*, 18 NY3d 964, 966; *Moye*, 12 NY3d at 744; *Forbes*, 111 AD3d at 1158; *People v Spence*, 92 AD3d 905, 905-906). In addressing inconsistencies between the complainant's testimony and his earlier statement to the police, the prosecutor argued that the complainant made only "[o]ne inconsistent statement, from talking to the police *and talking to me*" (emphasis added). The prosecutor's remark suggests that the complainant made numerous prior consistent statements to the police and to the prosecutor herself, and we conclude that such suggestion has no basis in the record (*see Fisher*, 18 NY3d at 966; *People v Ashwal*, 39 NY2d 105, 109-110).

The prosecutor also improperly appealed to the sympathies of the jury by extolling the complainant's "bravery" in calling the police and testifying against defendant (*see People v Smith*, 288 AD2d 496, 497; *People v Andre*, 185 AD2d 276, 278; *see generally People v Ballerstein*, 52 AD3d 1192, 1194). The prosecutor told the jurors that it was "not an easy decision" for complainant to call the police, and asked them to "hang [their] hat on . . . [the complainant]'s bravery by coming in front of you." The prosecutor argued that the neighborhood where the crime occurred and where the complainant's family worked "is an anti-police atmosphere." After defense counsel's objection to that comment was sustained, the prosecutor protested that "it was a statement in evidence" when, in fact, that testimony had been stricken from the record, and County Court had specifically warned the prosecutor not "to go into what this area is like." The prosecutor nonetheless continued her summation by asking the jurors to "[u]se [their] common sense to think about whether or not this happened *and why there's no other witnesses*" (emphasis added). The prosecutor argued that the complainant "is someone who knows the game. He knows the neighborhood, and he knows what would have been the easy thing to do, and I submit to you that easy thing to do was not to call 911 that day." She continued: "So please tell [the complainant] he did the right thing by calling 911 and telling them one man's word is enough. Tell them that he is brave to report this." The prosecutor ended her summation by urging the jury to "tell [the complainant] that his truthfulness is enough to convict the defendant" by returning a guilty verdict.

Although "[r]eversal is an ill-suited remedy for prosecutorial misconduct" (*People v Galloway*, 54 NY2d 396, 401), it is nevertheless mandated when the conduct of the prosecutor "has caused such substantial prejudice to the defendant that he [or she] has been denied due process of law. In measuring whether substantial prejudice has occurred, one must look at the severity and frequency of the

conduct, whether the court took appropriate action to dilute the effect of that conduct, and whether review of the evidence indicates that without the conduct the same result would undoubtedly have been reached" (*People v Mott*, 94 AD2d 415, 419). Here, misconduct permeated the trial and was at times severe. In addition to the misconduct on summation, the prosecutor asked improper questions and attempted to elicit irrelevant and inflammatory statements during her direct examination of the People's witnesses (*see generally People v Morrice*, 61 AD3d 1390, 1391). The prosecutor also called a police witness for the sole purpose of testifying about defendant's arrest, for which she was admonished by the court. Although the court sustained many of defense counsel's objections, "other improper remarks passed without objection or admonishment, and few curative instructions were given" (*Casanova*, 119 AD3d at 979). We therefore "cannot say that any resulting prejudice was alleviated" (*id.*; *see People v Clark*, 195 AD2d 988, 991). In any event, even where the trial court repeatedly sustains a defendant's objections and instructs the jury to disregard certain remarks by the prosecutor, "[a]fter a certain point, . . . the cumulative effect of a prosecutor's improper comments . . . may overwhelm a defendant's right to a fair trial" (*People v Riback*, 13 NY3d 416, 423).

Finally, inasmuch as the evidence in this case was far from overwhelming, we cannot conclude that "the same result 'would undoubtedly have been reached' without the misconduct" (*Clark*, 195 AD2d at 991; *see Fisher*, 18 NY3d at 966; *People v Cotton*, 242 AD2d 638, 639).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

190

CAF 13-00258

PRESENT: PERADOTTO, J.P., CARNI, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF RICKEY L. WILSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LINDA MCCRAY, RESPONDENT-RESPONDENT,
AND JASMINE JAEL GONZALEZ, FORMERLY KNOWN AS
FELICIA A. VADEN, FORMERLY KNOWN AS
FELICIA MITCHELL, RESPONDENT-APPELLANT.

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

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

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

TANYA CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered January 29, 2013 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 the order so appealed from is unanimously affirmed without costs.

Memorandum: Jasmine Jael Gonzalez (respondent), a nonparent, appeals from an order that, among other things, awarded sole custody of the subject child to petitioner father. "It is well established that, as between a parent and nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981, quoting *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544). The burden was on respondent to establish such extraordinary circumstances (*see Matter of Darlene T.*, 28 NY2d 391, 394, *Matter of Wilson v Smith*, 24 AD3d 562, 563), and the record supports Family Court's determination that she failed to meet that burden.

We reject respondent's contention that the court erred in refusing to adjourn the hearing when she failed to appear. "The grant

or denial of a motion for an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*Matter of Steven B.*, 6 NY3d 888, 889 [internal quotation marks omitted]). In view of respondent's repeated failures to appear, we perceive no abuse of discretion in the court's refusal to adjourn the hearing (*see Matter of Lillian D.L.*, 29 AD3d 583, 584). Contrary to respondent's further contention, we conclude that the court properly took judicial notice of its own prior proceedings with respect to the father's paternity (*see Matter of Gugino v Tsvasman*, 118 AD3d 1341, 1342).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

194

CA 13-01857

PRESENT: PERADOTTO, J.P., CARNI, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF HERBERT FARRINGTON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered September 18, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this proceeding seeking to annul a determination that he violated a certain inmate disciplinary rule. After petitioner appealed Supreme Court's judgment dismissing the petition, respondent issued an administrative order reversing the determination and directing that all references to the disciplinary proceeding be expunged. Because petitioner has obtained the relief he sought in the petition, this appeal is dismissed as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

195

CA 14-01025

PRESENT: PERADOTTO, J.P., CARNI, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF THE ACCOUNTING BY CHRISTOPHER J. SMOLKA, AS THE TRUSTEE OF THE MELVIN D. MERGENHAGEN AND GERALDINE R. MERGENHAGEN IRREVOCABLE TRUST DATED OCTOBER 10, 1994.

MEMORANDUM AND ORDER

CHRISTOPHER J. SMOLKA, PETITIONER;

DAVID MERGENHAGEN AND JAMES MERGENHAGEN, OBJECTANTS-RESPONDENTS;

CAROL A. SKRETNY, RESPONDENT-APPELLANT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (ROBERT J. FELDMAN OF COUNSEL), AND DUKE, HOLZMAN, PHOTIADIS & GRESENS, LLP, FOR RESPONDENT-APPELLANT.

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR OBJECTANTS-RESPONDENTS.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered April 8, 2014. The order, inter alia, denied the motion of respondent Carol A. Skretny seeking summary judgment granting and approving the petition of petitioner Christopher J. Smolka, Esq. for a judicial settlement of the account of the Melvin D. Mergenhagen and Geraldine R. Mergenhagen Irrevocable Trust dated October 10, 1994.

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

Memorandum: Respondent Carol A. Skretny (respondent) appeals from an order that, inter alia, denied her motion seeking summary judgment granting and approving the petition of petitioner Christopher J. Smolka, Esq. (Trustee), for a judicial settlement of the Trustee's account of the Melvin D. Mergenhagen and Geraldine R. Mergenhagen Irrevocable Trust dated October 10, 1994 (1994 Trust), and determined that the proceeds of the 1994 Trust should be paid in equal ⅓ shares to respondent and objectants.

The sole asset of the 1994 Trust was a "second to die" life insurance policy issued by Hartford Life Insurance Company insuring the lives of the 1994 Trust's grantors. Respondent and objectants are the grantors' children and primary beneficiaries, in equal shares, of

the 1994 Trust. Pursuant to the "Settlement Agreement" (Agreement) between respondent and objectants, objectants were responsible for paying the policy premiums for a specified period. During that specified period, objectant David Mergenhagen submitted checks to the Trustee on objectants' behalf in the amount of the premiums then due. Several of the checks contained handwritten notations in the memo line or elsewhere on the face of the checks referring to future premium dates. The Trustee returned to objectants the checks dated in November 2012, which contained the notation "September 2013 Premium Hartford," and December 2012, which contained the notation, "Premium Hartford L.I. Premium 9/13."

Following the death of the second grantor in February 2013, the proceeds of the life insurance policy were paid into the 1994 Trust. The Trustee thereafter filed his petition for judicial settlement of his account as Trustee of the 1994 Trust, and stated in the petition that respondent was entitled to the entire balance of the Trust, less administrative expenses, and that the interests of objectants had been forfeited. Respondent submitted an affidavit in support of the petition and thereafter moved for summary judgment granting and approving the petition. Objectants filed objections to the petition and opposed respondent's motion.

We agree with Surrogate's Court that the Trustee improperly rejected the proffered premium checks and determined that objectants had forfeited their interests in the 1994 Trust. As the Surrogate concluded, the handwritten notations on the November and December 2012 checks did not constitute special or restrictive endorsements (*see generally Spielman v Manufacturers Hanover Trust Co.*, 60 NY2d 221, 226-227). Rather, the notations appear on a portion of the checks that "is usually devoted to the bookkeeping records of the payor" (*Pincus-Litman Co. v Canon U.S.A.*, 98 AD2d 681, 681; *see C. I. T. Corp. v M & T Trust Co.*, 241 App Div 595, 596), and the checks at issue were timely submitted by objectants to the Trustee in the amount of the premium then due. Inasmuch as the Trustee had no legal basis for rejecting the checks, objectants were never in default of their obligations under the Agreement (*see Furgang v Epstein*, 106 AD2d 609, 609-610). In addition, it is well established that "the law abhors a forfeiture" (*Boyarsky v Froccaro*, 131 AD2d 710, 713). We therefore conclude that the Surrogate properly rejected the position of respondent and the Trustee that the handwritten notations on the November and December 2012 checks effected a forfeiture of objectants' interests in the 1994 Trust (*see generally Jacob & Youngs, Inc. v Kent*, 230 NY 239, 243-244, *rearg denied* 230 NY 656).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

200

CA 14-00736

PRESENT: PERADOTTO, J.P., CARNI, SCONIERS, AND WHALEN, JJ.

ANGELA SIMS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KUSHNOOD HAQ, DEFENDANT-APPELLANT.

HAGELIN KENT LLC, BUFFALO (BRENT C. SEYMOUR OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOGAN WILLIG, PLLC, AMHERST (SCOTT M. DUQUIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered January 15, 2014. The order denied the motion of defendant for summary judgment dismissing the complaint and granted the cross motion of plaintiff for partial summary judgment on liability, i.e., on the issue of negligence and her claim that she sustained a serious injury under the 90/180-day category of Insurance Law § 5102 (d).

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when her vehicle collided at an intersection with a vehicle operated by defendant. Plaintiff alleged that she sustained qualifying injuries pursuant to Insurance Law § 5102 (d) in the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury in the accident under any of those categories. Plaintiff cross-moved for partial summary judgment on liability, i.e., on the issue of negligence and her claim that she sustained a serious injury under the 90/180-day category (*see Ruzycki v Baker*, 301 AD3d 48-51, 52). Supreme Court properly denied defendant's motion, but erred in granting plaintiff's cross motion, and we therefore modify the order accordingly.

We conclude that the court properly denied the motion with respect to the permanent consequential limitation of use and significant limitation of use categories. Although defendant met his initial burden, plaintiff raised triable issues of fact (*see Leahey v Fitzgerald*, 1 AD3d 924, 926; *Parkhill v Cleary*, 305 AD2d 1088, 1089).

We further conclude that the court erred in granting that part of the cross motion concerning the 90/180-day category. The conflicting affirmations of the medical experts raise triable issues of fact whether plaintiff sustained a serious injury under that category (*see Linnane v Szabo*, 111 AD3d 1304, 1305; *Verkey v Hebard*, 99 AD3d 1205, 1206).

The court also erred in granting that part of the cross motion concerning defendant's negligence. The conflicting testimony of the parties with respect "to which driver was proceeding with a green light raised a triable issue of fact on the question of [negligence]" (*Alexandre v Dweck*, 44 AD3d 597, 597-598; *see D.F. v Wedge Mascot Corp.*, 43 AD3d 1372, 1373).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

201

KA 14-01229

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTWANE WALKER, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Onondaga County Court (Thomas J. Miller, J.), dated June 13, 2014. 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 (Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court's determination that defendant is a level two risk is based upon clear and convincing evidence (*see generally* § 168-n [3]). The evidence supports the court's determination that defendant's primary purpose in establishing the relationship with the victim was to victimize her (*see People v Washington*, 91 AD3d 1277, 1277, *lv denied* 19 NY3d 801). Defendant approached the victim on a bus and thereafter initiated contact with her through Facebook and by cell phone, even though she had not given defendant her last name or cell phone number. Defendant then persistently texted the victim and invited her to dinner, but instead took her to a hotel where he raped her. "[T]he self-serving denial of defendant that he established the relationship for the purpose of victimizing the victim presented an issue of credibility for the court" (*People v Romana*, 35 AD3d 1241, 1242, *lv denied* 8 NY3d 810).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

204

KA 13-01847

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM C. TRACY, DEFENDANT-APPELLANT.

ADAM H. VAN BUSKIRK, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered September 5, 2013. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree (four counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of four counts of rape in the third degree (Penal Law § 130.25 [2]) and one count of endangering the welfare of a child (§ 260.10 [1]). County Court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea on the ground that, as the result of his mental illness and use of psychiatric medication, the plea was not voluntarily, knowingly, and intelligently entered (*see generally People v Fiumefreddo*, 82 NY2d 536, 543-544). The record supports the court's conclusion that defendant's "plea was knowing, voluntary and intelligent, and that his psychiatric condition and medications did not undermine his ability to understand the terms and consequences of his guilty plea" (*People v Mack*, 90 AD3d 1317, 1321).

The court also properly refused to suppress defendant's statement to the police on the ground that he was impaired by medication during the interrogation and thus did not validly waive his *Miranda* rights. The evidence at the suppression hearing supports the court's determination that defendant effectively waived his *Miranda* rights, including the right to counsel (*see People v Twillie*, 28 AD3d 1236, 1237, *lv denied* 7 NY3d 795). Contrary to defendant's contention, the record does not establish that "he was under the influence of medication at the time he waived those rights 'to the degree of mania, or of being unable to understand the meaning of his statement[]' " (*People v Dasher*, 109 AD3d 1125, 1125, *lv denied* 22 NY3d 1040, quoting

People v Schompert, 19 NY2d 300, 305, *cert denied* 389 US 874).

We reject defendant's contention that the court erred in failing, sua sponte, to appoint new counsel to represent defendant on his motion to withdraw the guilty plea. Contrary to defendant's contention, defense counsel did not take a position adverse to defendant with respect to that motion (*see People v Wolf*, 88 AD3d 1266, 1268, *lv denied* 18 NY3d 863). Finally, the sentence is not unduly harsh or severe.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

206

KA 13-01214

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TODD R. BRIGLIN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered January 3, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: Defendant appeals from judgments rendered on the same day, convicting him upon his pleas of guilty of burglary in the third degree (Penal Law § 140.20). As defendant contends and the People correctly concede, the waiver of the right to appeal in each appeal is invalid because, "[a]lthough the record establishes that defendant executed a written waiver of the right to appeal, there was no colloquy between County Court and defendant regarding the waiver of the right to appeal to ensure that it was knowingly, voluntarily and intelligently entered" (*People v Carno*, 101 AD3d 1663, 1664, *lv denied* 20 NY3d 1060).

Defendant contends that the court erred in its determination of restitution with respect to the victims in each appeal. At sentencing, the People indicated that the amount of restitution was $905.02 based on two victim impact statements, but if there were additional victims seeking restitution the matter should be scheduled for a hearing. Defendant objected to any additional amounts of restitution and agreed to the People's suggestion that a hearing be held if there were additional amounts sought. The court bifurcated the sentencing proceeding by severing the issue of restitution for a hearing, if necessary. Several months later, the court issued an order of restitution in the amount of $905.02. Defendant failed to appeal from the order of restitution (*see People v Connolly*, 100 AD3d 1419, 1419; *People v Brusie*, 70 AD3d 1395, 1396), however, and thus

his challenge to the amount of restitution is not before us. We note in any event that defendant failed to preserve his challenge for our review (*see People v Horne*, 97 NY2d 404, 414 n 3; *People v Jorge N.T.*, 70 AD3d 1456, 1457, *lv denied* 14 NY3d 889), inasmuch as he did not object to the amount of $905.02 stated at sentencing or request a hearing with respect thereto. Even if defendant had appealed from the order of restitution, we would decline to exercise our power to review that challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v Marco A.C.*, 115 AD3d 1219, 1220, *lv denied* 23 NY3d 1039).

Finally, the sentence in each appeal is not unduly harsh or severe.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

207

KA 13-01215

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TODD R. BRIGLIN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered January 3, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Same Memorandum as in *People v Briglin* ([appeal No. 1] ___ AD3d ___ [Feb. 13, 2015]).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

211

CAF 14-00511

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

IN THE MATTER OF LENORES S.M.,
RESPONDENT-APPELLANT.

WAYNE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

CHARLES PLOVANICH, ATTORNEY FOR THE CHILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

DANIEL C. CONNORS, COUNTY ATTORNEY, LYONS (ERIN M. HAMMOND OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered February 3, 2014 in a proceeding pursuant to Family Court Act article 3. The order, among other things, placed respondent in the custody of the Wayne County Department of Social Services for a period of one year.

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

Memorandum: Respondent appeals from an order revoking his probation and placing him in the custody of the Wayne County Department of Social Services for a period of one year. This appeal is moot because respondent's one-year placement has expired, and the exception to the mootness doctrine does not apply (*see Matter of Sysamouth D.*, 98 AD3d 1314, 1314; *Matter of Kale F.*, 269 AD2d 832, 833; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

215

CA 14-01104

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

KEITH HAGENBUCH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VICTORIA WOODS HOA, INC., CROFTON ASSOCIATES, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (JENNIFER B. TAROLLI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

E. MICHAEL COOK, P.C., ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered November 21, 2012 in a personal injury action. The judgment and order, among other things, denied the motion of defendants-appellants for summary judgment dismissing the complaint and all cross claims against them.

It is hereby ORDERED that the judgment and order so appealed from is unanimously modified on the law by granting in part the motion of defendants-appellants and dismissing the complaint against them to the extent that the complaint, as amplified by the bill of particulars, alleges that they created or had actual notice of the allegedly dangerous condition, and as modified the judgment and order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he slipped and fell on a patch of ice at a complex owned by Victoria Woods HOA, Inc. and managed by Crofton Associates, Inc. (defendants). Supreme Court erred in denying that part of defendants' motion for summary judgment dismissing the complaint to the extent that the complaint, as amplified by the bill of particulars, alleges that defendants were negligent because they created or had actual notice of the allegedly dangerous condition, and we therefore modify the judgment and order accordingly. Defendants met their initial burden with respect thereto (*see generally Sweeney v Lopez*, 16 AD3d 1174, 1175), and plaintiff did not oppose the motion to that extent, thus implicitly conceding that defendants were entitled to summary judgment to that extent (*see Adams v Autumn Thoughts*, 298 AD2d 945, 946).

The court properly denied the motion, however, to the extent that

the complaint, as amplified by the bill of particulars, alleges that defendants were negligent based on their constructive notice of the allegedly dangerous condition. Defendants failed to meet their 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" (*Jordan v Musinger*, 197 AD2d 889, 890; *see Gwitt v Denny's, Inc*., 92 AD3d 1231, 1231-1232; *Kimpland v Camillus Mall Assoc., L.P.*, 37 AD3d 1128, 1128-1129).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

216

CA 14-01160

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

JEFFREY MALKAN, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK (STATE UNIVERSITY OF NEW YORK AT BUFFALO), DEFENDANT-RESPONDENT.
(CLAIM NOS. 116355 AND 117676.)

RICHARD E. CASAGRANDE, LATHAM (MARILYN RASKIN-ORTIZ OF COUNSEL), FOR CLAIMANT-APPELLANT.

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

Appeal from an order of the Court of Claims (Jeremiah J. Moriarty, III, J.), entered September 6, 2013. The order granted the motions of defendant for summary judgment and dismissed the claims.

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

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

217

CA 14-01182

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

IN THE MATTER OF OPERATION OSWEGO COUNTY, INC.,
PETITIONER-PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK AUTHORITIES BUDGET OFFICE, AN
INDEPENDENT ENTITY WITHIN THE DEPARTMENT OF STATE,
RESPONDENT-DEFENDANT-APPELLANT.

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

HISCOCK & BARCLAY LLP, SYRACUSE (ANDREW J. LEJA OF COUNSEL), FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered December 16, 2013 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment, among other things, ordered that a permanent injunction shall be entered against respondent prohibiting respondent from enforcing the reporting requirements complained of by petitioner.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the three decretal paragraphs are vacated, the petition/complaint insofar as it seeks relief pursuant to CPLR article 78 is denied, and judgment is granted in favor of respondent as follows:

> It is ADJUDGED AND DECLARED that petitioner is a local authority as defined in the Public Authorities Law.

Memorandum: Petitioner-plaintiff (petitioner) commenced this combined CPLR article 78 proceeding and declaratory judgment action seeking to annul the determination of respondent-defendant (respondent) that petitioner is subject to respondent's oversight and reporting obligations as a local authority and seeking, inter alia, a declaration that it is not a local authority as defined in the Public Authorities Law and thus is not subject to the reporting requirements therein. Supreme Court agreed with petitioner and, inter alia, issued a permanent injunction prohibiting respondent from imposing the reporting requirements against petitioner. We now reverse.

A "local authority" under the Public Authorities Law includes "a not-for-profit corporation affiliated with, sponsored by, or created

by a county, city, town or village government" (§ 2 [2] [b]). Petitioner is a not-for-profit corporation that acts as a local development corporation by establishing and implementing economic development strategies for Oswego County (County). We agree with respondent that petitioner is a local authority inasmuch as it is affiliated with and/or sponsored by the County (*see Matter of Griffiss Local Dev. Corp. v State of N.Y. Auth. Budget Off.*, 85 AD3d 1402, 1404-1405, *lv denied* 17 NY3d 714). The record establishes that the County regularly gives grants to petitioner, which comprise the majority of its budget. As explained in *Griffiss Local Dev. Corp.*, the term "sponsor" means, inter alia, " 'a person or an organization that *pays for* or plans and carries out a project or activity' " (*id.* at 1404, quoting Merriam-Webster On-line Dictionary [emphasis added]). The County has also given interest-free loans to petitioner. Furthermore, a County official serves as a voting member of petitioner's board, and several County officials serve as ex-officio, non-voting members of petitioner's board. Considering the totality of the circumstances (*see id.* at 1405 n 4), we conclude that petitioner is a local authority as defined in the Public Authorities Law.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1196

CA 14-00316

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

ANTOINETTE BLACK, AS TEMPORARY ADMINISTRATOR OF
THE ESTATE OF SERGIO BLACK, DECEASED,
CLAIMANT-RESPONDENT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT-RESPONDENT.
(CLAIM NO. 115567.)
(APPEAL NO. 1.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

FRANZBLAU DRATCH, P.C., NEW YORK CITY (STEPHEN N. DRATCH OF COUNSEL), FOR CLAIMANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Court of Claims (Diane L. Fitzpatrick, J.), entered February 20, 2013. The order determined that, for the purposes of determining the discount rate under CPLR 5031, the date of decision is March 30, 2012.

It is hereby ORDERED that said appeal and cross appeal are unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1197

CA 14-00317

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

ANTOINETTE BLACK, AS TEMPORARY ADMINISTRATOR OF
THE ESTATE OF SERGIO BLACK, DECEASED,
CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 115567.)
(APPEAL NO. 2.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANZBLAU DRATCH, P.C., NEW YORK CITY (STEPHEN N. DRATCH OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Diane L. Fitzpatrick, J.), entered April 19, 2013. The judgment awarded decedent money damages after a trial.

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

Memorandum: Sergio Black (decedent) commenced this action seeking damages for personal injuries allegedly caused by negligent medical care provided to him by defendant while he was in a state prison. Defendant appeals from a judgment awarding damages to decedent based upon a determination by the Court of Claims that a prison physician committed medical malpractice. Claimant, as temporary administrator of decedent's estate, was substituted as respondent on this appeal because decedent died shortly after the judgment was entered.

The evidence at trial established that, during his incarceration, decedent was injured several times in the summer of 2006 while playing basketball or lifting weights. The resulting injuries resolved relatively quickly and decedent thereafter returned to his customary activities. Decedent was again injured playing basketball on November 8, 2006. On that occasion, decedent's neck was bent backwards when he collided with another inmate. The prison physician's initial diagnosis was that decedent had suffered a "stinger," a relatively minor spinal nerve injury, which would resolve on its own within a few days. When the injury did not resolve by November 13th, however, the prison physician ordered an MRI of decedent's spine, which occurred

two days later. The prison physician had not yet received the MRI report when he saw decedent again on November 20th, and he directed prison personnel to obtain the report and forward it to him as soon as possible. Later that day, the prison physician received the report, which indicated that decedent had significant spinal stenosis, a condition in which the narrowing of the spinal canal causes pressure on the spinal cord, and myelomalacia, a softening of the spinal cord. The prison physician concluded that decedent's condition was serious and justified an expert consultation to ascertain the proper course of action, but that it did not require immediate emergency intervention. While awaiting approval for a neurological consultation, decedent further injured his cervical spine when he fell in his prison cell on December 18th. The resulting injuries rendered him a paraplegic with only limited use of his hands. Decedent's condition did not improve, and he died shortly after he was released from prison, during the pendency of this appeal.

At the trial of the claim, decedent relied upon expert testimony from a neurologist who opined that the prison physician deviated from the standard of care by, among other things, failing to obtain prompt and adequate medical treatment for decedent. The expert further opined that the prison physician was negligent in prescribing neurontin because its side effects included ataxia and dizziness. He opined that the medication was counterindicated for decedent because of his spinal condition, which made him prone to falling even without the medication. The court found in its decision that defendant was "100 percent responsible for [decedent]'s injuries as a result of the failure to promptly refer [decedent] for a neurological consultation evaluation and treatment from November 20, 2006." Judgment was entered on that decision and defendant appeals therefrom.

On appeal from a judgment entered after a nonjury trial, this Court has the power "to set aside the trial court's findings if they are contrary to the weight of the evidence" and to render the judgment we deem warranted by the facts (*Larkin v State of New York*, 84 AD2d 438, 444; *see Anastasio v Bartone*, 22 AD3d 617, 617). That power may be appropriately exercised, however, only after giving due deference to the court's "evaluation of the credibility of witnesses and quality of the proof" (*Ogle v State of New York*, 191 AD2d 878, 880; *see Anastasio*, 22 AD3d at 617-618). Moreover, "[o]n a bench trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Claridge Gardens v Menotti*, 160 AD2d 544, 544-545).

Here, giving due deference to the assessment of the evidence by the court, we conclude that a fair interpretation of the evidence supports its determination that defendant breached its duty to provide claimant's decedent with adequate medical care, resulting in his catastrophic injuries (*see Andrews v County of Cayuga*, 96 AD3d 1477, 1477-1478; *Farace v State of New York*, 266 AD2d 870, 870-871; *Kagan v State of New York*, 221 AD2d 7, 8). Decedent's expert testified credibly, based upon his review of decedent's medical records and his

examination of decedent, that the prison physician deviated from accepted standards of medical practice when he failed to recognize the urgency of decedent's condition and to make a prompt referral to a neurologist (*see Larkin*, 84 AD2d at 445). There is no basis in the record for rejecting that opinion (*see Fuller v Preis*, 35 NY2d 425, 431-432). We reject defendant's contention that the opinion of decedent's expert should be given no weight because his expertise is in the area of neurology, while the prison physician is an internist. The expertise of decedent's expert does not imply a lack of familiarity with the standards applicable to a general practitioner or internist (*see Hoagland v Kamp*, 155 AD2d 148, 151). Moreover, decedent's expert testified that, before becoming a neurologist, he had been employed as a general practitioner, and he was even employed as a general medical officer at a federal correctional facility. In addition, after he began practicing neurology, decedent's expert trained physicians working in family practice and internal medicine to conduct neurological examinations. Thus, claimant established an adequate foundation demonstrating his expert's familiarity with the standard of care that was the subject of the expert's testimony (*see id.* at 150), and the expert in fact testified about the treatment rendered to decedent in light of the standard applicable to all physicians (*see Kelly v State of New York*, 259 AD2d 962, 963).

We further conclude that the opinion of decedent's expert that decedent's injuries were caused by defendant's negligence is based on facts that "were either established or fairly inferable from the evidence" (*Naveja v Hillcrest Gen. Hosp.*, 148 AD2d 429, 430; *see Stringile v Rothman*, 142 AD2d 637, 639). Decedent's MRI report indicated, in relevant part, that there was "[s]evere stenosis" at C3-4 with evidence of myelomalacia in the spinal cord, among other abnormalities. The prison physician acknowledged that spinal cord stenosis could lead to permanent paralysis, but he concluded that the MRI report reflected a degenerative process rather than an acute condition requiring immediate intervention. Decedent's expert countered, however, that the prison physician failed to take into account decedent's clinical picture when he discounted the urgency of decedent's condition. The evidence at trial established that decedent's condition deteriorated precipitously between his basketball injury on November 8 and his fall on December 18. Prior to November 8, decedent, then a 35-year-old Marine Corps veteran, lifted weights and played basketball regularly. Following that date, he was in constant pain and had progressively increasing problems with mobility. He was unable to walk without assistance, and he twice requested a wheelchair before his collapse. Decedent and claimant both testified that decedent's condition was worsening as of November 20, and they each recalled becoming increasingly concerned about decedent's deteriorating condition and defendant's delay in addressing it. Decedent made repeated requests to discuss the MRI results with the prison physician, and even sought the prison warden's intervention regarding those requests. The prison physician, however, did not reevaluate decedent's condition to determine if it had worsened after receiving the MRI report. We note that, to the extent that decedent's medical records did not fully document his deteriorating condition, the lack of documentation is the result of the prison physician's

failure to reexamine him or otherwise reevaluate his condition.

In sum, the record supports the opinion of decedent's expert that the MRI report, coupled with "the accelerating nature of [decedent's] symptoms," demanded immediate action, which the prison physician neglected to take (*see Larkin*, 84 AD2d at 445). The prison physician conceded that he was aware, at least as of November 20, that referral to a neurologist was necessary, and a fair interpretation of the evidence supports the court's conclusion that his failure to recognize the urgency of that referral and to ensure that decedent received appropriate treatment constituted malpractice (*see Dockery v Sprecher*, 68 AD3d 1043, 1046; *Kelly*, 259 AD2d at 963; *Larkin*, 84 AD2d at 445).

We reject the contention of defendant that it could have done nothing to obtain the necessary referral and treatment prior to decedent's collapse on December 18 and, thus, that any negligence on the part of the prison physician did not proximately cause decedent's injuries. The record establishes that the prison physician defined the level of urgency that triggered the administrative protocols for scheduling appointments, and the lack of urgency that he reported resulted in the scheduling of a referral beyond December 18. In any event, as the court properly concluded, decedent was dependent on defendant for adequate medical care, and he should not suffer the consequences resulting from either the failure to recognize the urgency and risks of his condition or the failure of prompt and efficient internal procedures for obtaining a referral to and treatment by a specialist (*see Andrews*, 96 AD3d at 1478; *Kagan*, 221 AD2d at 11).

Inasmuch as the weight of the evidence supports the court's determination that defendant breached its duty to provide decedent with adequate medical care, we need not address the court's further determination that the prison physician's administration of neurontin to decedent constituted malpractice.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1304

CA 14-00914

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

MICHAEL F. FIORE AND SUSAN FIORE,
PLAINTIFFS-PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF WHITESTOWN, TOWN OF WHITESTOWN POLICE DEPARTMENT, BRIAN BROOKS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS A MEMBER OF THE WHITESTOWN POLICE COMMISSION, DANIEL SULLIVAN, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS A MEMBER OF THE WHITESTOWN POLICE COMMISSION, NORMAN ULINKSI, DONALD WOLANIN, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS CHIEF OF POLICE FOR TOWN OF WHITESTOWN, DEFENDANTS-RESPONDENTS-RESPONDENTS, ET AL., DEFENDANTS-RESPONDENTS.

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

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN GUYDER FELTER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Peter A. Schwerzmann, A.J.), entered July 22, 2013. The order granted the motion of defendants-respondents to dismiss the complaint-petition.

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

Memorandum: Plaintiff-petitioner Michael F. Fiore (plaintiff) was formerly employed by defendant-respondent Town of Whitestown Police Department (Police Department) as a part-time probationary police officer. Plaintiff was terminated from that position after the employee of a tanning salon appeared at a meeting of the Whitestown Police Commission (Police Commission) and told the Commissioners that, while plaintiff was off duty, he visited the tanning salon and displayed a handgun. The tanning salon employee also told the Commissioners that, before plaintiff began working for the Police Department, the owner of the tanning salon saw plaintiff masturbating in a tanning booth. After hearing from the tanning salon employee, the Police Commission terminated plaintiff's employment. After an unsuccessful course of litigation in federal court, plaintiffs-petitioners (plaintiffs) commenced this hybrid action at law and CPLR article 78 proceeding in Supreme Court, seeking, inter alia, damages

for allegedly defamatory statements made by defendants-respondents Brian Brooks, Daniel Sullivan, and Norman Ulinski, individually and in their official capacities as members of the Police Commission, and by defendant-respondent Donald Wolanin, individually and in his official capacity as Chief of Police for the Town of Whitestown. The court granted defendants-respondents' (defendants) motion to dismiss the complaint-petition (complaint) pursuant to CPLR 3211, and we affirm.

At the outset, we agree with the parties that defendants' motion should be considered a motion for summary judgment dismissing the complaint. Although defendants stated in their moving papers that they were seeking dismissal of the complaint pursuant to CPLR 3211, both parties submitted numerous exhibits to the court, including affidavits and transcripts of deposition testimony from several witnesses in the federal lawsuit. Thus, "the respective submissions of both parties demonstrate that they are laying bare their proof and deliberately charting a summary judgment course" (*Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 258-259; *see Nowacki v Becker*, 71 AD3d 1496, 1497).

Contrary to plaintiffs' contention, the court properly granted that part of the motion with respect to the first cause of action, for libel, asserted against Brooks, Sullivan, and Ulinski. That cause of action was based on allegations that Brooks, Sullivan, and Ulinski made libelous statements in the letter that terminated plaintiff's employment as a probationary police officer. There is complete immunity from liability for defamation for " 'an official [who] is a principal executive of State or local government who is entrusted by law with administrative or executive policy-making responsibilities of considerable dimension' . . . , with respect to statements made during the discharge of those responsibilities about matters which come within the ambit of those duties" (*Clark v McGee*, 49 NY2d 613, 617, quoting *Stukuls v State of New York*, 42 NY2d 272, 278). Here, the Town Board has the statutory authority to "make, adopt and enforce rules, orders and regulations for the government, discipline, administration and disposition of the police department and of the members thereof" (Town Law § 154) and, as members of the Police Commission, Brooks, Sullivan, and Ulinski were delegated "all the powers relative to police matters conferred upon the town board" (§ 150 [2]). We therefore conclude that Brooks, Sullivan, and Ulinski were entitled to absolute immunity because "members of the Town Board enjoy an absolute privilege against a claim of defamation where . . . the defamatory statements are made in the discharge of their responsibilities about matters within the ambit of their duties" (*Baumblatt v Battalia*, 134 AD2d 226, 228), and "[t]he privilege of absolute immunity . . . 'extends to those of subordinate rank who exercise delegated powers' " (*Firth v State of New York*, 12 AD3d 907, 907-908, *lv denied* 4 NY3d 709, quoting *Ward Telecom. & Computer Servs. v State of New York*, 42 NY2d 289, 292; *see Algarin v Town of Wallkill*, 313 F Supp 2d 257, 260-261, *affd* 421 F3d 137).

Contrary to plaintiffs' further contention, the court properly granted that part of defendants' motion seeking dismissal of the second and third causes of action, for two separate incidents of

slander, asserted against Ulinski. " 'A qualified privilege arises when a person makes a good[ ]faith, bona fide communication upon a subject in which he or she has an interest, or a legal, moral or societal interest to speak, and the communication is made to a person with a corresponding interest' " (*Matter of Hoge [Select Fabricators, Inc.]*, 96 AD3d 1398, 1400; *see Kondo-Dresser v Buffalo Pub. Schs.*, 17 AD3d 1114, 1114-1115). Here, defendants submitted evidence that, at the time of the alleged slanderous communications, Ulinski was a member of the Police Commission and, therefore, had an interest in plaintiff's performance as a probationary police officer, and that Ulinski made the communications to persons with a corresponding interest in plaintiff's performance, namely to a member of the Town Board, and to the president of the union that represented plaintiff (*see Hoge*, 96 AD3d at 1400; *Mancuso v Allergy Assoc. of Rochester*, 70 AD3d 1499, 1500). We further conclude that plaintiffs "failed to raise a triable issue of fact whether the statements were motivated solely by malice" (*Mancuso*, 70 AD3d at 1501; *see Cooper v Hodge*, 28 AD3d 1149, 1150-1151).

Contrary to plaintiffs' further contention, the court properly granted that part of defendants' motion seeking dismissal of the fourth cause of action, for slander, asserted against Wolanin. Wolanin's statements that plaintiff did something that "wasn't good" and that plaintiff "knew what he did" were not actionable because Wolanin's words were " 'vague, ambiguous, indefinite and incapable of being objectively characterized as true or false' " (*Boulos v Newman*, 302 AD2d 932, 933).

We conclude that the court also properly granted that part of defendants' motion seeking dismissal of plaintiffs' fifth cause of action, for tortious interference with prospective advantage, asserted against Brooks, Sullivan, and Ulinski, based on the allegation that those defendants interfered with plaintiff's attempts to find employment with other police agencies (*see North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5, 21; *see also Zetes v Stephens*, 108 AD3d 1014, 1020). Here, defendants established as a matter of law that they did not interfere with plaintiff's attempts to find such other employment (*see North State Autobahn, Inc.*, 102 AD3d at 21), and plaintiffs failed to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

We conclude that the court properly granted that part of defendants' motion seeking dismissal of plaintiffs' eighth cause of action, for tortious interference with contract, asserted against Brooks, Sullivan, and Ulinski. Defendants established as a matter of law that plaintiff did not have a valid contract with a third party, as is required to make out a prima facie case for tortious interference with an existing contract (*see generally Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424; *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 620-621). Plaintiff is not a party to the collective bargaining agreement with the Town of Whitestown (*see generally Matter of Board of Educ., Commack Union Free Sch. Dist. v Ambach*, 70 NY2d 501, 508, *cert denied* 485 US 1034), and has no standing to seek relief as a third-party beneficiary to that agreement

(*see generally Leblanc v Security Servs. Unit Empls. of N.Y. State Law Enforcement Officers Union, Council 82, AFSCME, AFL-CIO*, 278 AD2d 732, 734).

Contrary to plaintiffs' contention, the court properly granted that part of defendants' motion seeking dismissal of the sixth cause of action, for prima facie tort, asserted against Brooks, Sullivan, and Ulinski. Defendants established as a matter of law that the sole motivation in terminating plaintiff's employment was not " 'disinterested malevolence,' " which is a required element to recover damages for prima facie tort (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333; *see Morrison v Woolley*, 45 AD3d 953, 954), and plaintiffs failed to raise a triable issue of fact (*see generally Alvarez*, 68 NY2d at 324).

Contrary to plaintiffs' further contention, the court properly determined that plaintiff is not entitled to relief pursuant to CPLR article 78 and, therefore, properly granted that part of defendants' motion seeking dismissal of the 12th cause of action. As a probationary police officer, plaintiff could be " 'dismissed for almost any reason, or for no reason at all[,]' . . . [and he] had no right to challenge the termination by way of a hearing or otherwise, absent a showing that he was dismissed in bad faith or for an improper or impermissible reason" (*Matter of Swinton v Safir*, 93 NY2d 758, 762-763, quoting *Matter of Venes v Community Sch. Bd. of Dist. 26*, 43 NY2d 520, 525). Defendants submitted evidence establishing as a matter of law that plaintiff was not dismissed in bad faith or for an improper or impermissible reason, i.e., that he was dismissed from employment because he displayed a handgun while off duty and because he had masturbated at the tanning salon, and plaintiffs failed to submit any evidence raising a triable issue of fact (*see generally Matter of Mathis v New York State Dept. of Corr. Servs.* [appeal No. 2], 81 AD3d 1435, 1436-1437; *Matter of Carroll v New York State Canal Corp.*, 51 AD3d 1389, 1390). Finally, in view of our determination with respect to the foregoing causes of action, we conclude that the court properly granted that part of defendants' motion seeking dismissal of the derivative cause of action, for loss of consortium (*see Moore v First Fed. Sav. & Loan Assn. of Rochester*, 237 AD2d 956, 957).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1317

CA 14-01060

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

IN THE MATTER OF SMALL SMILES LITIGATION

ELIZABETH LORRAINE, AS PARENT AND NATURAL GUARDIAN OF INFANT SHILOH LORRAINE, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA NY, LLC, SMALL SMILES DENTISTRY OF ROCHESTER, LLC, ISMATU KAMARA, D.D.S., GARY GUSMEROTTI, D.D.S., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), AND SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE, FOR DEFENDANTS-APPELLANTS FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA NY, LLC, AND SMALL SMILES DENTISTRY OF ROCHESTER, LLC.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, ALBANY (MELISSA A. MURPHY-PETROS OF COUNSEL), FOR DEFENDANT-APPELLANT ISMATU KAMARA, D.D.S.

HISCOCK & BARCLAY, LLP, ROCHESTER (PAUL A. SANDERS OF COUNSEL), FOR DEFENDANT-APPELLANT GARY GUSMEROTTI, D.D.S.

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

Appeals from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered September 17, 2013. The order, insofar as appealed from, denied in part the summary judgment motions of defendants-appellants.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained by her infant son as a result of, inter alia, allegedly unnecessary dental treatment performed at a “Small Smiles” dental clinic in Rochester, New York, without informed consent or with fraudulently obtained consent. This action was coordinated for

purposes of discovery with two other actions in Supreme Court, Onondaga County. Although there are four groups of defendants involved in the three actions (*Matter of Small Smiles Litig.*, 109 AD3d 1212, 1212-1213), the only group relevant to the instant appeal is that comprised of the corporate defendants-appellants (collectively, New FORBA defendants) and the two individual defendants-appellants, the dentists who provided treatment to plaintiff's infant son at the Rochester clinic location. Supreme Court denied in part the motion of the New FORBA defendants for partial summary judgment as well as the motions of the two dentists for summary judgment dismissing the amended complaint against them.

The New FORBA defendants contend on appeal that the court erred in denying those parts of their motion with respect to the causes of action for battery, the violation of General Business Law § 349, negligence, and concerted action, and erred in refusing to strike plaintiff's demand for punitive damages. The individual dentists, Ismatu Kamara, D.D.S. and Gary Gusmerotti, D.D.S., each contend on appeal that the court erred in refusing to dismiss the dental malpractice cause of action against them. We note at the outset that the contention of the New FORBA defendants with respect to the negligence cause of action, i.e., that it should be dismissed as duplicative of the one for dental malpractice, is raised for the first time on appeal and is therefore not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Contrary to the contention of the New FORBA defendants, the cause of action asserting the complete absence of consent and/or fraudulently induced consent for treatment is properly treated as one for battery rather than for dental malpractice, and it is not duplicative of the dental malpractice cause of action (*see Small Smiles Litig.*, 109 AD3d at 1214; *VanBrocklen v Erie County Med. Ctr.*, 96 AD3d 1394, 1394). "It is well settled that a medical professional may be deemed to have committed battery, rather than malpractice, if he or she carries out a procedure or treatment to which the patient has provided 'no consent at all' " (*VanBrocklen*, 96 AD3d at 1394; *see Wiesenthal v Weinberg*, 17 AD3d 270, 270-271). The court properly denied that part of the New FORBA defendants' motion with respect to the battery cause of action, inasmuch as they failed to meet their initial burden of establishing that they "did not intentionally engage in offensive bodily contact without plaintiff's consent" (*Guntlow v Barbera*, 76 AD3d 760, 766, *appeal dismissed* 15 NY3d 906).

We reject the contention of the New FORBA defendants that the court erred in denying that part of their motion with respect to the cause of action under General Business Law § 349. A cause of action for deceptive business practices under section 349 "requires proof that the defendant engaged in consumer-oriented conduct that was materially deceptive or misleading, causing injury" (*Corcino v Filstein*, 32 AD3d 201, 201). Even assuming, arguendo, that the New FORBA defendants met their initial burden by establishing that the underlying transaction was private in nature and the allegedly deceptive acts were not aimed at the public at large (*see generally Confidential Lending, LLC v Nurse*, 120 AD3d 739, 741), we conclude

that plaintiff's submissions raised issues of fact concerning whether the New FORBA defendants engaged in a scheme to place profits before patient care, which allegedly included fraudulent practices that impacted consumers at large beyond a particular dentist's treatment of an individual patient (*see Morgan Servs. v Episcopal Church Home & Affiliates Life Care Community*, 305 AD2d 1105, 1106; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We likewise reject the contention of the New FORBA defendants that the court erred in refusing to strike the demand for punitive damages (*see Garber v Lynn*, 79 AD3d 401, 402-403). To the extent that those defendants contend that a stipulation in bankruptcy court to limit collection of any money judgment obtained by plaintiff to insurance proceeds precludes a claim for punitive damages, we conclude that such contention does not serve as a basis for affirmative relief at this juncture.

Contrary to Dr. Kamara's contention, the court properly refused to dismiss the dental malpractice cause of action against her on the ground that plaintiff's son was not injured during the treatment. Even assuming, arguendo, that Dr. Kamara met her initial burden of establishing that plaintiff's son was not injured by the treatment she performed (*see generally Shahid v New York City Health & Hosps. Corp.*, 47 AD3d 800, 801), we conclude that plaintiff raised a triable issue of fact whether her son sustained injuries as a result of such treatment (*see generally Zuckerman*, 49 NY2d at 562).

Contrary to the contention of Dr. Gusmerotti, the court also properly refused to dismiss the dental malpractice cause of action against him. Even assuming, arguendo, that Dr. Gusmerotti established his entitlement to summary judgment by submitting his own affidavit (*see Juba v Bachman*, 255 AD2d 492, 493, *lv denied* 93 NY2d 809), we conclude that plaintiff raised issues of fact whether Dr. Gusmerotti departed from the accepted standard of care and caused injury to plaintiff's son by fraudulently using the dental X rays of another child to obtain plaintiff's consent for medically unnecessary treatment (*see Taylor v Nyack Hosp.*, 18 AD3d 537, 538; *Ayoung v Epstein*, 177 AD2d 460, 460).

Lastly, in light of our determination with respect to the two individual defendants-appellants, we reject the contention of the New FORBA defendants that there is no independent tort to support plaintiff's concerted action cause of action (*cf. Brenner v American Cyanamid Co.*, 288 AD2d 869, 870; *see generally Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 295).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1361

CAF 13-01515

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

IN THE MATTER OF ZINETA AVDIC,
PETITIONER-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

REFIK AVDIC, RESPONDENT-RESPONDENT-APPELLANT.

IN THE MATTER OF REFIC AVDIC,
PETITIONER-RESPONDENT-APPELLANT,

V

ZINETA AVDIC, RESPONDENT-APPELLANT-RESPONDENT.

SUSAN B. MARRIS, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT-RESPONDENT.
(APPEAL NO. 1.)

SUSAN B. MARRIS, ATTORNEY FOR THE CHILD, MANLIUS, APPELLANT-RESPONDENT PRO SE.

SAUNDERS KAHLER, L.L.P., UTICA (JAMES S. RIZZO OF COUNSEL), FOR PETITIONER-APPELLANT-RESPONDENT AND RESPONDENT-APPELLANT-RESPONDENT.

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

Appeals and cross appeal from an amended order of the Family Court, Oneida County (Louis P. Gigliotti, A.J.), entered August 12, 2013 in proceedings pursuant to Family Court Act articles 4, 6 and 8. The amended order, among other things, adjudged that petitioner-respondent Zineta Avdic had willfully violated a court order and sentenced her to six weekends in jail and ordered the parties to enroll in therapeutic counseling.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by striking the provision conditioning the custody of the subject child with petitioner on the participation of petitioner “and/or” the child in therapeutic counseling and as modified the amended order is affirmed without costs, and the matter is remitted to Family Court, Oneida County, for further proceedings in accordance with the following memorandum: In appeal No. 1, petitioner-respondent mother and the Attorney for the Child (AFC) each appeal, and respondent-petitioner father cross-appeals, from an

amended order that, following a hearing on the father's cross petition to modify a prior order of custody and visitation, conditioned the continuation of the mother's joint custody of the child on, insofar as relevant to these appeals, the participation of the mother "and/or" the child in therapeutic counseling. In appeal No. 2, the mother and the AFC each appeal from an order that, following a hearing, modified the amended order in appeal No. 1 and awarded the father sole custody on the ground that the subject child failed and/or refused to attend therapeutic counseling.

We reject the contention of the father that the appeals of the mother and AFC from the amended order in appeal No. 1 were rendered moot by the subsequent order in appeal No. 2. The rights of the parties, and the best interests of their child, will be directly affected by the determination of appeal No. 1 and the interest of the parties and their child is an immediate consequence of that order (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714). Furthermore, as discussed herein, Family Court was without authority to issue the order in appeal No. 2, and thus it cannot be said that the order in appeal No. 2 rendered moot the order in appeal No. 1.

In appeal No. 1, as the father correctly concedes, the court erred in conditioning the mother's continued joint custody upon participation of the mother and/or the child in therapeutic counseling. Although a court may include a directive to obtain counseling as a *component* of a custody or visitation order, the court does not have the authority to order such counseling as a prerequisite to custody or visitation (*see Matter of Sweet v Passno*, 206 AD2d 639, 640). Here, the court erred in making the failure or refusal to participate in counseling the dispositive, triggering event in determining custody (*see Matter of Vieira v Huff*, 83 AD3d 1520, 1522; *Gadomski v Gadomski*, 256 AD2d 675, 677; *Matter of Dennison v Short*, 229 AD2d 676, 677). We therefore modify the amended order by striking the provision transferring sole custody to the father in the event that the mother and/or the child failed to attend and fully and meaningfully participate in the therapeutic counseling sessions ordered by the court.

With respect to appeal No. 1, we note that the court properly determined that there had been a sufficient change in circumstances to warrant a determination concerning the best interests of the child (*see Matter of Darla N. v Christine N*. [appeal No. 2], 289 AD2d 1012, 1012). Nevertheless, although the court's determination that the mother had engaged in parental alienation behavior raised a strong probability she is unfit to act as a custodial parent (*see Matter of Amanda B. v Anthony B*., 13 AD3d 1126, 1127), the court failed to make any explicit findings concerning the relevant factors that must be considered in making a best interests determination so as to resolve the petition and cross petition (*see Eschbach v Eschbach*, 56 NY2d 167, 172-173; *Fox v Fox*, 177 AD2d 209, 210). We therefore remit the matter to Family Court for a determination on the petition and cross petition, including specific findings, as to the best interests of the child, following an additional hearing if necessary. We note that, by failing to brief the issue, the mother has abandoned any contention in

appeal No. 1 concerning the modification of child support (*see Matter of Kirkpatrick v Kirkpatrick*, 117 AD3d 1575, 1575-1576; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We further note that, contrary to the mother's contention, the court did not abuse its discretion in declining to admit the written report of the forensic examiner in the absence of the expert's appearance in order to testify, authenticate the report and be subject to cross-examination (*see* Family Ct Act § 624; *see generally Matter of Berrouet v Greaves*, 35 AD3d 460, 461).

With respect to appeal No. 2, we reject the father's contention that the order was entered on the mother's default and is therefore not appealable. Although the mother did not appear at the hearing, the order does not recite that it was entered on default, no application was made for a default, and the mother's attorney appeared at the hearing (*cf. Matter of Bradley M.M. [Michael M.–Cindy M.]*, 98 AD3d 1257, 1257; *see generally Matter of Rosecrans v Rosecrans*, 292 AD2d 817, 817; *Matter of Williams v Lewis*, 269 AD2d 841, 841). We thus conclude that this appeal is properly before us. However, inasmuch as the order in appeal No. 2 was the direct result of a provision in the amended order in appeal No. 1 that the court had no authority to issue, we reverse the order in appeal No. 2 and dismiss the father's petition.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1362

CAF 14-00212

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

IN THE MATTER OF ZINETA AVDIC,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

REFIK AVDIC, RESPONDENT-RESPONDENT.

IN THE MATTER OF REFIC AVDIC,
PETITIONER-RESPONDENT,

V

ZINETA AVDIC, RESPONDENT-APPELLANT.

SUSAN MARRIS, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.
(APPEAL NO. 2).

SUSAN B. MARRIS, ATTORNEY FOR THE CHILD, MANLIUS, APPELLANT PRO SE.

SAUNDERS KAHLER, L.L.P., UTICA (JAMES S. RIZZO OF COUNSEL), FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Oneida County (Louis P. Gigliotti, A.J.), entered January 13, 2014 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent-petitioner Refik Avdic sole custody of the subject child.

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

Same memorandum as in *Matter of Avdic v Avdic* ([appeal No. 1] ___ AD3d ___ [Feb. 13, 2015]).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1364

CA 14-00851

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

RADON CORPORATION OF AMERICA, INC.,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

NATIONAL RADON SAFETY BOARD,
DEFENDANT-RESPONDENT,
RADON TESTING CORPORATION OF AMERICA, INC.,
DEFENDANT-RESPONDENT-APPELLANT,
NANCY BREDHOFF AND ANDREAS GEORGE,
DEFENDANTS-RESPONDENTS.

SCOLARO, FETTER, GRIZANTI, MCGOUGH & KING, P.C., SYRACUSE (DOUGLAS J. MAHR OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

BENJAMIN LAW PC, NEW YORK CITY (AMY J. BENJAMIN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MICHAEL P. RINGWOOD OF COUNSEL), FOR DEFENDANT-RESPONDENT NATIONAL RADON SAFETY BOARD.

SUGARMAN LAW FIRM, LLP, SYRACUSE (SAMUEL M. VULCANO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NANCY BREDHOFF AND ANDREAS GEORGE.

Appeal and cross appeal from a judgment of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered August 7, 2013. The judgment, inter alia, granted the motions of defendants-respondents for summary judgment dismissing the amended complaint against them, granted those parts of the motion of defendant Radon Testing Corporation of America, Inc. for summary judgment dismissing the third and fourth causes of action against it, and granted that part of the motion of plaintiff for summary judgment on its fifth cause of action, asserted only against defendant Radon Testing Corporation of America, Inc.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law without costs by denying those parts of defendants' motions with respect to the fourth cause of action and reinstating the amended complaint to that extent and by granting judgment in favor of plaintiff on the fifth cause of action as follows:

> It is ADJUDGED and DECLARED that plaintiff did not infringe on the trade name of defendant Radon Testing

Corporation of America, Inc.,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff appeals and defendant Radon Testing Corporation of America, Inc. (RTCA) cross-appeals from a judgment that, inter alia, granted the motions of defendants-respondents for summary judgment dismissing the amended complaint against them, granted those parts of the motion of RTCA for summary judgment dismissing the third and fourth causes of action against it, and granted that part of plaintiff's motion for summary judgment on its fifth cause of action, asserted only against RTCA.

Addressing first plaintiff's appeal, we conclude that Supreme Court properly granted those parts of the motion of defendant National Radon Safety Board (NRSB) for summary judgment dismissing the first and second causes of action. Those causes of action, asserted only against NRSB, alleged the denial of equal protection and due process, and NRSB is not a state actor (*see Consumers Union of U.S., Inc. v State of New York*, 5 NY3d 327, 347 n 14). The court also properly granted those parts of defendants' motions for summary judgment dismissing the third cause of action against them, because no cause of action for tortious interference will lie where, as here, a party's alleged motive in interfering with business relationships is "normal economic self-interest" (*Carvel Corp. v Noonan*, 3 NY3d 182, 190).

We agree with plaintiff, however, that the court erred in granting those parts of defendants' motions for summary judgment dismissing the fourth cause of action against them, alleging unfair competition and restraint of trade in violation of General Business Law § 340 (1) (hereafter, Donnelly Act), and we therefore modify the judgment accordingly. Nevertheless, we reject plaintiff's contention that it should have been awarded summary judgment on the fourth cause of action, inasmuch as there are triable issues of fact with respect thereto. "A party asserting a violation of the Donnelly Act is required to (1) identify the relevant product market; (2) describe the nature and effects of the purported conspiracy; (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question; and (4) show a conspiracy or reciprocal relationship between two or more entities" (*Newsday, Inc. v Fantastic Mind*, 237 AD2d 497, 497). The Court of Appeals has recognized, however, "that neither the Donnelly Act nor the Sherman Act, after which it was modeled, has been interpreted as prohibiting every agreement that has the effect of restraining trade, no matter how minimal. Instead, as construed by State and Federal courts, the antitrust laws prohibit only 'unreasonable' restraints on trade" (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 333). We note with respect to the first factor that we agree with plaintiff that New York constitutes a relevant geographic submarket for Continuous Radon Monitor (CRM)-calibration services (*see Brown Shoe Co. v United States*, 370 US 294, 336-337; *Continental Guest Servs. Corp. v International Bus Servs., Inc.*, 92 AD3d 570, 572-573).

We conclude with respect to the three remaining factors that

there are triable issues of fact whether RTCA and NRSB engaged in concerted action that unreasonably restrained trade in New York's CRM-calibration market inasmuch as the individual defendants are employed in various capacities with RTCA and are also board members of NRSB, the entity responsible for formally adopting the policy that effectively prohibited plaintiff from performing CRM-calibration services in New York (*see International Norcent Tech. v Koninklijke Philips Elecs. N.V.*, 2007 WL 4976364, *7 n 51 [CD Cal], *affd* 323 F Appx 571 [9th Cir]). Similarly, we note that NRSB's intra-entity contention is not dispositive because, here, plaintiff alleged a conspiracy between two distinct entities and there is an issue of fact whether RTCA is in competition with plaintiff (*see American Socy. of Mech. Engrs., Inc. v Hydrolevel Corp.*, 456 US 556, 572-574, *reh denied* 458 US 1116; *cf. Sands v Ticketmaster-N.Y., Inc.*, 207 AD2d 687, 688, *lv denied* 85 NY2d 904).

Contrary to the further contention of the individual defendants, they are not entitled to summary judgment dismissing the fourth cause of action against them. "[C]orporate officer[s] can also be held liable in civil antitrust actions" under the Donnelly Act, and there are triable issues of fact regarding their participation in the alleged corporate antitrust violations (*State of New York v Feldman*, 2003 WL 21576518, *3 [SD NY]).

Finally, contrary to the contention of RTCA on its cross appeal, we conclude that the court properly granted that part of plaintiff's motion for summary judgment on the fifth cause of action, asserted only against RTCA, seeking a declaration that plaintiff did not infringe on RTCA's trade name. The court erred, however, in failing to make a declaration, as sought in the fifth cause of action, and we therefore further modify the judgment accordingly.

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1382

KA 13-00583

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL ROLLINS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 15, 2013. The judgment convicted defendant, upon his plea of guilty, of 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 case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Defendant's sole contention on appeal is that Supreme Court erred in refusing to suppress physical evidence seized by the police and statements he made to them. The evidence at the suppression hearing established that, on March 21, 2012, City of Buffalo police officers responded to a report of gambling by a group of men in the road near 58 Wick Street. As officers approached the group, one officer observed defendant drop some dice on the ground and walk away from the group and onto a nearby porch. The other men remained standing near some money and open alcohol containers. The observing officer ordered defendant off the porch, and placed him under arrest for possession of a gambling device (§ 225.30 [a] [2]) and disorderly conduct (§ 240.20 [5]). During a search of defendant's person, the officer discovered a loaded gun in defendant's jeans pocket, and defendant told the officer that he had been "[s]hooting dice for drinks." A second officer searched defendant and discovered crack cocaine in his shirt pocket. Defendant later told officers that he had obtained the gun from his cousin and thought it was "fake." The court determined that the officer had probable cause to arrest defendant for "gambling" and therefore refused to suppress the gun, the cocaine and defendant's statement. That was error.

A police officer may arrest a person without a warrant where the officer has probable cause to believe that such person has committed or is presently committing an offense (*see* CPL 140.10; *see also People v Maldonado*, 86 NY2d 631, 635; *People v Hicks*, 68 NY2d 234, 238; *People v Bigelow*, 66 NY2d 417, 423). However, where an officer lacks probable cause to arrest the person, any evidence obtained as a result thereof must be suppressed (*see People v Johnson*, 66 NY2d 398, 407-408; *People v Ayers*, 85 AD3d 1583, 1584-1585, *lv denied* 18 NY3d 922).

A person commits the crime of possession of a gambling device "when, with knowledge of the character thereof, he . . . possesses . . . [a] gambling device, believing that the same is to be used in the advancement of unlawful gambling activity" (Penal Law § 225.30 [a] [2]). A person "[a]dvance[s] gambling activity" when he, "acting other than as a player, . . . engages in conduct which materially aids any form of gambling activity" (§ 225.00 [4]). Thus, "a person who engages in any form of gambling solely as a contestant or bettor," i.e., a player, is excluded from criminal culpability (§ 225.00 [3]; *see Matter of Victor M.*, 9 NY3d 84, 87).

Here, there was no evidence before the suppression court that defendant was anything more than a contestant or player in a game of dice (*see* Penal Law §§ 225.00, 225.30 [a] [2]; *Victor M.*, 9 NY3d at 87). The observing officer did not see defendant holding money, exchanging money with the other men in the group, or even rolling the dice (*cf. People v Wilder*, 38 AD3d 263, 263, *lv denied* 8 NY3d 951; *Matter of Curtis H.*, 216 AD2d 173, 174). Therefore, contrary to the determination of the suppression court, the officer did not have "knowledge of facts and circumstances 'sufficient to support a reasonable belief' " that defendant was using the dice in the advancement of a gambling activity (*Maldonado*, 86 NY2d at 635; *see* §§ 225.00 [3], [4]; 225.30 [a] [2]).

As an alternative ground for affirmance, the People contend that the observing officer had probable cause to arrest defendant for loitering for the purpose of gambling (Penal Law § 240.35 [2]). "It is well settled than an appellate court may not uphold a police action on a theory not argued before the suppression court" (*People v Lloyd*, 167 AD2d 856, 856; *see People v Dodt*, 61 NY2d 408, 415-416). Here, the People argued before the suppression court that the officer had probable cause to arrest defendant for possession of a gambling device, disorderly conduct, and possession of an open container of alcohol on a public street. Thus, the People's loitering contention is not properly before us (*see Dodt*, 61 NY2d at 415-416; *Lloyd*, 167 AD2d at 856-857).

We note, however, that the suppression court failed to rule on the People's contentions concerning disorderly conduct and possession of an open container of alcohol, despite testimony at the suppression hearing supporting those theories of arrest. We therefore hold the case, reserve decision, and remit the matter to Supreme Court to rule on those issues "based upon the evidence presented at the suppression hearing" (*People v Jones*, 39 AD3d 1169, 1172; *see* CPL 470.15 [1]; *People v LaFontaine*, 92 NY2d 470, 474-475, *rearg denied* 93 NY2d 849).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1391

CA 14-00871

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

IN THE MATTER OF MARGUERITE MITCHELL,
INDIVIDUALLY AND AS ADMINISTRATRIX OF THE
ESTATE OF JOHN K. MITCHELL, DECEASED,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

NRG ENERGY, INC. AND DUNKIRK POWER LLC,
DEFENDANTS-RESPONDENTS-APPELLANTS.

BROWN CHIARI LLP, LANCASTER (SAMUEL J. CAPIZZI OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS P. KAWALEC OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered December 20, 2013. The order, among other things, denied the motion of defendants for summary judgment and denied the cross motion of plaintiff 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, and dismissing the Labor Law § 200 and common-law negligence causes of action and the Labor Law § 241 (6) cause of action insofar as it is premised on the alleged violation of 12 NYCRR 23-9.7 (c), and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action, arising from the death of John K. Mitchell (decedent). Decedent was killed when the dump box of a dump truck lowered suddenly while he was attempting to unload debris from a demolition project, crushing him between the box and the frame of the truck. Plaintiff appeals and defendants cross-appeal from an order that, inter alia, denied plaintiff's cross motion for partial summary judgment on the issue of liability with respect to her cause of action pursuant to Labor Law § 240 (1), and denied defendants' motion for summary judgment seeking dismissal of the complaint. Contrary to the contentions of the parties on appeal and cross appeal, Supreme Court properly denied the motion and cross motion with respect to the cause of action for the violation of Labor Law § 240 (1). Although "there is a potential 'causal connection between the object['s] inadequately regulated descent and plaintiff's injury' . . . , neither party is

entitled to summary judgment on plaintiff's Labor Law § 240 (1) [cause of action]. Whether plaintiff's injuries were proximately caused by the lack of a safety device of the kind required by the statute is an issue for a trier of fact to determine" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 11, quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 605).

Contrary to defendants' contention on their cross appeal, the court properly denied their motion with respect to the Labor Law § 241 (6) cause of action insofar as it is premised on alleged violations of 12 NYCRR 23-2.1 (b) and the third sentence of 12 NYCRR 23-9.2 (a). "We have previously held that 12 NYCRR 23-2.1 (b) is sufficiently specific to support liability under section 241 (6)" (*DiPalma v State of New York*, 90 AD3d 1659, 1661), and "[t]he court properly concluded that defendant[s] [were] not prejudiced by [plaintiff's] delay in identifying the alleged violation of [that] section[] of the Industrial Code" (*Gizowski v State of New York*, 66 AD3d 1348, 1349). Moreover, we conclude that there are triable issues of fact whether defendants violated that regulation and whether decedent's injuries were proximately caused thereby.

With respect to the third sentence of 12 NYCRR 23-9.2 (a) we note that it is also sufficiently specific to support recovery under Labor Law § 241 (6) (*see Misicki v Caradonna*, 12 NY3d 511, 520-521), and we further conclude that there are triable issues of fact whether defendants violated that part of the regulation and whether decedent's injuries were proximately caused thereby. We reject defendants' contention that they cannot be held liable, in any event, for an alleged violation of 12 NYCRR 23-9.2 (a) inasmuch as they had no notice of, and were not aware that, the condition at issue was dangerous. Defendants' knowledge that the condition was dangerous is not a precursor to the imposition of liability (*see Harris v Seager*, 93 AD3d 1308, 1309).

We agree with defendants, however, that the court erred in denying their motion with respect to the Labor Law § 241 (6) cause of action insofar as it is premised on an alleged violation of 12 NYCRR 23-9.7 (c), and we therefore modify the order accordingly. That regulation states in pertinent part that "[t]rucks shall not be loaded beyond their rated capacities" (*id.*). Defendants met their initial burden on their motion of establishing that the truck was not overloaded, and plaintiff failed to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

We also agree with defendants that the court erred in denying that part of their motion seeking summary judgment on the Labor Law § 200 and common-law negligence causes of action, and we therefore further modify the order accordingly. It is well settled that, "[w]here the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505). Here, defendants met their burden on the motion of

establishing that they did not direct or control plaintiff's work (*see Jones v County of Erie*, 121 AD3d 1562, 1563), and plaintiff failed to raise a triable issue of fact (*see Sparks v Essex Homes of WNY, Inc.*, 20 AD3d 905, 906). "There is no evidence that defendant[s] gave anything more than general instructions on what needed to be done, not how to do it, and monitoring and oversight of the timing and quality of the work is not enough to impose liability under section 200" or under the common law (*Dalanna v City of New York*, 308 AD2d 400, 400).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1392

CA 13-01879

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

DORSIE KLEM, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SPECIAL RESPONSE CORPORATION, DEFENDANT.

ZURICH INSURANCE COMPANY, APPELLANT.

WHITE FLEISCHNER & FINO, LLP, NEW YORK CITY (JARED T. GREISMAN OF COUNSEL), FOR APPELLANT.

LAW OFFICE OF JACOB P. WELCH, CORNING (ANNA CZARPLES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered September 4, 2013. The order, insofar as appealed from, directed that the settlement proceeds be distributed to plaintiff and plaintiff's attorney, precluded Zurich Insurance Company from exercising any lien over the settlement proceeds, determined that any liens held by Zurich Insurance Company arising out of the subject accident are null and void and determined that Zurich Insurance Company is not entitled to a future offset.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the second through eighth ordering paragraphs are vacated, and the matter is remitted to Supreme Court, Steuben County, for further proceedings in accordance with the following Memorandum: Plaintiff injured her ankle in the course of her employment with Corning Hospital when she exited a van operated by defendant, Special Response Corporation (Special Response), which transported employees to and from a parking lot. As a result of plaintiff's injuries, appellant Zurich Insurance Company (Zurich), the workers' compensation insurer for plaintiff's employer, paid wage and medical benefits to plaintiff in the amount of $114,028 and claimed a lien in that amount (*see* Workers' Compensation Law § 29 [1]). Plaintiff commenced a personal injury action against Special Response and ultimately sought the approval of Supreme Court for a $70,000 settlement offer in the action. Insofar as relevant to this appeal, plaintiff also sought an order directing that any lien imposed by Zurich against the proceeds of the settlement be declared null and void or, in the alternative, an order determining the amount of such lien (*see id.*). The court determined, inter alia, that Zurich was not entitled to assert a lien against the settlement proceeds. We note at the outset that, contrary to plaintiff's contention, Zurich has

standing to pursue this appeal (*see Alam v Taxi Wheels to Lease, Inc.*, 57 AD3d 457, 458; *Castleberry v Hudson Val. Asphalt Corp.*, 70 AD2d 228, 241-242).

Turning to the merits, Zurich contends that it was entitled to assert a lien against the settlement proceeds for amounts paid in workers' compensation benefits, reduced by $50,000 as benefits paid in lieu of first-party benefits (*see* Workers' Compensation Law § 29 [1-a]; *see generally Matter of Buck v Graphic Arts Mut. Ins. Co.*, 19 AD3d 966, 967). We agree with Zurich that the court erred in determining that it is not entitled to a lien against the proceeds of the settlement that plaintiff received as a result of her personal injury action, and we therefore vacate the fifth through eighth ordering paragraphs. Where an individual receiving workers' compensation benefits commences a civil action against a tortfeasor "not in the same employ who caused the injuries giving rise to such benefits . . . , an automatic lien attaches to the proceeds of any recovery, in favor of the [worker's compensation carrier], for any amounts that the [carrier] has paid in compensation benefits, less litigation costs and amounts received in lieu of first[-]party benefits under the no-fault law" (*Miszko v Gress*, 4 AD3d 575, 577, *lv denied* 3 NY3d 606 [internal quotation marks omitted]; *see* § 29 [1-a]).

Here, plaintiff received $114,028 in workers' compensation benefits. Consequently, Zurich was entitled to a lien against the $70,000 settlement proceeds. The amount of such lien is calculated by subtracting from the total amount paid in wage and medical benefits, the $50,000 in payments that Zurich made in lieu of first-party benefits, as well as Zurich's share of an equitable apportionment of "reasonable and necessary expenditures" including attorneys' fees (*see* Workers' Compensation Law § 29 [1], [1-a]; *Matter of Kesick v Ulster County Self Ins. Plan*, 245 AD2d 752, 752-753*; see generally Kelly v State Ins. Fund*, 60 NY2d 131, 139-140). Although the court determined that certain "disbursements" simply listed by plaintiff without supporting documentation or explanation were "reasonable," we conclude that the record is not sufficient for us to review, or to determine ourselves, the amount of Zurich's share of "reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery" (§ 29 [1]). We therefore vacate the second through fourth ordering paragraphs, and we remit the matter to Supreme Court for further proceedings to establish and equitably apportion those "reasonable and necessary" expenditures and arrive at a final valuation of the lien in accordance herewith.

We have reviewed Zurich's remaining contention and note that whether it is entitled to future offsets against the settlement proceeds cannot be determined until the amount of its lien is established (*see* Workers' Compensation Law § 29 [1], [4]).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1394

CA 13-01595

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

KENNETH M. SCHLAU, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, BUFFALO URBAN RENEWAL AGENCY, WESTERN NEW YORK ARENA, LLC, HSBC ARENA, ADT SECURITY SERVICES, INC. (ADT), DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 1.)

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, NEW YORK CITY (GREGORY J. DELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 10, 2013. The order, among other things, vacated the CPLR 3216 (b) (3) notice filed by defendants City of Buffalo, Buffalo Urban Renewal Agency, Western New York Arena, LLC, HSBC Arena and ADT Security Services, Inc. (ADT).

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he touched the handle of an electronically secured door at HSBC Arena and sustained an electric shock. These consolidated appeals concern discovery disputes that have arisen between plaintiff and certain defendants.

In appeal No. 1, defendants City of Buffalo, Buffalo Urban Renewal Agency, Western New York Arena, LLC, HSBC Arena, and ADT Security Services, Inc. (ADT) (collectively, Arena defendants) appeal from an order that, inter alia, granted plaintiff's motion to vacate their CPLR 3216 (b) (3) notice, permitted discovery to continue beyond the 90-day period set forth in the notice, and denied their cross motion seeking a scheduling order. "Supreme Court is vested with broad discretion in supervising disclosure" (*Blumenthal v Tops Friendly Mkts.*, 182 AD2d 1105, 1106), and we conclude that it did not abuse its discretion in granting plaintiff's motion to vacate the CPLR 3216 (b) (3) notice. Discovery was not complete, and the Arena defendants continued to seek disclosure after serving the notice,

which "was sufficient reason in and of itself to" vacate the notice (*Gonzalez v Deutsch Co.*, 193 AD2d 449, 449; *see Little v Long Is. Jewish Med. Ctr.*, 231 AD2d 496, 498). In addition, the court acted within its discretion in scheduling its calendar and setting timetables for discovery when it denied the Arena defendants' cross motion for a scheduling order (*see Matter of Rattner v Planning Commn. of Vil. of Pleasantville*, 156 AD2d 521, 528, *appeal dismissed* 75 NY2d 897). The court also properly exercised its discretion in awarding costs on the motion to plaintiff (*see Greenspan v Rockefeller Ctr. Mgt. Corp.*, 268 AD2d 236, 237; *American Auto. Plan v Corcoran*, 166 AD2d 215, 215).

Contrary to the contention of the Arena defendants in appeal No. 2, we conclude that the court properly denied their motion seeking to limit further disclosure or, alternatively, the appointment of a referee to supervise further disclosure (*see Kogan v Royal Indem. Co.*, 179 AD2d 399, 399). We note that the court was without authority to appoint as a referee the private attorney proposed by the Arena defendants absent plaintiff's consent (*see Ploski v Riverwood Owners Corp.*, 255 AD2d 24, 28).

We agree with the Arena defendants and defendant U. & S. Services, Inc. (U. & S.) in appeal No. 3, however, that the court erred in denying in their entirety their respective motions seeking complete disclosure of plaintiff's unredacted medical records. Plaintiff waived the physician-patient privilege by affirmatively placing his medical and psychological condition in controversy, and he has disclosed all of his postaccident medical records (*see Goetchius v Spavento*, 84 AD3d 1712, 1713). With respect to plaintiff's preaccident medical records, the waiver of the physician-patient privilege extends to the same body parts or conditions that are at issue in the action (*see Geraci v National Fuel Gas Distrib. Corp.*, 255 AD2d 945, 946), but not to " 'information involving unrelated illnesses and treatments' " (*Carter v Fantauzzo*, 256 AD2d 1189, 1190). Upon our review of the disputed medical records, we conclude that the court properly denied the motions insofar as they sought to compel production of plaintiff's hospital and pediatric medical records dated on or before March 19, 1997, inasmuch as those records, in the context of the action herein, are not material and necessary to the defense (*see Chervin v Macura*, 28 AD3d 600, 601), nor are they reasonably likely to lead to relevant evidence (*see DeStrange v Lind*, 277 AD2d 344, 345). We further conclude, however, that given plaintiff's broad allegations of injury, disability, and loss of enjoyment of life, the court abused its discretion in denying the motions of the Arena defendants and U. & S. with respect to plaintiff's hospital and pediatric medical records dated on or after March 20, 1997 (*see Boyea v Benz*, 96 AD3d 1558, 1560). We therefore modify the order in appeal No. 3 accordingly.

We dismiss the appeals from the order in appeal No. 4. The motions of the Arena defendants and U. & S., although denominated motions seeking leave to renew and to reargue, sought leave to reargue only, and the court's order denying those motions is not appealable (*see D&A Constr., Inc. v New York City Hous. Auth.*, 105 AD3d 464, 465;

Coccia v Liotti, 70 AD3d 747, 759, *lv dismissed* 15 NY3d 767).

We also dismiss the appeals from the order in appeal No. 5. The Arena defendants challenge only that part of the order reserving decision on plaintiff's request for sanctions, and that part of the order is not appealable (*see Matter of Trader v State of New York*, 277 AD2d 978, 978). U. & S. challenges the order only insofar as it directs U. & S. to submit an affirmation concerning the medical records in its possession. U. & S. has complied with that directive, thus rendering its appeal moot (*see Lombardo v New York Univ. Med. Ctr.*, 232 AD2d 459, 460).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1395

CA 13-01596

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

KENNETH M. SCHLAU, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, BUFFALO URBAN RENEWAL AGENCY, WESTERN NEW YORK ARENA, LLC, HSBC ARENA, ADT SECURITY SERVICES, INC. (ADT), DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 2.)

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, NEW YORK CITY (GREGORY J. DELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 29, 2013. The order, among other things, denied the motion of defendants City of Buffalo, Buffalo Urban Renewal Agency, Western New York Arena, LLC, HSBC Arena and ADT Security Services, Inc. (ADT) for a protective order seeking general limits on further discovery and the number of depositions.

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

Same Memorandum as in *Schlau v City of Buffalo* ([appeal No. 1] ___ AD3d ___ [Feb. 13, 2015]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1396

CA 13-01597

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

KENNETH M. SCHLAU, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, BUFFALO URBAN RENEWAL AGENCY, WESTERN NEW YORK ARENA, LLC, HSBC ARENA, ADT SECURITY SERVICES, INC. (ADT), U. & S. SERVICES, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.
(APPEAL NO. 3.)

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, NEW YORK CITY (GREGORY J. DELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS CITY OF BUFFALO, BUFFALO URBAN RENEWAL AGENCY, WESTERN NEW YORK ARENA, LLC, HSBC ARENA, AND ADT SECURITY SERVICES, INC. (ADT).

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOEL J. JAVA, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT U. & S. SERVICES, INC.

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

Appeals from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 8, 2013. The order, among other things, denied the motions of defendants City of Buffalo, Buffalo Urban Renewal Agency, Western New York Arena, LLC, HSBC Arena, ADT Security Services, Inc. (ADT) and U. & S. Services, Inc. to compel production of complete copies of plaintiff's medical records previously subpoenaed to Supreme Court.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motions in part and directing plaintiff to produce unredacted copies of his hospital and pediatric medical records dated on or after March 20, 1997, and as modified the order is affirmed without costs.

Same Memorandum as in *Schlau v City of Buffalo* ([appeal No. 1] ___ AD3d ___ [Feb. 13, 2015]).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1397

CA 13-02027

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

KENNETH M. SCHLAU, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, BUFFALO URBAN RENEWAL AGENCY, WESTERN NEW YORK ARENA, LLC, HSBC ARENA, ADT SECURITY SERVICES, INC. (ADT), U. & S. SERVICES, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.
(APPEAL NO. 4.)

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, NEW YORK CITY (GREGORY J. DELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS CITY OF BUFFALO, BUFFALO URBAN RENEWAL AGENCY, WESTERN NEW YORK ARENA, LLC, HSBC ARENA, AND ADT SECURITY SERVICES, INC. (ADT).

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOEL J. JAVA, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT U. & S. SERVICES, INC.

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

Appeals from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 30, 2013. The order, among other things, denied the motions of defendants City of Buffalo, Buffalo Urban Renewal Agency, Western New York Arena, LLC, HSBC Arena, ADT Security Services, Inc. (ADT) and U. & S. Services, Inc. for leave to renew and/or reargue their motions to compel the production of complete copies of plaintiff's medical records.

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

Same Memorandum as in *Schlau v City of Buffalo* ([appeal No. 1] ___ AD3d ___ [Feb. 13, 2015]).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1398

CA 13-02028

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

KENNETH M. SCHLAU, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, BUFFALO URBAN RENEWAL AGENCY, WESTERN NEW YORK ARENA, LLC, HSBC ARENA, ADT SECURITY SERVICES, INC. (ADT), U. & S. SERVICES, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.
(APPEAL NO. 5.)

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, NEW YORK CITY (GREGORY J. DELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS CITY OF BUFFALO, BUFFALO URBAN RENEWAL AGENCY, WESTERN NEW YORK ARENA, LLC, HSBC ARENA, AND ADT SECURITY SERVICES, INC. (ADT).

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOEL J. JAVA, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT U. & S. SERVICES, INC.

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

Appeals from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 30, 2013. The order, among other things, directed plaintiff to produce a privilege log.

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

Same Memorandum as in *Schlau v City of Buffalo* ([appeal No. 1] ___ AD3d ___ [Feb. 13, 2015]).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1426

KA 10-01556

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

TAYE M. BROWN, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered March 11, 2009. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]). We reject defendant's contention that County Court erred in denying his motion seeking to suppress the identification testimony of two witnesses on the ground that the photo array used in the pretrial identification procedures was unduly suggestive. We note that one witness did not make a positive identification of defendant from any photo array at any time. Instead, that witness identified defendant in a lineup procedure. The other witness made a positive identification of defendant from a photo array and again in a lineup procedure conducted 53 days later. Contrary to defendant's contention, the fact that he was photographed from a closer range did not impermissibly draw attention to his photograph in the array (*see People v Brown*, 169 AD2d 934, 935, *lv denied* 77 NY2d 958; *see also People v Smiley*, 49 AD3d 1299, 1300, *lv denied* 10 NY3d 870). In addition, the court properly declined to suppress the lineup identification on the ground that it was influenced by the suggestiveness of the photo array procedure. We conclude that the passage of time between the photographic array and the lineup procedure was sufficient to dissipate any taint of suggestiveness (*see People v Thompson*, 17 AD3d 138, 139, *lv denied* 5 NY3d 795; *People v Allah*, 158 AD2d 605, 606, *lv denied* 76 NY2d 730).

We reject defendant's further contention that the procedure followed by the court with respect to a jury note during jury

deliberations violated the procedure set forth by the Court of Appeals in *People v O'Rama* (78 NY2d 270, 277-278), and we conclude that the court fulfilled its "core responsibilities under CPL 310.30" (*People v Tabb*, 13 NY3d 852, 853). Indeed, the record clearly indicates that defense counsel assisted in formulating responses to the specific factual inquiries presented in the jury note (*see People v Williams*, 50 AD3d 472, 473, *lv denied* 10 NY3d 940). Further, defendant failed to preserve for our review his contention with respect to that part of the jury note requesting readbacks of certain trial testimony (*see People v Alcide*, 95 AD3d 897, 898, *affd* 21 NY3d 687), and we decline to reach that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Lastly, defendant waived his right to be notified of the jury's request for the trial exhibits, to be present for the reading of any such request in a jury note, and to have any input into the manner of delivery of the exhibits to the jury (*see People v King*, 56 AD3d 1193, 1194, *lv denied* 11 NY3d 926).

Entered: February 13, 2015

Frances E. Cafarell
Clerk of the Court