SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

DECEMBER 23, 2021

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

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CA 20-00026

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

SHARAD SHAW, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER AND ROCHESTER POLICE DEPARTMENT,
DEFENDANTS-RESPONDENTS.

VAN HENRI WHITE, ROCHESTER, FOR PLAINTIFF-APPELLANT.

TIMOTHY R. CURTIN, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Monroe County (William K. Taylor, J.), entered May 30, 2019. The judgment dismissed plaintiff's complaint and awarded defendants costs and disbursements.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for, inter alia, false arrest and false imprisonment and assault arising from his arrest following a report of an altercation at a recreation center. Supreme Court denied plaintiff's motion for partial summary judgment on his cause of action for false arrest and false imprisonment, and the matter proceeded to a jury trial. The court denied plaintiff's subsequent motion for a directed verdict with respect to the causes of action for false arrest and false imprisonment and assault and granted that part of defendants' motion seeking a directed verdict with respect to the assault cause of action. The jury thereafter returned a verdict in favor of defendants on the false arrest and false imprisonment cause of action, and plaintiff now appeals from a judgment that, inter alia, dismissed the complaint upon the jury verdict. We affirm.

We note at the outset that plaintiff's appeal from the final judgment brings up for review the court's order denying his motion for partial summary judgment inasmuch as it constitutes a "non-final . . . order which necessarily affects the final judgment" (CPLR 5501 [a] [1]; *see Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390, 1390 [4th Dept 2014]). Nevertheless, we reject plaintiff's contention that the court erred in denying that motion.

"With respect to a cause of action for false arrest or false imprisonment . . . , the elements are that the defendant intended to

confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to the confinement, and that the confinement was not otherwise privileged" (*D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 961 [4th Dept 2014] [internal quotation marks omitted]; *see De Lourdes Torres v Jones*, 26 NY3d 742, 759 [2016]). Where, as here, "there has been an arrest and imprisonment without a warrant, the officer has acted extrajudicially and the presumption arises that such an arrest and imprisonment are unlawful" (*Broughton v State of New York*, 37 NY2d 451, 458 [1975], *cert denied* 423 US 929 [1975]; *see Tsachalis v City of Mount Vernon*, 293 AD2d 525, 525 [2d Dept 2002]). Thus, "[t]he cases uniformly hold that where the arrest or imprisonment is extrajudicial . . . it is not necessary to allege want of probable cause in a false imprisonment action" (*Broughton*, 37 NY2d at 458; *see D'Amico*, 120 AD3d at 961). "Indeed, the burden is on the defendant to prove the opposite" (*Broughton*, 37 NY2d at 458; *see Snead v Bonnoil*, 166 NY 325, 328 [1901]). "The existence of probable cause serves as a legal justification for the arrest and an affirmative defense to the claim" for false arrest and false imprisonment (*Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]; *see Broughton*, 37 NY2d at 458).

Here, we conclude that, although plaintiff was arrested without a warrant, he was not entitled to summary judgment because defendants raised a triable issue of fact whether there was probable cause to support the arrest (*see Hernandez v Denny's Corp.*, 177 AD3d 1372, 1374 [4th Dept 2019]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Plaintiff was arrested for obstructing governmental administration in the second degree, which occurs when a person "intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference" (Penal Law § 195.05). "The interference must be in part at least, physical in nature . . . , but criminal responsibility should attach to minimal interference set in motion to frustrate police activity" (*People v Dumay*, 23 NY3d 518, 524 [2014] [internal quotation marks omitted]; *see People v Adair*, 177 AD3d 1357, 1358 [4th Dept 2019], *lv denied* 34 NY3d 1125 [2020]).

The evidence submitted by defendants in opposition to plaintiff's motion included the deposition testimony of the arresting officer, who testified that he responded to a report of a fight at a recreation center. Upon his arrival, a witness identified plaintiff, who was then walking away from the recreation center, as an individual who was involved in the fight; the officer was not aware at that time whether plaintiff had been an assailant in the fight. As the dissent concedes, the officer "approached" plaintiff to investigate plaintiff's involvement in the fight. The officer then stopped "[a]bout 4 to 6 feet" in front of plaintiff before plaintiff continued walking and made contact with him. The dissent emphasizes that the officer believed he had reasonable suspicion at that time, but that belief is irrelevant to the analysis here (*see generally People v Robinson*, 97 NY2d 341, 349 [2001]).

Regardless of the officer's subjective belief, prior to plaintiff

making contact with him, the arresting officer was exercising his common-law right of inquiry, which " 'is activated by a founded suspicion that criminal activity is afoot' " (*People v Hollman*, 79 NY2d 181, 184 [1992], quoting *People v De Bour*, 40 NY2d 210, 223 [1976]; *see People v Moore*, 6 NY3d 496, 498-499 [2006]). Furthermore, unlike the dissent, we read defendants' opposition papers on the motion and their brief on appeal as arguing, if somewhat inarticulately, this contention: that the arresting officer was conducting a common-law inquiry when he attempted to speak with plaintiff in order to investigate plaintiff's role in the altercation at the recreation center. Accordingly, this contention is squarely presented for our review. We conclude that the officer's act of "stepping in front of [plaintiff] in an attempt to engage him was a continuation of the officer's own common-law right to inquire, not a seizure" (*Matter of Shariff H.*, 123 AD3d 714, 716 [2d Dept 2014], *lv denied* 25 NY3d 902 [2015]; *see People v Terry*, 124 AD3d 409, 409-410 [1st Dept 2015], *lv denied* 25 NY3d 993 [2015]; *see generally People v Bora*, 83 NY2d 531, 534-536 [1994]). Thus, the standard was not, as the dissent asserts, whether the officer had a sufficient quantum of knowledge at that point "to support a reasonable suspicion that *plaintiff* had *committed* a crime," but, rather, whether the officer had "a founded suspicion that criminal activity [wa]s present" (*De Bour*, 40 NY2d at 215; *see Moore*, 6 NY3d at 498-499; *Hollman*, 79 NY2d at 184-185; *People v Benjamin*, 51 NY2d 267, 270 [1980]). Defendants met that standard by providing evidence that the arresting officer was aware that plaintiff had been involved in an altercation, despite the fact that the officer did not know whether plaintiff was the victim or the aggressor (*see People v Bachiller*, 93 AD3d 1196, 1196 [4th Dept 2012], *lv dismissed* 19 NY3d 861 [2012]; *People v Chertok*, 303 AD2d 519, 520 [2d Dept 2003]; *see generally Moore*, 6 NY3d at 497-498; *People v Dibble*, 43 AD3d 1363, 1363-1364 [4th Dept 2007], *lv denied* 9 NY3d 1032 [2008]).

Further, while "[a]n individual to whom a police officer addresses a question has a constitutional right not to respond" (*People v Howard*, 50 NY2d 583, 586 [1980], *cert denied* 449 US 1023 [1980]), that person does not have the right to attempt to "walk through"—and thereby make physical contact with—the officer (*see e.g. Adair*, 177 AD3d at 1357-1358). Here, the officer described plaintiff's physical contact as more than merely incidental and similar to the degree of contact that occurs when a moving basketball player makes contact with a stationary player in an attempt to occupy the same space "and the referee calls for a blocking foul." Defendants also submitted the criminal complaint filed against plaintiff, which likewise alleged that plaintiff's attempt to walk through the officer prompted the officer to arrest plaintiff for obstructing governmental administration in the second degree. Based on the above, we conclude that defendants raised a triable issue of fact whether there was probable cause to arrest plaintiff, and the court thus properly denied plaintiff's motion for partial summary judgment (*see De Lourdes Torres*, 26 NY3d at 759; *Gisondi v Town of Harrison*, 72 NY2d 280, 283 [1988]; *Hernandez*, 177 AD3d at 1374).

To the extent that plaintiff further contends that the court erred in denying that part of his motion seeking a directed verdict with respect to his cause of action for false arrest and false imprisonment, we reject that contention. On a motion for a directed verdict, the court must accept as true the nonmoving party's evidence and afford that party "every favorable inference that may reasonably be drawn from the facts as presented . . . and grant the motion only if there is no rational process by which the [jury] could have found in [the non-movant's] favor" (*Kleist v Stern*, 174 AD3d 1451, 1452 [4th Dept 2019]; *see Stillman v Mobile Mtn., Inc.*, 166 AD3d 1580, 1581 [4th Dept 2018]; *Bolin v Goodman*, 160 AD3d 1350, 1351 [4th Dept 2018]). "[A] directed verdict should be granted only if it would be 'utterly irrational' for the jury to render a verdict in favor of the [non-movant]" (*Estate of Smalley v Harley-Davidson Motor Co. Group LLC*, 170 AD3d 1549, 1551 [4th Dept 2019], quoting *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

Affording defendants "every favorable inference that may reasonably be drawn from the facts as presented" (*Kleist*, 174 AD3d at 1452), we conclude that it would not have been "utterly irrational" (*Cohen*, 45 NY2d at 499) for the jury to determine that plaintiff, by making physical contact with the officer in an attempt to "walk through" him as the officer was investigating the report to which he was dispatched, frustrated police activity to such an extent that the officer reasonably believed that plaintiff committed the offense of obstructing governmental administration in the second degree (*see Dumay*, 23 NY3d at 524; *People v Bigelow*, 66 NY2d 417, 423 [1985]). Inasmuch as the existence of probable cause constitutes a complete defense to a false arrest or false imprisonment cause of action (*see De Lourdes Torres*, 26 NY3d at 759; *Gisondi*, 72 NY2d at 283), the court properly denied plaintiff's motion insofar as it sought a directed verdict on his cause of action for false arrest and false imprisonment.

The court also properly denied plaintiff's motion insofar as it sought a directed verdict on the assault cause of action and properly granted defendants' motion for a directed verdict with respect to that cause of action. Negligent assault is not a cognizable claim in New York (*see Smiley v North Gen. Hosp.*, 59 AD3d 179, 180 [1st Dept 2009]; *Salimbene v Merchants Mut. Ins. Co.*, 217 AD2d 991, 994 [4th Dept 1995]), and thus the court properly granted defendants' motion for a directed verdict with respect to plaintiff's assault cause of action insofar as it was premised on allegations of negligence (*see Cohen*, 45 NY2d at 499; *Estate of Smalley*, 170 AD3d at 1551). With respect to the claim of intentional assault, "there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact" (*Cotter v Summit Sec. Servs., Inc.*, 14 AD3d 475, 475 [2d Dept 2005] [internal quotation marks omitted]; *see Mykytyn v Hannaford Bros. Co.*, 141 AD3d 1153, 1154-1555 [4th Dept 2016]). The record, however, lacks the requisite proof of such conduct. There was no evidence adduced at trial that plaintiff "bec[a]me concerned that [the officer was] about to cause a harmful or offensive bodily contact" or that the officer engaged in a "menacing act or gesture that cause[d] the plaintiff to believe that a harmful or offensive bodily contact

[was] about to occur" (PJI 3:2).

We also reject plaintiff's contention that the court abused its discretion in denying his motion pursuant to CPLR 3025 (c) to amend the pleading to conform to the proof at trial by including a cause of action for battery (*see generally Broadway Warehouse Co. v Buffalo Barn Bd., LLC*, 143 AD3d 1238, 1240-1241 [4th Dept 2016]; *General Elec. Co. v Towne Corp.*, 144 AD2d 1003, 1004 [4th Dept 1988], *lv dismissed* 73 NY2d 994 [1989]). "Although leave to amend [the pleadings] should be freely granted, it will not be granted if the proposed amendment is without merit or would cause prejudice to the opposing party" (*Fingerlakes Chiropractic v Maggio*, 269 AD2d 790, 791 [4th Dept 2000]; *see Guest v City of Buffalo, Dept. of Sts. Sanitation*, 109 AD2d 1080, 1081 [4th Dept 1985]). Here, defendants made strategic decisions throughout the trial and based their defense on the allegations in the complaint, and plaintiff "failed to establish a reasonable excuse for [his] delay of nearly [nine] years in making the motion" (*Tinch-McNeill v Alcohol & Drug Dependency Servs., Inc.*, 96 AD3d 1407, 1408 [4th Dept 2012]).

Finally, we reject plaintiff's contention that the court erred in denying his request to include in its charge to the jury a quotation from a federal case. The court, relying on the pattern jury instructions, properly stated the law relevant to the particular facts in issue, and the language requested by plaintiff would have "confuse[d] or incompletely convey[ed] the germane legal principles to be applied" (*J.R. Loftus, Inc. v White*, 85 NY2d 874, 876 [1995]).

All concur except PERADOTTO, J.P., and TROUTMAN, J., who dissent and vote to modify in accordance with the following memorandum: The majority's reasoning rests entirely on unpreserved, alternate grounds for affirmance adopted sua sponte by the majority. For that reason, we respectfully dissent. Considering the contentions that are properly before us, we conclude that Supreme Court erred in denying plaintiff's motion for partial summary judgment on his cause of action for false arrest and false imprisonment. We would therefore modify the judgment accordingly and remit the matter for a trial on damages.

On the day of the incident, the 16-year-old plaintiff was at the Flint Street Recreation Center (recreation center) in the City of Rochester when he was struck by an unknown assailant. An employee of the recreation center called 911, but plaintiff left and began walking home before the police arrived. While plaintiff was walking away, a police officer arrived at the scene and spoke to the employee, who pointed to plaintiff and identified him as a person who had been involved in the altercation. The officer did not ask the employee any follow-up questions to determine the nature of plaintiff's involvement. Instead, the officer determined, on the basis of the information he had, that he then had at least reasonable suspicion to forcibly stop plaintiff, and he approached plaintiff for the purpose of determining whether he was the victim of the assault or the assailant. In response to the officer's questions, plaintiff asked to be left alone and continued walking home. The officer then stepped in front of plaintiff, placing himself in plaintiff's path. Plaintiff

walked into the officer, who immediately took plaintiff to the ground and, according to the officer, arrested plaintiff for obstructing governmental administration in the second degree (Penal Law § 195.05) for failing to answer the officer's questions and for making physical contact. After plaintiff was released from jail, he went to the emergency room where he was diagnosed with a fractured jaw. The obstructing governmental administration charge was eventually dismissed.

Plaintiff commenced this action to recover damages for, inter alia, false arrest and false imprisonment and thereafter moved for partial summary judgment on that cause of action. In opposition to the motion, defendants contended only that the officer, based on the information that he received from the employee, "had a reasonable suspicion that plaintiff was the suspected assailant in the fight" and "initiated a lawful '*Terry* stop' of . . . plaintiff to temporarily detain him to question and investigate plaintiff's role in the fight" (*see generally Terry v Ohio*, 392 US 1, 20-27 [1968]). Once plaintiff refused to answer the officer's questions and made physical contact with him, the officer arrested him for obstructing governmental administration. The court denied the motion, concluding only that there were "issues of fact."

On appeal, plaintiff contends that the court erred in denying his motion for partial summary judgment on the ground that there were issues of fact whether the officer's confinement of him was privileged. Defendants respond, as they did in opposition to the motion, that the officer engaged in a lawful forcible stop from the outset of the encounter based on reasonable suspicion that plaintiff had committed a crime at the recreation center: "In this case it was clear to the [c]ourt . . . that there was a reasonable suspicion for [the o]fficer . . . to conduct an investigatory '*Terry* stop' " of plaintiff. According to defendants, when plaintiff refused the officer's demand to stop and answer questions and made physical contact with the officer, the officer then had probable cause to arrest plaintiff for obstructing governmental administration in the second degree for obstructing the lawful forcible stop. We agree with plaintiff.

The elements of a cause of action for false arrest or imprisonment are "that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to the confinement, and that the confinement was not otherwise privileged" (*Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]; *see Zegarelli-Pecheone v New Hartford Cent. Sch. Dist.*, 132 AD3d 1258, 1259 [4th Dept 2015]). Where, as here, "there has been an arrest and imprisonment without a warrant, the officer has acted extrajudicially and the presumption arises that such an arrest and imprisonment are unlawful" (*Broughton v State of New York*, 37 NY2d 451, 458 [1975], *cert denied* 423 US 929 [1975]; *see Tsachalis v City of Mount Vernon*, 293 AD2d 525, 525 [2d Dept 2002]). Thus, plaintiff met his initial burden on his motion for partial summary judgment by showing that his arrest was made without a warrant, thereby shifting the burden to defendants to raise an issue of fact whether the officer

had probable cause for the arrest (*see Fakoya v City of New York*, 115 AD3d 790, 791 [2d Dept 2014]; *Ostrover v City of New York*, 192 AD2d 115, 118 [1st Dept 1993]).

Contrary to the majority, we conclude that defendants failed to raise an issue of fact whether the officer had probable cause to arrest plaintiff for obstruction of governmental administration. "[A] defendant may not be convicted of obstructing governmental administration or interfering with an officer in the performance of an official function unless it is established that the police were engaged in authorized conduct" (*People v Lupinacci*, 191 AD2d 589, 590 [2d Dept 1993]; *see People v Sumter*, 151 AD3d 556, 557 [1st Dept 2017]; *People v Perez*, 47 AD3d 1192, 1194 [4th Dept 2008]). In determining whether police conduct was authorized, we apply the four-tier framework established by the Court of Appeals in *People v De Bour* (40 NY2d 210 [1976]) and consider whether the conduct "was justified in its inception and . . . reasonably related in scope to the circumstances which rendered its initiation permissible" (*id.* at 222). The common-law right to inquire "is activated by a founded suspicion that criminal activity is afoot and permits . . . [a police officer] to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure" (*id.* at 223). A forcible stop, which defendants have steadfastly argued is what occurred here, is a separate level of contact permitting a significantly greater degree of intrusion (*see People v Hollman*, 79 NY2d 181, 184-185 [1992]; *De Bour*, 40 NY2d at 223) and is not authorized unless the officer has "reasonable suspicion that a crime has been, is being, or is about to be committed" by that person (*People v Martinez*, 80 NY2d 444, 447 [1992]; *see De Bour*, 40 NY2d at 223). Reasonable suspicion is the "quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*People v Cantor*, 36 NY2d 106, 112-113 [1975]; *see Martinez*, 80 NY2d at 448). "It may not rest on equivocal or 'innocuous behavior' that is susceptible of an innocent as well as a culpable interpretation" (*People v Brannon*, 16 NY3d 596, 602 [2011]). Thus, to justify a forcible stop, "the police officer must indicate specific and articulable facts which, along with any logical deductions, reasonably prompted that intrusion" (*Cantor*, 36 NY2d at 113; *see Brannon*, 16 NY3d at 602).

Here, we conclude that the officer did not have probable cause to arrest plaintiff for obstructing governmental administration in the second degree based on his alleged obstruction of a lawful forcible stop. Even viewing the submissions in the light most favorable to defendants, we conclude that the objective evidence before the officer established only that plaintiff had been identified as a person who had been involved in a fight. The officer's deposition testimony that the nature of plaintiff's involvement was such that plaintiff could have been a victim or a suspect and that the officer needed more information before making that determination demonstrated that the officer's quantum of knowledge at that point was insufficient to support a reasonable suspicion that *plaintiff* had *committed* a crime

(*see People v Coronado*, 139 AD3d 452, 452-453 [1st Dept 2016]; *People v Reyes*, 69 AD3d 523, 524-526 [1st Dept 2010], *appeal dismissed* 15 NY3d 863 [2010]; *cf. Martinez*, 80 NY2d at 448). Defendants' submissions in opposition further support the conclusion that the officer lacked the requisite reasonable suspicion to conduct a forcible stop. Thus, the officer was not authorized to forcibly stop plaintiff and lacked probable cause to arrest plaintiff for obstructing governmental administration in the second degree for plaintiff's purported obstruction of such an unauthorized forcible stop. Plaintiff's confinement therefore was not privileged, and plaintiff was entitled to partial summary judgment on his cause of action for false arrest and false imprisonment (*see generally Lupinacci*, 191 AD2d at 590; *Tetreault v State of New York*, 108 AD2d 1072, 1074 [3d Dept 1985]).

In our view, the majority does not affirm on the ground raised by the parties and decided by the trial court. Instead, the majority concludes that the officer had probable cause to arrest plaintiff for obstructing governmental administration because the officer lawfully exercised the common-law right to inquire and plaintiff interfered with the officer's investigation by making contact with him. From our perspective, however, that theory is an alternative ground for affirmance that the majority has raised sua sponte (*see generally Misicki v Caradonna*, 12 NY3d 511, 519 [2009]). Moreover, that ground was not presented to the trial court in the first instance and therefore is not properly before us (*see Canandaigua Natl. Bank & Trust Co. v Acquest S. Park, LLC*, 178 AD3d 1374, 1376 [4th Dept 2019]; *Breau v Burdick*, 166 AD3d 1545, 1549 [4th Dept 2018]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

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KA 18-00637

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE JENNINGS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN R. LEWIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered February 20, 2018. The judgment convicted defendant, upon a jury verdict, of murder in the second degree. The judgment was reversed by order of this Court entered February 11, 2021 in a memorandum decision (191 AD3d 1429), and the People on May 13, 2021 were granted leave to appeal to the Court of Appeals from the order of this Court (37 NY3d 957), and the Court of Appeals on November 18, 2021 reversed the order and remitted the case to this Court for consideration of the facts and issues raised but not determined on the appeal to this Court (37 NY3d 1078 [2021]).

Now, upon remittitur from the Court of Appeals and having considered the issues raised but not determined on the appeal to this Court,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed.

Memorandum: This case is before us upon remittitur from the Court of Appeals (*People v Jennings*, 37 NY3d 1078 [2021], *revg People v Jennings*, 191 AD3d 1429 [4th Dept 2021]). Defendant and a codefendant were charged with murder in the second degree (Penal Law § 125.25 [1]), by acting in concert and intentionally causing the death of the victim. Following a joint trial, the codefendant was acquitted, but defendant was convicted as charged. We previously reversed the judgment convicting defendant, concluding that defendant was denied meaningful representation at trial because there was no reasonable and legitimate trial strategy for his defense counsel's failure to object to the repugnant verdicts (*Jennings*, 191 AD3d at 1429-1430). The Court of Appeals reversed, stating that defense counsel's "failure to challenge the verdict as repugnant did not render the representation ineffective because the issue was not clear-

cut and dispositive given the jury charge" (*Jennings*, 37 NY3d at 1079). The Court of Appeals remitted the matter to this Court for "consideration of the facts and issues raised but not determined" previously (*id.*).

After review of defendant's contentions upon remittitur, we affirm the judgment of conviction. Contrary to defendant's contention, we conclude that Supreme Court did not err in admitting in evidence photographs depicting the fatal injuries sustained by the victim. The photographs were "relevant to a material issue at trial, and elucidated the testimony of the medical examiner regarding the cause of death" (*People v Lawson*, 114 AD3d 962, 963 [2d Dept 2014], *lv denied* 23 NY3d 1064 [2014]; *see People v Trinidad*, 107 AD3d 1432, 1432 [4th Dept 2013], *lv denied* 21 NY3d 1046 [2013]). Defendant failed to preserve for our review his related contention that the limiting instruction given by the court did not mitigate the allegedly prejudicial effect of the photographs (*see People v Delbrey*, 179 AD3d 1292, 1296 [3d Dept 2020], *lv denied* 35 NY3d 969 [2020]; *People v Irby*, 140 AD3d 1319, 1323 [3d Dept 2016], *lv denied* 28 NY3d 931 [2016]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to the further contention of defendant, defense counsel was not ineffective for failing to object to certain comments made by the prosecutor during summation or for failing to move for a mistrial based on those comments. The challenged statements "were fair comment on the evidence and did not constitute prosecutorial misconduct" (*People v Inman*, 134 AD3d 1434, 1435 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]; *see People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]).

Additionally, we reject defendant's contention that defense counsel was ineffective in failing to cross-examine an eyewitness about her mental health history inasmuch as defendant failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged failure" (*People v Nicholson*, 26 NY3d 813, 831 [2016]). Finally, to the extent that defendant contends that defense counsel was ineffective for failing to make a record of the court's rulings concerning the witness's mental health records, the contention is based on matters outside the record and thus must be raised in a motion pursuant to CPL article 440 (*see generally People v Maffei*, 35 NY3d 264, 269-270 [2020]).

Entered: December 23, 2021 Ann Dillon Flynn
Clerk of the Court

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

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CAF 19-02066

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

IN THE MATTER OF KEVIN DYLAN RIGDON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KELLY L. CLOSE, STEVEN A. CLOSE, AND
STEFANIE M. RIGDON, RESPONDENTS-RESPONDENTS.

LINDSAY P. QUINTILONE, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR PETITIONER-APPELLANT.

MICHAEL W. STIVERS, GENESEO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Livingston County (Dennis S. Cohen, J.), entered October 2, 2019 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of a prior custody and visitation order.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated and the matter is remitted to Family Court, Livingston County, for further proceedings in accordance with the following memorandum: Petitioner father commenced this proceeding pursuant to Family Court Act article 6 seeking to modify a prior custody and visitation order by allowing him to communicate in writing and by phone with the subject children while he was incarcerated. Family Court sua sponte dismissed the petition without a hearing. The father appeals from the order of disposition as of right (*see* Family Ct Act § 1112 [a]; *Matter of Foster v Bartlett*, 59 AD3d 976, 977 [4th Dept 2009], *lv denied* 12 NY3d 710 [2009]), and we now reverse.

"A hearing is not automatically required whenever a parent seeks modification of a custody [or visitation] order" (*Matter of Esposito v Magill*, 140 AD3d 1772, 1773 [4th Dept 2016], *lv denied* 28 NY3d 904 [2016] [internal quotation marks omitted]). Rather, "[t]he petitioner must make a sufficient evidentiary showing of a change in circumstances to require a hearing on the issue whether the existing custody [and visitation] order should be modified" (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417-1418 [4th Dept 2003] [internal quotation marks omitted]; *see Matter of Gelling v McNabb*, 126 AD3d 1487, 1487 [4th Dept 2015]).

In this case, the court dismissed the petition without a hearing on the ground that the father failed to fulfill one of the purported

prerequisites for seeking modification of visitation contained in the prior order because the father had not completed substance abuse treatment. We agree with the father that the court erred in that regard. The prior order appropriately "does not require [the father] to complete a parenting program and [engage in] mental health [and substance abuse] counseling as a prerequisite to filing a petition for modification of custody or visitation" (*Matter of Cramer v Cramer*, 143 AD3d 1264, 1264 [4th Dept 2016], *lv denied* 28 NY3d 913 [2017]; *see generally Matter of Allen v Boswell*, 149 AD3d 1528, 1529-1530 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]). Rather, the prior order states that the father's "engagement in and completion of a parenting program" and his "consistent engagement in mental health and substance abuse treatment" would constitute a change in circumstances sufficient to support a future petition for modification of the order (*see Cramer*, 143 AD3d at 1264-1265).

Here, the father showed, and the court did not conclude otherwise, that he completed a parenting program and had consistently engaged in mental health treatment. Contrary to the court's conclusion, however, the other component of the prior order that would constitute a change in circumstances requires only the father's *consistent engagement in*, not *completion of*, substance abuse treatment. We conclude on this record that the father showed that he consistently engaged in substance abuse treatment while incarcerated and that he appropriately sought to continue such engagement upon his transfer to a different correctional facility. We thus conclude that the father made a sufficient evidentiary showing of a change in circumstances under the prior order (*see generally Matter of DiPaolo v Avery*, 93 AD3d 1240, 1241 [4th Dept 2012]).

We also agree with the father that the court erred to the extent that it determined on this record that visitation in the form of communication in writing and by phone would be detrimental to the children. Visitation with a noncustodial parent is presumed to be in the best interests of the child, even when the parent seeking visitation is incarcerated (*see Matter of Granger v Misercola*, 21 NY3d 86, 90-91 [2013]), but "the presumption may be rebutted when it is shown, 'by a preponderance of the evidence, that visitation would be harmful to the child' " (*Matter of Fewell v Ratzel*, 121 AD3d 1542, 1542 [4th Dept 2014], quoting *Granger*, 21 NY3d at 92). Moreover, "[a] determination of the [child's] best interests should only be made after a full evidentiary hearing unless there is sufficient information before the court to enable it to undertake an independent comprehensive review of the [child's] best interests" (*Matter of Brown v Divelbliss*, 105 AD3d 1369, 1370 [4th Dept 2013] [internal quotation marks omitted]).

Here, we conclude that the record is not sufficient to determine whether the visitation requested by the father would be harmful to the children (*see id.*). None of the parties opposing his petition "presented any evidence rebutting the presumption that [the requested] visitation with the father is in the child[ren's] best interests, and the record does not otherwise contain any evidence rebutting that

presumption" (*id.*).

Based on the foregoing, we reverse the order, reinstate the petition, and remit the matter to Family Court for a hearing thereon.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

636

CA 20-00854

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

IN THE MATTER OF KERRI W.S., PSYD., AND
CARL J.S., JR., J.D., M.A., INDIVIDUALLY AND
ON BEHALF OF THEIR MINOR SON T.S.,
PETITIONERS-PLAINTIFFS-RESPONDENTS,

V OPINION AND ORDER

HOWARD ZUCKER, IN HIS OFFICIAL CAPACITY AS
COMMISSIONER OF HEALTH OF STATE OF NEW YORK,
NEW YORK STATE DEPARTMENT OF HEALTH,
RESPONDENTS-DEFENDANTS-APPELLANTS,
ET AL., RESPONDENTS-DEFENDANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

PATRICIA FINN ATTORNEY, P.C., NANUET (PATRICIA FINN OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Yates County (Daniel J. Doyle, J.), entered April 24, 2020 in a CPLR article 78 proceeding and declaratory judgment action. The order, among other things, denied in part the motion of respondents-defendants-appellants to dismiss the petition-complaint against them.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion insofar as it sought to dismiss pursuant to CPLR 3211 (a) (7) the petition-complaint against respondents-defendants-appellants except with respect to the claim challenging 10 NYCRR 66-1.1 (l) on legislative delegation grounds and granting judgment in favor of respondents-defendants-appellants as follows:

It is ADJUDGED AND DECLARED that 10 NYCRR 66-1.1 (l) does not violate the separation of powers doctrine or otherwise exceed the regulatory powers of its promulgator;

and as modified the order is affirmed without costs.

Opinion by NEMOYER, J.:

The legislature has determined that vaccines save lives. It has therefore established a mandatory "program of immunization . . . to raise to the highest reasonable level the immunity of the children of

the state against communicable diseases" (Public Health Law § 613 [1] [a]). And by promulgating 10 NYCRR 66-1.1 (l), respondents-defendants-appellants (defendants) merely implemented the legislature's policy in a manner entirely consistent with the legislative design. We therefore hold that 10 NYCRR 66-1.1 (l) is valid, does not violate the separation of powers doctrine, and does not exceed the authority of its promulgator.

I

"[T]he elimination of communicable diseases through vaccination [is] 'one of the greatest achievements' of public health in the 20th century" (*Bruesewitz v Wyeth LLC*, 562 US 223, 226 [2011]). Indeed, "routine vaccination is 'one of the most spectacularly effective public health initiatives this country has ever undertaken' " (*id.* at 245 [Breyer, J., concurring]).

Take measles – one of the diseases at issue in this case. The statistics are sobering. "[P]rior to the vaccine, measles killed seven to eight *million* children each year [across the world]" (*F.F. v State of New York*, 194 AD3d 80, 86 n 3 [3d Dept 2021], *appeal dismissed and lv denied* 37 NY3d 1040 [2021] [emphasis added]). Children were not the only victims of measles; in fact, measles is believed to have killed up to one-third of Hawaii's entire population in the 1850s (*see* Stanford Shulman et al., *The Tragic 1824 Journey of the Hawaiian King and Queen to London: History of Measles in Hawaii*, 28:8 Pediatric Infectious Disease Journal 728 [2009]). Thanks to the overwhelming success of the vaccine, however, measles was deemed eradicated from the United States in the year 2000 (*see F.F.*, 194 AD3d at 82), and only 73,400 people worldwide – of any age – are thought to have died from measles in 2015 (*see Global Burden of Disease Study 2015*, 388 Lancet 1459 [2016]).

And the smallpox vaccine actually banished that dreaded disease from the face of the earth altogether. As the Centers for Disease Control and Prevention (CDC) explains, "the last natural outbreak of smallpox in the United States occurred in 1949. In 1980, the World Health Assembly declared smallpox eradicated . . . , and no cases of naturally occurring smallpox have happened since."

"But these gains are fragile" (*Bruesewitz*, 562 US at 246 [concurrence]). Starting "in the 1970's and 1980's vaccines became, one might say, victims of their own success. They had been so effective in preventing infectious diseases that the public became much less alarmed at the threat of those diseases" (*id.* at 226 [majority opinion of Scalia, J.]). And the development of effective policy interventions for those who resist vaccination has flummoxed officials ever since organized opposition to vaccines first took root in the "apathy or ignorance[of] millions" (L 1968, ch 1094 § 1; *see generally Bruesewitz*, 562 US at 227-230 [majority], 246-248 [concurrence]).

Mandatory child vaccination statutes are among the most common policy responses to vaccine resistance (*see* Sean Coletti, *Taking*

Account of Partial Exemptors in Vaccination Law, Policy, and Practice, 36 Conn L Rev 1341, 1341 and n 2 [2004]). According to an early survey of the topic, "[v]accination has been compulsory in England since 1854, and the . . . 1898 [statute] requires every child born in England to be vaccinated within six months of its birth. [Vaccination] became compulsory in Bavaria in 1807; Denmark, 1810; Sweden, 1814; Würtemberg, Hesse, and other German states, 1818; Prussia, 1835; Roumania, 1874; Hungary, 1876; and Ser[b]ia, 1881" (*Matter of Viemeister*, 179 NY 235, 240 [1904]). In New York, the first mandatory child vaccination statute was enacted in 1860 (*see id.* at 237, citing L 1860, ch 438 [page 761]). Today, all parents in New York are required to vaccinate their children against certain specified diseases (*see* Public Health Law § 2164 [2]), and no unvaccinated child may attend any school or day care, public or private, for more than 14 days (*see* § 2164 [7] [a]).

The rationale for mandatory child vaccination statutes is well established. " '[T]he causative agents for . . . preventable childhood illnesses are ever present in the environment, waiting for the opportunity to attack the unprotected individual' " (*Bruesewitz*, 562 US at 246 [concurrence]) and, as the events of the past 24 months have demonstrated, "vaccines are effective in preventing outbreaks of disease *only* if a large percentage of the population is vaccinated" (*id.* at 227 [majority] [emphasis added]). "Even a brief period when vaccination programs are disrupted can lead to children's deaths" (*id.* at 246 [concurrence]).

The danger of failing to maintain herd immunity is no idle concern. For example, starting "in the fall of 2018, a nationwide measles outbreak occurred that was largely concentrated in communities in Brooklyn and Rockland County with 'precipitously low immunization rates' " (*F.F.*, 194 AD3d at 82; *see C.F. v New York City Dept. of Health & Mental Hygiene*, 191 AD3d 52, 56-57 [2d Dept 2020]). It is commonly accepted that the 2018 measles outbreak was fueled by sub-herd immunity rates traceable to a statutory provision – Public Health Law § 2164 former (9) – that had allowed parents to exempt their children from otherwise mandatory vaccinations on religious grounds (*see C.F.*, 191 AD3d at 56-58, 71). The legislature reacted decisively to the recent measles outbreak by repealing the religious exemption outright (*see* L 2019, ch 35, § 1 [repealing subdivision (9) of Public Health Law § 2164]), and the Third Department rejected a constitutional challenge to the repeal of the religious exemption (*see F.F.*, 194 AD3d at 89).

The only remaining exception to the mandatory child vaccination statute is the so-called medical exemption (*see* Public Health Law § 2164 [8]). The medical exemption provides: "If any physician licensed to practice medicine in this state certifies that such immunization *may be detrimental to a child's health*, the requirements of [the mandatory vaccination statute] shall be inapplicable until such immunization is found no longer to be detrimental to the child's health" (*id.* [emphasis added]). The statute does not define the phrase "may be detrimental to a child's health."

Following the repeal of the religious exemption, defendants – exercising their statutory authority to "adopt and amend rules and regulations to effectuate the provisions and purposes of [the mandatory vaccination statute]" (Public Health Law § 2164 [10]) – enacted a package of regulatory amendments designed to ensure the appropriate use of medical exemptions going forward. Within that package was a new regulatory provision that defined the phrase "may be detrimental to a child's health" in Public Health Law § 2164 (8) to mean that "a physician has determined that a child has a medical contraindication or precaution to a specific immunization consistent with ACIP guidance or other nationally recognized evidence-based standard of care" (10 NYCRR 66-1.1 [l]).[1]

II

Petitioners-plaintiffs (plaintiffs) enrolled their son, T.S., in a school for disabled students operated by respondents-defendants Monroe One BOCES, Fairport and Mark Frenzel, in his official capacity as principal of that school (respondents). In October 2019, after the effective date of 10 NYCRR 66-1.1 (l), plaintiffs submitted four certifications from T.S.'s physician to the school's principal that purported to medically exempt T.S. from a particular vaccine mandated by Public Health Law § 2164 (2) (b). The certifications, however, did not state that the subscribing physician had "determined that [T.S.] has a medical contraindication or precaution to a specific immunization," nor that such a determination would be "consistent with ACIP guidance or other nationally recognized evidence-based standard of care" (10 NYCRR 66-1.1 [l]). The school's medical director therefore determined – after seeking additional information from T.S.'s physician – that T.S. was not entitled to a medical exemption under Public Health Law § 2164 (8). Citing the medical director's determination, the principal then rejected plaintiffs' proffered medical exemption certifications and effectively barred T.S. from the school as required by section 2164 (7) (a).

Plaintiffs thereafter filed the instant lawsuit. Notably, both the parties and Supreme Court have consistently characterized plaintiffs' lawsuit as a hybrid declaratory judgment action and CPLR article 78 proceeding. The petition-complaint (complaint) sets forth an array of allegations that we will examine in greater detail below. In lieu of answering, defendants moved to dismiss the complaint against them pursuant to, inter alia, CPLR 3211 (a) (7). There is no indication in the record, however, that defendants ever sought a declaration in their favor on any issue.

The court issued a written order addressing defendants' motion to dismiss, among other things. As relevant here, the court construed the complaint to challenge two specific regulations (10 NYCRR 66-1.1 [l] and 10 NYCRR 66-1.3 [c]) on a theory of improper legislative delegation, i.e., a claim that the regulations exceeded defendants'

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[1] ACIP is the CDC's "Advisory Committee on Immunization Practices" (10 NYCRR 66-1.1 [f] [1]).

regulatory authority, violated the separation of powers doctrine, and unconstitutionally usurped the legislature's exclusive prerogative to make difficult policy decisions on contested issues. Applying the Court of Appeals' settled framework for analyzing legislative delegation challenges, Supreme Court held that 10 NYCRR 66-1.3 (c) did not transgress defendants' proper regulatory domain and thus was not invalid.[2] Conversely, the court held that plaintiffs had stated a cognizable legislative delegation challenge to 10 NYCRR 66-1.1 (l). The court therefore granted defendants' motion insofar as it sought under CPLR 3211 (a) (7) to dismiss plaintiffs' purported challenge to 10 NYCRR 66-1.3 (c), but it denied defendants' motion insofar as it sought under CPLR 3211 (a) (7) to dismiss plaintiffs' challenge to 10 NYCRR 66-1.1 (l). The court issued no declarations in its order, and because the merits of plaintiffs' legislative delegation challenge to 10 NYCRR 66-1.1 (l) was left for future adjudication, there is no dispute that the order did not finally determine the hybrid action/proceeding.

Defendants now appeal from the non-final order, purportedly as of right. On appeal, defendants argue that the court's legislative delegation analysis regarding 10 NYCRR 66-1.1 (l) was fundamentally flawed, and they ask us to declare that 10 NYCRR 66-1.1 (l) does not unconstitutionally exceed their regulatory authority or otherwise violate the separation of powers doctrine. Defendants also ask us to declare that 10 NYCRR 66-1.3 (c) does not unconstitutionally exceed their regulatory authority or otherwise violate the separation of powers doctrine. For the reasons that follow, we agree with defendants as to 10 NYCRR 66-1.1 (l), but we decline to issue any declaration as to 10 NYCRR 66-1.3 (c).

III

Several procedural considerations require our attention at the outset.

A

The first procedural difficulty arises from the fact that defendants are purporting to appeal *as of right* from an *interlocutory order* entered in a *hybrid* CPLR article 78 proceeding and declaratory

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[2] 10 NYCRR 66-1.3 (c) says that "[a] principal . . . shall not admit a child to school unless [his or her] parent[] . . . has furnished the school with . . . [a] signed, completed medical exemption form approved by the [State Health Department] or NYC Department of Education from a physician licensed to practice medicine in New York State certifying that immunization may be detrimental to the child's health, containing sufficient information to identify a medical contraindication to a specific immunization and specifying the length of time the immunization is medically contraindicated. The medical exemption must be reissued annually. The principal . . . may require additional information supporting the exemption."

judgment action. And while interlocutory orders are often appealable as of right in declaratory judgment actions (*see* CPLR 5701 [a] [2]), they are never appealable as of right in article 78 proceedings (*see* CPLR 5701 [b] [1]). That dichotomy calls into question the appealability of the order now before us.

The applicability of the CPLR 5701 (b) (1) bar, and by extension defendants' right to take this appeal, turns initially on whether the underlying lawsuit is properly classified as a declaratory judgment action, an article 78 proceeding, or both (*see Matter of Allstate Life Ins. Co. v Superintendent of Ins. of State of N.Y.*, 99 AD2d 278, 280 [1st Dept 1984], *affd* 64 NY2d 962 [1985]). If the lawsuit is properly classified as a declaratory judgment action only or an article 78 proceeding only, then the statutory text instantly resolves the appealability dilemma. Conversely, if the lawsuit is properly classified as a true hybrid action/proceeding, then defendants' right to appeal hinges on whether they are seeking review of a determination related to the declaratory judgment component of the case or the article 78 component of the case (*see Allstate Life Ins. Co.*, 99 AD2d at 280; *Matter of Yorktown Smart Growth v Town of Yorktown*, 168 AD3d 957, 958 [2d Dept 2019]; *Matter of Hart v Town Bd. of Town of Huntington*, 114 AD3d 680, 680-682 [2d Dept 2014], *lv denied* 24 NY3d 908 [2014]).

Discerning the true nature of the underlying lawsuit and its relationship to the instant appeal is not a simple inquiry, however. The complaint fails to assert discrete, non-duplicative, and legally cognizable causes of action that succinctly identify the governmental action being challenged, the governmental actor responsible for that action, the precise legal theory animating the challenge, the statutory vehicle by which that challenge is asserted, or the specific relief sought. Although the complaint purports to assert two separate causes of action, a review of their respective paragraphs reveals overlapping theories and allegations that defy neat compartmentalization, and the prayer for relief neither references the purported causes of action nor tracks the complaint in any other sense.

The complaint can be translated into justiciable claims only after isolating the specific governmental actions to which plaintiffs object, linking each such action to a specific defendant or respondent, discerning the gravamen of plaintiffs' objection to each challenged action, and thereupon applying well-established legal principles to determine whether the claims as thus formulated are best characterized as declaratory claims, article 78 claims, or both (*see generally Matter of Grocholski Cady Rd., LLC v Smith*, 171 AD3d 102, 107-108 [4th Dept 2019]). Upon performing that review, we can identify only two discrete governmental actions to which plaintiffs assert any cognizable challenge: (1) defendants' promulgation of 10 NYCRR 66-1.1 (l), which in plaintiffs' view is facially invalid because it exceeds defendants' regulatory authority, violates the separation of powers doctrine, and usurps the legislature's prerogative; and (2) respondents' rejection of plaintiffs' proffered medical exemption certifications, which plaintiffs claim was

arbitrary, capricious, and done in violation of lawful procedure. Plaintiffs' first claim, i.e., their facial challenge to the validity of 10 NYCRR 66-1.1 (l), is properly raised *only* in a declaratory judgment action (*see Matter of Carney v New York State Dept. of Motor Vehs.*, 133 AD3d 1150, 1151 n [3d Dept 2015], *affd* 29 NY3d 202 [2017]; *Matter of Spence v Shah*, 136 AD3d 1242, 1243 n 2 [3d Dept 2016]). By contrast, plaintiffs' second claim, i.e., their challenge to respondents' rejection of their proffered medical exemption certifications, is properly raised in an article 78 proceeding (*see C.F.*, 191 AD3d at 64-71; *Matter of Lynch v Clarkstown Cent. School Dist.*, 155 Misc 2d 846, 847, 856 [Sup Ct, Rockland County 1992]).

Consequently, at a high level of generality, this lawsuit is properly characterized as a true hybrid article 78 proceeding and declaratory judgment action. After all, it makes both declaratory and article 78 claims. The lawsuit, however, is not a hybrid as against any particular defendant or respondent. As against defendants, the lawsuit is a declaratory judgment action only; as against respondents, it is an article 78 proceeding only. It follows that the article 78 component of this hybrid case is not at issue on this appeal because the article 78 claim is not asserted against the appealing parties, i.e., defendants. Rather, this appeal necessarily involves only the declaratory claim asserted against the appealing parties (again, defendants). Thus, because this appeal involves only the declaratory side of a hybrid lawsuit, the CPLR 5701 (b) (1) bar does not apply (*see Allstate Life Ins. Co.*, 99 AD2d at 280; *Hart*, 114 AD3d at 680-682). Defendants' as-of-right appeal, which is otherwise proper under CPLR 5701 (a) (2) (iv), is therefore retained (*see Allstate Life Ins. Co.*, 99 AD2d at 280; *cf. Yorktown Smart Growth*, 168 AD3d at 958).

B

The next procedural issue is the propriety of defendants' appellate request for declarations notwithstanding their failure to seek declarations in the motion court. Ordinarily, an appellate request for affirmative relief not sought below would be unpreserved, and we would not reach it except under certain limited circumstances. For the reasons that follow, however, we have both the power and the duty within the unique context of a CPLR 3211 (a) (7) motion in a declaratory judgment action to declare the rights of the parties in appropriate circumstances notwithstanding their failure to seek such relief below.

In a non-declaratory case, a motion to dismiss under CPLR 3211 (a) (7) generally assesses only "whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). If so, the motion is denied and the case proceeds toward final adjudication. In declaratory judgment actions, however, CPLR 3211 (a) (7) empowers a court to grant judgment on the pleadings notwithstanding the absence of a motion for summary judgment (*see Boryszewski v Brydges*, 37 NY2d 361, 365 [1975]; *St. Lawrence Univ. v Trustees of Theol. School of St. Lawrence Univ.*, 20 NY2d 317, 325 [1967]). As the Court of Appeals explained, upon "determin[ing] that the case is properly one for declaratory relief, the court may

properly proceed, on a motion to dismiss [under CPLR 3211 (a) (7)] in an action for a declaratory judgment, to a consideration of the . . . plaintiff's claims on the merits" (*Boryszewski*, 37 NY2d at 365), and to thereupon immediately "declare the rights of the parties, whatever they may be" (*St. Lawrence Univ.*, 20 NY2d at 325).

The utility of this procedure in declaratory judgment actions, which has existed since at least 1937 (*see Dun & Bradstreet, Inc. v City of New York*, 276 NY 198, 206-207 [1937]), lies in its promotion of judicial economy. As the Second Department wrote in a 1957 case, perhaps "orderly procedure should require the service of answers, and [the making of] appropriate motions" in declaratory cases, but courts are nevertheless "reluctant . . . to compel the [parties] to resort to . . . unnecessary procedure[s where the] conceded facts are before [the court] now, as fully and as completely as though answers had been served and appropriate motions for affirmative judgments had been made" (*Civil Serv. Forum v New York City Tr. Auth.*, 4 AD2d 117, 129-130 [2d Dept 1957], *affd* 4 NY2d 866 [1958]).

Because CPLR 3211 (a) (7) does double duty in declaratory judgment actions as both a facial sufficiency screening mechanism and an accelerated-judgment mechanism, a motion to dismiss a declaratory claim under that provision must be analyzed in three steps (*see generally Matter of Jacobs v Cartalemi*, 156 AD3d 635, 637-638 [2d Dept 2017], *lv denied* 32 NY3d 903 [2018]; *Plaza Dr. Group of CNY, LLC v Town of Sennett*, 115 AD3d 1165, 1166 [4th Dept 2014]; *Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150-1151 [2d Dept 2011]). At the first step, the "only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether [any party] is entitled to a [particular] declaration" (*County of Monroe v Clough Harbour & Assoc., LLP*, 154 AD3d 1281, 1282 [4th Dept 2017] [internal quotation marks omitted]). If the answer to that question is no – for example, where the complaint is "so imprecise and its allegations so inexactly stated that . . . it fails to state an identifiable cause of action . . . on which declaratory relief may be granted, [in] either [party's] favor" (*Boryszewski*, 37 NY2d at 368) – then the CPLR 3211 (a) (7) motion should be granted, the complaint dismissed, and no declaration issued (*see e.g. Boryszewski*, 37 NY2d at 368; *McFadden v Schneiderman*, 137 AD3d 1618, 1619 [4th Dept 2016]; *Nasa Auto Supplies v 319 Main St. Corp.*, 133 AD2d 265, 266 [2d Dept 1987]). Conversely, if the answer to the step-one question is yes, i.e., "where [the relevant] cause of action is sufficient to invoke the court's power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy" (*Jacobs*, 156 AD3d at 637 [internal quotation marks omitted]), then the inquiry moves to step two.

At step two, the question is whether factual issues preclude a summary determination of the parties' rights (*see Dodson v Town Bd. of the Town of Rotterdam*, 182 AD3d 109, 112 [3d Dept 2020]). If yes, then the CPLR 3211 (a) (7) motion is denied, no declaration is made at that juncture, and the case continues on its ordinary course (*see*

Dodson, 182 AD3d at 112; *see e.g Sonne v Board of Trustees of Vil. of Suffern*, 67 AD3d 192, 203 and n 1 [2d Dept 2009]). If, however, "there are no questions of fact and the only issues presented are questions of law or statutory interpretation" (*Dodson*, 182 AD3d at 112), then the inquiry moves to step three.

At step three, the court denies the CPLR 3211 (a) (7) motion in order to "retain[] jurisdiction of the controversy," and it then immediately "declare[s] the rights of the parties, whatever they may be" (*St. Lawrence Univ.*, 20 NY2d at 325). In other words, at step three, the court effectively "treat[s]" the motion to dismiss for failure to state a cause of action "as a motion for a declaration" and proceeds accordingly (*Plaza Dr. Group of CNY, LLC*, 115 AD3d at 1166; *see Fekishazy v Thomson*, 204 AD2d 959, 962-963 and n 2 [3d Dept 1994], *appeal dismissed* 84 NY2d 844 [1994], *lv denied* 84 NY2d 812 [1995]). For these purposes, the caselaw's occasional reference to a "motion for a declaration" is just shorthand for a "motion for judgment on the pleadings," a procedural device that was explicitly recognized by the former Civil Practice Act and that remains a fixture of federal practice (*see* Fed Rules Civ Pro rule 12 [c]; *see generally Chavez v Occidental Chem. Corp.*, 35 NY3d 492, 497 n 1 [2020], *rearg denied* 36 NY3d 962 [2021]).

The motion court has "exceedingly broad discretion" at step three to "declare the rights and legal relations of the parties," and a party "will not . . . be denied [an appropriate declaration] merely because he does not ask for [the declaration] to which he might be entitled" (*Cahill v Regan*, 5 NY2d 292, 298 [1959] [internal quotation marks omitted]; *see Rivera v Russi*, 243 AD2d 161, 166 [1st Dept 1998]). Indeed, the motion court's power at step three follows the case to the Appellate Division and even to the Court of Appeals, both of which "could . . . and very properly [do]" issue declarations in eligible cases even when the parties "did not claim such a right in their complaint or urge it upon the [lower court]," and irrespective of whether the CPLR 3211 (a) (7) motion was granted or denied below (*Cahill*, 5 NY2d at 298; *see Garcia v New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601, 621 n 4 [2018]; *Brown v State of New York*, 144 AD3d 88, 91 [4th Dept 2016]; *New Yorkers for Constitutional Freedoms v New York State Senate*, 98 AD3d 285, 288, 297 [4th Dept 2012], *lv denied* 19 NY3d 814 [2012]).

Applying the three-step framework here leads us to conclude that defendants are entitled to a declaration as to the validity of 10 NYCRR 66-1.1 (l), but not as to the validity of 10 NYCRR 66-1.3 (c). At step one, plaintiffs' legislative-delegation challenge to 10 NYCRR 66-1.1 (l) is "sufficient to invoke the court's power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy" (*Jacobs*, 156 AD3d at 637 [internal quotation marks omitted]; *see e.g. Garcia*, 31 NY3d at 606-617, 621 and n 4 [adjudicating a legislative delegation challenge to an administrative vaccine mandate]). Conversely, to the extent that the complaint could be read to challenge any other regulation (such as 10 NYCRR 66-1.3 [c]), or to challenge 10 NYCRR 66-1.1 (l) on any ground except improper legislative delegation, any such challenge

would be "so imprecise and its allegations so inexactly stated that . . . it [would] fail[] to state an identifiable cause of action . . . on which declaratory relief may be granted[in] either [party's] favor" (*Boryszewski*, 37 NY2d at 368; *see McFadden*, 137 AD3d at 1619). Thus, while plaintiffs' legislative delegation challenge to 10 NYCRR 66-1.1 (l) states a cause of action and moves on to step two of the analysis, the complaint against defendants fails to state a cause of action in any other respect and is subject to summary dismissal to that extent.

At step two, it is undisputed that plaintiffs' legislative delegation challenge to 10 NYCRR 66-1.1 (l) does not implicate any material factual disputes. We thus arrive at step three, which requires us to uphold the court's denial of defendants' motion insofar as it sought to dismiss plaintiffs' legislative delegation challenge to 10 NYCRR 66-1.1 (l) under CPLR 3211 (a) (7), and to thereupon declare the rights of the parties on that particular issue.

IV

Fashioning the appropriate declaration at step three is, of course, the "merits" of this case, i.e., whether 10 NYCRR 66-1.1 (l) exceeds defendants' regulatory authority and thereby unconstitutionally usurps the legislature's prerogative to set policy on contested social issues. We now reject plaintiffs' legislative delegation challenge to 10 NYCRR 66-1.1 (l).

The separation of powers inherent in our tripartite form of government bars the legislative branch from "delegat[ing] *all* of its law-making powers to the executive branch" (*Boreali v Axelrod*, 71 NY2d 1, 9 [1987] [emphasis added]). The constitutional proscription against improper legislative delegation has never been applied in New York with the rigor found at the federal level and in other states, however, for it is well established that "there has never been in this state that sharp line of demarcation between the functions of the three branches of government which obtains in some other jurisdictions" (*Matter of Trustees of Vil. of Saratoga Springs v Saratoga Gas, Elec. Light & Power Co.*, 191 NY 123, 134 [1908]).

The "modern view" of legislative delegation theory, explained Judge Titone in *Boreali* (71 NY2d at 10), comes from *Matter of Levine v Whalen* (39 NY2d 510, 515-516 [1976]):

> "Because of the constitutional provision that '[t]he legislative power of this State shall be vested in the Senate and the Assembly' (NY Const, art III, § 1), the Legislature cannot pass on its law-making functions to other bodies . . . , but there is no constitutional prohibition against the delegation of power, with reasonable safeguards and standards, to [the executive branch] to administer the law as enacted by the Legislature . . . The delegation of power to make the law, which necessarily involves a discretion as to what it shall be, cannot be done, but there is no valid objection to the conferring of authority or discretion as to a law's execution, to be exercised under and in

pursuance of it.

> "The Legislature may constitutionally confer discretion upon [the executive branch] only if it limits the field in which that discretion is to operate and provides standards to govern its exercise. This does not mean, however, that a precise or specific formula must be furnished in a field where flexibility and the adaptation of the legislative policy to infinitely varying conditions constitute the essence of the program. The standards or guides need only be prescribed in so detailed a fashion as is reasonably practicable in the light of the complexities of the particular area to be regulated, since necessity fixes a point beyond which it is unreasonable and impracticable to compel the Legislature to prescribe detailed rules . . . Indeed, in many cases, the Legislature has no alternative but to enact statutes in broad outline, leaving to [executive] officials enforcing them the duty of arranging the details . . . More to the point, it is not always necessary that . . . legislation prescribe a specific rule of action and, where it is difficult or impractical for the Legislature to lay down a definite and comprehensive rule, a reasonable amount of discretion may be delegated to the [executive] officials."

The Court of Appeals has consistently applied *Levine*'s formulation of legislative delegation theory in the ensuing decades (*see e.g. Matter of LeadingAge N.Y., Inc. v Shah*, 32 NY3d 249, 259-261 [2018]; *Matter of Acevedo v New York State Dept. of Motor Vehs.*, 29 NY3d 202, 221 [2017]; *Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 NY3d 249, 254 [2004]; *Rent Stabilization Assn. of N.Y. City v Higgins*, 83 NY2d 156, 169 [1993], *cert denied* 512 US 1213 [1994]). In its most recent treatment of the topic, the high Court explained that: (1) "[a]dministrative agencies . . . are permitted to adopt regulations that go beyond the text of [their] enabling legislation, so long as those regulations are consistent with the statutory language and underlying purpose" (*Matter of Juarez v New York State Off. of Victim Servs.*, 36 NY3d 485, 491 [2021] [internal quotation marks omitted]); and (2) an agency's delegated rulemaking, if "reasonably designed to further the regulatory scheme, . . . cannot be disturbed by the courts unless it is arbitrary, illegal or runs afoul of the enabling legislation or constitutional limits . . . regardless of our assessment of the wisdom of the agency's approach" (*id*. at 492-493 [internal quotation marks omitted]). And while there are four so-called " 'coalescing circumstances' " that "*may* inform the [legislative delegation] inquiry" (*LeadingAge N.Y., Inc.*, 32 NY3d at 260-261, quoting *Boreali*, 71 NY2d at 11 [emphasis added]), "these are not 'criteria that should be rigidly applied in every case' but rather 'overlapping, closely related factors' that, viewed together, *may* signal that an agency has exceeded its authority" (*id.* at 261, quoting *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 23 NY3d 681, 696 [2014] [emphasis added]).

Ultimately, the dispositive questions in every legislative delegation analysis are whether "the agency has been empowered to regulate the matter in question" and whether the agency has "usurped the legislative prerogative" (*id.*). So long as the first question is answered in the affirmative and the second question is answered in the negative, "the separation of powers inquiry is at an end" and the challenged provision must be upheld (*id.*).

Here, exercising their legislatively conferred power to "adopt and amend rules and regulations to effectuate the provisions and purposes of [the mandatory child vaccination statute]" (Public Health Law § 2164 [10]), defendants adopted a regulation (10 NYCRR 66-1.1 [l]) that merely defines a phrase ("may be detrimental to a child's health") that appears in, but is not defined by, the operative statutory text (Public Health Law § 2164 [8]). The definition set forth in the regulation is entirely consistent with the statutory text, and it operates simply to align the statutorily designated eligibility criteria for medical exemptions with generally accepted medical paradigms. In other words, the regulation forecloses medical exemptions based on anything other than a "nationally recognized evidence-based standard of care" (10 NYCRR 66-1.1 [l]). The regulation will thereby necessarily decrease the number of unvaccinated children, and *that* plainly advances the legislative goal of implementing "a program of immunization . . . to raise to the *highest reasonable level* the immunity of the children of the state against communicable diseases" (§ 613 [1] [a] [emphasis added]).

There is no legislative delegation claim under these circumstances. As the Court of Appeals has repeatedly held in materially indistinguishable cases, a regulatory agency does not transgress the limits of its delegated authority or otherwise trespass upon the legislative prerogative simply by exercising its explicit power to define an otherwise undefined statutory term in a manner that is consistent with the statutory text, that harmonizes with the overall statutory scheme, and that undeniably furthers the legislature's articulated policy goals (*see Juarez*, 36 NY3d at 491-495; *Rent Stabilization Assn. of N.Y. City*, 83 NY2d at 168-170; *Matter of New York Pub. Interest Research Group v Town of Islip*, 71 NY2d 292, 305-306 [1988]; *see also Consolidated Edison Co. of N.Y. v City of New Rochelle*, 140 AD2d 125, 131-133 [2d Dept 1988]). Indeed, the specific holding of *Juarez* can be applied directly here merely by transposing the challenged provision: "Because [Public Health Law § 2164 (8) limits the availability of medical exemptions to vaccines that 'may be detrimental to a child's health'] but is silent with regard to the parameters of what ['may be detrimental to a child's health'], the legislature necessarily granted [defendants] the authority to determine the scope of that term. In other words, the definition of the term ['may be detrimental to a child's health'] was left to [defendants'] discretion" (36 NY3d at 493). Given *Juarez*'s squarely controlling holding and rationale, we need not mechanistically apply each *Boreali* factor seriatim in order to ascertain the validity of 10 NYCRR 66-1.1 (l).

Supreme Court's three rationales for concluding otherwise cannot

bear scrutiny. *First*, the court found it significant that the New York Legislature had not followed the California Legislature's lead in codifying the substantive standard of 10 NYCRR 66-1.1 (l). To our mind, however, the legislative enactments or non-enactments of a sister state have no bearing on a legislative delegation challenge to a New York regulation. In any event, "[l]egislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences" (*Acevedo*, 29 NY3d at 225 [internal quotation marks omitted]), and legislative inaction is entitled to virtually no weight at all where, as here, the legislature has specifically authorized the implementing agency to enact comprehensive interstitial regulations consistent with the legislative purpose (*see* Public Health Law § 2164 [10]). The affirmative grant of interstitial regulatory authority itself explains why the legislature did not codify the substantive standard of 10 NYCRR 66-1.1 (l) – there was no practical need to do so in light of the agency's interstitial regulatory power.

Second, the court noted that the *college-student* vaccination statute (Public Health Law § 2165 [8]) contains some language similar to 10 NYCRR 66-1.1 (l), and it thus reasoned that the absence of similar language from the *child* vaccination statute (§ 2164 [8]) demonstrates that the legislature intended to exclude the substantive standard of 10 NYCRR 66-1.1 (l) from the ambit of section 2164. The court's reasoning, however, overlooks the key fact that section 2165 was enacted over 20 years *after* section 2164 (*compare* L 1989, ch 405, § 1 *with* L 1966, ch 994, § 1), and the legislature's inclusion of more specific language in section 2165 actually *validates* defendants' subsequent decision to adopt a consistent definition of the cognate provision in section 2164. Far from frustrating the legislative will, defendants' exercise of their interstitial regulatory authority to align the interpretation of an undefined phrase in section 2164 with the legislature's definition of that same phrase in the subsequently enacted section 2165 only reinforced the legislative will.

Third, the court reasoned that 10 NYCRR 66-1.1 (l) constituted a "comprehensive set of rules" written on a "blank slate" that should have been enacted by the legislature in order to satisfy the demands of tripartite government. On that point, the court simply misapprehended the regulation and the regulatory context; the "comprehensive set of rules" at issue were written by the legislature in the form of Public Health Law § 2164, and the regulatory provision at issue – 10 NYCRR 66-1.1 (l) – merely defined a key phrase selected by the legislature in that "comprehensive set of rules." Such a definitional regulation is the very embodiment of proper interstitial rule making (*see e.g. Juarez*, 36 NY3d at 491-495). In short, there was no "blank slate" here, and the court erred in finding otherwise.

CONCLUSION

Accordingly, the order should be modified by granting defendants' motion insofar as it sought pursuant to CPLR 3211 (a) (7) to dismiss the complaint against defendants except with respect to plaintiffs' claim challenging 10 NYCRR 66-1.1 (l) on legislative delegation

grounds and granting judgment in favor of defendants as follows: It is ADJUDGED AND DECLARED that 10 NYCRR 66-1.1 (l) does not violate the separation of powers doctrine or otherwise exceed the regulatory powers of its promulgator.

All concur except SMITH, J.P. and CARNI, J., who concur in the result only.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

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CA 20-01338

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

STEPHEN T. DIVITO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD L. FIANDACH, DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHENEY LAW FIRM, PLLC, GENEVA (DAVID D. BENZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), dated August 8, 2020. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action to recover the full amount of a retainer agreement with defendant, an attorney who represented him in relation to criminal charges. Supreme Court previously granted defendant's motion to dismiss the complaint; however, on appeal, we reinstated the cause of action alleging that the retainer agreement is unconscionable (*Divito v Fiandach*, 160 AD3d 1356, 1357-1358 [4th Dept 2018]). Subsequently, the court denied defendant's motion for summary judgment dismissing the complaint. We reverse, grant the motion, and dismiss the complaint.

"Whether a contract or any clause of the contract is unconscionable is a matter for the court to decide against the background of the contract's commercial setting, purpose, and effect" (*Wilson Trading Corp. v David Ferguson, Ltd.*, 23 NY2d 398, 403 [1968]; *see Laidlaw Transp. v Helena Chem. Co.*, 255 AD2d 869, 870 [4th Dept 1998]). "A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988] [internal quotation marks omitted]; *see Matter of Lawrence*, 24 NY3d 320, 336-337 [2014], *rearg denied* 24 NY3d 1215 [2015]). " 'The most important factor [in determining procedural unconscionability] is whether the

client was fully informed upon entering the agreement' " (*Divito*, 160 AD3d at 1358, quoting *Lawrence*, 24 NY3d at 337). "[T]he attorney must show that the client executed the contract with 'full knowledge of all the material circumstances known to the attorney . . . and that the contract was one free from fraud on [the attorney's] part or misconception on the part of [the client]' " (*Lawrence*, 24 NY3d at 337, quoting *Matter of Howell*, 215 NY 466, 473-474 [1915]).

Here, defendant met his initial burden on the motion by establishing that the retainer agreement is not procedurally unconscionable. Plaintiff's deposition testimony, which defendant submitted in support of the motion, demonstrated that plaintiff had ample opportunity to become fully informed about the retainer agreement and to make a meaningful choice about representation. Plaintiff did not dispute in his deposition that, as defendant averred, defendant previously represented plaintiff in relation to a charge of driving while intoxicated for which a similar fixed-fee retainer agreement was used. Indeed, plaintiff admitted that defendant previously represented him at least once. Defendant's submissions on the motion also established that the retainer agreement here was not presented to plaintiff until nine days after the drunk-driving incident giving rise to the criminal charges against him and several days after plaintiff had been released from the hospital. By that time, plaintiff had been arraigned on the felony complaint, and therefore was aware of the charges of aggravated vehicular homicide against him for the deaths of two persons. Before signing the retainer agreement, plaintiff's family had contacted at least one other attorney on plaintiff's behalf, and plaintiff negotiated terms of the agreement with defendant. Furthermore, although defendant submitted plaintiff's interrogatory answers in which plaintiff stated that he relied on defendant's statements that defendant had never had a client go to prison and that he would work on plaintiff's case "24/7," plaintiff conceded during his deposition that defendant never guaranteed that he would avoid prison and that plaintiff understood defendant's statements regarding the amount of time defendant would spend on plaintiff's case to be hyperbole.

In opposition, plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

684

CA 20-01029

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

THE CINCINNATI INSURANCE COMPANY, AS SUBROGEE OF
60 LBC, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ACADIA INSURANCE COMPANY, DEFENDANT-RESPONDENT.

VAHEY GETZ, LLP, ROCHESTER (JARED K. COOK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

O'CONNOR FIRST, ALBANY (KATHLEEN A. BARCLAY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Timothy J. Walker, A.J.), entered July 13, 2020. The order granted the motion of defendant to dismiss the complaint and dismissed the complaint.

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

Memorandum: Plaintiff, as subrogee of 60 LBC, LLC (60 LBC), commenced this action seeking damages arising from defendant's allegedly improper disclaimer of insurance coverage to 60 LBC as an additional insured on a liability policy issued by defendant to nonparty Red Cedar Arborists & Landscapers, Inc. (Red Cedar). Defendant moved to dismiss the complaint based on res judicata, among other grounds. Supreme Court granted the motion, and we now reverse.

In 2015, Irene Frey sustained injuries after she slipped and fell on property owned by 60 LBC, which was insured by plaintiff. 60 LBC had retained Red Cedar to clear snow and ice from the area where Frey fell. Pursuant to their contract, Red Cedar was required to defend and indemnify 60 LBC for any injuries caused by its actions or omissions. The contract also required Red Cedar to obtain insurance coverage for itself with 60 LBC as an additional insured. Red Cedar procured coverage from defendant, and the policy contained a blanket additional insured provision that, as defendant now concedes, covers 60 LBC.

Frey thereafter sued 60 LBC for negligence, and 60 LBC requested a defense and indemnification from defendant on the basis that it was an additional insured on the Red Cedar policy. Defendant disclaimed

coverage to 60 LBC on the ground that it was not an additional insured. 60 LBC was defended in the Frey action by its own carrier, i.e., plaintiff, and commenced a third-party action against Red Cedar, asserting breach of contract based on Red Cedar's failure to defend and indemnify 60 LBC. The third-party complaint further alleged that Red Cedar breached the contract by failing to obtain coverage for 60 LBC as an additional insured.

Eventually, Frey's action against 60 LBC and the third-party action were settled in a global agreement that was reached during mediation. Pursuant to the agreement, Frey received $350,000 from Red Cedar and $50,000 from 60 LBC. Defendant paid Frey on behalf of Red Cedar, and plaintiff paid her on behalf of 60 LBC.

Plaintiff, as subrogee of 60 LBC, thereafter commenced this action against defendant asserting, inter alia, a cause of action for breach of contract. The complaint alleges in relevant part that defendant breached the insurance contract by disclaiming coverage to 60 LBC as an additional insured. Defendant moved to dismiss the complaint, contending that 60 LBC's coverage claim against defendant was encompassed in the global settlement of Frey's action and the third-party action. We agree with plaintiff that the court erred in granting the motion.

"Subrogation, an equitable doctrine, allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]; *see Phoenix Ins. Co. v Stamell*, 21 AD3d 118, 121 [4th Dept 2005]). Here, plaintiff, as subrogee of 60 LBC, stands in the shoes of 60 LBC and "is subject to whatever rules of estoppel would apply to the insured" (*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 665 [1990]; *see State Farm Mut. Auto. Ins. Co. v Polge*, 258 AD2d 911, 911 [4th Dept 1999]).

"Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action" (*Parker v Blauvelt Volunteer Fire* Co., 93 NY2d 343, 347 [1999]; *see Simmons v Trans Express, Inc*., 37 NY3d 107, 111 [2021]). "One linchpin of res judicata is an identity of parties actually litigating successive actions against each other: the doctrine applies only when a claim *between* the parties has been previously brought to a final conclusion" (*City of New York v Welsbach Elec. Corp*., 9 NY3d 124, 127 [2007] [internal quotation marks omitted]). "Th[at] rule is grounded in public policy concerns, including fairness to the parties, and is 'intended to ensure finality, prevent vexatious litigation and promote judicial economy' " (*Simmons*, 37 NY3d at 111, quoting *Xiao Yang Chen v Fischer*, 6 NY3d 94, 100 [2005]).

The court determined that plaintiff is barred by res judicata from pursuing 60 LBC's coverage claim against defendant because it was resolved in the global settlement reached during mediation. We disagree. Defendant was not a party to the underlying personal injury action or the third-party action, and the release resulting from the

settlement of those actions makes no mention of any claims directly against defendant by 60 LBC or anyone else. Nor does the stipulation of discontinuance. The breach of contract claim asserted by 60 LBC against Red Cedar in the third-party action is separate and distinct from plaintiff's breach of contract cause of action against defendant here.

Although the third-party complaint against Red Cedar mentions defendant's disclaimer of coverage to 60 LBC as an additional insured, that was only in relation to 60 LBC's claim that "Red Cedar failed to provide a benefit required" under the snowplow contract. The third-party complaint did not assert a cause of action directly against defendant or otherwise allege that defendant wrongly disclaimed coverage to 60 LBC as an additional insured.

In sum, 60 LBC's coverage claim against defendant is not barred by res judicata because it was not encompassed in the global settlement reached during mediation. Inasmuch as 60 LBC still has a valid coverage claim against defendant, plaintiff, having paid $50,000 on 60 LBC's behalf to settle the Frey action, may proceed against defendant on the coverage claim as subrogee of 60 LBC.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

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CA 20-01024

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

JAMES KAVANAUGH, HELEN KAVANAUGH AND
MATTHEW G. KAVANAUGH,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

MARY ELLEN KAVANAUGH, DEFENDANT-RESPONDENT,
NEIL KAVANAUGH, ALSO KNOWN AS CORNELIUS
KAVANAUGH, MARTHA KAVANAUGH, CONSUMERS
BEVERAGES, INC., AND KAVCON DEVELOPMENT LLC,
DEFENDANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

GROSS SHUMAN, P.C., BUFFALO (HUGH C. CARLIN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

ADAMS LECLAIR LLP, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT MARTHA KAVANAUGH.

CONNORS LLP, BUFFALO (VINCENT E. DOYLE, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT NEIL KAVANAUGH, ALSO KNOWN AS CORNELIUS KAVANAUGH.

GARVEY & GARVEY, BUFFALO (DENNIS J. GARVEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

BARCLAY DAMON LLP, BUFFALO (JAMES P. MILBRAND OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS CONSUMERS BEVERAGES, INC. AND KAVCON DEVELOPMENT LLC.

Appeal and cross appeals from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered June 5, 2020. The order denied the motion of plaintiffs for partial summary judgment and the cross motion of defendants Consumers Beverages, Inc. and Kavcon Development LLC for summary judgment.

It is hereby ORDERED that said cross appeals by defendants Neil Kavanaugh, also known as Cornelius Kavanaugh, and Martha Kavanaugh are unanimously dismissed and the order is modified on the law by granting the motion insofar as made by plaintiffs James Kavanaugh and Helen Kavanaugh and granting judgment in their favor as follows:

> It is ADJUDGED and DECLARED that the transfers of shares and ownership interests in defendants Consumers

Beverages, Inc. and Kavcon Development LLC from defendants Martha Kavanaugh and Mary Ellen Kavanaugh to defendant Neil Kavanaugh, also known as Cornelius Kavanaugh, are null and void,

and as modified the order is affirmed without costs.

Memorandum: This appeal is part of an extended intra-family litigation concerning the ownership of two family companies, defendants Consumers Beverages, Inc. (CBI) and Kavcon Development LLC (Kavcon). CBI and Kavcon were founded decades ago by Lawrence Kavanaugh. Plaintiffs—James Kavanaugh, Helen Kavanaugh, and Matthew G. Kavanaugh—and defendants Neil Kavanaugh, also known as Cornelius Kavanaugh, Mary Ellen Kavanaugh, and Martha Kavanaugh are some of Lawrence's children. James, Helen, Matthew, Neil, Mary Ellen, and Martha are all current or former shareholders in CBI and current or former members of Kavcon. James, Helen, Matthew, Neil, Mary Ellen, and Martha are also all signatories to the separate agreements that govern the ownership structure of each company (CBI Agreement and Kavcon Agreement, respectively). In 2012 and 2013, Neil purchased Mary Ellen's and Martha's interests in CBI and Kavcon (CBI Purchases and Kavcon Purchases, respectively).

Plaintiffs objected to the CBI Purchases and the Kavcon Purchases, and they thereafter commenced this action. Only the first and second causes of action are at issue in this appeal. The first cause of action, which was asserted only by James and Helen, alleged that the CBI Purchases violated certain transfer restrictions in the CBI Agreement, and it therefore sought a declaration that the CBI Purchases were null and void. The second cause of action, which was likewise asserted only by James and Helen, alleged that the Kavcon Purchases violated certain transfer restrictions in the Kavcon Agreement, and it therefore sought a declaration that the Kavcon Purchases were null and void. Notably, both the first and second causes of action were asserted only against Neil, Martha, and Mary Ellen as individuals, not against CBI and Kavcon as corporations; indeed, the complaint does not allege any wrongdoing by CBI and Kavcon as corporations. CBI and Kavcon are thus properly treated only as nominal defendants in this action, i.e., parties whose presence in the litigation is necessary only to bind them to the eventual judgment and to ensure full relief between the real parties in interest (*see e.g. Harris v Harris*, 193 AD3d 457, 457-458 [1st Dept 2021]; *Berger v Friedman*, 151 AD3d 678, 678-679 [2d Dept 2017]; *see generally Acosta v Saakvitne*, 355 F Supp 3d 908, 916-919 [D Haw 2019]; *Allen v Park Natl. Bank & Trust of Chicago*, 1998 WL 299477, *3 [ND Ill, May 29, 1998, No. C 2198]).

Neil answered the complaint, asserting—as relevant here—affirmative defenses of waiver and estoppel premised on plaintiffs' failure to object to 73 intra-family transactions involving CBI shares between 1986 and 2002 (Prior Transactions), each of which allegedly failed to comply with the transfer restrictions in the CBI Agreement. Plaintiffs' failure to object to the Prior Transactions constituted, in Neil's view, an implicit prospective

waiver of the transfer restrictions in both the CBI Agreement and the Kavcon Agreement such that plaintiffs should be barred by principles of waiver and estoppel from challenging both the CBI Purchases and the Kavcon Purchases.

Following discovery, plaintiffs moved for partial summary judgment on the first and second causes of action. In opposition, Neil argued that summary judgment in plaintiffs' favor was precluded by triable issues of fact with respect to the estoppel and waiver affirmative defenses, but he did not formally cross-move for summary judgment dismissing the first and second causes of action against him. Despite the absence of any cause of action against them, CBI and Kavcon opposed plaintiffs' motion and cross-moved for summary judgment dismissing the complaint as purportedly against them. For their part, Martha and Mary Ellen both conceded liability and advocated in plaintiffs' favor, although neither sister filed a formal motion or cross motion on her own behalf.

Supreme Court determined, as a matter of law, that the CBI Purchases violated the transfer restrictions of the CBI Agreement and that the Kavcon Purchases violated the transfer restrictions of the Kavcon Agreement. Nevertheless, the court denied both plaintiffs' motion and the cross motion by CBI and Kavcon solely on the ground that triable issues of fact existed as to the affirmative defenses of waiver and estoppel. Plaintiffs now appeal, and defendants—with the exception of Mary Ellen—now cross-appeal.

Martha is not aggrieved by the order from which she purports to cross-appeal because that order neither granted relief against her nor denied any motion for affirmative relief on her own behalf (*see* CPLR 5511; *Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 664 n 4 [2014]; *MacKay v Paliotta*, 196 AD3d 552, 553 [2d Dept 2021]; *see generally* CPLR 2211, 2215; *Free in Christ Pentecostal Church v Julian*, 64 AD3d 1153, 1154 [4th Dept 2009]). Martha's support for plaintiffs' efforts to void the CBI Purchases and the Kavcon Purchases does not make her an "aggrieved" party in a technical sense; "aggrievement is about relief, not reasoning" (*Mixon v TBV, Inc.*, 76 AD3d 144, 154 [2d Dept 2010]), and the fact that Martha "may be disappointed or even have been deprived of a financial benefit by the adjudication[s] does not, without more, make [her] a party 'aggrieved' " within the meaning of CPLR 5511 (*Matter of DeLong*, 89 AD2d 368, 370 [4th Dept 1982], *lv denied* 58 NY2d 606 [1983]; *see Matter of Tariq S. v Ashlee B.*, 177 AD3d 1385, 1386 [4th Dept 2019]). Rather, to qualify as a party aggrieved under CPLR 5511, "[i]t must be shown that [such] party had some legal right or interest in the subject of the determination which was adversely affected thereby" (*DeLong*, 89 AD2d at 370). Martha's cross appeal must therefore be dismissed (*see Fabrizi*, 22 NY3d at 664; *MacKay*, 196 AD3d at 553).

We likewise dismiss Neil's cross appeal. Neil did not formally cross-move for affirmative relief on his own behalf, the court did not grant relief against him, and he is not individually aggrieved by the denial of CBI's and Kavcon's cross motion because that "portion of the order . . . affected [at most] only the [purported] rights of the

corporation[s], and not [Neil's] individual rights" (*LaRose v Cricchio*, 134 AD3d 680, 681 [2d Dept 2015]; *see Berrechid v Shahin*, 60 AD3d 884, 884 [2d Dept 2009]; *Broadway Equities v Metropolitan Elec. Mfg. Co.*, 306 AD2d 426, 427 [2d Dept 2003]). Neil's belated attempt, following oral argument of the motions, to orally "join in" CBI's and Kavcon's cross motion was ineffective in light of his failure to "formally" join that cross motion in compliance with CPLR 2215 (*Matter of Arkadian S. [Crystal S.]*, 130 AD3d 1457, 1458 [4th Dept 2015], *lv dismissed* 26 NY3d 995 [2015]; *see Free in Christ Pentecostal Church*, 64 AD3d at 1154; *but see Voorhees v Babcock & Wilcox Corp.*, 150 AD2d 677, 678 [2d Dept 1989]). To the extent that Neil's oral attempt to "join in" CBI's and Kavcon's cross motion could be construed as an independent application for summary judgment dismissing the first and second causes of action *as against himself*, and to the further extent that the order on appeal could be read to deny such an application, we note only that the denial of an oral application made on the return date is not appealable as of right under CPLR 5701 (a) (2) because such an application is not a proper cross motion made on notice under CPLR 2215 (*see Free in Christ Pentecostal Church*, 64 AD3d at 1154).

With respect to the cross appeal by CBI and Kavcon, we reject their contention that the court erred in denying their cross motion, although our reasoning differs from the motion court's. It is well established that a party lacks standing to seek the dismissal of claims not asserted against it (*see Cox v NAP Constr. Co., Inc.*, 40 AD3d 459, 460 [1st Dept 2007], *affd* 10 NY3d 592 [2008]; *Matter of Coalition to Save Cedar Hill v Planning Bd. of Inc. Vil. of Port Jefferson*, 51 AD3d 666, 668 [2d Dept 2008], *lv denied* 11 NY3d 702 [2008]; *Richard J. Principi, Inc. v Richard J. Novak, Ltd.*, 271 AD2d 591, 592 [2d Dept 2000]), and here, as previously noted, CBI and Kavcon are merely nominal defendants inasmuch as the complaint did not allege any wrongdoing by or liability on their part. Moreover, given that "a corporation has no interest in the individual ownership of its shares" (*Hook v Hoffman*, 16 Ariz 540, 561, 147 P 722, 731 [1915]; *see Diamond v Oreamuno*, 29 AD2d 285, 288 [1st Dept 1968], *affd* 24 NY2d 494 [1969]; *Hauben v Morris*, 255 App Div 35, 46 [1st Dept 1938], *affd* 281 NY 652 [1939]; *see also Treadway Companies, Inc. v Care Corp.*, 638 F2d 357, 376-377 [2d Cir 1980]; *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v Stewart*, 833 A2d 961, 974 [Del Ch Ct 2003], *affd* 845 A2d 1040 [Del 2004]; *Behlow v Fischer*, 102 Cal 208, 214, 36 P 509, 510 [1894]), the fact that CBI and Kavcon will be ministerially bound by any judgment declaring the rights of the real parties in interest—i.e., the individual parties—cannot by itself confer standing upon them to seek summary judgment on claims to which they stand legally indifferent (*see Matter of Sheldon v Vermonty*, 36 AD3d 619, 620 [2d Dept 2007]; *Doctor v Hughes*, 169 App Div 810, 811 [1st Dept 1915]; *see also Gapihan v Hemmings*, 80 AD3d 1138, 1139 [3d Dept 2011]). CBI and Kavcon thus lacked standing to seek summary judgment dismissing any part of the complaint, and their cross motion should have been denied solely on that basis (*see Sheldon*, 36 AD3d at 620; *Solomon v City of New York*, 225 AD2d 539, 539 [2d Dept 1996]; *Doctor*, 169 App Div at 811-812; *see also People v Grasso*, 54 AD3d 180, 197

[1st Dept 2008]; *see generally Falk v Falk*, 74 AD3d 1841, 1841 [4th Dept 2010]).

Similarly, Matthew lacked standing to seek summary judgment on the first and second causes of action inasmuch as those causes of action were asserted only by James and Helen (*see generally Cox*, 40 AD3d at 460; *Coalition to Save Cedar Hill*, 51 AD3d at 668; *Richard J. Principi, Inc.*, 271 AD2d at 592). Thus, plaintiffs' motion—insofar as made by Matthew—should have been denied solely on that basis (*see Solomon*, 225 AD2d at 539; *see also Grasso*, 54 AD3d at 197; *see generally Falk*, 74 AD3d at 1841).

We now address the contention of James and Helen, on their appeal, that the court erred in determining that triable issues of fact as to Neil's affirmative defenses of waiver and estoppel precluded summary judgment in their favor on the first and second causes of action. Even viewing the Kavanaugh family's transactional history in the light most favorable to Neil as the non-movant (*see generally De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]), we agree with James and Helen that the subject affirmative defenses are unavailing as a matter of law and that there are no triable issues of *material* fact with respect thereto. Because the parties use the terms waiver and estoppel interchangeably and make the same arguments based on both theories, we "shall not enter into any discussion as to the distinction in principle between waiver and estoppel" and will instead analyze the subject affirmative defenses solely in terms of waiver (*McArdle v German Alliance Ins. Co.*, 183 NY 368, 374 [1906]; *see Matter of Heisler v Gingras*, 90 NY2d 682, 686-687 [1997], *rearg denied* 91 NY2d 867 [1997]; *Foster v White & Sons*, 244 App Div 368, 369-371 [1st Dept 1935], *affd* 270 NY 572 [1936]).

We first analyze James' and Helen's entitlement to summary judgment on the first cause of action, which concerns the CBI Purchases. According to Neil's own submissions in opposition to James and Helen's motion, the Prior Transactions that underlie the subject affirmative defenses fall into three distinct categories: 61 transfers of CBI shares by Lawrence, eight transfers of CBI shares by Lawrence's second wife (Zita), and four transfers of CBI shares by another Kavanaugh sibling (Mark). The transfer restrictions in the CBI Agreement, however, apply only to transactions in which a "Shareholder" is the *transferor*, and the CBI Agreement explicitly limits the defined term "Shareholder" to Lawrence's eight children. Lawrence, by contrast, is defined as CBI's one and only "Principal," and the text and structure of the CBI Agreement clearly indicate that the "Principal" cannot simultaneously be a "Shareholder" as those terms are used in the CBI Agreement. Zita, moreover, is neither the "Principal" nor a "Shareholder" as defined by the CBI Agreement; indeed, Zita is not even a signatory to that contract. Thus, while Lawrence and Zita were both CBI shareholders in the colloquial sense of the term, neither Lawrence nor Zita was a "Shareholder" to whom the transfer restrictions of the CBI Agreement applied. Contrary to Neil's contention, Lawrence's inclusion on the CBI Agreement's original Schedule A merely reflected his status as a shareholder in

the colloquial sense, not as a "Shareholder" to whom the transfer restrictions applied. Consequently, the transfers by Lawrence and Zita could not have violated the transfer restrictions in the CBI Agreement because, simply put, those provisions did not apply to them. And because there was no basis to invoke the transfer restrictions of the CBI Agreement to challenge either Lawrence's 61 transfers or Zita's eight transfers, any failure by James and Helen to do so cannot be deemed a prospective waiver of their right to enforce the transfer restrictions of the CBI Agreement in proper circumstances.

Excluding Lawrence's 61 transfers and Zita's eight transfers, Mark's four transfers are the lone remaining basis on which the subject affirmative defenses to the first cause of action might still validly rest. Mark's transfers—which collectively constituted a single discrete transaction in 1995—bear the greatest similarity to the CBI Purchases. Unlike the other 69 transfers on which the subject affirmative defenses are also based, it is plausible that Mark's four transfers in 1995 did violate the transfer restrictions in the CBI Agreement. For purposes of summary judgment, we will assume that Mark's transfers were made in derogation of the applicable transfer restrictions, and we will further assume, as Neil also asserts, that James and Helen knowingly acquiesced in Mark's transfers without objecting or otherwise attempting to enforce the applicable transfer restrictions as written (*see generally De Lourdes Torres*, 26 NY3d at 763).

Even with those assumptions, however, James' and Helen's failure to enforce the transfer restrictions of the CBI Agreement with respect to Mark's single discrete transaction in 1995—approximately 18 years before the CBI Purchases—does not, as a matter of law, constitute a blanket prospective waiver of those contractual provisions (*see Kamco Supply Corp. v On the Right Track, LLC*, 149 AD3d 275, 283-284 [2d Dept 2017], *lv dismissed* 30 NY3d 1036 [2017]; *EchoStar Satellite L.L.C. v ESPN, Inc.*, 79 AD3d 614, 618-620 [1st Dept 2010]). To the contrary, a party's failure to enforce a contractual provision in limited and isolated instances is "reasonably . . . understood as a waiver of the [contractual provision in those particular instances], but not as a prospective waiver of [the contractual] requirements [going forward]" (*Kamco Supply Corp.*, 149 AD3d at 284). Thus, any implied waiver of the CBI Agreement's transfer restrictions stemming from Mark's transfers in 1995 "was a discrete event that did not promise another waiver" (*DLJ Mtge. Capital Corp., Inc. v Fairmont Funding, Ltd.*, 81 AD3d 563, 564 [1st Dept 2011]), and it follows that James and Helen are not barred from now enforcing those provisions with respect to the CBI Purchases at issue in this case. The court therefore erred in denying James' and Helen's motion insofar as it sought summary judgment on the first cause of action, and we modify the order accordingly.

Addressing next James' and Helen's entitlement to summary judgment on the second cause of action, which concerns the Kavcon Purchases, we emphasize that the affirmative defenses at issue are based exclusively on the Kavanaugh family's alleged history of transferring *CBI shares* without adhering to the transfer restrictions

in the *CBI Agreement*. As we recently held, however, a party's failure to enforce the provisions of one contract cannot, as a matter of law, "be imputed as a waiver" of that party's right to enforce the provisions of a different contract, even in the context of related "entities that comprise [a] family business" (*McGuire v McGuire*, 197 AD3d 897, 902 [4th Dept 2021]). Our holding in *McGuire* is conclusive of James' and Helen's entitlement to summary judgment on the second cause of action because, as to that particular claim, the subject affirmative defenses are inextricably wedded to the very premise that *McGuire* rejects, to wit, the notion that an alleged waiver of the transfer restrictions in the CBI Agreement could be "imputed as a waiver" of the transfer restrictions in the Kavcon Agreement (*id.*). We note that the transfer restrictions in the CBI Agreement differ substantively from the transfer restrictions in the Kavcon Agreement. The court thus erred in denying James' and Helen's motion insofar as it sought summary judgment on the second cause of action, and we further modify the order accordingly.

Neil's contention that James and Helen are not entitled to summary judgment on the second cause of action in light of various intra-family transfers of the shares of Kavcon's predecessor entity is raised for the first time on appeal and is thus not properly before us (*see Salahuddin v Craver*, 163 AD3d 1508, 1509, 1511 [4th Dept 2018]; *BRT Realty Trust v 3747 Purchase St. Realty Co., LLC*, 87 AD3d 963, 966 [2d Dept 2011]). Moreover, the supporting documents on which Neil now relies for that argument were not before the motion court because they were improperly submitted by CBI and Kavcon for the first time on reply in connection with their cross motion (*see Matter of Mary Beth B. v West Genesee Cent. Sch. Dist.*, 186 AD3d 979, 981 [4th Dept 2020]; *McNair v Lee*, 24 AD3d 159, 160 [1st Dept 2005]), and Neil did not incorporate those documents into his own submissions opposing plaintiffs' motion (*cf. Carlson v Town of Mina*, 31 AD3d 1176, 1177 [4th Dept 2006]).

Neil's further contentions that James and Helen have "unclean hands" and that the CBI Purchases and the Kavcon Purchases did not actually violate the transfer restrictions of the respective agreements are unpreserved for appellate review because Neil never specifically advanced them before the motion court (*see Aprile-Sci v St. Raymond of Penyafort R.C. Church*, 151 AD3d 671, 673 [2d Dept 2017]; *Seymour v Northline Utils., LLC*, 79 AD3d 1386, 1389 [3d Dept 2010]; *see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 546 [1983]; *Estate of Essig v Essig*, 196 AD3d 1055, 1057 [4th Dept 2021]). Neil's attempt during motion practice to summarily "incorporate all the arguments submitted by" his allied codefendants in the litigation, without identifying those arguments and explaining why they availed him particularly, did not suffice to preserve his present arguments for appellate review (*see generally Kuriansky v Bed-Stuy Health Care Corp.*, 73 NY2d 875, 876 [1988]; *Olney v Town of Barrington*, 180 AD3d 1364, 1365 [4th Dept 2020]). Rather, "it was incumbent upon [Neil] to object, raise the specific arguments [he] now asserts . . . , and ask the [trial] court to conduct that

analysis in order to preserve [his] challenge[s] for appellate review" (*Matter of New York City Asbestos Litig.*, 27 NY3d 1173, 1176 [2016]).

James' and Helen's remaining contentions are academic in view of our determination.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

704

CA 20-01025

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

MATTHEW G. KAVANAUGH, INDIVIDUALLY AND AS A DIRECTOR OF CONSUMERS BEVERAGES, INC., A MEMBER OF KAVCON DEVELOPMENT LLC, AND A DIRECTOR OF KAVCO DISTRIBUTING COMPANY, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEIL KAVANAUGH, ALSO KNOWN AS CORNELIUS KAVANAUGH, MARTHA KAVANAUGH, DEFENDANTS-RESPONDENTS-APPELLANTS, AND MARY ELLEN KAVANAUGH, DEFENDANT-RESPONDENT. (APPEAL NO. 2.)

GROSS SHUMAN, P.C., BUFFALO (HUGH C. CARLIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (VINCENT E. DOYLE, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT NEIL KAVANAUGH, ALSO KNOWN AS CORNELIUS KAVANAUGH.

ADAMS LECLAIR LLP, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT MARTHA KAVANAUGH.

GARVEY & GARVEY, BUFFALO (DENNIS J. GARVEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross appeals from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered June 5, 2020. The order denied the motion of plaintiff for partial summary judgment.

It is hereby ORDERED that said cross appeals are unanimously dismissed, the order is reversed on the law without costs, the motion is granted, and judgment is granted in favor of plaintiff as follows:

> It is ADJUDGED and DECLARED that the transfers of shares and ownership interests in Consumers Beverages, Inc. and Kavcon Development LLC from defendants Martha Kavanaugh and Mary Ellen Kavanaugh to defendant Neil Kavanaugh, also known as Cornelius Kavanaugh, are null and void.

Memorandum: This appeal is part of an extended intra-family litigation concerning the ownership of two family companies, Consumers Beverages, Inc. (CBI) and Kavcon Development LLC (Kavcon). The

parties are siblings, and they are all current or former shareholders in CBI and current or former members of Kavcon. The parties are also signatories to the separate agreements that govern the ownership structure of each company.

In 2012, defendant Neil Kavanaugh, also known as Cornelius Kavanaugh, purchased defendant Mary Ellen Kavanaugh's interests in CBI and Kavcon. In 2013, Neil purchased defendant Martha Kavanaugh's interests in CBI and Kavcon. Plaintiff objected to those purchases, and he thereafter commenced this action. Only the first and second causes of action are at issue in this appeal; in those causes of action, plaintiff sought a declaration that the disputed purchases were null and void because they violated the transfer restrictions of the governing agreements. Neil's answer asserted, inter alia, affirmative defenses of waiver and estoppel.

Following discovery, plaintiff moved for partial summary judgment on the first and second causes of action. Neil opposed that motion, arguing only that summary judgment in plaintiff's favor was precluded by triable issues of fact with respect to his affirmative defenses of waiver and estoppel. Neil did not cross-move for summary judgment dismissing the first and second causes of action against him. Martha and Mary Ellen both conceded liability and advocated in plaintiff's favor, although neither sister filed any formal motion or cross motion on her own behalf.

Supreme Court determined, as a matter of law, that the disputed purchases violated the transfer restrictions of the governing agreements. Nevertheless, the court denied plaintiff's motion solely on the ground that triable issues of fact existed as to the affirmative defenses of waiver and estoppel. Plaintiff now appeals; Martha and Neil now cross-appeal.

We dismiss Martha's cross appeal for the reasons stated in *Kavanaugh v Kavanaugh* ([appeal No. 1] — AD3d — [Dec. 23, 2021] [4th Dept 2021] [decided herewith]).

We also dismiss Neil's cross appeal. The court refused to grant relief against Neil on plaintiff's motion and, as noted above, Neil did not seek affirmative relief on his own behalf. Thus, Neil is not aggrieved by the order from which he purports to cross-appeal (*see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 664 n 4 [2014]; *MacKay v Paliotta*, 196 AD3d 552, 553 [2d Dept 2021]; *see generally* CPLR 5511). We recognize that the second decretal paragraph of the subject order purports to deny "Defendants' cross-motion for partial summary judgment," but that is clearly a ministerial error carried over from a separate order in a related action. Indeed, the court's underlying decision correctly indicates that no cross motion was made in this action (*see generally Nicastro v New York Cent. Mut. Fire Ins. Co.*, 117 AD3d 1545, 1546 [4th Dept 2014], *lv dismissed* 24 NY3d 998 [2014]).

On the merits of plaintiff's appeal, we conclude—for the reasons stated in *Kavanaugh* (— AD3d at —)—that the court erred in denying

plaintiff’s motion for partial summary judgment on his first and second causes of action. We thus reverse the order and grant that motion.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

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CA 20-01061

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

MICHALLA CORTER-LONGWELL, AS ADMINISTRATRIX
OF THE ESTATE OF JAMES L. CORTER, PLAINTIFF,

V MEMORANDUM AND ORDER

ROBERT S. JULIANO, JR., ET AL., DEFENDANTS.

POCONO LOGISTIC, INC., THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

SENECA MEADOWS, INC., THIRD-PARTY
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

GOLDBERG SEGALLA LLP, GARDEN CITY (FRANK S. ROSENFIELD OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (DAVID M. KATZ OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Daniel J. Doyle, J.), entered November 22, 2019. The order denied the motion of the third-party defendant for summary judgment and granted the cross motion of third-party plaintiff for summary judgment dismissing the breach of contract counterclaims.

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

Memorandum: Third-party defendant Seneca Meadows, Inc. (Seneca) operated a landfill to which third-party plaintiff Pocono Logistic, Inc. (Pocono) transported trailers of waste pursuant to its written agreement with Seneca's parent company. Plaintiff, as administratrix of the estate of James L. Corter (decedent), commenced this action seeking damages for the wrongful death and conscious pain and suffering of decedent, who was killed during the course of his employment with Seneca when defendant Robert S. Juliano, Jr., a vehicle operator employed by a subcontractor of Pocono, backed a trailer onto landfill equipment on which decedent was present. Pocono thereafter commenced a third-party action against Seneca seeking,

inter alia, common-law indemnification. Seneca answered and asserted counterclaims seeking, inter alia, contractual indemnification from Pocono.

Seneca subsequently moved for summary judgment in its favor and dismissing the third-party complaint, asserting that, as a matter of law, Pocono breached a duty to Seneca as a third-party beneficiary under the agreement to procure specified insurance coverage naming Seneca as an additional insured and, in the event of such a breach, Pocono was required under the agreement to indemnify Seneca. Pocono cross-moved for summary judgment dismissing Seneca's counterclaims for breach of contract, asserting that, as a matter of law, it did not breach the insurance procurement provision of the agreement because that provision did not require that it name Seneca as an additional insured.

In appeal No. 1, Seneca appeals from an order that denied its motion and granted Pocono's cross motion. In appeal No. 2, Seneca appeals from an order that denied its motion seeking leave to reargue its motion for summary judgment. As a preliminary matter, we dismiss Seneca's appeal from the order in appeal No. 2 inasmuch as the order denying the motion for leave to reargue is not appealable (*see Page v Niagara Falls Mem. Med. Ctr.*, 141 AD3d 1084, 1084-1085 [4th Dept 2016]; *Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]). With respect to appeal No. 1, although we reject Seneca's contention that the court erred in denying its motion, we agree with Seneca for the reasons that follow that Supreme Court erred in granting Pocono's cross motion. We therefore modify the order accordingly.

Initially, contrary to the court's determination and Pocono's contention, we conclude on this record that Seneca's assertion of third-party beneficiary status under the agreement was properly before the court on Seneca's motion (*see D&M Concrete, Inc. v Wegmans Food Mkts., Inc.*, 133 AD3d 1329, 1330-1331 [4th Dept 2015], *lv denied* 27 NY3d 901 [2016]; *Boyle v Marsh & McLennan Cos., Inc.,* 50 AD3d 1587, 1588 [4th Dept 2008], *lv denied* 11 NY3d 705 [2008]). With respect to the merits of Seneca's assertion, "[a third] party asserting rights as a third-party beneficiary must establish '(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [the third party's] benefit and (3) that the benefit to [the third party] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [the third party] if the benefit is lost' " (*State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000], quoting *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 [1983]; *see DeLine v CitiCapital Commercial Corp.*, 24 AD3d 1309, 1311 [4th Dept 2005]). A third party is "an intended beneficiary, rather than merely an incidental beneficiary, when the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance" (*DeLine*, 24 AD3d at 1311 [internal quotation marks omitted]).

Here, regarding the first element, it is now undisputed that the

agreement is a valid and binding contract between Seneca's parent company and Pocono. With respect to the second and third elements, Seneca contends that the agreement was intended for its benefit and that such benefit was immediate because the agreement required that Pocono procure insurance in favor of Seneca as an additional insured. In that regard, " '[a] party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with' " (*DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011]). Similarly, a party seeking summary judgment dismissing a claim that it failed to procure insurance may demonstrate its entitlement to judgment as a matter of law by establishing that it was not contractually obligated to name the claiming entity as an additional insured based on the language of the subject agreement (*see Uddin v A.T.A. Constr. Corp.*, 164 AD3d 1402, 1405 [2d Dept 2018]; *Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 967 [2d Dept 2012]).

We conclude that neither party met its initial burden on its motion inasmuch as the agreement is ambiguous with respect to whether Pocono was obligated to name Seneca as an additional insured on the insurance policies required by the agreement (*see M&M Realty of N.Y., LLC v Burlington Ins. Co.*, 170 AD3d 407, 407-408 [1st Dept 2019], *lv denied* 35 NY3d 901 [2020]). An agreement "is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself" (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009]). Thus, " 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' " (*id.*, quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). "A[n agreement] is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion' " (*Greenfield*, 98 NY2d at 569). Conversely, ambiguity in an agreement arises "when specific language is 'susceptible of two reasonable interpretations' " (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]; *see Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]; *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). "Whether an agreement is ambiguous is a question of law for the courts" (*Kass v Kass*, 91 NY2d 554, 566 [1998]; *see Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009]) and, consequently, a court may conclude that an agreement is ambiguous even if the parties contend otherwise (*see NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 58 [1st Dept 2008]). With respect to the type of agreement at issue here, "[a] provision in a . . . contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated. In addition, contract language that merely requires the purchase of insurance will not be read as also requiring that a . . . party be named as an additional insured" (*Trapani v 10 Arial Way Assoc.*, 301 AD2d 644, 647 [2d Dept 2003]; *see Clavin v CAP Equip. Leasing Corp.*, 156 AD3d 404, 405 [1st Dept 2017]; *General*

Motors, LLC v B.J. Muirhead Co., Inc., 120 AD3d 927, 928-929 [4th Dept 2014]).

Here, as noted by the court and Pocono, the specific insurance procurement paragraphs in Section 14 of the agreement—i.e., (a) (i), (a) (ii), (a) (iii), and the stand-alone excess coverage paragraph—do not mention any obligation for Pocono to name Seneca as an additional insured. Indeed, the paragraphs requiring Pocono and its subcontractors to obtain employers' liability and workers' compensation insurance, as well as an excess policy, make no reference to additional insureds. The paragraphs requiring Pocono and its subcontractors to obtain comprehensive commercial general liability and automobile liability insurance specify only that Seneca's parent company, not Seneca the subsidiary (*see generally Connecticut Gen. Life Ins. Co. v Superintendent of Ins. of State of N.Y.*, 10 NY2d 42, 50 [1961]), must be added as an additional insured on those policies pursuant to specified forms. Thus, none of the abovementioned paragraphs contains express and specific language requiring that Pocono name Seneca as an additional insured on the subject policies and, as stated previously, contract language that merely requires the purchase of insurance cannot be read as also requiring that a party be named as an additional insured (*see e.g. General Motors*, 120 AD3d at 928-929).

As Seneca notes, however, the fourth paragraph in Section 14 of the agreement—i.e., (a) (iv)—provides that Pocono and its subcontractors "shall provide certificates of insurance naming [Seneca's parent company] and Seneca . . . as an [sic] additional insured prior to the performance of any of its obligations under" the agreement. That broad sentence—which mentions certificates for both Seneca's parent company and Seneca, places no limitation on the policies to which it refers, and is included among other sentences that apply to "[e]ach policy of insurance" (*see generally* Black's Law Dictionary [11th ed 2019], noscitur a sociis)—may reasonably be interpreted as applying to all of the policies that Pocono was required to obtain pursuant to the preceding paragraphs. The case before us is not one in which a plain reading of the subject agreement reveals an utter lack of language requiring that a particular entity be named as an additional insured (*cf. e.g. Ramcharan*, 94 AD3d at 967); instead, the record demonstrates the existence of other language in the agreement indicating that Pocono may have been required to name Seneca as an additional insured (*cf. Clavin*, 156 AD3d at 405). We note that Pocono even acknowledged in its moving papers that the import of the certificates of insurance language was "unclear" and that the agreement was "at least ambiguous" regarding whether Pocono was required to obtain insurance for Seneca. We thus conclude that the language of the agreement is ambiguous and "raise[s] an issue of fact as to the intent of the parties concerning which entities should be included as additional insureds" (*Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 472 [1st Dept 2008]; *see M&M Realty of N.Y.*, 170 AD3d at 407-408).

The court and Pocono nonetheless attempt to dismiss the impact of the paragraph requiring that Pocono name Seneca as an additional

insured, arguing that providing a certificate of insurance is not the same as procuring that insurance (*see Landsman Dev. Corp. v RLI Ins. Co.*, 149 AD3d 1489, 1490 [4th Dept 2017]). In essence, the court and Pocono assert that the reference to certificates of insurance in the agreement is meaningless. We reject that assertion. First, as a matter of general principle, "a contract must be read as a whole to give effect and meaning to every term . . . Indeed, '[a] contract should be interpreted in a way [that] reconciles all [of] its provisions, if possible' " (*New York State Thruway Auth. v KTA-Tator Eng'g Servs., P.C.*, 78 AD3d 1566, 1567 [4th Dept 2010]; *see RLI Ins. Co. v Smiedala*, 96 AD3d 1409, 1411 [4th Dept 2012]). Therefore, "[e]ffect and meaning must be given to every term of the contract . . . , and reasonable effort must be made to harmonize all of its terms" (*Village of Hamburg v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 89 [4th Dept 2001], *lv denied* 97 NY2d 603 [2001] [internal quotation marks omitted]; *see Matter of El-Roh Realty Corp.*, 74 AD3d 1796, 1799 [4th Dept 2010]). Second, with respect to the specific language here, although it is true that a certificate of insurance, by itself, does not confer coverage (*see Landsman Dev. Corp.*, 149 AD3d at 1490), that undisputed principle is not the focus of our inquiry. Instead, the question before us is whether the inclusion of the language in the agreement requiring certificates of insurance evinced an intent by the parties to have Pocono obtain the required policies and then ultimately name Seneca as an additional insured. In that regard, we conclude that the inclusion of such language raises an issue of fact and represents an unresolved ambiguity regarding intent because, "[a]lthough [i]t is well established that a certificate of insurance, by itself, does not confer insurance coverage, such a certificate is evidence of a carrier's intent to provide coverage" (*Hunt v Ciminelli-Cowper Co., Inc.*, 93 AD3d 1152, 1156 [4th Dept 2012] [internal quotation marks omitted]). In other words, by agreeing to language in the agreement that it would provide certificates of insurance to Seneca's parent company and Seneca naming both of those entities as additional insureds prior to the performance of any obligations under the agreement, Pocono at minimum indicated its intent to have insurance coverage provided to Seneca.

Given the unresolved ambiguity in the agreement regarding whether Pocono was required to name Seneca as an additional insured under the required policies of insurance, we conclude that Seneca is not entitled to summary judgment on its motion asserting that, as a matter of law, Pocono breached a duty to Seneca as a third-party beneficiary under the agreement to procure specified insurance coverage naming Seneca as an additional insured, and Pocono is not entitled to summary judgment on its cross motion asserting that, as a matter of law, it did not breach the insurance procurement provision of the agreement.

Finally, Seneca contends that the court should have granted the motion insofar as it sought summary judgment on Seneca's counterclaims for contractual indemnification. We reject that contention. In support of its motion Seneca raised one—and only one—ground upon which it was purportedly entitled to contractual indemnification from Pocono: the indemnification provision contemplated that, in the event of a breach of the agreement, the breaching party (i.e., Pocono) was

required to defend, indemnify, and hold harmless Seneca, and here Pocono breached the agreement by failing to ensure that Seneca was named as an additional insured. For the reasons previously discussed, there is an unresolved ambiguity in the agreement regarding whether Pocono was required to procure insurance in favor of Seneca and, thus, Seneca failed to establish as a matter of law that Pocono breached the agreement in a manner that would, as asserted by Seneca in support of its motion, trigger the indemnification provision (*see e.g. Velasquez v Mosdos Meharam Brisk of Tashnad*, 189 AD3d 1655, 1657 [2d Dept 2020]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

711

CA 20-01062

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

MICHALLA CORTER-LONGWELL, AS ADMINISTRATRIX
OF THE ESTATE OF JAMES L. CORTER, PLAINTIFF,

V MEMORANDUM AND ORDER

ROBERT S. JULIANO, JR., ET AL., DEFENDANTS.

POCONO LOGISTIC, INC., THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

SENECA MEADOWS, INC., THIRD-PARTY
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

GOLDBERG SEGALLA LLP, GARDEN CITY (FRANK S. ROSENFIELD OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (DAVID M. KATZ OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Daniel J. Doyle, J.), entered July 20, 2020. The order denied the motion of third-party defendant for leave to reargue its motion for summary judgment.

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

Same memorandum as in *Corter-Longwell v Juliano* ([appeal No. 1] — AD3d — [Dec. 23, 2021] [4th Dept 2021]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

743

KA 14-02141

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWAYNE TUCKER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered November 24, 2014. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3] [felony murder]) in connection with the shooting death of the victim that occurred during a robbery or attempted robbery. We affirm.

Defendant contends that Supreme Court erred in admitting into evidence text messages recovered from two cell phones obtained from defendant and a codefendant at the time of their arrests because the People failed to establish a proper foundation for that evidence. We reject that contention and conclude that the text messages recovered from both cell phones were properly authenticated and received into evidence by the court. "[A]uthenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it," and "[t]he foundation necessary to establish these elements may differ according to the nature of the evidence sought to be admitted" (*People v McGee*, 49 NY2d 48, 59 [1979], *cert denied* 446 US 942 [1980]; *see generally* Jerome Prince, Richardson on Evidence § 4-203 [Farrell 11th ed 1995]). Here, the authenticity of the text messages recovered from the two phones in question was established by the text message logs of the wireless service providers for both phones, as well as through the text messages that were directly downloaded from each phone. The data in those logs matched the metadata recovered from the cell phones, and the sent messages

recovered from the two phones were identical to one another. That proof, coupled with the fact that the phones were recovered from defendant and the codefendant at the time of their arrests, provided sufficient authentication for the admission of the text messages into evidence (*see generally People v Hughes*, 114 AD3d 1021, 1023 [3d Dept 2014], *lv denied* 23 NY3d 1038 [2014]; *People v Clevenstine*, 68 AD3d 1448, 1450-1451 [3d Dept 2009], *lv denied* 14 NY3d 799 [2010]).

The cases relied upon by defendant in support of his argument that the text messages were not properly authenticated are inapposite because they involved text message evidence that was not supported by *any* authenticating evidence from a wireless service provider or directly from the involved device itself (*see e.g. People v Flower*, 173 AD3d 1449, 1456-1457 [3d Dept 2019], *lv denied* 34 NY3d 931 [2019]; *People v Givans*, 45 AD3d 1460, 1461-1462 [4th Dept 2007]; *Castaldi v Castle Restoration LLC*, 66 Misc 3d 1214[A], 2020 NY Slip Op 50086[U], *2 [Sup Ct, Suffolk County 2020]). Here, the People submitted authenticating evidence from both of those sources. To the extent that defendant contends that the text messages were not properly authenticated because the People did not establish whether he or the codefendant actually authored the text messages—i.e., that someone else actually sent the messages from the phones—we conclude that the likelihood of that scenario goes to the weight to be accorded the evidence, not its admissibility, and therefore presented a factual issue for the jury to resolve (*see People v Serrano*, 173 AD3d 1484, 1488 [3d Dept 2019], *lv denied* 34 NY3d 937 [2019]; *Hughes*, 114 AD3d at 1023; *Clevenstine*, 68 AD3d at 1451).

We also conclude that the court properly admitted the text messages sent by the codefendant's cell phone pursuant to the coconspirator exception to the hearsay rule. " 'A declaration by a coconspirator during the course and in furtherance of the conspiracy is admissible against another coconspirator as an exception to the hearsay rule' " (*People v Caban*, 5 NY3d 143, 148 [2005], quoting *People v Bac Tran*, 80 NY2d 170, 179 [1992], *rearg denied* 81 NY2d 784 [1993]). Such a declaration may be admitted only where the People have established a prima facie case of conspiracy " 'without recourse to the declarations [of that coconspirator]' " (*id.*, quoting *People v Salko*, 47 NY2d 230, 238 [1979], *rearg denied and remittitur amended* 47 NY2d 1010 [1979]; *see People v Robles*, 72 AD3d 1520, 1521 [4th Dept 2010], *lv denied* 15 NY3d 777 [2010]). The prima facie case of conspiracy does not need to be established before the coconspirator's statements are admitted in evidence, so long as "the People independently establish a conspiracy by the close of their case" (*Caban*, 5 NY3d at 151).

Here, the People established a prima facie case that defendant and the codefendant conspired to commit a robbery at the same time and place that the victim was shot and killed. The properly admitted text messages sent by defendant's phone in the days leading up to the shooting permitted the inference that defendant and the codefendant were planning a robbery (*see generally People v Trappler*, 173 AD3d 1334, 1336-1337 [3d Dept 2019], *lv denied* 34 NY3d 985 [2019],

reconsideration denied 34 NY3d 1082 [2019], *cert denied* — US —, 140 S Ct 1281 [2020]). Other evidence establishing a conspiracy to commit a robbery consisted of, inter alia, testimony that multiple individuals were observed at the scene immediately after the shooting, evidence of the ransacking of the victim's vehicle and the home where the shooting occurred, circumstantial evidence placing defendant and the codefendant at the scene of the crime, as well as evidence that defendant's phone was used to call for a taxi shortly after the shooting, that the taxi picked up somebody near the scene of the shooting, and that the passenger had the taxi driver pick up another individual before dropping both of them off close to where defendant lived (*see generally People v Portis*, 129 AD3d 1300, 1301-1302 [3d Dept 2015], *lv denied* 26 NY3d 1091 [2015]; *Robles*, 72 AD3d at 1521). We also conclude that the shooting of the victim during the robbery or attempted robbery constituted an overt act taken in furtherance of the conspiracy (*see McGee*, 49 NY2d at 57). Defendant contends that the People failed to show that a coconspirator shot and killed the victim, but we reject that contention because it was possible for the jury to infer that everyone who accompanied defendant and the codefendant to the scene of the crime that night was a participant in the conspiracy to commit the robbery (*see generally People v Reyes*, 31 NY3d 930, 931-932 [2018]).

Defendant further contends that the conviction is not supported by legally sufficient evidence because the People did not establish that the victim's death was caused "in the course of" or "in the furtherance of" a robbery or attempted robbery (Penal Law § 125.25 [3]) inasmuch as they did not show that defendant participated in the predicate crime or that physical force was used on the victim to aid in taking property from him. We conclude that defendant failed to preserve those specific contentions for our review inasmuch as his "motion for a trial order of dismissal was not specifically directed at the issues raised on appeal" (*People v Pittman*, 109 AD3d 1080, 1082 [4th Dept 2013], *lv denied* 22 NY3d 1043 [2013]; *see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Robinson*, 193 AD3d 1393, 1394 [4th Dept 2021], *lv denied* 37 NY3d 968 [2021]). Nevertheless, we necessarily " 'review the evidence adduced as to each of the elements of the crime[] in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]; *see People v Jones*, 194 AD3d 1358, 1359 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), however, we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

748

KA 17-01356

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAFAEL NIEVES-CRUZ, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered June 7, 2017. The judgment convicted defendant upon a jury verdict of criminal mischief in the third degree and obstructing governmental administration in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of criminal mischief in the third degree (Penal Law § 145.05 [2]) and obstructing governmental administration in the second degree (§ 195.05). We affirm.

We reject defendant's contention that County Court erred in refusing to substitute counsel in place of his assigned attorney. Where a defendant makes a seemingly serious request for new counsel, the court must make some minimal inquiry to determine whether the claim is meritorious (*see People v Sides*, 75 NY2d 822, 825 [1990]; *People v Coffie*, 192 AD3d 1641, 1642 [4th Dept 2021], *lv denied* 37 NY3d 963 [2021]). Where, however, a defendant states only conclusory allegations bereft of factual details, he or she fails to make a seemingly serious request and further inquiry is not required (*see People v Porto*, 16 NY3d 93, 100-101 [2010]; *People v Brady*, 192 AD3d 1557, 1558 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]; *People v Barnes*, 156 AD3d 1417, 1418 [4th Dept 2017], *lv denied* 31 NY3d 1078 [2018]). Here, on the day jury selection was to commence, defendant made only generalized and conclusory expressions of dissatisfaction with defense counsel's representation—i.e., defense counsel was not "representing [his] best interests" or representing him in "the right way." We conclude that no further inquiry by the court was required because defendant's belated complaint was not a " 'serious complaint[] about counsel' " (*Porto*, 16 NY3d at 100; *see Coffie*, 192 AD3d at 1642-

1643; *Barnes*, 156 AD3d at 1418).

Defendant also contends that the court erred in proceeding to trial because he was incapacitated pursuant to CPL article 730. An " '[i]ncapacitated person' " is "a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense" (CPL 730.10 [1]). "The key inquiry in determining whether a criminal defendant is fit for trial is 'whether he [or she] has sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding—and whether he [or she] has a rational as well as factual understanding of the proceedings against him [or her]' " (*People v Phillips*, 16 NY3d 510, 516 [2011]; *see People v Powell*, 194 AD3d 1423, 1424 [4th Dept 2021], *lv denied* 37 NY3d 967 [2021]). "A court must issue an order of examination 'when it is of the opinion that the defendant may be an incapacitated person' " (*Powell*, 194 AD3d at 1424, quoting CPL 730.30 [1]).

Here, in February 2017, the court sua sponte, and over defense counsel's objection, ordered a competency examination pursuant to CPL 730.30 (1) because it thought defendant may be incapacitated. In March 2018, two certified psychologists submitted reports following a clinical examination of defendant, concluding that he was fit to proceed. When each psychiatric examiner submits a report concluding that the defendant is not an incapacitated person, a "court *may*, on its own motion, conduct a hearing to determine the issue of capacity, and it must conduct a hearing upon motion therefor by the defendant or by the district attorney" (CPL 730.30 [2] [emphasis added]; *see generally* CPL 730.60 [2]; *People v Tortorici*, 92 NY2d 757, 766 [1999], *cert denied* 528 US 834 [1999]). Where "no motion for a hearing is made, the criminal action against the defendant *must* proceed" (CPL 730.30 [2] [emphasis added]). After the certified psychologists returned their reports, neither defendant nor the People made any motion for a competency hearing (*see Powell*, 194 AD3d at 1424) and, accordingly, a hearing was not mandated, but rather was a matter entrusted to the court's discretion (*see* CPL 730.30 [2]; *Tortorici*, 92 NY2d at 766). We conclude, based on our review of the record, that the court did not abuse its discretion by failing to hold a competency hearing and permitting defendant to proceed to trial (*see People v Lendof-Gonzalez*, 170 AD3d 1508, 1511 [4th Dept 2019], *affd* 36 NY3d 87 [2020]; *Powell*, 194 AD3d at 1424; *People v Ubbink*, 100 AD3d 1528, 1529 [4th Dept 2012], *lv denied* 20 NY3d 1066 [2013]).

We reject defendant's contention that the evidence is legally insufficient to support his conviction of criminal mischief in the third degree. Viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), the testimony of the jail officials establishes that defendant intended to damage property belonging to the Ontario County Jail in excess of $250, i.e., the glass window of his detention cell (*see* Penal Law § 145.05 [2]). There was ample circumstantial evidence establishing that defendant damaged the window of his cell, such as the undisputed fact that defendant was the only person in the cell at the time the window was

damaged, testimony that defendant was making noise in the cell shortly before the damage was discovered, and testimony that an easily loosened shower head located in the cell perfectly fit into the indentation of the window. Thus, contrary to defendant's contention, the lack of eyewitness testimony establishing that defendant damaged the window does not render the evidence legally insufficient (*see People v Suarez*, 175 AD3d 1036, 1037 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]).

We also reject the contention that the evidence is legally insufficient to support defendant's conviction of obstructing governmental administration in the second degree. Viewed in the light most favorable to the People (*see Contes*, 60 NY2d at 621), the trial testimony of the jail officials, coupled with the video recording of the incident, establishes that defendant intentionally obstructed or impaired jail officials' performance of an official function by means of physical force or interference (*see* Penal Law § 195.05). Specifically, the evidence establishes that defendant physically resisted the jail officials who were attempting to transfer him to the jail's medical unit by biting, kicking and spitting at the officials, which ultimately required that they restrain him to complete the transfer.

Further, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we also reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude the jury did not fail to give the evidence the weight it should be accorded (*see id.*).

Defendant contends that the court abused its discretion in permitting jail officials to testify about several prior incidents of bad behavior that occurred while defendant was being detained (*see generally People v Molineux*, 168 NY 264, 293-294 [1901]). The court properly admitted testimony about several instances of defendant's uncharged bad acts while being detained "to complete the narrative of the events charged in the indictment . . . , and [to] provide[] necessary background information" to explain, inter alia, why defendant required additional securing while being transferred from one detention cell to another (*People v Feliciano*, 196 AD3d 1030, 1031 [4th Dept 2021], *lv denied* 37 NY3d 1059 [2021] [internal quotation marks omitted]; *see People v Butler*, 192 AD3d 1701, 1702 [4th Dept 2021], *amended on rearg* 196 AD3d 1093 [4th Dept 2021], *lv denied* 37 NY3d 963 [2021]). It also properly admitted that testimony to establish that defendant intended to cause damage to the window in his jail cell (*see generally People v Whitfield*, 115 AD3d 1181, 1182 [4th Dept 2014], *lv denied* 23 NY3d 1044 [2014]). Further, in admitting the *Molineux* testimony, the court did not abuse its discretion in determining that the probative value of that evidence outweighed its potential for prejudice (*see generally People v Cass*, 18 NY3d 553, 560 [2012]) and, moreover, "the court's prompt limiting instruction ameliorated any prejudice" (*People v Emmons*, 192 AD3d 1658, 1659 [4th

Dept 2021], *lv denied* 37 NY3d 992 [2021]; *see People v Holmes*, 104 AD3d 1288, 1289 [4th Dept 2013], *lv denied* 22 NY3d 1041 [2013]).

Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

754

TP 20-01596

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF MARC A. MARIO, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENTS.

JEFFREY WICKS, PLLC, ROCHESTER (CHARLES D. STEINMAN OF COUNSEL), FOR PETITIONER.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (AARON M. WOSKOFF OF COUNSEL), FOR RESPONDENT NEW YORK STATE DIVISION OF HUMAN RIGHTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KEVIN C. HU OF COUNSEL), FOR RESPONDENT NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [David A. Murad, J.], entered August 3, 2020) to review a determination of respondent New York State Division of Human Rights. The determination dismissed the complaint of petitioner.

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

Memorandum: Petitioner filed a complaint with respondent New York State Division of Human Rights (DHR), alleging that his employer, respondent New York State Department of Corrections and Community Supervision (DOCCS), unlawfully discriminated and retaliated against him. After a public hearing before an Administrative Law Judge (ALJ), the Commissioner of DHR adopted the recommended order of the ALJ and dismissed the complaint. Petitioner thereafter commenced this proceeding to review the Commissioner's determination, which was transferred to this Court pursuant to Executive Law § 298.

We reject petitioner's contention that the Commissioner erred in determining that petitioner's allegations regarding conduct occurring before February 28, 2017, are untimely. Executive Law § 297 (5) provides that a complaint alleging unlawful discrimination must be filed within one year of the alleged unlawful discriminatory practice. "If the alleged unlawful discriminatory practice is of a continuing

nature, the date of its occurrence shall be deemed to be any date subsequent to its inception, up to and including the date of its cessation" (9 NYCRR 465.3 [e]; *see State Div. of Human Rights v Marine Midland Bank*, 87 AD2d 982, 982-983 [4th Dept 1982]). " '[A] continuing violation may be found where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice' " (*Clark v State of New York* [appeal No. 2], 302 AD2d 942, 945 [4th Dept 2003]). The acts occurring before and during the limitations period must be " 'sufficiently similar . . . to justify the conclusion that both were part of a single discriminatory practice' " (*id.*). Here, petitioner filed the complaint on February 28, 2018, and therefore the alleged incidents occurring before February 28, 2017 are outside the limitations period (*see* Executive Law § 297 [5]). We conclude that petitioner failed to establish that the alleged acts occurring before and during the limitations period were not separate and unrelated incidents, i.e., he failed to establish "that a specific related incident took place within the limitations period, which would have invoked the continuous violation doctrine" (*Matter of Lozada v Elmont Hook & Ladder Co. No. 1*, 151 AD3d 860, 862 [2d Dept 2017]; *cf. Clark*, 302 AD2d at 945). Moreover, petitioner failed to establish that the incidents occurring within the limitations period had a discriminatory motive (*see Robinson v New York State Div. of Human Rights*, 277 AD2d 76, 78 [1st Dept 2000], *lv dismissed* 96 NY2d 775 [2001]).

We also reject petitioner's contention that the ALJ erred by refusing to allow petitioner to offer rebuttal testimony and refusing to accept petitioner's post-hearing rebuttal submissions. Broad discretion is given to an ALJ in controlling the presentation of evidence and conduct of the hearings, including the power "to foreclose the presentation of evidence that is cumulative, argumentative, or beyond the scope of the case" (9 NYCRR 465.12 [f] [3]; *see Matter of McGuirk v New York State Div. of Human Rights*, 139 AD3d 570, 571 [1st Dept 2016]; *see generally Matter of State Div. of Human Rights v Berler*, 46 AD3d 32, 42 [2d Dept 2007]). Here, the ALJ did not abuse his discretion in denying petitioner's request to testify in rebuttal with respect to his work productivity inasmuch as petitioner had ample opportunity to present such evidence in his case-in-chief and during cross-examination. Moreover, the ALJ did not abuse his discretion in concluding that such evidence did not have any bearing on the allegedly discriminatory actions. We further conclude that the ALJ did not abuse his discretion in rejecting petitioner's written rebuttal submission because the submission was made without permission after the close of the hearing (*see generally* 9 NYCRR 465.12 [b] [3]; [f]).

Contrary to petitioner's contention, the determination that petitioner failed to establish that he was subject to retaliation is supported by substantial evidence. "In order to make out the claim [for unlawful retaliation], [petitioner] must show that (1) [petitioner] has engaged in protected activity, (2) [the] employer was aware that [petitioner] participated in such activity, (3)

[petitioner] suffered an adverse employment action based upon [such] activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]). "Once that showing is made, 'the burden then shifts to [the employer] to present legitimate, independent and nondiscriminatory reasons to support [its] actions. Then, if [the employer] meet[s] this burden, [petitioner] has the obligation to show that the reasons put forth by [the employer] were merely a pretext' " (*Matter of Russo v New York State Div. of Human Rights*, 137 AD3d 1600, 1602 [4th Dept 2016]). Here, petitioner alleged that he was retaliated against because he was formally counseled for alleged work violations only after he made his complaints of discrimination. Even assuming, arguendo, that petitioner established the first three elements of unlawful retaliation, we conclude that DOCCS established that there were legitimate reasons for counseling petitioner, including incidents of insubordination and leaving work early without notifying the supervisor, and petitioner failed to show that the reasons given by DOCCS were a pretext for unlawful retaliation (*see id.*; *see generally Wallace v SUNY Upstate*, 162 AD3d 1719, 1720 [4th Dept 2018]).

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

764

KA 20-01300

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AVERY EDWARDS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (Stephen J. Dougherty, J.), entered October 1, 2020. 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 reversed on the law without costs and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that he was denied due process when the Board of Examiners of Sex Offenders (Board) failed to comply with Correction Law § 168-n (3), which provides in relevant part that, "[n]o later than thirty days prior to the board's recommendation, the sex offender shall be notified that his or her case is under review and that he or she is permitted to submit to the board any information relevant to the review." Although defendant was not provided that requisite notice, we conclude that the error was harmless under the circumstances of this case (*see People v Baxin*, 26 NY3d 6, 11-12 [2015]; *People v Lashway*, 25 NY3d 478, 484 [2015]).

Defendant was not prejudiced by the error because, even though he did not have the opportunity to submit information relevant to the initial case review, the Board was aware when it prepared its recommendation that defendant had not been charged with any reoffending conduct since his release from prison years earlier and, moreover, after he was timely notified of the scheduled SORA hearing and provided with the Board's recommendation (*see* Correction Law § 168-n [3]), defendant submitted numerous documents to County Court, in advance of the hearing, rebutting the Board's recommendation and supporting his assertion of mitigating circumstances (*see generally*

Lashway, 25 NY3d at 484; *People v Krahmalni*, 170 AD3d 444, 444-445 [1st Dept 2019]).

We reject defendant's further contention that the court erred in assessing 15 points against him under risk factor 1 for having inflicted physical injury on the victim. In any event, even assuming, arguendo, that the court erred in assessing 15 points with respect to that risk factor, we note that defendant would nevertheless have been assessed 85 points under the risk assessment instrument, which is still a presumptive level two risk (*see People v Rawlinson*, 106 AD3d 1509, 1510 [4th Dept 2013], *lv denied* 21 NY3d 863 [2013]).

Finally, defendant contends that the court erred in refusing to grant him a downward departure from his presumptive risk level. A sex offender seeking a downward departure has the initial burden of "(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the [SORA] Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence" (*People v Sanders*, 196 AD3d 1066, 1066 [4th Dept 2021] [internal quotation marks omitted]; *see People v Gillotti*, 23 NY3d 841, 861 [2014]). If the defendant meets that burden, "the court *must* exercise its discretion by weighing the mitigating factor to determine whether the totality of the circumstances warrants a departure to avoid an overassessment of the defendant's dangerousness and risk of sexual recidivism" (*People v Ramos*, 186 AD3d 511, 511 [2d Dept 2020], *lv denied* 36 NY3d 901 [2020] [emphasis added]; *see Gillotti*, 23 NY3d at 861).

Here, we agree with defendant that the court erred in concluding that defendant failed to identify and establish the existence of a mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines. Defendant was sentenced to one year in jail with no postrelease supervision and, due to an oversight, he was not registered as a sex offender at sentencing or upon his release from jail. In support of his request for a downward departure, defendant relied on, inter alia, the fact that, despite being unsupervised, he did not reoffend during the seven years between his release from prison on the underlying sex offense and the SORA hearing.

In our view, the fact that defendant was at liberty while unsupervised for an extended period of time without any reoffending conduct is a mitigating factor not adequately taken into account by the guidelines (*see People v Sotomayer*, 143 AD3d 686, 687 [2d Dept 2016]; *see also People v Burgess*, 191 AD3d 1256, 1256-1257 [4th Dept 2021]), and it is undisputed that defendant established the existence of that mitigating factor by a preponderance of the evidence (*see e.g. Sotomayer*, 143 AD3d at 687; *People v Rivera*, 109 AD3d 805, 806 [2d Dept 2013], *lv denied* 22 NY3d 856 [2013]).

In view of the court's conclusion, it did not exercise its discretion to determine whether the totality of the circumstances

warrants a departure to avoid an overassessment of defendant's dangerousness and risk of sexual recidivism. Under the circumstances of this case, we reverse the order and remit the matter to County Court to make that determination (*see People v Lewis*, 140 AD3d 1697, 1697 [4th Dept 2016]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

773

CAF 20-00429

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF ANTHONY W.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND
FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ANTOINETTE K., RESPONDENT,
AND ANTHONY W., RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (TYLER BUGDEN OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (JOSEPH M. MARZOCCHI OF COUNSEL), FOR PETITIONER-RESPONDENT.

CATHERINE M. SULLIVAN, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered February 10, 2020 in a proceeding pursuant to Family Court Act article 10. The order denied the motion of respondent Anthony W. to dismiss the petition.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order that denied his motion to dismiss the petition against him. After entry of that order, Family Court entered an order of fact-finding and disposition from which respondent has not appealed. The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of the order of disposition (*see Matter of Aho*, 39 NY2d 241, 248 [1976]; *Matter of Brittany C. [Linda C.]*, 67 AD3d 788, 789 [2d Dept 2009], *lv denied* 14 NY3d 702 [2010]; *see generally Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

803

CA 20-01666

PRESENT: CENTRA, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

RICHARD N. STANG AND MADONNA STANG,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ERIE INSURANCE COMPANY AND ERIE INSURANCE
COMPANY OF NEW YORK, DEFENDANTS-APPELLANTS.

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

GIBSON MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered December 15, 2020. The order denied the motion of defendants to limit the amount of damages plaintiffs may recover and granted the cross motion of plaintiffs to dismiss defendants' affirmative defense of collateral estoppel.

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

Memorandum: Plaintiff Richard N. Stang was operating a motor vehicle in which his wife, plaintiff Madonna Stang, was a passenger when that vehicle was involved in a collision with another vehicle. Plaintiffs subsequently commenced a personal injury action against the driver of the other vehicle (nonparty driver), and the parties in that action agreed to submit to binding arbitration. Pursuant to the terms of the arbitration agreement, the decision rendered by the arbitrator was to be conclusive "only as to the matters being adjudicated in this Arbitration and only as to the parties to this Arbitration and State Farm Insurance Company, as the insurer of [the nonparty driver]." The agreement was to have "no res judicata, collateral estoppel, carry-over estoppel and/or binding effect as to the same or similar issues in any claim or action for supplementary underinsured motor[ist]'s benefits." After the arbitrator awarded plaintiffs $390,000 for, inter alia, Richard Stang's past and future pain and suffering, plaintiffs and the nonparty driver settled for the upper limit of the State Farm Insurance Company policy, i.e., $250,000.

Plaintiffs then submitted a claim for supplementary uninsured/underinsured motorist (SUM) benefits to their insurance

carrier, defendant Erie Insurance Company (Erie). Erie denied the claim. Thereafter, plaintiffs commenced the instant action against defendants seeking to recover damages in the amount of the SUM coverage available under the policy, less an offset of the $250,000.

Defendants moved for an order, inter alia, limiting on the ground of collateral estoppel the maximum amount of damages that plaintiffs may recover to the amount of the arbitrator's award. Plaintiffs cross-moved for an order dismissing defendants' affirmative defense of collateral estoppel. Supreme Court denied defendants' motion and granted plaintiffs' cross motion, and we affirm.

"[P]arties are free to limit the scope and effect of an arbitration agreement by formulating their own 'contractual restrictions on carry-over estoppel effect' " (*Matter of State Farm Ins. Co. v Smith*, 277 AD2d 390, 391 [2d Dept 2000], quoting *Matter of American Ins. Co. [Messinger–Aetna Cas. & Sur. Co.]*, 43 NY2d 184, 194 [1977]). Here, plaintiffs and the nonparty driver, as parties to the prior arbitration, consented to the provision in the arbitration agreement that limited the preclusive effect of the arbitrator's decision. Thus, the prior arbitration decision does not limit the amount of damages that plaintiffs may recover in this action (*see id.*; *Kerins v Prudential Prop. & Cas.*, 185 AD2d 403, 404 [3d Dept 1992]).

In light of our determination, defendants' remaining contentions are academic.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

815

KA 18-02422

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID PARKS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NOREEN E. MCCARTHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered October 25, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The charge arose from an incident in which defendant, who was a passenger in a car that came under gunfire from occupants of another car, fired a handgun at that other car. We affirm.

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's assertion, we conclude that "the verdict cannot be against the weight of the evidence on [any form of justification] defense because [a justification] defense was not submitted to the jury" (*People v Manners*, 196 AD3d 1125, 1126 [4th Dept 2021], *lv denied* 37 AD3d 1028 [2021]; *see People v Simpson*, 173 AD3d 1617, 1618 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019]).

Contrary to defendant's further contention, Supreme Court properly denied his request for a justification instruction based on self-defense under Penal Law § 35.15 inasmuch as that particular defense is "inapplicable to the crime of criminal possession of a weapon, in any degree" (*People v Alexander*, 160 AD3d 1370, 1371 [4th Dept 2018], *lv denied* 32 NY3d 1001 [2018]; *see People v Pons*, 68 NY2d

264, 265 [1986]; *People v Almodovar*, 62 NY2d 126, 130-131 [1984]). Defendant's contention that *Pons* and *Almodovar* were abrogated by the United States Supreme Court's decision in *District of Columbia v Heller* (554 US 570 [2008]) is wholly without merit and we conclude that, "[t]o the extent that defendant is claiming that []he was constitutionally entitled to a jury charge on [self-defense], that claim is unpreserved and . . . without merit" (*People v Aracil*, 45 AD3d 401, 402 [1st Dept 2007], *lv denied* 9 NY3d 1030 [2008]). To the extent defendant contends that the court should have provided a justification instruction pursuant to Penal Law § 35.05 (2), that contention is likewise unpreserved (*see People v LaPetina*, 9 NY3d 854, 855 [2007], *rearg denied* 13 NY3d 855 [2009]).

We reject defendant's contention that defense counsel was ineffective for failing to request an instruction on temporary and lawful possession inasmuch as the evidence, viewed in the light most favorable to defendant (*see generally People v Zona*, 14 NY3d 488, 493 [2010]), did not support such an instruction (*see People v Shamsiddeen*, 98 AD3d 694, 694-695 [2d Dept 2012], *lv denied* 20 NY3d 988 [2012]). In order for defendant to be entitled to such an instruction, "there must be proof in the record showing a legal excuse for having the weapon in [one's] possession as well as facts tending to establish that, once possession has been obtained, the weapon had not been used in a dangerous manner" (*People v Williams*, 50 NY2d 1043, 1045 [1980]). Here, even assuming, arguendo, that defendant obtained possession of the gun in an excusable manner, we conclude that there were no facts tending to establish that thereafter the gun "had not been used in a dangerous manner" (*id.*; *see People v Williams*, 172 AD3d 637, 637 [1st Dept 2019], *affd* 36 NY3d 156 [2020]). We also reject defendant's remaining allegations of ineffective assistance of counsel and conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, we have reviewed defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

816

KA 16-01771

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TONI A. PORTER, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered April 25, 2016. The judgment convicted defendant upon her plea of guilty of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: On appeal from a judgment convicting her upon a plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [2]), defendant contends that Supreme Court erred in refusing to suppress her statements to the police and certain physical evidence that the officers observed during a protective sweep of her house. Even assuming, arguendo, that the court's statements during the plea proceeding establish that before defendant entered her plea the court "implicitly but conclusively denied that part of defendant's omnibus motion seeking to suppress physical evidence and statements that [s]he made to the police" (*People v Gates*, 152 AD3d 1222, 1223 [4th Dept 2017], *affd* 31 NY3d 1028 [2018]) and thus that the suppression issues are properly before us (*see* CPL 710.70 [2]; *see generally People v Elmer*, 19 NY3d 501, 509 [2012]), we conclude that the court properly refused to suppress the fruits of the search.

Here, the record from the suppression hearing establishes that several police officers responded to a notification that a burglar alarm had been activated at the rear door of a location that was defendant's residence. Upon arrival, the officers found that the door was ajar. They yelled into the house, but no one responded. The officers thereafter conducted a security sweep of the house, during which they located a weapon. Defendant later made statements to the police. We conclude that, because "the officers had reasonable grounds to believe that there was an emergency at the [residence]

requiring their immediate assistance for the protection of life or property" (*People v McKnight*, 261 AD2d 926, 926 [4th Dept 1999], *lv denied* 94 NY2d 826 [1999]), they "were not 'constitutionally precluded from conducting a protective sweep to ascertain whether any armed [or injured] persons were inside' " (*People v Junious*, 145 AD3d 1606, 1608-1609 [4th Dept 2016], *lv denied* 29 NY3d 1033 [2017], *reconsideration denied* 29 NY3d 1129 [2017]).

Defendant failed to address in her brief on appeal the remaining grounds for suppression that she raised in the motion court, and we thus deem any contentions with respect thereto abandoned (*see generally People v Dombrowski*, 87 AD3d 1267, 1267 [4th Dept 2011]).

We reject defendant's further contention that the court erred in refusing to hold a *Franks/Alfinito* hearing with respect to the search warrant application used to secure a search warrant following the protective sweep (*see Franks v Delaware*, 438 US 154 [1978]; *People v Alfinito*, 16 NY2d 181 [1965]). Defendant failed to make " 'a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard of the truth, was included by the affiant in the [search] warrant affidavit, and . . . [that such] statement [was] necessary to the finding of probable cause' " (*People v Binion*, 100 AD3d 1514, 1514-1515 [4th Dept 2012], *lv denied* 21 NY3d 911 [2013], quoting *Franks*, 438 US at 155-156; *see People v Barnes*, 139 AD3d 1371, 1373-1374 [4th Dept 2016], *lv denied* 28 NY3d 926 [2016]; *see generally People v Tambe*, 71 NY2d 492, 504 [1988]).

Defendant's contention that she was denied effective assistance of counsel does not survive her plea of guilty because she has not established that any deficiencies in defense counsel's performance infected the plea bargaining process or that she ultimately decided to enter the plea based on defense counsel's allegedly poor performance (*see People v Goforth*, 122 AD3d 1310, 1310 [4th Dept 2014], *lv denied* 25 NY3d 951 [2015]; *see also People v Ware*, 159 AD3d 1401, 1402 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

836

KA 17-01508

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUINNTON M. DUBOIS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MERIDETH H. SMITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KAYLAN PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (J. Scott Odorisi, J.), rendered November 30, 2016. The judgment convicted defendant after a nonjury trial of attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a nonjury trial of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [1]). Defendant contends that the evidence is legally insufficient to establish that he intended to cause serious physical injury to the victim. We note at the outset that, contrary to the conclusion of the dissent, Supreme Court expressly addressed each of the specific arguments raised in defendant's motion for a trial order of dismissal, including the argument raised on appeal, and we are therefore not left in a position in which we would have to impermissibly deem the court's failure to rule on the motion as a denial thereof (*cf. People v Capitano*, 198 AD3d 1324, 1324-1325 [4th Dept 2021]). With respect to the merits, we reject defendant's argument. "Attempted assault in the second degree can be proven without any serious physical injury or even any physical injury; all that is required is that the defendant intended such injury and engaged in conduct directed at accomplishing that objective" (*People v McCloud*, 121 AD3d 1286, 1287 [3d Dept 2014], *lv denied* 25 NY3d 1167 [2015] [internal quotation marks omitted]; *see generally People v Ford*, 114 AD3d 1273, 1274 [4th Dept 2014], *lv denied* 23 NY3d 962 [2014]). Here, defendant's intent may be "inferred from the totality of [his] conduct," which included "repeatedly striking [the victim] while [she was] on the ground defenseless" (*People v Meacham*, 84 AD3d 1713, 1714 [4th Dept 2011], *lv denied* 17 NY3d 808 [2011]). Further, viewing the evidence in light of the elements of the crime in this

nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

All concur except CURRAN, J., who dissents and votes to hold the case, reserve decision and remit the matter to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: I respectfully dissent and would hold the case, reserve decision, and remit the matter to Supreme Court for a ruling on defendant's motion for a trial order of dismissal because the court never expressly decided defendant's motion adversely to him. Compelling that conclusion, I note that the Court of Appeals " 'has construed CPL 470.15 (1) as a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court' " (*People v Hallmark*, 122 AD3d 1438, 1439 [4th Dept 2014], quoting *People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]; *see People v Coles*, 105 AD3d 1360, 1363 [4th Dept 2013]). Further, I note that this Court has repeatedly held that it lacks the power to review a sufficiency contention where the court has not expressly ruled on, and denied, a defendant's motion for a trial order of dismissal (*see e.g. People v Johnson*, 192 AD3d 1612, 1615-1616 [4th Dept 2021]; *People v Bennett*, 180 AD3d 1357, 1358 [4th Dept 2020]; *People v Moore*, 147 AD3d 1548, 1548-1549 [4th Dept 2017]; *see generally People v Spratley*, 96 AD3d 1420, 1421 [4th Dept 2012]), even in the context of a nonjury trial (*see e.g. People v Capitano*, 198 AD3d 1324, 1324-1325 [4th Dept 2021]; *People v White*, 134 AD3d 1414, 1415 [4th Dept 2015]).

Here, during the nonjury trial, the court expressly reserved decision on defendant's motion for a trial order of dismissal. Although the Criminal Procedure Law requires a court to determine a motion on which it has reserved decision (*see* CPL 290.10 [1]; 320.20 [4]), the court here never again addressed that motion by name on the record. Rather, in rendering its verdict, the court stated merely that, "based upon the credible trial evidence, this [c]ourt finds the defendant guilty of . . . attempted assault in the second degree [because] there was legally sufficient proof that the defendant intended to cause the victim serious physical injury based upon his conduct, and [in] consideration of all the surrounding circumstances."

In reaching the merits of defendant's legal sufficiency contention, the majority tacitly concludes that the court implicitly denied defendant's motion when it rendered its guilty verdict, likely due to the court's reference to the "legally sufficient proof" supporting its finding of guilt. I respectfully disagree with this approach for two reasons. First, as noted above, the court did not determine defendant's motion as required by the Criminal Procedure Law, but instead rendered its verdict. Second, this Court's precedent in applying *LaFontaine* and its progeny has repeatedly rejected reliance on a court's "implicit" determinations to reach the merits of an issue and instead requires that a court must "*expressly* 'decide [an] issue adversely to [a] defendant' " before we may consider it on

appeal (*People v Gainey*, 130 AD3d 1504, 1505 [4th Dept 2015] [emphasis added]; *see Capitano*, 198 AD3d at 1325; *Spratley*, 96 AD3d at 1421). In my view, that precedent does not permit us to construe the court's verdict as the required determination of defendant's motion.

I nevertheless agree with the majority that the court's verdict statement supports a fair inference that it implicitly denied defendant's motion, even though it made no express statement to that effect. The same could reasonably be said whenever a court convicts a defendant in a nonjury trial inasmuch as "[t]rial judges . . . are presumed to know the law and to apply it in making their decisions" (*People v Barthel*, 199 AD3d 32, 36 [4th Dept 2021], *lv denied* 37 NY3d 1058 [2021] [internal quotation marks omitted]), and a nonjury verdict of guilt presumptively requires the court to first conclude that there is legally sufficient evidence supporting the conviction. Indeed, but for this Court's precedent applying the *LaFontaine* rule to a trial court's failure to rule on motions for a trial order of dismissal in a nonjury context (*see e.g. Capitano*, 198 AD3d at 1324; *White*, 134 AD3d at 1415), I would have no objection to the majority's more practical result, which, I note, also serves the interest of judicial economy. Nonetheless, given our precedent, I respectfully disagree with the majority's parsing of the court's words to conclude that it determined the motion; such a granular focus on the words the court uttered when rendering its verdict to conclude that the motion had been decided invites only inconsistency and unpredictability.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

845

CA 19-01255

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

BERNARD A. UNGER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL A. GANCI, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

LAW OFFICE OF GARY R. EBERSOLE, GRAND ISLAND (STEPHEN C. HALPERN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GROSS SHUMAN, P.C., BUFFALO (B. KEVIN BURKE, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered May 6, 2019. The order determined that defendant is entitled to judgment on his counterclaims for breach of contract and rescission.

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

Same memorandum as in *Unger v Ganci* ([appeal No. 2] — AD3d — [Dec. 23, 2021] [4th Dept 2021]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

846

CA 20-00627

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

BERNARD A. UNGER, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL GANCI, DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

LAW OFFICE OF GARY R. EBERSOLE, GRAND ISLAND (STEPHEN C. HALPERN OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

GROSS SHUMAN, P.C., BUFFALO (B. KEVIN BURKE, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Supreme Court, Erie County (Mark A. Montour, J.), entered March 11, 2020. The judgment, among other things, dismissed plaintiff's causes of action.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by dismissing the first, second and third counterclaims and as modified the judgment is affirmed without costs.

Memorandum: In October 2010, plaintiff sold his Buffalo-area financial services company to defendant pursuant to a sale contract. The contract required defendant to make 20 quarterly installment payments totaling $500,000 in exchange for plaintiff's book of business. The contract also contained a non-compete clause, the validity of which is not in dispute on this appeal, which provided that plaintiff "agree[d] to not compete with [defendant] nor [would] he solicit business or services from [defendant's] clients nor their immediate families," that plaintiff was "forbid[den from] acting as a consultant, representative agent or advisor to any existing client of [plaintiff's former business]," and that plaintiff would not "contact any client without prior written consent from [defendant]."

Although plaintiff moved from the Buffalo area soon after the sale, he eventually returned and again began working as a financial advisor around mid-2012, soliciting prospective clients in the community through seminars, newsletters, and mailings. Although the exact time frame is unclear, prior to July 2013, plaintiff had begun managing the accounts of six people who had previously been clients of his former business and who had accounts under defendant's management.

Up until that point in time, defendant had made 11 quarterly

payments pursuant to the sale contract. According to plaintiff's testimony at the nonjury trial on liability in this case, defendant's next payment was due at the latest by July 15, 2013. Defendant, however, made no further payments. In the months that followed, plaintiff began directly contacting his former clients that had accounts under defendant's management. Plaintiff thereafter commenced this action asserting, inter alia, a cause of action for breach of contract based on defendant's failure to continue making the quarterly payments. In response, defendant, inter alia, asserted counterclaims for breach of contract and rescission based on plaintiff's violation of the non-compete clause.

In appeal No. 1, plaintiff appeals from an order of Supreme Court that determined, after the nonjury trial on liability, that defendant was entitled to judgment on his counterclaims for breach of contract and rescission. In appeal No. 2, plaintiff appeals and defendant cross-appeals from a judgment of the same court that, inter alia, granted defendant judgment on his counterclaims for breach of contract and rescission, determined that defendant failed to establish damages on those claims, and dismissed each of plaintiff's causes of action. As an initial matter, appeal No. 1 must be dismissed inasmuch as the order at issue therein is subsumed in the final judgment (*see Wiedenhaupt v Hogan* [appeal No. 2], 89 AD3d 1525, 1526 [4th Dept 2011]; *see also Knapp v Finger Lakes NY, Inc.*, 184 AD3d 335, 337 [4th Dept 2020], *lv dismissed* 36 NY3d 963 [2021]).

In appeal No. 2, contrary to plaintiff's contention, we conclude that the court properly dismissed his cause of action for breach of contract. Following a nonjury trial, this Court's authority is as broad as that of the trial court. Nonetheless, "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" (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993] [internal quotation marks omitted]; *see Howard v Pooler*, 184 AD3d 1160, 1163 [4th Dept 2020]). The elements of a breach of contract cause of action are " 'the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages' " (*Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]). It is undisputed that, by July 2013, plaintiff had begun managing the accounts of six former clients that had been, until his return to the area, under defendant's management. Based on that conduct and applying the above standard of review, we conclude that plaintiff breached the terms of the non-compete clause in the sale contract. That conduct occurred prior to the date that, according to plaintiff, defendant's next quarterly payment became due. Furthermore, under the circumstances of this case, we conclude that plaintiff's breach of the sale contract was material, that it ended defendant's obligation to continue performing under the contract (*see Sarantopoulos v E-Z Cash ATM, Inc.*, 35 AD3d 708, 709-710 [2d Dept 2006]; *cf. Wolfson v Faraci Lange, LLP*, 103 AD3d 1272, 1273 [4th Dept 2013]), and that it was fatal to plaintiff's ability to establish his own performance under the contract (*see generally Niagara Foods, Inc.*,

111 AD3d at 1376).

We agree with plaintiff, however, that the court erred in granting judgment in favor of defendant on his counterclaim for rescission. A claim for rescission, as opposed to a claim for breach of contract, seeks to " 'restore the parties to status quo,' " as if the parties had never entered into the contract (*Lenel Sys. Intl., Inc. v Smith*, 106 AD3d 1536, 1537-1538 [4th Dept 2013]; *see WILJEFF, LLC v United Realty Mgt. Corp.*, 82 AD3d 1616, 1617 [4th Dept 2011]). Rescission sounds in equity (*see generally Willoughby Rehabilitation & Health Care Ctr., LLC v Webster*, 134 AD3d 811, 813-814 [2d Dept 2015]), and is appropriate only where, among other things, the status quo can be " 'substantially restored' " (*Singh v Carrington*, 18 AD3d 855, 857 [2d Dept 2005], quoting *Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]; *see Nelson v Rosenkranz*, 166 AD3d 558, 558 [1st Dept 2018]; *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 71 [1st Dept 2002]). In this case, rescission is unavailable because the status quo cannot be substantially restored. Here, "the assimilation of plaintiff's company [into defendant's business is] complete," and events have rendered the status quo practically impossible to recreate (*Rudman*, 30 NY2d at 14; *see Sokolow*, 299 AD2d at 71). We therefore modify the judgment by dismissing the first counterclaim.

We likewise agree with plaintiff that the court erred in granting judgment to defendant on his two counterclaims for breach of contract. Damages are an element of a claim for breach of contract (*see Niagara Foods, Inc.*, 111 AD3d at 1376) and, here, defendant's counterclaims for breach of contract should have been dismissed upon the court's determination that defendant failed to establish damages (*see Ahmed v Carrington Mtge. Servs., LLC*, 189 AD3d 960, 961-963 [2d Dept 2020]; *Viacom Outdoor, Inc. v Wixon Jewelers, Inc.*, 82 AD3d 604, 604 [1st Dept 2011]; *Rakylar v Washington Mut. Bank*, 51 AD3d 995, 995-996 [2d Dept 2008]). We therefore further modify the judgment by dismissing the second and third counterclaims.

Finally, although defendant contends on his cross appeal that he is entitled to nominal damages (*see generally Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 [1993]), that contention is not properly before us because it is raised for the first time on his cross appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]; *see generally Sultan v Payson*, 259 AD2d 610, 611 [2d Dept 1999]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

848

CA 20-01425

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

GRETCHEN REVERE AND KEVIN REVERE, HER HUSBAND,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ROBERT P. BURKE, D.O., ROBERT P. BURKE, M.D., P.C.,
STELLA M. CASTRO, M.D., LINDSEY PETRIE, FNP-BC,
ASTHMA & ALLERGY ASSOCIATES, P.C.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (THOMAS J. DEBERNARDIS OF COUNSEL), FOR DEFENDANTS-APPELLANTS ROBERT P. BURKE, D.O. AND ROBERT P. BURKE, M.D., P.C.

MARTIN, GANOTIS, BROWN, MOULD & CURRY, P.C., DEWITT (GABRIELLE L. BULL OF COUNSEL), FOR DEFENDANTS-APPELLANTS STELLA M. CASTRO, M.D., LINDSEY PETRIE, FNP-BC, AND ASTHMA & ALLERGY ASSOCIATES, P.C.

ROBERT F. JULIAN, P.C., UTICA (ROBERT F. JULIAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered October 13, 2020. The order denied the motions of defendants Robert P. Burke, D.O., Robert P. Burke, M.D., P.C., Stella M. Castro, M.D., Lindsey Petrie, FNP-BC and Asthma & Allergy Associates, P.C., for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the motion of defendants Stella M. Castro, M.D., Lindsey Petrie, FNP-BC, and Asthma & Allergy Associates, P.C., and dismissing the complaint against them except insofar as the complaint, as amplified by the bills of particulars, alleges that Castro failed to communicate her November 21, 2014 impressions about plaintiff Gretchen Revere to defendant Robert P. Burke, D.O., and as modified the order is affirmed without costs.

Memorandum: In 2015, a benign brain tumor was discovered in the frontal lobe of Gretchen Revere (plaintiff). Plaintiffs commenced this medical malpractice action alleging, inter alia, that defendants-appellants failed to discover the tumor at an earlier time. Defendant Robert P. Burke, D.O. was plaintiff's primary care physician and, during the course of his treatment of plaintiff, he referred her in

2014 to defendant Asthma & Allergy Associates, P.C., where she was seen by defendant Stella M. Castro, M.D.

Castro, along with Asthma & Allergy Associates, P.C., and defendant Lindsey Petrie, FNP-BC (collectively, AAA defendants), moved for summary judgment dismissing the complaint against them. In addition, Burke and defendant Robert P. Burke, M.D., P.C. (collectively, Burke defendants) moved for summary judgment dismissing the complaint and any cross claims against them. Supreme Court denied the motions, and the Burke defendants and the AAA defendants appeal.

Addressing first the motion of the Burke defendants, it is well established that, "[a]lthough physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied upon by the patient" (*Burtman v Brown*, 97 AD3d 156, 161-162 [1st Dept 2012] [internal quotation marks omitted]). Consistent with that principle, a physician may satisfy his or her duty of care to a patient by referring the patient to a specialist who is "better equipped to handle [the patient's] condition" (*Perez v Edwards*, 107 AD3d 565, 566 [1st Dept 2013], *lv denied* 22 NY3d 862 [2014]; *see G.L. v Harawitz*, 146 AD3d 476, 476 [1st Dept 2017]; *see also Dombroski v Samaritan Hosp.*, 47 AD3d 80, 84-85 [3d Dept 2007]; *Wasserman v Staten Is. Radiological Assoc.*, 2 AD3d 713, 714 [2d Dept 2003]), and after a referral is made, a primary care physician does not have an "independent duty to assess the course of treatment set and monitored by another physician" (*Burtman*, 97 AD3d at 164).

Here, we conclude that, contrary to the Burke defendants' contention, although they met their initial burden on their motion with respect to whether Burke departed from the accepted standard of care, plaintiffs raised a triable issue of fact in that regard in opposition (*see generally Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]). Plaintiff presented to Burke's office on September 8, 2014, and Burke referred her to Asthma & Allergy Associates, P.C., to address her allergy symptoms. However, there is an issue of fact whether plaintiff complained about a loss of smell or taste to Burke during the September 8 visit. Burke acknowledged in his affidavit that, if she had done so, "the appropriate and reasonable course [would have been] to refer [her] to an appropriate [ear, nose, and throat] specialist best equipped to assess and treat those conditions[.]" Indeed, Burke referred plaintiff to such a specialist in 2012 when she complained, at that time, about a loss of smell and taste. Because there is an issue of fact whether Burke complied with the accepted standard of care by referring plaintiff to an appropriate specialist following the September 8 visit (*cf. G.L.*, 146 AD3d at 476; *Perez*, 107 AD3d at 566), we conclude that the court properly denied the motion of the Burke defendants.

Addressing next the motion of the AAA defendants, we note that, when plaintiff first presented to Castro on November 21, 2014, Castro made preliminary observations regarding plaintiff's condition. According to her notes from the November 21 visit, which the AAA defendants submitted in support of their motion, Castro recognized

plaintiff's "complex history" and stated that, "even if [plaintiff] has allergies, it may not fully explain her symptom complex. Meds will be started to see if we can address her rhinitis and sense disturbance. Sinus CT scan vs rhinoscopy may be required to complete the evaluation. I also recommend a comprehensive primary care evaluation and baseline sleep study going forward." In opposition to the motion of the AAA defendants, plaintiffs submitted an expert affirmation of an internal medicine physician. We conclude that, although the AAA defendants met their initial burden on their motion with respect to whether Castro departed from the accepted standard of care, the expert's affirmation submitted by plaintiffs in opposition raised a triable issue of fact whether Castro departed therefrom by failing to communicate her November 21 impressions about plaintiff to Burke (*see generally Bubar*, 177 AD3d at 1359).

In reaching our conclusion, we reject the contention of the AAA defendants that plaintiffs' expert was unqualified to render opinions about Castro, an allergist. The opinion rendered by plaintiffs' expert did not concern Castro's specialty as an allergist. Rather, the opinion pertained to a physician's more general duty to communicate. We conclude that plaintiffs' expert laid an adequate foundation for the opinion rendered (*see Chillis v Brundin*, 150 AD3d 1649, 1650 [4th Dept 2017]), and any lack of knowledge by the expert about Castro's specific field merely "goes to the weight and not the admissibility" of the expert's opinion (*Stradtman v Cavaretta* [appeal No. 2], 179 AD3d 1468, 1471 [4th Dept 2020] [internal quotation marks omitted]).

To the extent, however, that plaintiffs' expert further opined that Castro deviated from the accepted standard of care by failing to order a CT scan of plaintiff, we conclude that the opinion is speculative and insufficient to raise a triable issue of fact inasmuch as Castro's duty to plaintiff was limited to treating plaintiff's allergy symptoms (*see Burtman*, 97 AD3d at 161-162; *Dombroski*, 47 AD3d at 84-85). Moreover, we agree with the AAA defendants that plaintiffs' expert failed to address any of plaintiffs' other claims of negligence against them as stated in plaintiffs' bills of particulars. We therefore conclude that the court erred in denying the unopposed motion of the AAA defendants with respect to those claims (*see Pasek v Catholic Health Sys., Inc.*, 186 AD3d 1035, 1036 [4th Dept 2020]), and we modify the order accordingly.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

850

CA 21-00405

PRESENT: SMITH, J.P., CARNI, CURRAN, AND DEJOSEPH, JJ.

KATHY GAMBLIN, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

MIMI NAM AND DONG H. NAM,
DEFENDANTS-APPELLANTS-RESPONDENTS.

LAW OFFICES OF JOHN TROP, ROCHESTER (TIFFANY L. D'ANGELO OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 11, 2021. The order granted in part and denied in part the motion of plaintiff for summary judgment and the cross motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's motion in its entirety, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries she sustained when the vehicle in which she was a passenger was struck by a vehicle driven by Mimi Nam (defendant) and owned by Dong H. Nam (collectively, defendants). Specifically, plaintiff alleged in an amended complaint that, as a result of defendant's negligence, the vehicle defendant was driving rear-ended the vehicle in which plaintiff was a passenger, causing plaintiff to sustain serious injuries. Plaintiff moved for summary judgment on the issues of defendant's negligence and whether plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d) under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories, and defendants cross-moved for summary judgment dismissing the amended complaint. Defendants now appeal from an order insofar as it granted plaintiff's motion in part with respect to the issue of negligence and denied the cross motion with respect to that issue. Plaintiff cross-appeals from the same order to the extent that it denied her motion in part with respect to the three abovementioned categories of serious injury and granted the cross motion with respect to the permanent consequential limitation of use category of serious injury.

Initially, we agree with defendants on their appeal that Supreme

Court erred in granting plaintiff's motion insofar as it sought summary judgment on the issue of negligence, and we therefore modify the order accordingly. We conclude that the court erred in analyzing this case under the legal framework generally applicable in the context of a rear-end collision, i.e., where there is a presumption of negligence absent the defendant's proffer of a nonnegligent explanation for the collision (*see e.g. Wisniewski v Jaeger*, 189 AD3d 2129, 2129 [4th Dept 2020]; *Rodriguez v First Student, Inc.*, 163 AD3d 1425, 1427 [4th Dept 2018]). Rather, the court should have applied general negligence principles to determine whether plaintiff met her initial burden on her motion with respect to the issue of defendant's negligence (*see generally Edwards v Gorman*, 162 AD3d 1480, 1481 [4th Dept 2018]; PJI 2:77). The largely undisputed facts in this case, as set forth in plaintiff's submissions, establish that the subject accident was not the prototypical rear-end collision warranting application of the presumption of negligence. Prior to the accident, plaintiff's daughter was driving the vehicle in which plaintiff was a passenger on an entrance ramp leading to the New York State Thruway when the vehicle suddenly hit a patch of ice, causing it to slide off the road and into a ditch. About 10 minutes later, defendant's vehicle encountered the same patch of ice on the road, also slid off the road into the ditch, and then struck plaintiff's vehicle from behind. Defendant had no idea that plaintiff's car had even been on the road until the collision occurred.

Under these facts, we conclude that defendant never had any opportunity to keep a safe distance from plaintiff's vehicle (*see generally* Vehicle and Traffic Law § 1129). Additionally, the facts of this particular case do not implicate the presumption applicable in most rear-end collision cases because there was a "substantial time interval" between when each vehicle encountered the icy condition, slid off the road, and entered the ditch (*Holtermann v Conchetti*, 295 AD2d 680, 681 [3d Dept 2002]; *see Torres v WABC Towing Corp.*, 282 AD2d 406, 406-407 [1st Dept 2001]). Indeed, unlike most typical rear-end collision cases, this is not a case where two vehicles were essentially driving in tandem down the road in the moments leading up to the accident. Thus, the presumption of negligence does not apply here because it cannot be determined that defendant violated any "duty to maintain a safe distance" between her vehicle and plaintiff's vehicle prior to the accident (*Webber v Bleiler*, 270 AD2d 933, 934 [4th Dept 2000]; *see Kress v Allen*, 11 AD3d 985, 986 [4th Dept 2004]; *Gubala v Gee*, 302 AD2d 911, 912 [4th Dept 2003]), and we conclude that, under general negligence principles, plaintiff failed to meet her initial burden on her motion of establishing defendant's negligence (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Torres-Cummings v Niagara Falls Police Dept.*, 193 AD3d 1372, 1373 [4th Dept 2021]).

Moreover, even assuming, arguendo, that this case is governed by the rules generally applicable to rear-end collisions (*see generally Rodriguez*, 163 AD3d at 1427), we conclude that the court should have denied that part of plaintiff's motion on the issue of negligence. Although it is undisputed that defendant's vehicle collided with the rear of plaintiff's vehicle, the parties' submissions raise an issue

of fact whether defendant had an adequate nonnegligent explanation for the collision sufficient to rebut the presumption of negligence (*see Baldauf v Gambino*, 177 AD3d 1307, 1309 [4th Dept 2019]). Specifically, plaintiff and defendant both testified at their depositions that there existed a sudden and unanticipated icy condition on the entrance ramp that caused both vehicles to slide off the road into the ditch where they collided (*see id.*; *Chwojdak v Schunk*, 164 AD3d 1630, 1631-1632 [4th Dept 2018]; *Dalton v Lucas*, 96 AD3d 1648, 1649 [4th Dept 2012]).

For the same reasons, we conclude that, contrary to defendants' further contention on their appeal, the court properly denied their cross motion with respect to the issue of negligence (*see Baldauf*, 177 AD3d at 1309).

On the issue of serious injury, we conclude that, contrary to the contention of plaintiff on her cross appeal, the court properly denied her motion with respect to the three categories of serious injury in question, and properly granted the cross motion insofar as it sought summary judgment dismissing plaintiff's claim under the permanent consequential limitation of use category. With respect to the significant limitation of use category, " '[w]hether a limitation of use . . . is "significant" . . . relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part' " (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002], *rearg denied* 98 NY2d 728 [2002]; *see Habir v Wilczak*, 191 AD3d 1320, 1322 [4th Dept 2021]). We conclude that plaintiff satisfied her initial burden on the motion with respect to that category. Plaintiff submitted an affirmation from an expert who opined that plaintiff sustained cervical and lumbar strains that had not resolved about 10 months after the accident, and also submitted evidence that she had severe muscle spasms, which constitute objective evidence of injury (*see Latini v Barwell*, 181 AD3d 1305, 1307 [4th Dept 2020]; *Armella v Olson*, 134 AD3d 1412, 1413 [4th Dept 2015]; *Austin v Rent A Ctr. E., Inc.*, 90 AD3d 1542, 1544 [4th Dept 2011]). Plaintiff further submitted "several reports of tests that produced 'designation[s] of . . . numeric percentage[s] of . . . plaintiff's loss of range of motion' " (*Thomas v Huh*, 115 AD3d 1225, 1225 [4th Dept 2014]; *see Matte v Hall*, 20 AD3d 898, 899 [4th Dept 2005]; *see generally Toure*, 98 NY2d at 350). In opposition to the motion, however, defendants raised a triable issue of fact with respect to the significant limitation of use category "by submitting an affirmation of a radiologist who opined that there was no objective evidence of a serious injury and no showing of any significant injuries" (*Habir*, 191 AD3d at 1323; *see generally Smith v Hamasaki*, 173 AD3d 1816, 1817 [4th Dept 2019]). Further, the radiologist opined that plaintiff has sustained only degenerative changes to her spine that are the result of age, rather than traumatic injuries caused by the accident (*see Deering v Prosser*, 182 AD3d 1029, 1030 [4th Dept 2020]; *see generally Green v Repine*, 186 AD3d 1059, 1061 [4th Dept 2020]).

With respect to the permanent consequential limitation of use category, a plaintiff must "submit objective proof of a permanent

injury" to establish a qualifying serious injury (*McKeon v McLane Co., Inc.*, 145 AD3d 1459, 1461 [4th Dept 2016]; *see Schaubroeck v Moriarty*, 162 AD3d 1608, 1610 [4th Dept 2018]). Here, we conclude that defendants met their initial burden on the cross motion with respect to that category "by submitting evidence that plaintiff sustained only a temporary cervical strain, rather than any significant injury to h[er] nervous system or spine, as a result of the accident" (*Williams v Jones*, 139 AD3d 1346, 1347 [4th Dept 2016]; *see Latini*, 181 AD3d at 1306; *Cook v Peterson*, 137 AD3d 1594, 1596 [4th Dept 2016]). We further conclude that plaintiff failed to raise a triable question of fact in opposition with respect to that category because the affidavits submitted by plaintiff fail to establish that any of her injuries were permanent (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Finally, to establish a qualifying serious injury with respect to the 90/180-day category, a plaintiff must establish that he or she was unable to "perform substantially all of [his or] her activities of daily living for not less than 90 days during the 180 days immediately following the occurrence of [his or] her injuries" (*James v Thomas*, 156 AD3d 1440, 1441 [4th Dept 2017]; *see Maurer v Colton* [appeal No. 3], 180 AD3d 1371, 1373 [4th Dept 2020]), and that he or she "has been curtailed from performing his [or her] usual activities to a great extent rather than some slight curtailment" (*Licari v Elliott*, 57 NY2d 230, 236 [1982]; *see Deering*, 182 AD3d at 1032). "A showing that 'plaintiff may have missed more than 90 days of work is not determinative' " (*Savilo v Denner*, 170 AD3d 1570, 1571 [4th Dept 2019]). Here, we conclude that plaintiff did not meet her initial burden on her motion with respect to the 90/180-day category because she submitted conflicting evidence concerning whether she could perform her typical daily activities during the relevant time frame. Specifically, she provided evidence establishing that she had been told not to go to work, as well as contradictory expert reports indicating that she could work. Further, plaintiff submitted her own deposition testimony, in which she testified that she was able to cook and clean after the accident. In light of plaintiff's failure to meet her initial burden on the motion with respect to the 90/180-day category, there is no need for us to consider the sufficiency of defendants' opposition to the motion on that issue (*see Winegrad*, 64 NY2d at 853).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

852

CA 20-00864

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

CITY OF UTICA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHELLE MALLETTE, FORMERLY KNOWN AS MICHELLE BANNATYNE, DEFENDANT-APPELLANT.

LAMB & BARNOSKY, MELVILLE (SCOTT M. KARSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM M. BORRILL, CORPORATION COUNSEL, UTICA (ARMOND J. FESTINE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered December 11, 2019. The order denied the motion of defendant to vacate a default judgment.

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

Memorandum: In 2010, defendant's husband owned the Doyle Hardware Building, a landmark four-story building in plaintiff City of Utica (City). The City made loans to defendant's husband totaling $150,000 for the purpose of purchasing and installing an elevator in the building (project), which were secured by a mortgage on the building. Defendant signed a personal loan guarantee, in which she "unconditionally guarantee[d]" repayment of the loans should her husband default.

In August 2013, the City commenced this action alleging, in a single cause of action, that defendant's husband had defaulted on the loans and that defendant failed to remit payment under the personal guarantee, despite the City's "due demand." In May 2014, the City moved for a default judgment, noting that defendant, who then lived in Connecticut, had been properly served with the summons and complaint in October 2013, and that she never responded or answered the complaint. Consequently, Supreme Court entered a default judgment against defendant in July 2014. Thereafter, in October 2014, the City allegedly served defendant in Connecticut with an information subpoena, along with a copy of the default judgment. In 2019, defendant moved to vacate the default judgment, and she now appeals from an order denying that motion. We affirm.

Defendant contends that the court erred in denying her motion

insofar as it sought to vacate the default judgment pursuant to CPLR 5015 (a) (4) because the court lacked personal jurisdiction over her (*see generally Yellowbook, Inc. v Hedge*, 183 AD3d 925, 926 [2d Dept 2020]). We reject that contention. It is well settled that a court may "exercise personal jurisdiction over a non-domiciliary [where] two requirements are satisfied: the action is permissible under the long-arm statute (CPLR 302) and the exercise of jurisdiction comports with due process" (*Williams v Beemiller, Inc.*, 33 NY3d 523, 528 [2019]; *see LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]). Under CPLR 302 (a), a court may exercise personal jurisdiction over any non-domiciliary who, inter alia, "transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR 302 [a] [1]). The statute also requires, however, "an 'articulable nexus' or 'substantial relationship' " between the cause of action, or an element thereof, and defendant's alleged contacts with New York State (*D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 298 [2017]; *see Zeidan v Scott's Dev. Co.*, 173 AD3d 1639, 1640 [4th Dept 2019]). With respect to due process, a non-domiciliary must have "certain minimum contacts with [New York] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' " (*International Shoe Co. v Washington*, 326 US 310, 316 [1995]; *see Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915, 919 [2011]). That test is satisfied where a defendant "purposefully avails [himself or herself] of the privilege of conducting activities within the forum State" (*LaMarca*, 95 NY2d at 216 [internal quotation marks omitted]), thereby "invoking the benefits and protections of [New York's] laws" (*Hanson v Denckla*, 357 US 235, 253 [1958]).

Here, the court properly concluded that it had personal jurisdiction over defendant because the City's cause of action directly arose from her business transactions related to the project, including, but not limited to, her personal guarantee of the loans (*see* CPLR 302 [a] [1]). The evidence in the record establishes that defendant played far more than a minimal role in the project besides indemnifying the loans with a personal guarantee. Specifically, defendant was named, alongside her husband, as part of the project's two-person development team, and her qualifications for that role were extensively detailed in a request for financing brochure. Further, an affidavit from a member of the City's economic development department, who had personally met defendant, established that she was heavily involved in the project, had intimate knowledge of the project and its operations, and made frequent trips to the City for meetings to monitor the project's progress. Consequently, defendant's association with New York with respect to the project far exceeded "the negotiation and execution of the indemnity agreement" while in another state that the Court of Appeals previously concluded was insufficient to support long-arm jurisdiction under CPLR 302 (a) (1) (*Ferrante Equip. Co. v Lasker-Goldman Corp.*, 26 NY2d 280, 284 [1970]).

For similar reasons, we conclude that the exercise of personal jurisdiction under CPLR 302 (a) (1) here also comported with federal due process (*see LaMarca*, 95 NY2d at 216; *see generally International*

Shoe Co., 326 US at 316). Defendant's detailed personal involvement in multiple aspects of the project, as detailed above, amply demonstrated that she purposefully availed herself of the privilege of conducting business activities in New York, thereby invoking the benefits and privileges of the state's laws (*see Hanson*, 357 US at 253; *LaMarca*, 95 NY2d at 216). This is not one of the "rare" cases where "personal jurisdiction permitted under the long-arm statute may theoretically be prohibited under due process analysis" (*D&R Global Selections, S.L.*, 29 NY3d at 299-300 [internal quotation marks omitted]; *see Rushaid v Pictet & Cie*, 28 NY3d 316, 330-331 [2016], *rearg denied* 28 NY3d 1161 [2017]).

We further conclude that the court properly denied defendant's motion insofar as it sought to vacate the default judgment pursuant to CPLR 5015 (a) (1). "[A] party seeking to vacate a default judgment pursuant to CPLR 5015 (a) (1) must demonstrate a reasonable excuse for the default and a meritorious defense" (*Peroni v Peroni*, 189 AD3d 2058, 2060 [4th Dept 2020]; *see Wells Fargo Bank, N.A. v Mazzara*, 124 AD3d 875, 875 [2d Dept 2015]). The "determination of what constitutes a reasonable excuse lies within the sound discretion of the trial court" (*Solorzano v Cucinelli Family*, 1 AD3d 887, 887 [4th Dept 2003] [internal quotation marks omitted]; *see Wells Fargo Bank, N.A. v Dysinger*, 149 AD3d 1551, 1552 [4th Dept 2017]). Here, we conclude that the court did not abuse its discretion in determining that defendant failed to establish a reasonable excuse for her default because defendant's stated lack of familiarity "with the legal system is insufficient" to demonstrate such a reasonable excuse (*US Bank N.A. v Brown*, 147 AD3d 428, 429 [1st Dept 2017]; *see also Wells Fargo Bank, N.A.*, 149 AD3d at 1552; *U.S. Bank N.A. v Ahmed*, 137 AD3d 1106, 1109 [2d Dept 2016]). In light of that conclusion, we need not consider whether defendant established a potentially meritorious defense (*see Wells Fargo Bank, N.A. v Stewart*, 146 AD3d 921, 922-923 [2d Dept 2017]; *Abbott v Crown Mill Restoration Dev., LLC*, 109 AD3d 1097, 1100 [4th Dept 2013]).

Finally, we conclude that the court did not abuse its discretion in denying defendant's motion insofar as it sought to vacate the default judgment pursuant to CPLR 5015 (a) (3) (*see generally VanZandt v VanZandt*, 88 AD3d 1232, 1233 [3d Dept 2011]). Here, defendant did not meet her "burden of establishing fraud, misrepresentation, or other misconduct on the part of [the City] sufficient to entitle [her] to vacatur of the judgment" (*Abbott*, 109 AD3d at 1100), because she "offered nothing more than broad, unsubstantiated allegations of fraud on the part of [the City]" (*Bank of N.Y. v Stradford*, 55 AD3d 765, 766 [2d Dept 2008] [internal quotation marks omitted]; *see Matter of Jon Z. [Margaret Z.]*, 178 AD3d 1417, 1418 [4th Dept 2019]; *Carlson v Dorsey*, 161 AD3d 1317, 1320 [3d Dept 2018]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

853

CA 20-00771

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

IN THE MATTER OF WEBSTER CITIZENS FOR APPROPRIATE LAND USE, INC., PETITIONER-PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF WEBSTER, TOWN OF WEBSTER PLANNING BOARD, TOWN OF WEBSTER ZONING BOARD OF APPEALS, RESPONDENTS-DEFENDANTS-APPELLANTS, ET AL., RESPONDENTS-DEFENDANTS.

CHARLES J. GENESE, TOWN ATTORNEY, WEBSTER, FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

KNAUF SHAW LLP, ROCHESTER (JONATHAN R. TANTILLO OF COUNSEL), FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Gail Donofrio, J.), entered May 19, 2020 in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, among other things, granted in part the relief sought in the petition-complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the petition-complaint insofar as it sought to annul the "refusal" of respondent-defendant Town of Webster Zoning Board of Appeals to hear the appeal of petitioner-plaintiff, and vacating the second decretal paragraph, and as modified the judgment is affirmed without costs.

Memorandum: This appeal involves the proposed development of a hydroponic farming operation (project) on a 140.8-acre parcel of land in respondent-defendant Town of Webster (Town). The project would be located within the Town's LL Large-Lot Single-Family Residential District (LL District). While respondent-defendant Town of Webster Planning Board (Planning Board) was conducting the site plan review process for the project, petitioner-plaintiff (petitioner) attempted to challenge a determination, which was embodied in the agenda for a November 19, 2019 Planning Board meeting, that the project constituted a permitted use in the LL District pursuant to section 225-12 (A) (6) of the Code of the Town of Webster. Specifically, petitioner sought to appeal the determination to respondent-defendant Town of Webster Zoning Board of Appeals (ZBA). On behalf of the ZBA, however, the Deputy Town Attorney rejected petitioner's appeal. Thereafter, at its

December 3, 2019 meeting, the Planning Board granted preliminary and final site plan approval for the project.

Petitioner then commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul the "refusal" of the ZBA to hear petitioner's appeal, and to annul the determinations of the Planning Board granting preliminary and final site plan approval. Supreme Court, inter alia, granted the petition-complaint (petition) insofar as it sought to annul the determinations of the Planning Board granting preliminary and final site plan approval, in effect, further granted the petition insofar as it sought to annul the "refusal" of the ZBA to hear petitioner's appeal, and remitted the matter to the ZBA to consider petitioner's appeal. The Town, the Planning Board, and the ZBA (respondents) now appeal.

We agree with respondents that the court erred by, in effect, granting the petition insofar as it sought to annul the "refusal" of the ZBA to hear petitioner's appeal, and by remitting the matter to the ZBA to consider petitioner's appeal. Pursuant to the Code of the Town of Webster, absent an "order, requirement, decision or determination by any administrative official of the Town" charged with the enforcement of the Town's local zoning ordinance, the ZBA is without jurisdiction to hear an appeal (Code of the Town of Webster § 225-108 [D] [1]; *see* Town Law § 267-a [4]; *Chestnut Ridge Assoc., LLC v 30 Sephar Lane, Inc.*, 169 AD3d 995, 997-998 [2d Dept 2019]; *see also Matter of Willows Condominium Assn. v Town of Greensburgh*, 153 AD3d 535, 537 [2d Dept 2017]). In the process of site plan review, the Town's Department of Public Works (DPW) is required to review applications for development "and make recommendations to the [Planning] Board concerning the project" (Code of the Town of Webster § 228-7 [B]). As relevant here, such recommendation "shall include an identification of any variances required for the project" (*id.*). We therefore conclude that the determination that the project was a permitted use in the LL District was not appealable to the ZBA unless it was made by the DPW.

In October 2019, the DPW issued a written memorandum in which it required numerous revisions to the project. The memorandum, however, is silent with respect to whether any variances are needed for the project. Indeed, there is no evidence in the record that the statement in the Planning Board's November 19, 2019 meeting agenda, i.e., that the project constituted a permitted use, was made as a result of any determination by the DPW. Thus, we conclude on this record that there was no determination from the DPW affording jurisdiction to the ZBA to hear petitioner's appeal (*see Chestnut Ridge Assoc., LLC*, 169 AD3d at 997-998), and we therefore modify the judgment accordingly.

We note, however, that respondents do not challenge the judgment insofar as it annulled the determinations of the Planning Board granting preliminary and final site plan approval, and thus they have abandoned any contention with respect thereto (*see Jeffery v Queen City Foods, LLC*, 197 AD3d 946, 947 [4th Dept 2021]; *Ciesinski v Town*

of Aurora, 202 AD2d 984, 984 [4th Dept 1994]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

862

KA 19-00969

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYLER D. MAGEE, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered December 1, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Preliminarily, we note that defendant did not waive his right to appeal in this case; although defendant stated during the plea colloquy that he was "willing" to waive his right to appeal as part of the plea bargain, he was never thereafter called upon to actually waive that right. Contrary to defendant's contentions on the merits, however, County Court properly refused to suppress the subject guns on reargument because, for the reasons that follow, he was not subjected to either a *De Bour* level one interaction on the street or to a level three seizure in the form of pursuit (*see generally People v Arnau*, 58 NY2d 27, 32 [1982], *cert denied* 468 US 1217 [1984]; *People v De Bour*, 40 NY2d 210, 223 [1976]). We therefore have no occasion to consider whether the police would have had the requisite basis to conduct either a level one interaction or a level three seizure under these circumstances.

A level one interaction is a request for information in which an officer asks " 'basic, nonthreatening questions regarding, for instance, identity, address or destination' " (*People v Garcia*, 20 NY3d 317, 322 [2012], quoting *People v Hollman*, 79 NY2d 181, 185 [1992]). Here, it is undisputed that the officers never " 'request[ed] information' " from defendant as he walked down the

street or as he ran into a house (*id.*). Indeed, the officers had no contact of any kind with defendant before or as he ran into the house (*cf. People v Terracciano*, 135 AD2d 849, 850-851 [2d Dept 1987], *lv denied* 71 NY2d 903 [1988]). Level one analysis is thus inapplicable in this case (*see People v Birch*, 171 AD3d 938, 939-940 [2d Dept 2019], *lv denied* 33 NY3d 1102 [2019]; *People v Thornton*, 238 AD2d 33, 35 [1st Dept 1998]).

Nor did the officers pursue defendant into the house and thereby effect a level three seizure. Pursuit constitutes a level three seizure for *De Bour* purposes " 'where [the] police action results in a significant interruption [of the] individual's liberty of movement' " (*People v Allen*, 188 AD3d 1595, 1596 [4th Dept 2020], *lv denied* 36 NY3d 1117 [2021], quoting *People v Bora*, 83 NY2d 531, 534 [1994]), and that did not occur here. Defendant had already entered the house of his own volition *before* the officers got out of their vehicle or said anything to him, and the subsequent actions of one officer in approaching the house, knocking on the door, and securing the occupant's implicit permission to enter did not and could not have impeded defendant's freedom of movement to be where he had already chosen to be, i.e., inside the house (*see People v Hughes*, 174 AD2d 692, 693-694 [2d Dept 1991], *lv denied* 78 NY2d 967 [1991]; *see also Allen*, 188 AD3d at 1596; *People v Giles*, 223 AD2d 39, 43 [1st Dept 1996], *lv denied* 89 NY2d 864 [1996]).

To the extent that the court's implicit credibility findings are material to the resolution of this appeal, we perceive no basis to disturb those determinations (*see People v Ponzo*, 111 AD3d 1347, 1347-1348 [4th Dept 2013]). We add only that, contrary to defendant's characterization, his challenges to the suppression court's credibility findings are not properly analyzed within the framework that governs our review of the weight of the evidence underlying a guilty verdict (*compare* CPL 470.15 [5] *with* CPL 470.15 [1]; *see generally People v Wilson*, 5 NY3d 778, 780 [2005]; *People v Prochilo*, 41 NY2d 759, 761 [1977]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

871

CA 20-00842

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ.

MOHAMMAD M. MASHEH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JHF MANAGEMENT, LLC, JODA PROPERTIES, LLC, STEVE FERRARO AND JOHN H. FERRARO, DEFENDANTS-RESPONDENTS.

LEGAL SERVICES OF CENTRAL NEW YORK, INC., BINGHAMTON (GEORGE B. HADDAD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, JAMESVILLE (LAUREN M. MILLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered June 23, 2020. The order denied the motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff, a month-to-month tenant at an apartment in a building owned and operated by defendants, commenced this action to recover damages arising from defendants' actions in taking possession of the apartment and removing plaintiff's belongings from the premises and disposing of them. Plaintiff now appeals from an order denying his motion for summary judgment on his cause of action for wrongful eviction. We affirm.

Plaintiff contends that he was entitled to summary judgment on his wrongful eviction cause of action because he was a month-to-month tenant and defendants wrongfully evicted him by failing to commence a special proceeding (*see* RPAPL 711). Plaintiff further contends that the evidence established that he never intended to abandon the premises. We reject those contentions and conclude that plaintiff's own moving papers raise triable issues of fact whether he abandoned the subject premises (*see generally Smith v Hamasaki*, 173 AD3d 1816, 1817 [4th Dept 2019]; *Gawron v Town of Cheektowaga*, 125 AD3d 1467, 1468 [4th Dept 2015]).

On his motion, plaintiff bore the initial burden of establishing his prima facie entitlement to judgment as a matter of law and to "show that there is no defense to [his] cause of action" for wrongful eviction (CPLR 3212 [b]; *see generally Winegrad v New York Univ. Med.*

Ctr., 64 NY2d 851, 853 [1985]). "Abandonment in law depends upon the concurrence of two and only two factors; one, an intention to abandon or relinquish; and two, some overt act, or some failure to act, which carries the implication that owner neither claims nor retains any interest in the subject matter of the abandonment" (*City of Binghamton v Gartell*, 275 App Div 457, 460 [3d Dept 1949]). Here, we conclude plaintiff's own motion papers raise questions of material fact whether he notified defendants of an intention to terminate his tenancy and, if so, whether he retracted that notification. There also are triable questions of fact whether plaintiff evidenced his abandonment of the premises by, inter alia, failing to respond to the calls and a notice from defendants regarding his status and by the condition in which he allegedly left the apartment. "Viewing the evidence in the light most favorable to defendant[s], the nonmoving part[ies]" (*Jackson v Rumpf*, 177 AD3d 1354, 1355 [4th Dept 2019]), we conclude that plaintiff failed to meet his initial burden on the motion regardless of the sufficiency of defendants' opposition papers (*see generally Winegrad*, 64 NY2d at 853).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

872

CA 21-00046

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ.

CRYSTAL MORROW, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRIGHTHOUSE LIFE INSURANCE COMPANY OF NY,
METROPOLITAN LIFE INSURANCE COMPANY,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

WOOD SMITH HENNING & BERMAN LLP, WHITE PLAINS (CHRISTOPHER J. SEUSING OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered June 8, 2020. The order, insofar as appealed from, denied in part the motion of defendants to dismiss the third amended complaint.

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

Memorandum: Brighthouse Life Insurance Company of NY and Metropolitan Life Insurance Company (defendants) appeal from an order that, inter alia, denied in part their motion seeking to dismiss the third amended complaint against them. Plaintiff alleged that, in May 2006, she purchased a $100,000 life insurance policy naming her son as the insured and naming herself and her grandson as the beneficiaries. Plaintiff further alleged that, either before or after she signed the policy application, her son's girlfriend was added as a beneficiary to the policy without plaintiff's approval, knowledge, or consent. In May 2011, plaintiff submitted a claim on the policy after the death of her son. Proceeds from the policy were placed in separate checking accounts for plaintiff, her grandson, and her son's girlfriend, but plaintiff was given all three checkbooks and withdrew the amount in the son's girlfriend's account, leading to criminal charges against plaintiff. Upon the criminal trial of those charges, plaintiff was acquitted on some counts and the jury deadlocked on the remaining counts. Supreme Court (Wolfgang, J.) dismissed the remaining counts in the furtherance of justice.

We agree with defendants that Supreme Court (Ogden, J.) erred in denying those parts of the motion seeking to dismiss the fourth, fifth, sixth, and tenth causes of action as barred by the applicable statute of limitations. Those causes of action were for,

respectively, breach of contract, breach of fiduciary duty, conversion, and aiding and abetting breach of fiduciary duty. Contrary to both plaintiff's position in opposition to the motion and the court's conclusion, those causes of action did not accrue at the time the criminal proceeding terminated. The termination of a criminal proceeding is relevant for claims for malicious prosecution and legal malpractice arising out of a criminal proceeding (*see Britt v Legal Aid Socy.*, 95 NY2d 443, 445-448 [2000]). For those claims, a plaintiff is required to make a showing of innocence, and thus the claims do not accrue until the plaintiff can assert the element of his or her innocence on the criminal charges (*see id.*). Plaintiff here does not need to assert her innocence on the criminal charges as an element of the causes of action for breach of contract, conversion, and breach of fiduciary duty (*see generally Bratge v Simons*, 167 AD3d 1458, 1459 [4th Dept 2018]).

The statute of limitations for a cause of action for breach of contract is six years (*see* CPLR 213 [2]). "[A] breach of contract cause of action accrues at the time of the breach," even if the damage does not occur until later (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]). Here, any breach occurred when the policy was issued in May 2006. The policy stated that the beneficiary was named in the application and referred the reader to an attached copy of the application, which listed the son's girlfriend as a beneficiary. Inasmuch as plaintiff commenced this action more than six years after the policy was issued, the breach of contract cause of action is untimely. The fact that plaintiff alleged that she did not discover the breach until she made a claim under the policy in May 2011 does not compel a different outcome inasmuch as "the breach of contract cause[] of action accrued at the time of the breach, not on the date of discovery of the breach" (*Yarbro v Wells Fargo Bank, N.A.*, 140 AD3d 668, 668 [1st Dept 2016]; *see Deutsche Bank Natl. Trust Co. v Flagstar Capital Mkts.*, 32 NY3d 139, 145-146 [2018]; *ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 25 NY3d 581, 593-594 [2015]; *Ely-Cruikshank Co.*, 81 NY2d at 404).

A cause of action for conversion has a three-year statute of limitations (*see* CPLR 214 [3]) and accrues on the date the conversion takes place (*see DiMatteo v Cosentino*, 71 AD3d 1430, 1431 [4th Dept 2010]). "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). Here, any conversion took place in May 2011, when plaintiff made a claim under the policy and allegedly received less than she was entitled to, and the cause of action is untimely inasmuch as plaintiff commenced this action more than three years later.

With respect to the breach of fiduciary duty causes of action, "where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213 (8)" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009], *rearg denied* 12 NY3d 889 [2009]; *see Monaghan v Ford Motor Co.*, 71 AD3d 848, 849-850 [2d Dept 2010]). Even assuming,

arguendo, that the breach of fiduciary duty causes of action contain allegations of fraud that are essential to the claims, they are still untimely under CPLR 213 (8). The alleged fraudulent action occurred at the latest when the policy was issued in May 2006, and this action was commenced more than six years later and more than two years after May 2011, when plaintiff discovered the alleged fraudulent action.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

873

CA 20-01569

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ.

PHILLIP H. OWENS, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 133716.)

ROTH & ROTH, LLP, NEW YORK CITY (ELLIOT D. SHIELDS OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered May 18, 2020. The order, insofar as appealed from, granted defendant's motion to dismiss and dismissed the amended claim.

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

Memorandum: Claimant commenced this action pursuant to Court of Claims Act § 8-b seeking damages based on allegations that he was wrongly convicted and imprisoned by defendant, State of New York (State). We agree with claimant that the Court of Claims, after granting his cross motion to amend the claim, erred in granting the State's motion to dismiss.

Claimant's criminal prosecution arose from an alleged incident in which claimant, while in a vehicle located in a convenience store parking lot, fired gunshots at a vehicle being driven by claimant's now ex-wife (*see People v Owens*, 159 AD3d 1349, 1350 [4th Dept 2018]). The evidence at the jury trial established that the ex-wife made a 911 call approximately one hour after the shooting in which she reported that she was driving down a street in a green Lexus with the then-four-year-old son of the ex-wife and claimant, and that she was approaching the intersection where the convenience store was located when claimant fired gunshots from a vehicle in the convenience store parking lot. During the intervening hour before the 911 call, the ex-wife had made a significant number of phone calls, including to her divorce attorney. The ex-wife testified regarding the route that she took to the intersection and described seeing claimant firing a gun at her (*see id.*).

Although multi-camera surveillance video from the convenience store at the intersection where the shooting occurred was admitted in evidence during the prosecution's case-in-chief, it was not played in court until summations (*see id.* at 1351). Upon watching the video played during the prosecutor's summation, including camera angles from inside the store, claimant recognized the ex-wife as the woman purchasing items and then exiting the convenience store parking lot with two children in a blueish-gray Nissan, which was different from the green Lexus that the ex-wife was supposedly driving when the shooting occurred at the intersection less than two minutes later. Thus, the video evidence depicted the ex-wife leaving the convenience store parking lot in a vehicle with two children even though the prosecution's theory at trial, as supported by the ex-wife's testimony, was that the ex-wife arrived at the scene less than two minutes later, approaching the intersection on a different street from the opposite direction in a different vehicle, with just the son in the back seat (*see id.*).

The criminal court denied claimant's motion to reopen the proof to recall the ex-wife for further cross-examination about the video evidence. Thereafter, claimant was convicted of one count each of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). Claimant was sentenced to a controlling determinate term of imprisonment of 13 years.

On appeal, we reversed the judgment of conviction on two grounds, including that the criminal court abused its discretion in denying claimant's motion to reopen the proof (*see Owens*, 159 AD3d at 1351-1353). We noted that defense counsel "set forth a proffer of material evidence that was directly relevant to the issue whether the alleged victim and sole eyewitness had fabricated her story or was even at the scene at the time of the alleged shooting incident" (*id.* at 1352). "Inasmuch as the video depicted a woman identified by [claimant] as the [ex-]wife purchasing items and then leaving the store with two children in a vehicle different from the one that she supposedly occupied with just one child at the time of the shooting less than two minutes later," we agreed with claimant that "the video provided strong proof that the [ex-]wife was not at the intersection in a green Lexus at the time of the shooting" (*id.*). We concluded that the criminal court, in denying claimant's motion to reopen the proof, erred in "failing to recognize [claimant's] constitutional right to present a complete defense and confront his accuser with evidence that, under these circumstances, would certainly [have] influence[d] the jury's determination of guilt" (*id.* at 1353). In further concluding that claimant was denied meaningful representation by defense counsel's failures related to his lack of due diligence in investigating and reviewing the video evidence prior to trial, we determined that "the video significantly—if not entirely—undermined the prosecution's theory by calling into doubt the [ex-]wife's veracity and the physical possibility of her account given the actions and travel distance necessary for her to have returned to the scene in a different vehicle with one less child, from a different direction,

in less than two minutes" (*id.*). We thus granted claimant a new trial on the relevant counts of the indictment (*see id.* at 1354).

During the retrial, the ex-wife was called to testify by the prosecution, but she ultimately invoked her Fifth Amendment right against self-incrimination. After the prosecution rested without the testimony of the ex-wife, claimant moved for a trial order of dismissal pursuant to CPL 290.10, which was unopposed by the prosecution due to lack of evidence to establish each element of the charged crimes. The criminal court granted the motion, and claimant was released from prison.

"Section 8-b of the Court of Claims Act was enacted to provide redress to innocent persons who prove by clear and convincing evidence that they were unjustly convicted and imprisoned" (*Ivey v State of New York*, 80 NY2d 474, 479 [1992]). As relevant on this appeal, a claimant may be eligible to seek relief under the statute when the "judgment of conviction was reversed or vacated, and . . . , if a new trial was ordered, . . . [the claimant] was found not guilty at the new trial" (Court of Claims Act § 8-b [3] [b] [ii]). In other words, a claimant may present a claim under the statute where, inter alia, the judgment of conviction was reversed and "there has been a retrial and an acquittal" (*Ivey*, 80 NY2d at 481).

Here, as claimant contends and the State correctly concedes, the court erred in determining that claimant "was not retried." To the contrary, the record establishes that "a new trial was ordered" and held inasmuch as the jury was sworn, the parties made opening statements, the prosecution called various witnesses and, following the close of the prosecution's case, the criminal court granted claimant's motion for a trial order of dismissal (Court of Claims Act § 8-b [3] [b] [ii]; *see Owens*, 159 AD3d at 1354; *see generally* CPL 1.20 [11]; *People v Crespo*, 32 NY3d 176, 182 [2018], *cert denied* — US —, 140 S Ct 148 [2019]).

We further conclude, as claimant contends and the State correctly concedes, that the court erred in determining that a trial order of dismissal pursuant to CPL 290.10 was not the equivalent of a finding of not guilty, i.e., an acquittal, for purposes of Court of Claims Act § 8-b (3) (b) (ii). Considering the remedial purpose of the statute (*see* § 8-b [1]) and the fact that an acquittal is a "useful and relevant indicator of innocence" (*Ivey*, 80 NY2d at 480), we agree with the parties that there is no meaningful distinction for purposes of a claimant's threshold showing between an acquittal by a trier of fact due to failure to prove guilt beyond a reasonable doubt (*see id.* at 481) and a trial order of dismissal due to legally insufficient evidence (*see generally People v Delamota*, 18 NY3d 107, 113 [2011]). For purposes of the statute, as in other contexts, we conclude that a trial order of dismissal "is the equivalent of a judicial acquittal" (William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 290.10; *see generally Martinez v Illinois*, 572 US 833, 841 [2014]; *People v Biggs*, 1 NY3d 225, 229 [2003]). Thus, claimant established his eligibility to present his claim because, as relevant on appeal, his judgment of conviction was reversed and "there

has been a retrial and an acquittal" (*Ivey*, 80 NY2d at 481; *see* Court of Claims Act § 8-b [3] [b] [ii]).

We also agree with claimant that, contrary to the State's contention, the court erred in granting the motion to dismiss on the alternative ground that claimant failed to sufficiently plead his claim. As relevant on appeal, Court of Claims Act § 8-b (4) (a) provides that "[t]he claim shall state facts in sufficient detail to permit the court to find that claimant is likely to succeed at trial in proving that . . . he did not commit any of the acts charged in the accusatory instrument." "[T]he familiar standard governing motions to dismiss in Supreme Court is appropriate" in actions brought under Court of Claims Act § 8-b and, therefore, the "Court of Claims, like other trial courts, should 'accept the facts as alleged in the [claim] as true' " (*Warney v State of New York*, 16 NY3d 428, 435 [2011]). Nonetheless, "section 8-b still imposes a higher pleading standard than the CPLR" (*id.*). The court "must consider whether the allegations are sufficiently detailed to demonstrate a likelihood of success at trial" (*id.*, citing Court of Claims Act § 8-b [4]). " '[T]he allegations in the claim must be of such character that, if believed, they would clearly and convincingly establish the elements of the claim, so as to set forth a cause of action' " (*id.*). "In evaluating the likelihood of success at trial, [the court] should avoid making credibility and factual determinations" (*id.*). Indeed, "[i]n the absence of serious flaws in a . . . statement of facts, the weighing of the evidence is more appropriately a function to be exercised at the actual trial" (*id.* [internal quotation marks omitted]).

Here, accepting the truth of claimant's allegations, as we must, we conclude that the allegations in the amended claim, as supported by documentary evidence despite there being no requirement that such evidence be submitted (*see id.* at 434), "are sufficiently detailed to demonstrate a likelihood of success at trial" (*id.* at 435; *see* Court of Claims Act § 8-b [4]). In particular, claimant's allegations and submissions are of such character that, if believed, they would clearly and convincingly establish that claimant did not possess a gun or fire such gun at the ex-wife as alleged in the indictment and, instead, that the ex-wife—the only person to place claimant at the scene—fabricated the story of claimant's involvement in the alleged shooting (*see Dozier v State of New York*, 134 AD2d 759, 761 [3d Dept 1987]). In determining otherwise, the court improperly assessed the credibility of the evidence (*see Warney*, 16 NY3d at 435; *Solomon v State of New York*, 146 AD2d 439, 445 [1st Dept 1989]). Where, as here, there is an "absence of serious flaws in a claimant's statement of facts, the weighing of the evidence is more appropriately a function to be exercised at the actual trial, rather than on a motion to dismiss" (*Dozier*, 134 AD2d at 761; *see Warney*, 16 NY3d at 435).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

881

KA 21-00476

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYSEAN STROUD, DEFENDANT-APPELLANT.

CONNORS LLP, BUFFALO (TERRENCE M. CONNORS OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered March 18, 2021. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree and unlawful possession of marihuana in the second degree.

It is hereby ORDERED that the judgment so appealed from is affirmed and the matter is remitted to Erie County Court for proceedings pursuant to CPL 460.50 (5).

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]) and unlawful possession of marihuana in the second degree (§ 221.05), defendant contends that County Court erred in refusing to suppress physical evidence obtained following a vehicle and traffic stop, as well as statements he made to officers. We reject that contention. The officers testified at a suppression hearing that, on November 27, 2018, they were in a marked patrol vehicle when they smelled an odor of marihuana coming from a car parked by a gas station. Although the officers agreed that there is a difference between the odors of “burnt” and “burning” marihuana, one of the officers testified that he smelled “burnt” marihuana, whereas the other testified that he smelled “burning” marihuana. When the car drove away, the officers followed it in their vehicle and continued to smell the odor coming from the car. Thus, they pulled the car over. Defendant, a passenger in the car, said “come on, man, we are not doing anything wrong, we are just smoking some weed,” at which point he handed one of the officers a bag of marihuana. The other officer then observed a gun by defendant’s left thigh between the car seat and center console.

Contrary to defendant’s contention, the police were justified in

stopping the car based on the odor of marihuana alone. It is well established that the police may stop a vehicle if they have "reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" (*People v Spencer*, 84 NY2d 749, 753 [1995], *cert denied* 516 US 905 [1995]; *see People v Cator*, 159 AD3d 1583, 1583-1584 [4th Dept 2018]). As the law existed in 2018, a person was guilty of criminal possession of marihuana in the fifth degree, a class B misdemeanor, if he or she possessed burning marihuana inside of a vehicle located on a public highway (*see* Penal Law former § 221.10 [1]; *People v Jackson*, 18 NY3d 738, 742-747 [2012]), and thus a police officer, qualified by training and experience, was at the time justified in stopping such a vehicle if he or she detected the odor of marihuana emanating from that vehicle (*see generally People v Chestnut*, 43 AD2d 260, 261-262 [3d Dept 1974], *affd* 36 NY2d 971 [1975]).

Nonetheless, defendant further contends that the police testimony was inconsistent and incredible, and thus that the court was unjustified in crediting their assertions that they detected the odor of marihuana emanating from the car. Among other things, defendant contends that the officers' respective testimony concerning what they smelled casts doubt on the accuracy of that testimony. " 'Great weight must be accorded to the determination of the suppression court because of its ability to observe and assess the credibility of the witnesses, and its findings should not be disturbed unless clearly erroneous or unsupported by the hearing evidence' " (*People v Johnson*, 138 AD3d 1454, 1454 [4th Dept 2016], *lv denied* 28 NY3d 931 [2016]; *see People v Daniels*, 147 AD3d 1392, 1392 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]). In our view, the testimony of the officers "contained only minor inconsistencies, and there is no indication that it was tailored to meet constitutional requirements" (*People v Williams*, 18 AD3d 241, 241 [1st Dept 2005], *lv denied* 5 NY3d 771 [2005]).

Finally, we reject defendant's contention that the officers' act of stopping the car was based on a " 'hunch' or 'gut reaction' " after observing an "innocuous act" (*People v Sobotker*, 43 NY2d 559, 564 [1978]; *cf. People v Hernandez*, 187 AD3d 1502, 1504-1505 [4th Dept 2020]).

All concur except WHALEN, P.J., and NEMOYER, J., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent. We agree with defendant that County Court erred in denying that part of his omnibus motion seeking suppression of all evidence seized or discovered by police officers following the officers' stop of a vehicle in which defendant was a passenger. We would therefore reverse the judgment, vacate the plea, grant that part of the motion seeking to suppress the evidence seized or discovered by the police following the stop, and dismiss the indictment. It is well settled that, although the defendant bears the ultimate burden of proving that suppression is warranted, the People bear the initial burden of showing the legality of the police conduct in the first instance (*see People v Berrios*, 28 NY2d 361, 367 [1971]; *People v Dortch*, 186 AD3d 1114, 1115 [4th Dept 2020]). In reviewing a

determination of the suppression court on whether the People have met that initial burden, we generally must accord "great weight" to the court's decision "because of its ability to observe and assess the credibility of the witnesses, and its findings should not be disturbed unless clearly erroneous" (*People v Stokes*, 212 AD2d 986, 987 [4th Dept 1995], *lv denied* 86 NY2d 741 [1995]; *see People v Mejia*, 64 AD3d 1144, 1145 [4th Dept 2009], *lv denied* 13 NY3d 861 [2009]; *see generally People v Prochilo*, 41 NY2d 759, 761 [1977]). That deference is not absolute, however, inasmuch as we also have the "fact-finding authority to determine whether police conduct was justified" (*People v Lopez*, 149 AD3d 1545, 1547 [4th Dept 2017]; *see also People v McRay*, 51 NY2d 594, 605 [1980]) as well as the responsibility, by "careful exercise of [our] jurisdiction, in reviewing the evidence, [to] effectively curtail [any] alleged abuses" (*Berrios*, 28 NY2d at 369).

Here, contrary to the conclusion of the suppression court, we conclude that "the significant inconsistencies and gaps in memory . . . [in] the testimony of the police officers who testified at the hearing bear negatively on their overall credibility" (*People v Rhames*, 196 AD3d 510, 513 [2d Dept 2021] [internal quotation marks omitted]). Neither of the two officers who testified could recall with clarity any of the details of their stop of the vehicle in which defendant was a passenger, with one officer acknowledging that the only thing that he could recall was that he "smelled mari[h]uana." The officers disagreed whether that smell was of burnt or burning marihuana. Inasmuch as both officers testified that they each had conducted innumerable traffic stops where marihuana was involved, their inability to recall further details regarding this particular stop undermines the reliability of the officers' testimony. We therefore conclude that, because the lapses in the officers' memory of the stop render their testimony unworthy of belief, the People failed to meet their burden of coming forward with sufficient evidence to establish the legality of the police conduct in the first instance (*see generally Berrios*, 28 NY2d at 369).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

883

KA 18-02070

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTUAN YEOMAS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO, HODGSON RUSS LLP (PETER A. SAHASRABUDHE OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered May 2, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that Supreme Court erred in denying that part of his omnibus motion seeking suppression of statements that he made to law enforcement. Following the suppression hearing, the court indicated that it would be denying defendant's motion to that extent, but reserved on issuing its "findings of fact, its conclusions of law and the reasons for its determination" (CPL 710.60 [6]). Defendant subsequently agreed prior to pleading guilty that he wished to forgo the court issuing those findings of fact and conclusions of law. We note that a denial of a suppression motion "without explanation," regardless of whether that determination is rendered with or without the benefit of a hearing, "not only transgresses CPL 710.60 (6), . . . but also effectively precludes informed appellate review" (*People v Bonilla*, 82 NY2d 825, 827-828 [1993]). Indeed, under these circumstances, we cannot address defendant's suppression contention on this record. Inasmuch as defendant expressly waived the issuance of the statutorily required findings of fact and conclusions of law prior to pleading guilty, we conclude that defendant waived "the making of a record and, in consequence, foreclosed the possibility of appellate review of his challenge to the [suppression ruling]" (*People v Fernandez*, 67 NY2d 686, 688 [1986]). In light of our conclusion, defendant's remaining

contention is academic.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

885

KA 19-01907

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN E. DOLISON, DEFENDANT-APPELLANT.

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered August 29, 2019. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the second degree (Penal Law § 160.10 [1]). We affirm.

Defendant contends that County Court improperly failed to inquire into his requests for a new attorney. "Assuming, arguendo, that [defendant's] contention is not foreclosed by his guilty plea" (*People v Jeffords*, 185 AD3d 1417, 1418 [4th Dept 2020], *lv denied* 35 NY3d 1095 [2020]), we reject it. Defendant's oral request for a new lawyer was couched in vague and conclusory terms of unspecified coercion and "communication issues," and it is well established that such a request does not "trigger the court's duty to make a minimal inquiry" (*People v El Hor*, 197 AD3d 1118, 1120 [2d Dept 2021], *lv denied* — NY3d — [2021]; *see People v MacLean*, 48 AD3d 1215, 1217 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008], *reconsideration denied* 11 NY3d 790 [2008]; *People v Rodriguez*, 28 AD3d 403, 404 [1st Dept 2006], *lv denied* 7 NY3d 817 [2006]). Defendant abandoned his subsequent written request for a new lawyer by pleading guilty before the court could rule on it (*see People v Crosby*, 195 AD3d 1602, 1604 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]; *see also People v Alexander*, 82 AD3d 619, 623-624 [1st Dept 2011], *affd* 19 NY3d 203 [2012]; *People v Goodison*, 196 AD3d 1049, 1049 [4th Dept 2021], *lv denied* — NY3d — [2021]). Contrary to defendant's assertion, the court did not respond to the written request with "an ultimatum . . . to either plead guilty with present counsel or proceed to trial with present counsel" (*Crosby*, 195 AD3d at

1602 [internal quotation marks omitted]; *cf. People v Jones*, 173 AD3d 1628, 1630 [4th Dept 2019]). Indeed, when the court asked defendant if he "want[ed] to be heard" following the submission of his written request, defendant said only "I'm willing to take the plea," and he then pleaded guilty without any further complaint about his lawyer.

The sentence is not unduly harsh or severe. We are nevertheless " 'compelled to emphasize once again' that, contrary to the assertion in the People's brief, a criminal defendant need not show extraordinary circumstances or an abuse of discretion by the sentencing court in order to obtain a sentence reduction under CPL 470.15 (6) (b)" (*People v Curtis*, 196 AD3d 1145, 1146 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]). Contrary to the People's further contention, " 'and as we have previously noted, it is [likewise] well settled that this Court's sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court . . . , and that we may substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence' " (*People v Cutaia*, 167 AD3d 1534, 1535 [4th Dept 2018], *lv denied* 33 NY3d 947 [2019]; *see People v Alexander*, 197 AD3d 1013, 1015 [4th Dept 2021], *lv denied* — NY3d — [2021]).

Defendant's remaining contentions are unpreserved for appellate review.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

889

CA 21-00092

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

IN THE MATTER OF THE APPLICATION OF EVAN DAVIS, SAMANTHA DAVIS, BETTY EBLING, MARILYN CROWELL, LINDA HALL, HENRY CROWELL-GIANATASIO, KAYME CROWELL-GIANATASIO, J. DUDLEY ROBINSON, DIANA ERMER, MARTIN HUBER, NANCY HUBER, SUSAN BALDWIN, JULIE DELCAMP, ROBIN DELCAMP, ANGELO GRAZIANO, TINA GRAZIANO, RICHARD IVORY, THOMAS IVORY, MICHAEL MCGRAW, KATHRYN MCGRAW, ROBERT MCGRAW AND JOSEPH IVORY, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN BOARD OF TOWN OF VILLENOVA, BALL HILL WIND ENERGY, LLC, AND RENEWABLE ENERGY SYSTEMS AMERICAS, RESPONDENTS-RESPONDENTS.

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR PETITIONERS-APPELLANTS.

THE KNOER GROUP, PLLC, BUFFALO (COLIN M. KNOER OF COUNSEL), FOR RESPONDENT-RESPONDENT TOWN BOARD OF TOWN OF VILLENOVA.

HODGSON RUSS LLP, BUFFALO (CHARLES W. MALCOMB OF COUNSEL), FOR RESPONDENT-RESPONDENT BALL HILL WIND ENERGY, LLC.

NIXON PEABODY LLP, BUFFALO (LAURIE STYKA BLOOM OF COUNSEL), FOR RESPONDENT-RESPONDENT RENEWABLE ENERGY SYSTEMS AMERICAS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), entered June 30, 2020 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: Petitioners commenced this CPLR article 78 proceeding (2019 proceeding) seeking, inter alia, to void an approval made by respondent Town Board of Town of Villenova (Town Board) of local laws and the grant of a special use permit to respondent Ball Hill Wind Energy, LLC (Ball Hill) to construct wind turbines up to 599 feet in height in the Town of Villenova. Most of the same petitioners had commenced an identical proceeding in 2018 (2018 proceeding) seeking the same relief. In the 2018 proceeding, Supreme Court, inter

alia, granted the petitioners' first cause of action regarding an alleged violation of the State Environmental Quality Review Act. The respondents appealed from that judgment, and we reversed the judgment insofar as appealed from and denied the petition in its entirety (*Matter of McGraw v Town Bd. of Town of Villenova*, 186 AD3d 1014 [4th Dept 2020]). Before our decision was released, however, the Town Board took steps to comply with the court's judgment in the 2018 proceeding, including approving a supplemental final draft environmental impact statement, issuing a special use permit, and adopting relevant local laws. Petitioners commenced the 2019 proceeding, and the court denied and dismissed the petition.

We dismiss the appeal as moot. It is well settled that "an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]). Stated another way, "an appeal is moot unless an adjudication of the merits will result in immediate and practical consequences to the parties" (*Coleman v Daines*, 19 NY3d 1087, 1090 [2012]; *see City of New York v Maul*, 14 NY3d 499, 507 [2010]).

Here, petitioners are challenging the issuance of the special use permit and the adoption of the 2019 local laws that allowed the increase in height of the turbines from 495 feet to 599 feet. The Town Board's resolution granting Ball Hill's special use permit included language that, if the Town Board prevailed on its appeal in the 2018 proceeding before this Court, the resolution would be deemed rescinded and the Town Board's 2018 determinations with respect to the project would remain in full force and effect. The identical special use permit issued in 2018 thus remains and is not challenged on this appeal. In addition, although the 2019 local laws may be challenged by petitioners on this appeal, even assuming, arguendo, that we annulled those 2019 local laws, we conclude that the identical 2018 local laws remain valid and in effect, and thus annulling the 2019 local laws will not affect the rights of the parties. The appeal is thus moot (*see Boland v Indah Kiat Fin. [IV] Mauritius*, 298 AD2d 288, 289 [1st Dept 2002]; *Matter of Freihofer v Lake George Town Bd.*, 147 AD2d 865, 866-868 [3d Dept 1989]; *see also Matter of El-Roh Realty Corp.*, 55 AD3d 1431, 1433 [4th Dept 2008]). We further conclude that the exception to the mootness doctrine does not apply here (*see Hearst Corp.*, 50 NY2d at 714-715).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

891

TP 21-00787

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

IN THE MATTER OF SPENSER MCAVOY, PETITIONER,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER AND LA'RON SINGLETARY, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE FOR CITY OF ROCHESTER, RESPONDENTS.

TREVETT CRISTO, ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR PETITIONER.

PULLANO & FARROW, PLLC, ROCHESTER (JEFFREY S. ALBANESE OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Monroe County [William K. Taylor, J.], entered November 16, 2020) to review a determination of respondents. The determination, among other things, terminated petitioner's employment with the Rochester Police Department.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul those parts of a determination following a hearing pursuant to Civil Service Law § 75 that found him guilty of the disciplinary charge of making an arrest without reasonable cause and terminated his employment as an officer with the Rochester Police Department. Contrary to petitioner's contentions, the determination with respect to that charge is supported by substantial evidence (*see Matter of Hanlon v New York State Police*, 133 AD3d 1265, 1266 [4th Dept 2015]), and the penalty is not shocking to one's sense of fairness (*see Matter of Arroyo v O'Neill*, 35 NY3d 1030, 1031 [2020]; *Hanlon*, 133 AD3d at 1266).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

894

CA 21-00173

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

JONES MEMORIAL HOSPITAL, JONES MEMORIAL HOSPITAL FOUNDATION AND MLMIC INSURANCE COMPANY, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

MAIN STREET AMERICA ASSURANCE COMPANY, DEFENDANT-RESPONDENT-APPELLANT. (APPEAL NO. 1.)

HURWITZ & FINE, P.C., BUFFALO (DAN D. KOHANE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MATTHEW C. RONAN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered August 3, 2020. The judgment, among other things, granted in part and denied in part the motion of plaintiffs for summary judgment and declared that defendant is obligated to defend and indemnify plaintiffs Jones Memorial Hospital and Jones Memorial Hospital Foundation on an excess and non-contributory basis in the underlying action.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting plaintiffs' motion in its entirety, vacating the declaration, and granting judgment in favor of plaintiffs as follows:

> It is ADJUDGED and DECLARED that defendant is obligated to defend and indemnify plaintiffs Jones Memorial Hospital and Jones Memorial Hospital Foundation in the underlying personal injury action on a primary and non-contributory basis,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs Jones Memorial Hospital and Jones Memorial Hospital Foundation (collectively, Hospital plaintiffs) own property and leased office space to Zahi N. Kassas, M.D. The Hospital plaintiffs had an insurance policy with plaintiff MLMIC Insurance Company (MLMIC) for the property, and Dr. Kassas had a businessowners policy with defendant. In June 2015, a woman taking her infant son to

a medical appointment with Dr. Kassas tripped and fell on an uneven sidewalk or walkway leading to the entrance of his office. The woman commenced a personal injury action against Dr. Kassas and the Hospital plaintiffs (underlying action). Plaintiffs then commenced this action seeking a judgment declaring that the Hospital plaintiffs are entitled to a defense and indemnification from defendant on a primary and non-contributory basis in the underlying action. Plaintiffs moved for summary judgment on the complaint, and defendant cross-moved for summary judgment, inter alia, declaring that it had no obligation to defend or indemnify the Hospital plaintiffs. Supreme Court granted in part and denied in part plaintiffs' motion, denied defendant's cross motion, and declared that defendant is obligated to defend and indemnify the Hospital plaintiffs on an excess and non-contributory basis in the underlying action. Plaintiffs appeal and defendant cross-appeals, and we now modify.

Addressing first defendant's cross appeal, we reject plaintiffs' contention that the cross appeal is untimely. Defendant requested an extension of time to file its brief, which we construed as a request for an extension of time to perfect the cross appeal and granted it. On the merits, however, we reject defendant's contention on the cross appeal that the court erred in determining that defendant was obligated to defend and indemnify the Hospital plaintiffs. In disputes over insurance coverage, we must look to the language of the policy (*see Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162 [2005], *rearg denied* 5 NY3d 825 [2005]). Here, the additional insured endorsement in the policy issued by defendant to Dr. Kassas provided coverage to the "lessor of premises to whom you are obligated by virtue of a written 'Insured Contract' to provide insurance such as afforded by this policy, but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you," and "insured contract" was defined as, inter alia, "[a] contract for a lease of premises." Pursuant to the provisions of the lease between the Hospital plaintiffs and Dr. Kassas, the premises leased to Dr. Kassas was defined as "an area of approximately 2400 square feet, together with the right to use, in common with other tenants of the buildings in which the Premises is located . . . , the Common Areas." The common areas included, inter alia, "access driveways, walkways, . . . and entranceways." The lease required Dr. Kassas to "maintain insurance protecting and indemnifying the Landlord and the Tenant against any and all claims for injury . . . to persons . . . occurring in or about the Premises and the Common Area."

Thus, the evidence submitted by plaintiffs established that the lease constituted an "insured contract" within the meaning of the policy issued by defendant to Dr. Kassas, and the lease obligated Dr. Kassas to provide insurance coverage to the Hospital plaintiffs. Defendant was therefore required to provide coverage to the Hospital plaintiffs, but "only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to" Dr. Kassas. The Court of Appeals has explained that " 'arising out of' " means " 'originating from, incident to, or having a connection with' " (*Regal Constr. Corp. v National Union Fire Ins. Co. of*

Pittsburgh, PA, 15 NY3d 34, 38 [2010], quoting *Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472 [2005]). It "requires only that there be some causal relationship between the injury and the risk for which coverage is provided" (*Maroney*, 5 NY3d at 472).

The evidence was undisputed that Dr. Kassas did not own the sidewalk, nor did he maintain it. Plaintiffs, however, established that Dr. Kassas used the sidewalk on which the accident occurred and that the sidewalk was "part of the premises leased to" Dr. Kassas, and defendant failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The sidewalk "was necessarily used for access in and out of [Dr. Kassas's office] and was thus, by implication, 'part of the . . . premises' that [Dr. Kassas] was licensed to use under the parties' [lease]" (*ZKZ Assoc. v CNA Ins. Co.*, 89 NY2d 990, 991 [1997]; *see Public Serv. Mut. Ins. Co. v Nova Cas. Co.*, 177 AD3d 472, 472-473 [1st Dept 2019]; *One Reason Rd., LLC v Seneca Ins. Co., Inc.*, 163 AD3d 974, 976-977 [2d Dept 2018]; *Tower Ins. Co. of N.Y. v Leading Ins. Group Ins. Co., Ltd.*, 134 AD3d 510, 510 [1st Dept 2015]; *Mack-Cali Realty Corp. v NGM Ins. Co.*, 119 AD3d 905, 907 [2d Dept 2014]). In addition, the lease also explicitly included the sidewalk as part of the leased premises (*see Pixley Dev. Corp. v Erie Ins. Co.*, 174 AD3d 1415, 1416-1417 [4th Dept 2019]; *cf. Christ the King Regional High School v Zurich Ins. Co. of N. Am.*, 91 AD3d 806, 806-808 [2d Dept 2012]). Thus, the Hospital plaintiffs were entitled to a defense and indemnification.

Next, addressing plaintiffs' appeal, we conclude that the court erred in denying plaintiffs' motion insofar as it sought a declaration that the Hospital plaintiffs were entitled to a defense and indemnification from defendant on a primary basis and in declaring that defendant's policy provided excess coverage only. We therefore modify the judgment by granting plaintiffs' motion in its entirety, vacating the declaration, and declaring that defendant is obligated to defend and indemnify the Hospital plaintiffs in the underlying personal injury action on a primary and non-contributory basis. In determining whether defendant's policy provides primary or excess coverage, the "other insurance" clauses in defendant's policy and MLMIC's policy must be examined (*see generally Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 686-687 [1999]). The MLMIC policy issued to the Hospital plaintiffs provided that its coverage was excess "over any other primary insurance available to you covering liability for damages arising out of the premises or operations . . . for which you have been added as an additional insured." Thus, the excess provision in MLMIC's policy applies here, which defendant does not dispute.

Section III (H) in defendant's policy sets forth the "other insurance" provision. Defendant does not dispute that section III (H) (1) applies only to first-party property damage. Section III (H) (2) (b), which was relied upon by the court and states that business liability coverage is excess over any other primary insurance available to "you [i.e., Dr. Kassas] covering liability for damages arising out of the premises or operations for which you have been

added as an additional insured by attachment of an endorsement," is inapplicable to the Hospital plaintiffs. That leaves only section III (H) (2) (a), which states that business liability coverage is excess over "[a]ny other insurance that insures for direct physical loss or damage." We agree with plaintiffs that section III (H) (2) (a) is unambiguous and is referring to coverage for property damage, not liability coverage for bodily injury (*see generally Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Section I, entitled Property, in the businessowners coverage form provides coverage "for direct physical loss of or damage to Covered Property," and the phrase "direct physical loss or damage" is used multiple times throughout that section. That phrase is not used in Section II, entitled Liability, in the businessowners coverage form. Construing the policy as a whole, subparagraph (H) (2) (a) in Section III, entitled Common Policy Conditions, is referring to coverage for property damage, not liability coverage for bodily injury (*see generally New York State Thruway Auth. v KTA-Tator Eng'g Servs., P.C.*, 78 AD3d 1566, 1567 [4th Dept 2010]). Thus, defendant's policy provides primary coverage to the Hospital plaintiffs and, pursuant to MLMIC's other insurance provision, MLMIC's coverage was excess where there was other primary insurance coverage. Defendant's policy did not state that its coverage was excess to other primary insurance available to the Hospital plaintiffs, an additional insured. Thus, defendant's policy is primary (*see Public Serv. Mut. Ins. Co.*, 177 AD3d at 473; *Tower Ins. Co. of N.Y.*, 134 AD3d at 510-511; *see generally Harleysville Ins. Co. v Travelers Ins. Co.*, 38 AD3d 1364, 1366-1367 [4th Dept 2007], *lv denied* 9 NY3d 811 [2007]), and the court erred in determining that it was excess.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

895

CA 21-00251

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

JONES MEMORIAL HOSPITAL, JONES MEMORIAL HOSPITAL FOUNDATION AND MLMIC INSURANCE COMPANY, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V ORDER

MAIN STREET AMERICA ASSURANCE COMPANY, DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

HURWITZ & FINE, P.C., BUFFALO (DAN D. KOHANE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MATTHEW C. RONAN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered December 2, 2020. The order denied plaintiffs' motion seeking leave to reargue and denied defendant's cross motion seeking leave to reargue.

It is hereby ORDERED that said appeal and cross appeal are unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

898

CA 21-00085

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

SECURITY PLANS, INC., FORMERLY KNOWN AS
CREDITOR SERVICES, INC.,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

HARTER SECREST & EMERY, LLP, FRED G.
ATEN, ESQ., JERAULD E. BRYDGES, ESQ.,
JEFFREY A. WADSWORTH, ESQ., AND
CRAIG S. WITTLIN, ESQ.,
DEFENDANTS-RESPONDENTS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (ANNE K. BOWLING OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

CONNORS, LLP, BUFFALO (VINCENT E. DOYLE, III, OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered January 7, 2021. The order, among other things, denied in part plaintiff's motion for, inter alia, partial summary judgment and denied defendants' cross motion for summary judgment.

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

Memorandum: Plaintiff commenced this legal malpractice action alleging that defendants were negligent with respect to their representation of plaintiff in certain litigation in federal court. Contrary to plaintiff's contention on appeal, Supreme Court properly denied that part of its motion seeking summary judgment on liability. Plaintiff did not meet its initial burden of establishing that defendants "failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by a member of the legal community" (*Greene v Payne, Wood & Littlejohn*, 197 AD2d 664, 666 [2d Dept 1993]; *see Deitz v Kelleher & Flink*, 232 AD2d 943, 944 [3d Dept 1996]). Likewise, contrary to defendants' contention on cross appeal, the court properly denied their cross motion for summary judgment dismissing the amended complaint inasmuch as defendants failed to meet their initial burden (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We have reviewed plaintiff's remaining contentions on appeal and defendants' remaining contentions on cross

appeal and conclude that none warrants reversal or modification of the order.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

899

CA 21-00743

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

DONNA VANDAMME, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK A. CURRAN, DEFENDANT-APPELLANT.

THE LAW OFFICE OF TERESA M. PARE, CANANDAIGUA (TERESA M. PARE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LACY KATZEN LLP, ROCHESTER (LAURA K. ASHIKAGA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, J.), entered December 21, 2020. The order denied the motion of defendant to, inter alia, vacate a judgment of divorce and rescind the parties' separation agreements.

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

Memorandum: In this post-divorce action, defendant husband appeals from an order that denied his motion to, inter alia, vacate the judgment of divorce entered upon his default and rescind the parties' separation agreements. We affirm.

Defendant contends that Supreme Court erred in denying his motion insofar as it sought to rescind the parties' separation agreements because those agreements were manifestly unfair or the product of fraud or overreach by plaintiff wife. We reject that contention. Where, as here, a "separation agreement is incorporated but not merged into the divorce judgment, vacatur of the divorce judgment [would have] no effect on the enforceability of the agreement; the agreement survives as a separate and enforceable contract" (*Kellman v Kellman*, 162 AD2d 958, 958 [4th Dept 1990]; *see Peroni v Peroni*, 189 AD3d 2058, 2059 [4th Dept 2020]). Thus, in order to set aside the separation agreements, defendant was required "to commence a plenary action or assert an affirmative defense or counterclaim, which he did not do; 'such relief cannot be obtained on motion' " (*Peroni*, 189 AD3d at 2059-2060).

Contrary to defendant's further contention, the court did not abuse its discretion in denying that part of the motion seeking to vacate the default judgment of divorce pursuant to CPLR 5015 (a) (1). That part of the motion was untimely inasmuch as "it was not made

within one year after service of a copy of the default [judgment] with notice of entry" (*Ogunbekun v Strong Mem. Hosp.*, 181 AD3d 1189, 1189 [4th Dept 2020]; *see* CPLR 5015 [a] [1]). Although "the court retains inherent authority to vacate its own judgment or order in the interest of justice, even where the statutory one-year period . . . has expired," here, defendant failed to "demonstrate a reasonable excuse for his lengthy delay in moving to vacate the [judgment]" (*Ogunbekun*, 181 AD3d at 1189-1190 [internal quotation marks omitted]; *see Carter v Daimler Trust*, 177 AD3d 541, 541 [1st Dept 2019]; *Chase Home Fin., LLC v Desormeau*, 152 AD3d 1033, 1035 [3d Dept 2017]). Moreover, even if that part of defendant's motion seeking to vacate the default judgment of divorce was timely or presented a reasonable excuse for his delay in moving, defendant was required to " 'establish a reasonable excuse for the default and a meritorious cause of action' " (*Ogunbekun*, 181 AD3d at 1190), and defendant made neither showing in this case.

Nor did the court abuse its discretion in denying that part of defendant's motion seeking to vacate the default judgment of divorce pursuant to CPLR 5015 (a) (3), which permits "[t]he court which rendered a judgment . . . [to] relieve a party from it upon such terms as may be just . . . upon the ground of . . . fraud, misrepresentation, or other misconduct of an adverse party." Contrary to defendant's contention, the allegedly misleading statements made by plaintiff did not prevent him from "fully and fairly litigating the matter" (*Shaw v Shaw*, 97 AD2d 403, 403 [2d Dept 1983]; *cf. Petrosino v Petrosino*, 171 AD3d 960, 960-961 [2d Dept 2019]; *Bird v Bird*, 77 AD3d 1382, 1383 [4th Dept 2010]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

905

KA 19-01420

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY N. OTT, DEFENDANT-APPELLANT.

WILLIAM CLAUSS, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered April 17, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree and 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 murder in the second degree (Penal Law § 125.25 [1]) and assault in the first degree (§ 120.10 [1]). We note by way of background that this matter has been before us on several occasions. On defendant's original appeal, we modified the judgment convicting him upon a jury verdict of these charges by vacating the sentence in part, and we remitted the matter to County Court for resentencing (*People v Ott*, 83 AD3d 1495 [4th Dept 2011], *lv denied* 17 NY3d 808 [2011]). Later, we affirmed the resentence (*People v Ott*, 126 AD3d 1372 [4th Dept 2015], *lv denied* 26 NY3d 1148 [2016]). Thereafter, however, we granted defendant's motion for a writ of error coram nobis on the ground that appellate counsel had failed to raise an issue on appeal that may have merit, i.e., whether the court erred when it failed to comply with CPL 310.30 in its handling of jury notes (*People v Ott*, 153 AD3d 1135 [4th Dept 2017]) and, upon reviewing the appeal de novo, we reversed the judgment of conviction and granted a new trial on that ground (*People v Ott*, 165 AD3d 1601 [4th Dept 2018]). The matter was transferred to Supreme Court, and defendant now appeals from the judgment convicting him after that retrial. We affirm.

We reject defendant's contention that the court erred in refusing to charge the jury on manslaughter in the first degree (Penal Law § 125.20 [1]) as a lesser included offense of murder in the second degree. It is well settled that a trial court " 'may, in addition to

submitting the greatest offense which it is required to submit, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed' the lesser but not the greater offense (CPL 300.50 [1]). It is undisputed that manslaughter in the first degree is a lesser included offense of second-degree murder within the meaning of CPL 1.20 (37), so 'the question simply is whether on *any* reasonable view of the evidence it is possible for the trier of the facts to acquit the defendant on the higher count and still find him guilty on the lesser one' " (*People v Hull*, 27 NY3d 1056, 1058 [2016]). Contrary to defendant's contention, no such reasonable view of the evidence is present here (*see People v Boyer*, 31 AD3d 1136, 1138 [4th Dept 2006], *lv denied* 7 NY3d 865 [2006]). Viewing the evidence " 'in the light most favorable to [the] defendant' " (*People v Rivera*, 23 NY3d 112, 121 [2014]), we conclude that there is no reasonable view of the evidence whereby defendant intended to cause serious physical injury to that victim but did not intend to cause his death when defendant inflicted the final stab wounds into the chest of the deceased victim, who was on the ground and not resisting. Defendant had already subdued the assault victim by stabbing him in the abdomen with such force that the victim's intestines were protruding from his torso. Defendant, the only person in the incident who was armed, then stabbed the deceased victim eight times, causing punctures to, inter alia, the victim's heart, right lung, colon, and pancreas. Given the ferocity of the attack, the number of possibly fatal wounds, and the way in which they were inflicted, we conclude that "no lesser-included offense instruction on . . . serious injury manslaughter intent . . . was warranted or compelled. The crime was intentional murder in the second degree or nothing" (*People v Butler*, 84 NY2d 627, 634 [1994], *rearg denied* 85 NY2d 858 [1995]; *see People v Saalfield*, 185 AD3d 723, 724 [2d Dept 2020], *lv denied* 35 NY3d 1096 [2020]; *People v Vega*, 68 AD3d 665, 665 [1st Dept 2009], *lv denied* 14 NY3d 806 [2010], *cert denied* 562 US 925 [2010]).

Defendant further contends that neither County nor Supreme Court ruled on that part of his omnibus motion seeking suppression of identification evidence. We determined that issue on defendant's original appeal (*Ott*, 83 AD3d at 1497), defendant could have raised that contention on his de novo prior appeal but failed to do so (*see People v Licitra*, 125 AD2d 592, 592 [2d Dept 1986]), and here he presents no new argument that would cause us to depart from our determination.

Contrary to defendant's contention, the admission in evidence of testimony that he declined to speak to a police investigator regarding the crimes does not require reversal because defendant opened the door to the challenged testimony. It is well settled "that statements taken in violation of *Miranda v Arizona* (384 US 436 [1966]) are admissible if a defendant opens the door by presenting conflicting testimony" (*People v Reid*, 19 NY3d 382, 388 [2012]). Here, because defense counsel's cross-examination of the investigator may have created a misimpression that the investigator did not fully investigate this incident because the investigator did not speak to defendant, the People were entitled to correct that misimpression on

redirect examination (*see People v Paul*, 171 AD3d 1467, 1469 [4th Dept 2019], *lv denied* 33 NY3d 1107 [2019], *reconsideration denied* 34 NY3d 953 [2019], *cert denied* — US —, 140 S Ct 1151 [2020]; *People v Taylor*, 134 AD3d 1165, 1169 [3d Dept 2015], *lv denied* 26 NY3d 1150 [2016]). Furthermore, we reject defendant's contention that defense counsel was ineffective for opening the door to that testimony. Defendant failed to demonstrate the absence of strategic or other legitimate explanations for that alleged deficiency (*see generally People v Benevento*, 91 NY2d 708, 712-713 [1998]). There also is no merit to defendant's remaining allegations of ineffective assistance of counsel (*see generally People v Caban*, 5 NY3d 143, 152 [2005]; *Benevento*, 91 NY2d at 713-714).

Contrary to defendant's further contention, he was not deprived of a fair trial when the prosecutor commented upon defendant exercising his right to remain silent. Insofar as the prosecutor improperly characterized defendant's silence as evidence of his consciousness of guilt (*see generally People v Conyers*, 52 NY2d 454, 457-460 [1981]), such impropriety was obviated when the court sustained defendant's objection to that comment and gave a curative instruction to the jury (*see People v Simpson*, 151 AD3d 762, 763 [2d Dept 2017], *lv denied* 30 NY3d 1063 [2017]; *People v Davis*, 163 AD2d 826, 827 [4th Dept 1990], *lv denied* 76 NY2d 939 [1990], *reconsideration denied* 76 NY2d 939 [1990]), and, in any event, such impropriety is harmless in light of the overwhelming evidence of defendant's guilt and the lack of any reasonable possibility that defendant otherwise would have been acquitted (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

Defendant's contention that the court erred in permitting a police officer to testify that eyewitnesses identified defendant during showup identification procedures lacks merit. It is well settled that "CPL 60.25 applies to a situation where the witness, due to lapse of time or change in appearance of the defendant, cannot make an in-court identification, but has on a previous occasion identified the defendant. Under such circumstances, any other witness may then establish that the defendant in court is the same person that the eyewitness identified on the previous occasion" (*People v Nival*, 33 NY2d 391, 394-395 [1974], *appeal dismissed and cert denied* 417 US 903 [1974]).

Defendant's contention that the sentence was a punishment for successfully appealing the first conviction (*see People v Van Pelt*, 76 NY2d 156, 159-163 [1990]), and his further contention that the sentence is vindictive, are not preserved for our review (*see People v Olds*, 36 NY3d 1091, 1092 [2021]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). The sentence is not unduly harsh or severe.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

907

KA 19-00163

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARIO SADDLER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLYSON L. KEHL-WIERZBOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered November 20, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). For reasons stated in its decision, we conclude that Supreme Court (Wolfgang, J.) properly refused to suppress the subject gun (*see also People v Magee*, — AD3d —, — [Dec. 23, 2021] [4th Dept 2021]; *People v Moore*, 191 AD3d 1415, 1416-1417 [4th Dept 2021], *lv denied* 36 NY3d 1122 [2021]). Contrary to defendant's further contention, the court did not improperly curtail his cross-examination of the witnesses at the suppression hearing (*see People v Carroll*, 303 AD2d 200, 201 [1st Dept 2003], *lv denied* 100 NY2d 560 [2003]; *People v Presha*, 190 AD2d 1005, 1005 [4th Dept 1993], *lv denied* 81 NY2d 891 [1993]), particularly because the precluded questions involved collateral issues with no direct bearing on the suppression analysis (*see People v Arnau*, 58 NY2d 27, 37 [1982], *cert denied* 468 US 1217 [1984]; *People v Patino*, 97 AD2d 552, 553 [2d Dept 1983] [Gibbons, J., concurring]). Defendant's allegations of ineffective assistance of counsel are forfeited by his guilty plea (*see People v Petgen*, 55 NY2d 529, 534-535 [1982], *rearg denied* 57 NY2d 674 [1982]). Finally, contrary to his assertion on appeal, defendant never sought to withdraw his guilty plea during the 2018 sentencing proceeding, and Supreme Court (Burns, J.) thus could not have erred in failing to hold a hearing on a motion

that defendant never made.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

909

CAF 20-00618

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF GRAYSON R.V.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JESSICA D., RAYMOND J., KIMBERLY K.,
RESPONDENTS-APPELLANTS,
AND DAVID P., RESPONDENT.
(APPEAL NO. 1.)

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT JESSICA D.

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

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT KIMBERLY K.

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHELLE MONCHER OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered March 13, 2020 in a proceeding pursuant to Family Court Act article 10. The order, among other things, determined that the subject child had been abused by respondents Jessica D., Raymond J., and Kimberly K.

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

Same memorandum as in *Matter of Grayson R.V. (Jessica D.)* ([appeal No. 2] — AD3d — [Dec. 23, 2021] [4th Dept 2021]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

910

CAF 20-00966

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF GRAYSON R.V.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JESSICA D., RAYMOND J., KIMBERLY K.,
RESPONDENTS-APPELLANTS,
AND DAVID P., RESPONDENT.
(APPEAL NO. 2.)

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT JESSICA D.

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

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT KIMBERLY K.

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHELLE MONCHER OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeals from a corrected order of the Family Court, Erie County (Margaret O. Szczur, J.), entered May 5, 2020 in a proceeding pursuant to Family Court Act article 10. The corrected order, among other things, determined that the subject child had been severely abused by respondents Jessica D., Raymond J., and Kimberly K.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, Jessica D., Raymond J., and Kimberly K. (respondents) appeal, in appeal No. 1, from an order determining that the subject child was an abused child due to the actions of respondents. In appeal No. 2, respondents appeal from a corrected order determining that the child was a severely abused child due to the actions of respondents.

At the outset, we note that the order in appeal No. 1 was superseded by the corrected order in appeal No. 2, and we therefore must dismiss appeal No. 1 (*see Matter of Alex V. [Dennis V.]*, 172 AD3d 734, 734 [2d Dept 2019]; *Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]; *see generally U.S. Bank N.A. v Balderston*, 163 AD3d 1482, 1483 [4th Dept 2018]). We further note that both of

the notices of appeal filed by Kimberly K. apply only to the order in appeal No. 1. Nevertheless, we exercise our discretion to treat one of her notices of appeal as valid with respect to the corrected order in appeal No. 2 (*see* CPLR 5520 [c]; *Matter of Goodyear v New York State Dept. of Health*, 163 AD3d 1427, 1428 [4th Dept 2018], *lv denied* 32 NY3d 914 [2019]).

In appeal No. 2, we reject the contention of Raymond J. that he is not a proper respondent in this Family Court Act article 10 proceeding. Pursuant to Family Court Act § 1012 (a), a respondent "includes any parent or other person legally responsible for a child's care who is alleged to have abused or neglected such child." On the record before us, we conclude that Raymond J. "acted as the functional equivalent of a parent with respect to the . . . child, rendering him a person legally responsible for that child's care" (*Matter of Donell S. [Donell S.]*, 72 AD3d 1611, 1612 [4th Dept 2010], *lv denied* 15 NY3d 705 [2010]; *see Matter of Yolanda D.*, 88 NY2d 790, 795-797 [1996]; *Matter of Celeste S. [Richard B.]*, 164 AD3d 1605, 1606 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]; *Matter of Mackenzie P.G. [Tiffany P.]*, 148 AD3d 1015, 1017 [2d Dept 2017]).

Respondents contend that petitioner did not meet its burden in establishing that the child was abused within the meaning of Family Court Act §§ 1012 (e) and 1046 (a) (ii) because the child had multiple caregivers during the relevant times. We reject those contentions. Family Court Act § 1046 (a) (ii) "provides that a prima facie case of child abuse or neglect may be established by evidence of (1) an injury to a child which would ordinarily not occur absent an act or omission of respondents, and (2) that respondents were the caretakers of the child at the time the injury occurred" (*Matter of Philip M.*, 82 NY2d 238, 243 [1993]; *see Matter of Nancy B.*, 207 AD2d 956, 957 [4th Dept 1994]). Section 1046 (a) (ii) "authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur" (*Philip M.*, 82 NY2d at 244). Although the burden of proving child abuse rests with the petitioner (*see id.*; *Matter of Mary R.F. [Angela I.]*, 144 AD3d 1493, 1493 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]), once the petitioner "has established a prima facie case, the burden of going forward shifts to [the] respondents to rebut the evidence of parental culpability" (*Philip M.*, 82 NY2d at 244; *see generally Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849 [4th Dept 2010]).

In this case, we conclude that petitioner established that the child suffered numerous injuries that "would ordinarily not occur absent an act or omission of respondents" (*Philip M.*, 82 NY2d at 243). Specifically, when the child was seven months old, he was diagnosed with, among other injuries, numerous broken ribs, a fractured skull, and numerous fractures to both of his legs (*see Matter of Tyree B. [Christina H.]*, 160 AD3d 1389, 1389 [4th Dept 2018]), which had been inflicted over the course of several months. Moreover, petitioner offered unrebutted testimony from the child's pediatrician that some of the child's fractures were the result of "repeated violent shaking," and that those types of fractures did not "occur for any other reason" (*see Matter of Deseante L.R. [Femi R.]*, 159 AD3d 1534,

1535 [4th Dept 2018]; *Matter of Wyquanza J. [Lisa J.]*, 93 AD3d 1360, 1361 [4th Dept 2012]).

We further conclude that petitioner established that "respondents were the caretakers of the child at the time the injur[ies] occurred" (*Philip M.*, 82 NY2d at 243), despite the fact that the child had multiple caregivers, including other individuals who occasionally babysat the child, during the months in which he sustained his injuries. Contrary to respondents' contentions, petitioner was not required to pinpoint the exact time when the injuries occurred in order to establish which respondent was "the culpable caregiver" (*Matter of Matthew O. [Kenneth O.]*, 103 AD3d 67, 74 [1st Dept 2012]; *see Matter of Avianna M.-G. [Stephanie G.]*, 167 AD3d 1523, 1523-1524 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]). Petitioner established that respondents "shared responsibility for [the child's] care" during the time period in which the injuries were sustained (*Matthew O.*, 103 AD3d at 75; *see Matter of Fantaysia L.*, 36 AD3d 813, 814 [2d Dept 2007]; *Matter of Seamus K.*, 33 AD3d 1030, 1033-1034 [3d Dept 2006]), and "the presumption of culpability extends" to all three respondents (*Matthew O.*, 103 AD3d at 74). Thus, petitioner established a prima facie case against all three respondents (*see id.* at 75). In response, respondents "fail[ed] to offer any explanation for the child's injuries" and simply denied inflicting them (*Philip M.*, 82 NY2d at 246). We therefore conclude that respondents failed to rebut the presumption of culpability (*see Tyree B.*, 160 AD3d at 1389; *Matter of Damien S.*, 45 AD3d 1384, 1384 [4th Dept 2007], *lv denied* 10 NY3d 701 [2008]).

Finally, contrary to respondents' further contentions, Family Court's finding of severe abuse is supported by the requisite clear and convincing evidence (*see* Family Ct Act § 1051 [e]; *see generally* Social Services Law § 384-b [8] [a] [i]). Indeed, the court's finding of severe abuse is supported by the "nature and severity of the child's injuries, coupled with [respondents'] failure to offer any explanation for those injuries" (*Mackenzie P.G.*, 148 AD3d at 1017), and evidence that respondents failed to promptly seek medical attention for the child (*see Matter of Mya N. [Reginald N.]*, 185 AD3d 1522, 1524-1525 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]; *see generally Seamus K.*, 33 AD3d at 1035).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

914

CA 20-01017

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF JOSEPH SAPIENZA AND AFFORDABLE ELECTRICAL SERVICES BY SAPIENZA ELECTRIC, INC., PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, RESPONDENT-RESPONDENT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CHAD A. DAVENPORT OF COUNSEL), FOR PETITIONERS-APPELLANTS.

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered August 4, 2020 in a proceeding pursuant to CPLR article 78. The judgment granted respondent's motion to dismiss the petition.

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

Memorandum: Petitioners commenced the instant article 78 proceeding seeking to compel respondent, City of Buffalo, to, inter alia, inspect and release as approved in a timely fashion electrical work performed by petitioners. Supreme Court granted respondent's motion to dismiss the petition pursuant to, inter alia, CPLR 3211 (a) (7). We affirm.

Contrary to petitioners' contention, the court properly granted the motion with respect to that part of the petition seeking to compel respondent to perform inspections of petitioners' electrical work within a specific time period. Petitioners failed to allege any statute that requires respondent to perform inspections within a particular time period and thus, petitioners failed to allege they had a legal right to such relief (*see Matter of Urban Stategies v Novello*, 297 AD2d 745, 748 [2d Dept 2002]).

We reject petitioners' contention that the court erred in granting the motion with respect to that part of the petition seeking to compel respondent to maintain records of electrical permits and inspections. Under CPLR 7803 (1), a petitioner seeking mandamus to compel " 'must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of

the administrative agency to grant that relief' " (*Matter of Anonymous v Commissioner of Health*, 21 AD3d 841, 842 [1st Dept 2005]). While the Charter of the City of Buffalo provides that respondent has a nondiscretionary duty to maintain such records (*see* Charter of the City of Buffalo §§ 165-22, 165-31), petitioners failed to identify any records that were not maintained and thus failed to allege that they have a clear legal right to the relief demanded (*see generally Matter of Eck v Mayor of Vil. of Attica*, 28 AD3d 1195, 1196 [4th Dept 2006]; *Matter of Thomas v City of Buffalo Inspections Dept.*, 275 AD2d 1004, 1004 [4th Dept 2000]).

Petitioners' contention that the petition stated a cause of action for mandamus to review pursuant to CPLR 7803 (3) is without merit. Indeed, the petition does not refer to CPLR 7803 (3) or allege that respondent acted arbitrarily and capriciously (*cf. Matter of Gilbert v Planning Bd. of Town Irondequoit*, 148 AD3d 1587, 1588 [4th Dept 2017]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

916

CA 21-00579

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF THE APPLICATION OF THE ROCHESTER POLICE CIVIL TECHNICIANS UNIT MEMBERS STEPHANIE MINTZ, KAREN HAYES, LIZ MARSDEN, ABIGAIL MINCHELLA, GIANA NITTI, BRITTANY SANDS, RYAN RADELL AND JASON TERRIGINO, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, ROCHESTER POLICE DEPARTMENT, ROCHESTER CHIEF OF POLICE LA'RON SINGLETARY, ROCHESTER MAYOR LOVELY WARREN AND TASSIE DEMPS, DIRECTOR OF HUMAN RESOURCES, RESPONDENTS-APPELLANTS.

TIMOTHY R. CURTIN, CORPORATION COUNSEL, ROCHESTER (YVETTE CHANCELLOR GREEN OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

VAHEY GETZ LLP, ROCHESTER (JON P. GETZ OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (James J. Piampiano, J.), entered November 12, 2020 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the first decretal paragraph and as modified the judgment is affirmed without costs, and respondents are granted 20 days from service of the order of this Court with notice of entry to serve and file an answer.

Memorandum: Petitioners, civilian members of the Technicians Unit of respondent Rochester Police Department, commenced this CPLR article 78 proceeding to challenge the denial of their requests for exemptions from respondent City of Rochester's residency rule, which requires that certain employees reside within the City of Rochester. Respondents moved pursuant to CPLR 3211 to dismiss the petition, and they now appeal from a judgment that denied the motion and granted the petition.

Initially, we note that respondents moved to dismiss on two grounds, to wit, that the petition is time-barred under the statute of limitations and that it fails to state a cause of action. On appeal, however, they challenge only that part of the judgment that denied

their motion on statute of limitations grounds. Therefore, we conclude that they have abandoned their contention that the petition fails to state a cause of action (*see generally Sto Corp. v Henrietta Bldg. Supplies*, 202 AD2d 969, 970 [4th Dept 1994]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We reject respondents' contention that Supreme Court erred in denying that part of the motion seeking to dismiss the petition on statute of limitations grounds. It is well settled that, "[o]n a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is time-barred, [a] defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (*Cimino v Dembeck*, 61 AD3d 802, 803 [2d Dept 2009]; *see Federal Natl. Mtge. Assn. v Tortora*, 188 AD3d 70, 74 [4th Dept 2020]; *Larkin v Rochester Housing Auth.*, 81 AD3d 1354, 1355 [4th Dept 2011]). Consequently, respondents here were required to "establish, inter alia, when [petitioners'] cause of action accrued" (*Swift v New York Med. Coll.*, 25 AD3d 686, 687 [2d Dept 2006]; *see Chaplin v Tompkins*, 173 AD3d 1661, 1662 [4th Dept 2019]; *Larkin*, 81 AD3d at 1355). A CPLR article 78 proceeding must be commenced within four months after the determination to be reviewed becomes "final and binding upon the petitioner" (CPLR 217), which is when the challenged determination "inflicts an actual, concrete injury upon the petitioner" (*Matter of Town of Olive v City of New York*, 63 AD3d 1416, 1418 [3d Dept 2009] [internal quotation marks omitted]). Thus, a CPLR article 78 proceeding accrues when the petitioner seeking review has been aggrieved by the challenged agency action and has received notice of that action (*see Matter of Village of Westbury v Department of Transp. of State of N.Y.*, 75 NY2d 62, 72 [1989]; *Matter of Fields v City of Buffalo*, 174 AD3d 1436, 1437 [4th Dept 2019]). Here, we conclude that respondents failed to meet that burden inasmuch as they introduced no admissible evidence that petitioners were notified of the determination to deny their requests for exemptions from the residency rule more than four months before the commencement of the proceeding.

Moreover, "[w]hen a court rules on a CPLR 3211 motion to dismiss, it 'must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord [petitioners] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]; *see Bisimwa v St. John Fisher Coll.*, 194 AD3d 1467, 1469 [4th Dept 2021]). Those requirements apply to motions to dismiss based on the statute of limitations (*see e.g. Collins v Davirro*, 160 AD3d 1343, 1343 [4th Dept 2018]; *Town of Macedon v Village of Macedon*, 129 AD3d 1639, 1641 [4th Dept 2015]). Here, petitioners alleged in the petition that they were not notified of respondents' determination to deny their requests for exemptions from the residency rule until approximately seven weeks prior to the commencement of the proceeding. Thus, accepting that allegation as true, and in light of the lack of any evidence to the contrary, respondents failed to meet their burden of establishing that the statute of limitations began to run more than four months prior to

the commencement of the proceeding. Consequently, the court properly denied the motion.

We agree with respondents, however, that the court then erred in granting the petition. The only motion before the court was respondents' pre-answer motion to dismiss, which the court properly denied. In a CPLR article 78 proceeding, once such a "motion is denied, the court shall permit respondent to answer, upon such terms as may be just" (CPLR 7804 [f]). Here, in denying the motion, the court essentially treated respondents' motion as one for summary judgment, searched the record, and granted summary judgment against respondents. It is well settled, however, that "if the court intends to treat the motion as one for summary judgment, it must give adequate notice to the parties that it so intends" (*Matter of Ostrowski v County of Erie*, 245 AD2d 1091, 1092 [4th Dept 1997] [internal quotation marks omitted]; *see Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d 100, 103 [1984]), and the court gave no such notice here. Additionally, only where "the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer" should a court grant the petition without permitting respondents to answer (*Nassau BOCES Cent. Council of Teachers*, 63 NY2d at 102; *see Matter of Kickertz v New York Univ.*, 25 NY3d 942, 944 [2015]; *Matter of Citizens Against Retail Sprawl v Giza*, 280 AD2d 234, 239-240 [4th Dept 2001]), and no such clarity exists on this record. Consequently, we modify the judgment by vacating that part granting the petition, and we grant respondents 20 days from service of the order of this Court with notice of entry to serve and file an answer.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

918

CA 20-01466

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, BANNISTER, AND DEJOSEPH, JJ.

TIMOTHY B. O'SHEA AND MARGARET A. O'SHEA,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JOSEPH F. FEMIA, M.D., AND JOSEPH F.
FEMIA, M.D., P.C., DEFENDANTS-APPELLANTS.

GALE GALE & HUNT, LLC, FAYETTEVILLE (KEVIN T. HUNT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROBERT F. JULIAN, P.C., UTICA (ROBERT F. JULIAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered October 16, 2020. The order, insofar as appealed from, denied in part defendants' motion for summary judgment dismissing plaintiffs' complaint and granted plaintiffs' cross motion seeking to strike defendants' statute of limitations defense.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the cross motion is denied, the fifth affirmative defense is reinstated, the motion is granted in its entirety, and the complaint is dismissed.

Memorandum: In this medical malpractice action, defendants appeal from those parts of an order that denied in part their motion for summary judgment dismissing the complaint and granted plaintiffs' cross motion to strike defendants' statute of limitations defense. Defendants met their initial burden of establishing that the action was time-barred with respect to services rendered prior to September 8, 2014, and plaintiffs failed to raise a triable issue of fact with respect to the continuous treatment doctrine (*see* CPLR 214-a; *DeMarco v Santo*, 43 AD3d 1285, 1286 [4th Dept 2007]; *Trimper v Jones*, 37 AD3d 1154, 1155-1156 [4th Dept 2007]; *Sofia v Jimenez-Rueda*, 35 AD3d 1247, 1248-1249 [4th Dept 2006]*; see generally Massie v Crawford*, 78 NY2d 516, 519-520 [1991], *rearg denied* 79 NY2d 978 [1992]). With respect to services rendered after September 8, 2014, defendants met their initial burden with respect to deviation from the applicable standard of care, and plaintiffs failed to raise a triable issue of fact in opposition (*see Martingano v Hall*, 188 AD3d 1638, 1639-1640 [4th Dept 2020], *lv denied* 36 NY3d 912 [2021]; *Lake v Kaleida Health*, 59 AD3d 966, 966-967 [4th Dept 2009]). We therefore reverse the order insofar as appealed from, deny the cross motion, reinstate the fifth

affirmative defense, grant the motion in its entirety, and dismiss the complaint.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

920

CA 21-00752

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, BANNISTER, AND DEJOSEPH, JJ.

KALEIDA HEALTH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARGARET HYLAND, MARGARET HYLAND SUPPLEMENTAL NEEDS TRUST, ANDREW HYLAND AND WILLIAM HYLAND, III, DEFENDANTS-RESPONDENTS.

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (SEAN J. MACKENZIE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Niagara County (Timothy J. Walker, A.J.), entered November 2, 2020. The order granted the motion of defendants to dismiss plaintiff's second, fifth, sixth and seventh causes of action.

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

Memorandum: Plaintiff, a not-for-profit hospital corporation, owns and operates DeGraff Rehab and Long Term Care, a residential skilled nursing facility where defendant Margaret Hyland (Margaret) resides. Plaintiff commenced this action seeking, inter alia, monetary damages for unpaid charges associated with Margaret's residence and care at the facility that were incurred, in part, because Erie County Department of Social Services imposed a penalty period for Margaret's eligibility for Medicaid benefits based on her alleged transfer of various assets for less than fair market value. In lieu of an answer, defendants moved to dismiss plaintiff's second, fifth, sixth, and seventh causes of action pursuant to CPLR 3211 (a) (7). Supreme Court granted the motion, and plaintiff appeals.

Contrary to plaintiff's contention, the court properly granted the motion insofar as it sought dismissal of the second cause of action, which is based on a breach of fiduciary duty by defendant William Hyland, III (William), Margaret's son and alleged attorney-in-fact. The elements of a cause of action for a breach of fiduciary duty are "the existence of a fiduciary relationship, misconduct by defendant, and damages directly caused by that misconduct" (*Wells v Hurlburt Rd. Co., LLC*, 145 AD3d 1486, 1487 [4th Dept 2016]). In the context of a motion to dismiss pursuant to CPLR 3211 (a) (7), we must "accept the facts as alleged in the complaint as true, accord

plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Here, defendants are entitled to dismissal of the second cause of action because plaintiff did not allege that there was a fiduciary relationship between it and William (*see Shaffer v Gilberg*, 125 AD3d 632, 635 [2d Dept 2015]; *Cornwell v NRT N.Y. LLC*, 95 AD3d 637, 637 [1st Dept 2012]; *see also Mazzarella v Syracuse Diocese* [appeal No. 2], 100 AD3d 1384, 1385 [4th Dept 2012]).

We agree with plaintiff, however, that the court erred in granting the motion insofar as it sought dismissal of the fifth, sixth, and seventh causes of action, and we therefore modify the order accordingly. The fifth cause of action is premised on Debtor and Creditor Law former § 273. Pursuant to former section 273, "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his [or her] actual intent if the conveyance is made or the obligation is incurred without a fair consideration." "[B]oth insolvency and lack of fair consideration are prerequisites to a finding of constructive fraud under [former] section 273" (*Joslin v Lopez*, 309 AD2d 837, 838 [2d Dept 2003]; *see Matter of City of Syracuse Indus. Dev. Agency [Amadeus Dev., Inc.–Financitech, Ltd.]*, 156 AD3d 1329, 1331-1332 [4th Dept 2017], *lv dismissed* 32 NY3d 947 [2018]). Here, we conclude that plaintiff sufficiently alleged a cause of action under former section 273. Plaintiff alleged that defendants made conveyances as that term is defined in Debtor and Creditor Law former § 270. Plaintiff further alleged that those conveyances were made without fair consideration (*see* former § 272) and that they rendered Margaret insolvent (*see* former § 271 [1]).

Plaintiff's sixth cause of action is premised on Debtor and Creditor Law former § 276. Pursuant to former section 276, "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." Plaintiff alleged that the conveyances were made with actual intent to defraud, and we accept those allegations as true (*see Leon*, 84 NY2d at 87). Although defendants submitted in support of the motion an affidavit of Margaret explaining her rationale for certain transactions, the affidavit did not "establish *conclusively* that . . . plaintiff has no cause of action" (*Jeanty v State of New York*, 175 AD3d 1073, 1074 [4th Dept 2019], *lv denied* 34 NY3d 912 [2020] [internal quotation marks omitted]; *see Karla W. v Carlisha K.M.*, 193 AD3d 1335, 1336 [4th Dept 2021]).

Finally, in light of our conclusion with respect to plaintiff's sixth cause of action, we agree with plaintiff that the court erred in granting the motion insofar as it sought dismissal of the seventh cause of action in which plaintiff seeks an award of attorney's fees

pursuant to Debtor and Creditor Law former § 276-a.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

921

KA 15-01502

PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN J. NEWMAN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (HELEN SYME 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 (Christopher S. Ciaccio, J.), rendered May 27, 2015. The appeal was held by this Court by order entered April 24, 2020, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (182 AD3d 1067 [4th Dept 2020]). The proceedings were held and completed.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of menacing a police officer or peace officer (Penal Law § 120.18) and one count of criminal trespass in the third degree (§ 140.10 [a]). We previously held the case, reserved decision, and remitted the matter to County Court for a hearing on defendant's motion to set aside the verdict pursuant to CPL 330.30 (2) on the ground of misconduct during jury deliberations, which had been summarily denied by the court (*People v Newman*, 182 AD3d 1067 [4th Dept 2020]). Upon remittal, a hearing was held while the trial jurist was still a County Court Judge. Over a month-and-a-half later, after having been sworn in as Surrogate's Court Judge and while sitting as an Acting Supreme Court Justice, the jurist rendered a decision and order denying defendant's motion.

Defendant contends that the jurist, in his capacity as Acting Supreme Court Justice, lacked subject matter jurisdiction to render a decision and order on the CPL 330.30 motion that had been remitted to County Court. Contrary to defendant's contention, we conclude that he is not entitled to relief on jurisdictional grounds inasmuch as Supreme Court possesses concurrent subject matter jurisdiction to hear and decide a CPL 330.30 motion in a criminal proceeding (*see generally* NY Const, art VI, § 7 [a]; *People v Correa*, 15 NY3d 213, 228 [2010]).

Defendant further contends that the proceeding was improperly transferred from County Court to Supreme Court. We agree. Preliminarily, "[a]lthough a contention that a [jurist] lacks subject matter jurisdiction to preside over a matter may be raised for the first time on appeal . . . , '[g]iven that Supreme Court [and County Court] had the power to hear the [motion], the transfer error defendant alleges [here] is the equivalent of an improper venue claim, which is not jurisdictional in nature and is waived if not timely raised,' " i.e., that contention is subject to the preservation rule (*People v Ott*, 83 AD3d 1495, 1496 [4th Dept 2011], *lv denied* 17 NY3d 808 [2011], *writ of error coram nobis granted on other grounds* 153 AD3d 1135 [4th Dept 2017], quoting *People v Wilson*, 14 NY3d 895, 897 [2010]; *see e.g. People v Morgan*, 96 AD3d 1418, 1420 [4th Dept 2012], *lv denied* 20 NY3d 987 [2012]; *People v Woodrow*, 91 AD3d 1188, 1189 [3d Dept 2012], *lv denied* 18 NY3d 999 [2012]). Here, we conclude that defendant's contention is reviewable despite being raised for the first time on appeal following remittal because the sequence of events described above "deprived [defendant] of a practical ability to timely and meaningfully object" to the allegedly improper transfer of the proceeding from County Court to Supreme Court (*People v Harris*, 31 NY3d 1183, 1185 [2018]; *see People v Hernandez*, 193 AD3d 1413, 1414 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]; *cf. People v Williams*, 27 NY3d 212, 214 [2016]).

With respect to the merits, the record establishes that we remitted the matter to County Court for a hearing and determination on defendant's CPL 330.30 motion (*Newman*, 182 AD3d at 1069; *see* CPL 470.45), and that the hearing was properly held before the trial jurist in his capacity as County Court Judge. However, the proceeding was effectively transferred from County Court to Supreme Court when the jurist, in his capacity as Acting Supreme Court Justice, and no longer serving as a County Court Judge, rendered the decision and order on the motion (*see People v Williams*, 163 AD3d 1420, 1421 [4th Dept 2018]). That transfer was improper because there is no indication that it was authorized by the Chief Administrator and, moreover, the transfer occurred after the commencement of trial (*see* 22 NYCRR 200.14; *Williams*, 163 AD3d at 1421; *People v Adams*, 74 AD3d 1897, 1898-1899 [4th Dept 2010]). Additionally, even assuming, arguendo, that 22 NYCRR 200.14, by its terms, does not apply in the post-judgment posture of this case with the sentence having remained intact (*cf. Williams*, 163 AD3d at 1420-1421), we conclude that the rule then fails to provide the requisite legal basis for Supreme Court to have transferred this proceeding to itself (*see* NY Const, art VI, § 19 [a]; 22 NYCRR 200.14 [a]) or for County Court to have transferred the proceeding to Supreme Court (*see* 22 NYCRR 200.14 [b]; *see generally* William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, CPL 230.10). We thus conclude that the proceeding was improperly transferred from County Court to Supreme Court.

With respect to the appropriate remedy, although remittal is required, we reject defendant's contention that he is entitled to a new hearing. The jurist properly conducted the hearing as a County Court Judge in conformance with our remittal to County Court.

Defendant was thus provided a full and fair opportunity to produce witnesses and litigate the merits of his CPL 330.30 motion at the hearing. The procedural error of transferring the proceeding to Supreme Court, which occurred *after* the hearing was properly conducted in County Court, is the sole reason that remittal is required again. Under these circumstances, we remit the matter to County Court to rule on the motion based on the evidence presented at the hearing (*see People v Gambale*, 150 AD3d 1667, 1670 [4th Dept 2017]; *People v Rainey*, 110 AD3d 1464, 1466 [4th Dept 2013]; *see generally* Judiciary Law § 21; *People v Hampton*, 21 NY3d 277, 279 [2013]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

924

KA 18-01882

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FAROD MOSLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered February 8, 2018. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts) and reckless endangerment in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of reckless endangerment in the first degree (§ 120.25), arising from an incident in which a gun was fired several times at an occupied motor vehicle. We affirm.

We reject defendant's contention that, at trial, County Court erred in allowing a police detective to identify him in a surveillance video. "A lay witness may give an opinion concerning the identity of a person depicted in a surveillance [video] if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the [video] than is the jury" (*People v Graham*, 174 AD3d 1486, 1487-1488 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019] [internal quotation marks omitted]; *see People v Russell*, 165 AD2d 327, 336 [2d Dept 1991], *affd* 79 NY2d 1024 [1992]). We conclude that the court did not abuse its discretion (*see Russell*, 79 NY2d at 1025) in permitting that testimony because the People presented evidence establishing that the police detective was familiar with defendant based on numerous prior interactions with defendant over the course of more than a year, during which time the police detective observed defendant's appearance, body language, demeanor, and gait. Thus,

there "was some basis for concluding that the [police detective] was more likely to identify defendant correctly than was the jury" (*People v Gambale*, 158 AD3d 1051, 1053 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018]; *see People v Trowell*, 172 AD3d 1112, 1113 [2d Dept 2019], *lv denied* 33 NY3d 1074 [2019]). Also, the court properly concluded that the police detective would be more likely to identify defendant in the surveillance video, "[n]otwithstanding the fact that defendant[] had not changed [his] appearance subsequent to having been videotaped," because of the "poor quality of the surveillance [video]" (*People v Pinkston*, 169 AD3d 520, 521 [1st Dept 2019], *lv denied* 33 NY3d 1107 [2019]). Thus, the police detective's testimony "served to aid the jury in making an independent assessment regarding whether the man in the [video] was indeed the defendant" (*People v Montanez*, 135 AD3d 528, 528 [1st Dept 2016], *lv denied* 27 NY3d 1072 [2016]). We also note that the court properly instructed the jurors that, inter alia, the police detective's testimony should not automatically be accepted and that the identity of the shooter was a question of fact for the jury, thereby emphasizing to the jury that the police detective's "opinion was merely to aid their decision based upon all the facts and circumstances of the case and that they were entitled to accept or reject it" (*Gambale*, 158 AD3d at 1053).

Defendant failed to preserve for our review his contention that the People committed a *Rosario* violation when they failed to collect and disclose to defendant a second surveillance video purportedly depicting the shooting (*see* CPL 470.05 [2]; *People v Page*, 105 AD3d 1380, 1383 [4th Dept 2013], *lv denied* 23 NY3d 1023 [2014]). In any event, that contention lacks merit. The second surveillance video does not constitute *Rosario* material inasmuch as it was not "a statement made by a prosecution witness" (*Page*, 105 AD3d at 1383 [internal quotation marks omitted]).

Defendant further contends that the court should have given the jury an adverse inference instruction based on the People's failure to preserve the second surveillance video. That contention is also unpreserved because defendant did not request such an instruction and did not object to the court's ultimate charge on that ground (*see People v Brown*, 181 AD3d 1301, 1304 [4th Dept 2020], *lv denied* 35 NY3d 1064 [2020]; *People v Williams*, 38 AD3d 577, 578 [2d Dept 2007], *lv denied* 9 NY3d 883 [2007]; *see generally People v Washington*, 173 AD3d 1644, 1645 [4th Dept 2019], *lv denied* 34 NY3d 985 [2019]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, the conviction is supported by legally sufficient evidence of his identity as the shooter (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Contes*, 60 NY2d 620, 621 [1983]). The evidence at trial included surveillance video footage depicting a person, identified by the police detective as defendant, running into the frame, brandishing a gun, and discharging the gun multiple times in the direction of the victim's vehicle, which had just exited the frame (*see People v Fletcher*, 192 AD3d 1667, 1667 [4th Dept 2021], *lv denied* 37 NY3d 964

[2021]; *People v Jordan*, 181 AD3d 1248, 1249 [4th Dept 2020], *lv denied* 35 NY3d 1067 [2020]). Viewing the evidence in the light most favorable to the People, we conclude that "there is a valid line of reasoning and permissible inferences from which a rational jury could have" determined that defendant was the shooter (*Danielson*, 9 NY3d at 349 [internal quotation marks omitted]; *see generally Contes*, 60 NY2d at 621). We further conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although a different verdict would not have been unreasonable given the low quality of the surveillance video footage that purportedly depicted defendant (*see Danielson*, 9 NY3d at 348), we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495).

We conclude that the court did not abuse its discretion in refusing to grant defendant youthful offender status (*see People v Simpson*, 182 AD3d 1046, 1047 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]; *People v Lewis*, 128 AD3d 1400, 1400 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]; *see generally People v Minemier*, 29 NY3d 414, 421 [2017]). In addition, having reviewed the applicable factors pertinent to a youthful offender determination (*see People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]), we decline to exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*see Simpson*, 182 AD3d at 1047; *Lewis*, 128 AD3d at 1400-1401; *cf. Keith B.J.*, 158 AD3d at 1161).

Finally, we reject defendant's contention that the sentence is unduly harsh and severe.

All concur except WHALEN, P.J., and LINDLEY, J., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent. Initially, we conclude that County Court abused its discretion in allowing a police detective to identify defendant in a surveillance video depicting the shooting for which defendant was arrested (*see generally People v Russell*, 79 NY2d 1024, 1025 [1992]). During voir dire, the police detective testified that he interacted with defendant at a police station, where he "sat in rooms" with defendant, "walked side by side" with him on occasion, and viewed photographs of him. The police detective could recall, however, only a single day on which these interactions took place and conceded that he did not recall ever having a "street interaction[]" with defendant. Thus, contrary to the determination of the majority, there was an insufficient basis on which to conclude that the police detective was more likely than the jury to correctly identify the person in the poor quality surveillance video as defendant (*cf. People v Gambale*, 158 AD3d 1051, 1053 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018]), particularly because there was no evidence that defendant's appearance had changed since the surveillance video was recorded (*cf. People v Sanchez*, 95 AD3d 241, 249-250 [1st Dept 2012], *affd* 21 NY3d 216 [2013]). Further, in an apparent effort to curb any prejudice to defendant from testimony that he had previously been the subject of a

police investigation, the court permitted the police detective to testify that he had known defendant for a "long period of time" and "talked to him on numerous occasions." As a result, the police detective testified before the jury that he had known defendant for approximately a year and a half from his work canvassing in the neighborhood where the shooting occurred, during which time he became familiar with defendant's body language. That testimony overstated the police detective's familiarity with defendant and thus deprived the jury of the ability to independently assess the police detective's basis for making the identification and determine whether to accept or reject that testimony (*see generally Gambale*, 158 AD3d at 1053). Inasmuch as the People conceded at oral argument, correctly in our opinion after viewing the surveillance video, that the jury would have been unable to identify defendant as the shooter from the video in the absence of the police detective's identification testimony, we cannot conclude that this error was harmless.

Moreover, we conclude that the verdict is against the weight of the evidence even with the identification testimony from the police detective. The only evidence that defendant was the shooter is the blurry surveillance video, therefore an acquittal would have been reasonable (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The police detective conceded that he was not familiar with what defendant looked like on the date of the shooting. When asked in front of the jury whether he could identify the shooter depicted on the video, the police detective testified that, based "on previously viewing the video and being able to zoom in and stuff, . . . that's [defendant] in the video." He explained that he had previously been able to identify the individual as defendant based on the individual's build and the shape of his nose. The police detective acknowledged that video stills of the individual's face were too blurry to allow for facial features to be discerned and, although he testified that the facial features were clearer when the surveillance video was allowed to play, the jury was never shown how the police detective was able to "zoom in" such that any further detail could be discerned. Thus, we conclude that the jury "failed to give the [identification] evidence the weight it should be accorded" (*id.*). We would therefore reverse the judgment and dismiss the indictment.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

925

KA 17-00230

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWIGHT MOSS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

DWIGHT MOSS, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered January 25, 2017. The judgment convicted defendant upon a nonjury verdict of sexual abuse in the first degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence, and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon a nonjury verdict of, inter alia, sexual abuse in the first degree (Penal Law § 130.65 [3]), defendant contends in his main brief that County Court erred in allowing the victim to testify about a prior, uncharged incident of sexual abuse allegedly perpetrated by defendant inasmuch as that testimony was not relevant to absence of mistake, to motive, or as background information (*see generally People v Molineux*, 168 NY 264, 293 [1901]; *People v Workman*, 56 AD3d 1155, 1156 [4th Dept 2008], *lv denied* 12 NY3d 789 [2009]). Defendant failed to preserve his contention for our review inasmuch as he did not raise it before the trial court (*see People v Case*, 197 AD3d 985, 987 [4th Dept 2021]). In any event, we conclude that the court properly allowed the victim to testify about the earlier incident of alleged abuse because it is relevant to the absence of mistake (*see People v Chrisley*, 126 AD3d 1495, 1495 [4th Dept 2015], *lv denied* 26 NY3d 1007 [2015]; *People v Gonzalez*, 62 AD3d 1263, 1265 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009]). Here, it was alleged that defendant “pinched” and “rubbed” the seven-year-old victim’s vagina while participating in a “tickle fight” with her and her brothers. It would be reasonable to infer based on the victim’s testimony concerning that event alone that any inappropriate touching of the victim was a mistake or was accidental.

Evidence that defendant had touched the victim inappropriately on a prior occasion while playing with her and her brothers would tend to show that his conduct was not accidental, and thus, the evidence of the prior, alleged incident was "relevant to establish the absence of mistake or accident, as well as intent" (*Gonzalez*, 62 AD3d at 1265).

Contrary to defendant's contentions in his pro se supplemental brief, we conclude that the conviction is supported by legally sufficient evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]) and, upon viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to the further contention in defendant's main and pro se supplemental briefs, viewing the evidence, the law, and the circumstances of this case in totality and as of the time of representation, we conclude that defendant received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant further contends in his pro se supplemental brief that the court erred in sentencing him as a second child sexual assault felony offender without holding a hearing. We agree. Because defendant did not controvert the existence of the predicate conviction of course of sexual conduct against a child in the second degree, it was incumbent upon him "to allege and prove facts to establish his claim that the conviction was unconstitutionally obtained" (*People v Konstantinides*, 14 NY3d 1, 15 [2009]; *see* CPL 400.19; *see also People v Farmer*, 136 AD3d 1410, 1413 [4th Dept 2016], *lv denied* 28 NY3d 1027 [2016]). Here, defendant stated that the court in the prior proceeding coerced him into pleading guilty to a reduced charge by threatening to impose the maximum sentence if he were convicted after a trial. "[A] threat to impose a maximum sentence if the defendant is convicted goes beyond a description of the possible sentencing exposure and has consistently been held impermissibly coercive" (*People v Fisher*, 70 AD3d 114, 117 [1st Dept 2009]; *see People v Boyde*, 122 AD3d 1302, 1302-1303 [4th Dept 2014]; *People v Kelley*, 114 AD3d 1229, 1230 [4th Dept 2014]). Thus, defendant's representations here constitute a claim that his plea of guilty to course of sexual conduct against a child had been coerced, thereby entitling him to a hearing on the constitutionality of that guilty plea (*see People v Mack*, 203 AD2d 131, 132-133 [1st Dept 1994]; *see generally Konstantinides*, 14 NY3d at 14-15). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for further proceedings.

Finally, we have considered the remaining contentions raised by defendant in his pro se supplemental brief and conclude that none warrants further modification or reversal of the judgment.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

929

KA 18-01883

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FAROD MOSLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered February 8, 2018. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and petit larceny.

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 for burglary in the second degree under count four of the indictment to a determinate term of incarceration of seven years and five years of postrelease supervision, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that the evidence is legally insufficient to establish that he knowingly entered the victim's dwelling unlawfully. We reject that contention. To convict a person of burglary in the second degree, the People are required to establish that the defendant knowingly entered or remained unlawfully in a dwelling with the intent to commit a crime therein (*see* § 140.25 [2]). "A person 'enters or remains unlawfully' in or upon premises when he [or she] is not licensed or privileged to do so" (§ 140.00 [5]). "In general, a person is licensed or privileged to enter private premises when he [or she] has obtained the consent of the owner or another whose relationship to the premises gives him [or her] authority to issue such consent" (*People v Dombrowski*, 87 AD3d 1267, 1268 [4th Dept 2011] [internal quotation marks omitted]; *see People v Graves*, 76 NY2d 16, 20 [1990]). Because the intruder "must be aware of the fact that he [or she] has no license or privilege to enter the premises . . . , a person who mistakenly believed that he [or she] was licensed or privileged to enter a building . . . would not be guilty of burglary,

even though he [or she] entered with intent to commit a crime therein" (*People v Uloth*, 201 AD2d 926, 926 [4th Dept 1994]; *see Dombrowski*, 87 AD3d at 1268).

Viewing the evidence in the light most favorable to the People, we conclude that "there is a valid line of reasoning and permissible inferences from which a rational jury could have" determined that defendant unlawfully entered the victim's dwelling (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]; *see generally People v Contes*, 60 NY2d 620, 621 [1983]). Although there is no "direct testimony by the occupant[]" establishing defendant's unlawful entry, defendant's unlawful entry can be established circumstantially (*People v Thornton*, 4 AD3d 561, 562 [3d Dept 2004], *lv denied* 2 NY3d 808 [2004]; *see People v Tennant*, 285 AD2d 817, 818-819 [3d Dept 2001]). Despite testimony that defendant had, on occasion, been permitted to spend time at the victim's apartment, "it does not follow from that testimony that defendant had permission to enter the dwelling without the owner's knowledge or invitation" (*People v Little*, 139 AD3d 1356, 1356 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016]), particularly where there was no evidence that defendant also lived at the apartment (*cf. People v McCargo*, 226 AD2d 480, 480-481 [2d Dept 1996]). Indeed, the People presented evidence that the victim had taken steps to secure her apartment to prevent defendant and a friend from stealing from her and that she had made statements to defendant intended to convey to him that she did not want him in her apartment by himself. The People also presented evidence that defendant used force to enter the apartment through a window (*see People v Clarke*, 185 AD2d 124, 125-126 [1st Dept 1992], *affd* 81 NY2d 777 [1993]; *Little*, 139 AD3d at 1356; *Thornton*, 4 AD3d at 562).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we also reject defendant's contention that the verdict with respect to burglary in the second degree is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Where, as here, "witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor" (*People v Streeter*, 118 AD3d 1287, 1288 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014] [internal quotation marks omitted]). We note that there was nothing about the testimony establishing defendant's guilt that was "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Barnes*, 158 AD3d 1072, 1073 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018] [internal quotation marks omitted]; *see People v Smith*, 73 AD3d 1469, 1470 [4th Dept 2010], *lv denied* 15 NY3d 778 [2010]). Further, the jury was entitled to disregard any portions of relevant testimony it found to be untruthful and accept the portions it found to be truthful and accurate (*see People v Jemes*, 132 AD3d 1361, 1362 [4th Dept 2015], *lv denied* 26 NY3d 1110 [2016]).

We conclude that County Court did not abuse its discretion in

refusing to grant defendant youthful offender status (*see People v Simpson*, 182 AD3d 1046, 1047 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]; *People v Lewis*, 128 AD3d 1400, 1400 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]; *see generally People v Minemier*, 29 NY3d 414, 421 [2017]). In addition, having reviewed the applicable factors pertinent to a youthful offender determination (*see People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]), we decline to exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*see Simpson*, 182 AD3d at 1047; *Lewis*, 128 AD3d at 1400-1401; *cf. Keith B.J.*, 158 AD3d at 1161).

We agree with defendant, however, that the sentence imposed—a determinate term of incarceration of 15 years, which is the legal maximum (Penal Law § 70.02 [3] [b])—is unduly harsh and severe. Under the circumstances of this case, including that defendant was 17 years old at the time of the incident, we modify the judgment as a matter of discretion in the interest of justice by reducing the sentence to a determinate term of incarceration of seven years followed by the five-year period of postrelease supervision previously imposed by the court (*see generally* CPL 470.15 [6] [b]), which will continue to run consecutively to the sentences imposed under Indictment No. 2016-0678-1.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

930

CA 20-01445

PRESENT: CENTRA, J.P., LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

ISMAHAN A., INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF J.A., A MINOR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAMSVILLE BOARD OF EDUCATION AND WILLIAMSVILLE CENTRAL SCHOOL DISTRICT, DEFENDANTS-RESPONDENTS.

NELSON S. TORRE, BUFFALO, FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (KARA M. EYRE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Dennis Ward, J.), entered August 11, 2020. The order granted defendants' motion for summary judgment dismissing 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 to recover damages for injuries sustained by her son as a result of defendants' alleged negligent supervision of a physical education class during which plaintiff's son, a high school freshman, was blindsided by a much larger student while playing one-hand touch football, resulting in a fracture of his jaw. We agree with plaintiff that Supreme Court erred in granting defendants' motion for summary judgment dismissing the complaint. Therefore, we reverse the order, deny the motion, and reinstate the complaint.

"Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *see Knaszak v Hamburg Cent. Sch. Dist.*, 196 AD3d 1141, 1142 [4th Dept 2021]). "In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" (*Mirand*, 84 NY2d at 49; *see Knaszak*, 196 AD3d at 1142). "Actual or

constructive notice to the school of prior similar conduct is generally required because, obviously, school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily" (*Mirand*, 84 NY2d at 49; *see Knaszak*, 196 AD3d at 1142). Nevertheless, "[e]ven if a breach of the duty of supervision is established, the inquiry is not ended; the question arises whether such negligence was the proximate cause of the injuries sustained" (*Mirand*, 84 NY2d at 50; *see Doyle v Binghamton City School Dist.*, 60 AD3d 1127, 1128-1129 [3d Dept 2009]). "The test to be applied is whether under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school's negligence" (*Mirand*, 84 NY2d at 50).

We conclude that defendants failed to meet their initial burden on the motion inasmuch as their own evidentiary submissions raised issues of fact whether plaintiff's son was injured as a result of "an unforeseeable act that, without sufficiently specific knowledge or notice, could not have been reasonably anticipated" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]; *cf. Knaszak*, 196 AD3d at 1142-1143). The testimony of the physical education teacher raised an issue of fact with respect to notice inasmuch as it established that, on the day before the collision, there was a "very similar" incident involving a collision between two boys during a touch football game in physical education class, resulting in injury. Nonetheless, the students in his game were, according to the testimony of plaintiff's son, expected to call their own penalties. In addition, although the substitute teacher who was supervising the class that day testified that the class was divided into three separate games and that he was able to supervise them all simultaneously, plaintiff's son further testified that the class was divided into four games, and the substitute teacher acknowledged that he did not see the collision that caused the injury to plaintiff's son.

We further conclude that defendants failed to meet their initial burden with respect to causation inasmuch as their own evidentiary submissions raised issues of fact whether "the alleged absence of adequate supervision was the proximate cause of the injury-causing event" (*Doyle*, 60 AD3d at 1128). Plaintiff's son testified that he believed the collision was intentional because he "was nowhere near the ball handler" at the time he was hit from behind and "the only way" that the other student, who was six inches taller, could have hit plaintiff's son's jaw was if he had lowered his shoulder. Thus, considering that testimony together with the testimony that the students were expected to call their own penalties, we conclude that there exists a question of fact whether this was a "foreseeable consequence of the situation created by the school's negligence" (*Mirand*, 84 NY2d at 50) or "a 'spontaneous and accidental' collision . . . that even the most careful supervision could not prevent" (*id.*).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

934

CA 20-00018

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF STEVEN L. SCHUNK AND
JAMIE SCHUNK, CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF YORK AND COUNTY OF LIVINGSTON,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

PAUL WILLIAM BELTZ, P.C., BUFFALO (ANNE B. RIMMLER OF COUNSEL), FOR CLAIMANTS-APPELLANTS.

LIPPMAN O'CONNOR, BUFFALO (MATTHEW J. DUGGAN OF COUNSEL), FOR RESPONDENT-RESPONDENT TOWN OF YORK.

WEBSTER SZANYI LLP, BUFFALO (PETER L. VEECH OF COUNSEL), FOR RESPONDENT-RESPONDENT COUNTY OF LIVINGSTON.

Appeal from an order of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered December 19, 2019. The order denied the application of claimants for leave to serve a late notice of claim.

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

Memorandum: In appeal No. 1, claimants appeal from an order that denied their application for leave to serve a late notice of claim alleging that Steven L. Schunk (claimant) sustained injuries in a motor vehicle accident that resulted from a hazardous road design that respondents created and permitted to persist. In appeal No. 2, claimants appeal from an order that denied their motion for leave to reargue and renew their application for leave to serve a late notice of claim.

With respect to appeal No. 1, we conclude that Supreme Court did not abuse its discretion in denying claimants' application for leave to serve a late notice of claim. A party asserting a tort claim against a public corporation must serve a notice of claim within 90 days after the claim arises (*see* General Municipal Law § 50-e [1] [a]; *Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 460 [2016], *rearg denied* 29 NY3d 963 [2017]). "A court may, however, extend the time in which to serve a notice of claim upon consideration of several factors, including whether the claimant has shown a

reasonable excuse for the delay, whether [the] respondents had actual knowledge of the facts surrounding the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would cause substantial prejudice to the [respondents]" (*Matter of Diaz v Rochester-Genesee Regional Transp. Auth. [RGRTA]*, 175 AD3d 1821, 1821 [4th Dept 2019] [internal quotation marks omitted]). "While the presence or absence of any single factor is not determinative, one factor that should be accorded great weight is whether the [respondent] received actual knowledge of the facts constituting the claim in a timely manner" (*Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016] [internal quotation marks omitted]; *see Matter of Bingham v Town of Wheatfield*, 185 AD3d 1482, 1484-1485 [4th Dept 2020]). "Absent a clear abuse of the court's broad discretion, the determination of an application for leave to serve a late notice of claim will not be disturbed" (*Dalton v Akron Cent. Schools*, 107 AD3d 1517, 1518 [4th Dept 2013], *affd* 22 NY3d 1000 [2013] [internal quotation marks omitted]).

Here, there is no dispute that claimants' unsubstantiated claim of law office failure does not constitute a reasonable excuse for their failure to serve a timely notice of claim (*see Matter of Lugo v GNP Brokerage*, 185 AD3d 824, 826 [2d Dept 2020]; *Seif v City of New York*, 218 AD2d 595, 596 [1st Dept 1995]). Moreover, we conclude that claimants failed to establish that respondents had actual knowledge of the facts surrounding the claim. To establish actual knowledge, claimants were required to show that respondents had "knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim, and not merely some general knowledge that a wrong has been committed" (*Matter of Tejada v City of New York*, 161 AD3d 876, 877 [2d Dept 2018] [internal quotation marks omitted]; *see Matter of Szymkowiak v New York Power Auth.*, 162 AD3d 1652, 1655 [4th Dept 2018]). Contrary to claimants' contention, the police report prepared following the motor vehicle accident did not provide actual knowledge of the essential facts constituting the claim because nothing contained therein would have allowed respondents to readily infer that the accident was, as claimants assert, attributable to hazardous road design or construction (*see Brown v City of Buffalo*, 100 AD3d 1439, 1440 [4th Dept 2012]). Additionally, we conclude that the prior discussions between respondents concerning public requests for the installation of a four-way stop at the accident site did not establish respondents' actual knowledge (*cf. Fenton v County of Dutchess*, 148 AD2d 573, 575 [2d Dept 1989], *lv denied* 74 NY2d 608 [1989]) and that evidence that local residents previously complained about the potentially dangerous condition of the roads at the accident site constituted, at best, constructive knowledge of the essential facts of the claim, which is insufficient (*see Matter of Ficek v Akron Cent. Sch. Dist.*, 144 AD3d 1601, 1603 [4th Dept 2014]). In light of our determination, we need not consider claimants' remaining contention in appeal No. 1.

With respect to appeal No. 2, the appeal from the order insofar as it denied that part of claimants' motion seeking leave to reargue

must be dismissed because no appeal lies therefrom (*see MidFirst Bank v Storto*, 121 AD3d 1575, 1575 [4th Dept 2014]; *Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]). The court did not abuse its discretion in denying that part of the motion seeking leave to renew because claimants' "submissions on that motion were merely cumulative of [their] submissions in [support of] the original [application]" (*Violet Realty, Inc. v Gerster Sales & Serv., Inc.* [appeal No. 2], 128 AD3d 1348, 1349-1350 [4th Dept 2015] [internal quotation marks omitted]; *see Giangrosso v Kummer Dev. Corp.*, 16 AD3d 1094, 1094-1095 [4th Dept 2005]), and therefore claimants did not adduce any new facts in support of that part of their motion (*see* CPLR 2221 [e] [2]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

935

CA 20-00729

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF STEVEN L. SCHUNK AND
JAMIE SCHUNK, CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF YORK AND COUNTY OF LIVINGSTON,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

PAUL WILLIAM BELTZ, P.C., BUFFALO (ANNE B. RIMMLER OF COUNSEL), FOR CLAIMANTS-APPELLANTS.

LIPPMAN O'CONNOR, BUFFALO (MATTHEW J. DUGGAN OF COUNSEL), FOR RESPONDENT-RESPONDENT TOWN OF YORK.

WEBSTER SZANYI LLP, BUFFALO (PETER L. VEECH OF COUNSEL), FOR RESPONDENT-RESPONDENT COUNTY OF LIVINGSTON.

Appeal from an order of the Supreme Court, Livingston County (Thomas E. Moran, J.), entered June 5, 2020. The order denied the motion of claimants for leave to reargue and renew their application for leave to serve a late notice of claim.

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

Same memorandum as in *Matter of Schunk v Town of York* ([appeal No. 1] — AD3d — [Dec. 23, 2021] [4th Dept 2021]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

948

CA 20-00963

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, WINSLOW, AND BANNISTER, JJ.

SCOTT C. WARME, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SAMANTHA M. BANAS, DEFENDANT-RESPONDENT.

JACKSON & BALKIN, LOCKPORT (NICHOLAS D. D'ANGELO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CAMILLE S. BROWN, NIAGARA FALLS, ATTORNEY FOR THE CHILD.

Appeal from a judgment of the Supreme Court, Niagara County (Paula L. Feroleto, J.), entered September 10, 2020. The judgment, inter alia, dissolved the marriage between the parties.

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

Memorandum: In this divorce action, plaintiff husband appeals from an order that, inter alia, granted the cross motion of defendant wife insofar as it sought an order dismissing that portion of the complaint seeking "custody and/or visitation" with respect to the subject child. Although the order is subsumed in the final judgment of divorce subsequently entered and the appeal properly lies from the judgment, we exercise our discretion to treat the notice of appeal as valid and deem the appeal taken from the judgment (*see* CPLR 5520 [c]; *Antinora v Antinora*, 125 AD3d 1336, 1337 [4th Dept 2015]; *Hughes v Hughes*, 84 AD3d 1745, 1745-1746 [4th Dept 2011]), and we affirm for reasons stated in the decision at Supreme Court underlying the order.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

962

KA 15-01321

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER DEFIO, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered July 24, 2015. The judgment convicted defendant upon a jury verdict of aggravated vehicular assault, assault in the second degree (three counts) and speed not reasonable or prudent.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts by reversing that part convicting defendant of assault in the second degree under count 11 of the indictment and dismissing that count of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of aggravated vehicular assault (Penal Law § 120.04-a [4]), three counts of assault in the second degree (§ 120.05 [4]), and one count of a traffic infraction, all arising from an incident that began when she drove her car into a construction barrier in the City of Syracuse. After she came to a halt, defendant initially appeared to be shaking and unresponsive, but when a Syracuse Police Officer knocked on the window of the driver's side door, defendant immediately became alert, looked at the officer, engaged the accelerator, drove through the barrier, and fled, driving at over 80 miles per hour on city streets until she struck another vehicle, injuring the occupants of the vehicle and a pedestrian.

Contrary to defendant's contention, Supreme Court properly declined to suppress the statements she made to a Syracuse Police Officer while seated in the back of a patrol car, before she was advised of her *Miranda* rights. No warnings were required because those "statements were not the product of police interrogation inasmuch as the officer asked defendant only preliminary questions that 'were investigatory and not accusatory' " (*People v Hailey*, 153

AD3d 1639, 1641 [4th Dept 2017], *lv denied* 30 NY3d 1060 [2017]; *see People v Towsley*, 85 AD3d 1549, 1551 [4th Dept 2011], *lv denied* 17 NY3d 905 [2011]; *People v Hayes*, 60 AD3d 1097, 1100-1101 [3d Dept 2009], *lv denied* 12 NY3d 925 [2009]). Contrary to defendant's further contention, the officers had probable cause to arrest her (*see generally People v Vandover*, 20 NY3d 235, 238-239 [2012]; *People v Russ*, 183 AD3d 1238, 1238 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]), and we conclude that her consent to having her blood drawn was voluntary (*see generally People v Mojica*, 62 AD3d 100, 114 [2d Dept 2009], *lv denied* 12 NY3d 856 [2009]). The court thus properly declined to suppress the results of the tests performed on her blood (*see People v Badia*, 130 AD3d 744, 745 [2d Dept 2015], *lv denied* 26 NY3d 1085 [2015]; *see generally People v Centerbar*, 80 AD3d 1008, 1010-1011 [3d Dept 2011]).

Defendant next contends that she is entitled to reversal based on several alleged discovery violations. Defendant failed to preserve for our review her contentions concerning the majority of those allegations inasmuch as she did not object on the specific grounds raised on appeal (*see People v Delatorres*, 34 AD3d 1343, 1344 [4th Dept 2006], *lv denied* 8 NY3d 921 [2007]). In any event, with respect to both defendant's preserved and unpreserved allegations of discovery violations, we cannot conclude that "the conduct has caused such substantial prejudice to defendant . . . that . . . she has been denied due process of law" (*People v Davis*, 52 AD3d 1205, 1206 [4th Dept 2008]; *see generally People v Kessler*, 122 AD3d 1402, 1404 [4th Dept 2014], *lv denied* 25 NY3d 990 [2015]).

We reject defendant's contention that she was deprived of effective assistance of counsel inasmuch as she failed to " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998]). With respect to defendant's claim that defense counsel was ineffective because he failed to call an expert witness to establish that her symptoms were caused by seizures rather than impairment by drugs, defendant did not demonstrate that such expert "testimony was available, that it would have assisted the jury in its determination or that [s]he was prejudiced by its absence" (*People v West*, 118 AD3d 1450, 1451 [4th Dept 2014], *lv denied* 24 NY3d 1048 [2014] [internal quotation marks omitted]; *see People v Finch*, 180 AD3d 1362, 1363 [4th Dept 2020], *lv denied* 35 NY3d 993 [2020]; *People v Richards*, 177 AD3d 1280, 1281 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]). Contrary to defendant's further contention, "defense counsel's failure to call [a] certain witness[ ] was a matter of strategy and also did not constitute ineffective assistance of counsel" (*People v Gonzalez*, 62 AD3d 1263, 1265 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009]; *see e.g. People v Magee*, 182 AD3d 996, 998 [4th Dept 2020], *lv denied* 35 NY3d 1028 [2020]). Insofar as defendant's ineffective assistance challenge involves matters outside the record on appeal, it must be raised by way of a CPL article 440 motion (*see People v Timmons*, 151 AD3d 1682, 1684 [4th Dept 2017], *lv denied* 30 NY3d 984 [2017]). We have reviewed the remaining claims of ineffective assistance of counsel, and we conclude that, because "the

evidence, the law, and the circumstances [in this] case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement [has] been met" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

Contrary to defendant's further contention, we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Nevertheless, viewing the evidence in light of the elements of assault in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we agree with defendant that the verdict finding her guilty of that crime under count 11 of the indictment is contrary to the weight of the evidence because the People failed to prove beyond a reasonable doubt that defendant caused serious physical injury to the victim. Although the victim testified that he sustained a skull fracture (*see People v Rollins*, 118 AD2d 949, 951 [3d Dept 1986]; *see generally People v Ford*, 114 AD3d 1273, 1274 [4th Dept 2014], *lv denied* 23 NY3d 962 [2014]), the People also introduced expert medical testimony establishing that he did not have a skull fracture. In addition, although the victim testified to ongoing memory issues, there is evidence in the record establishing that he had several other concussions that could also have caused those issues, including one that occurred when he was struck by a metal bat only a few months after this incident. Consequently, we cannot conclude that "the jury was justified in finding . . . defendant guilty beyond a reasonable doubt" (*Danielson*, 9 NY3d at 348; *cf. People v Mosley*, 59 AD3d 961, 962 [4th Dept 2009], *lv denied* 12 NY3d 918 [2009], *reconsideration denied* 13 NY3d 861 [2009]). We therefore modify the judgment by reversing that part convicting defendant of assault in the second degree under count 11 of the indictment and dismissing that count of the indictment. Viewing the evidence with respect to the remaining counts of the indictment in light of the elements of those counts as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict on those counts is not against the weight of the evidence (*see generally id.* at 348–349; *Bleakley*, 69 NY2d at 495).

Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

968

TP 19-01463

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

IN THE MATTER OF CAROLA B.-M. AND TIARA M.,
MOTHER AND DEPENDENT DAUGHTER, ISAIAH M.M.,
AN INFANT, PETITIONERS,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY
ASSISTANCE AND ORLEANS COUNTY DEPARTMENT OF SOCIAL
SERVICES, RESPONDENTS.

HARTER SECREST & EMERY LLP, BUFFALO (MARY CLAIRE HAMILTON OF COUNSEL), FOR PETITIONERS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENT NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE.

KATHERINE BOGAN, COUNTY ATTORNEY, ALBION (JOHN C. GAVENDA OF COUNSEL), FOR RESPONDENT ORLEANS COUNTY DEPARTMENT OF SOCIAL SERVICES.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Orleans County [Tracey A. Bannister, J.], entered August 1, 2019) to review a determination of respondent New York State Office of Temporary and Disability Assistance. The determination, among other things, denied the application of petitioners Carola B.-M. and Tiara M. for supplemental nutrition assistance program benefits.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs, the petition is granted and the matter is remitted to respondent Orleans County Department of Social Services for further proceedings in accordance with the following memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul a determination of respondent New York State Office of Temporary and Disability Assistance (respondent) that, among other things, upheld, after a hearing, the denial by respondent Orleans County Department of Social Services (DSS) of supplemental nutrition assistance program (SNAP) benefits (*see* 18 NYCRR part 387) to Carola B.-M. and Tiara M. (petitioners) on the ground that they were ineligible college students. We agree with petitioners that the determination should be annulled.

"Congress created SNAP to provide food for people in need. SNAP

is administered by the states, in compliance with rules and regulations set by the U.S. Department of Agriculture (USDA). SNAP benefits are disbursed to 'household' units based on a formula that considers a household's income and size" (*Matter of Leggio v Devine*, 34 NY3d 448, 451 [2020]). "To be eligible for SNAP benefits, household members between the ages of 16 and 59 also must comply with work requirements set out in 7 CFR 273.7, promulgated pursuant to the statutory conditions of participation in the program (*see* 7 USC § 2015 [d] [1]). Household members between the ages of 18 and 49 who are students are exempt from the work requirements set forth in section 273.7 but are not eligible to participate in SNAP unless they comply with student-specific eligibility requirements found in 7 CFR 273.5 (b) (*see* 7 USC § 2015 [e]; 7 CFR 273.7 [b] [1] [viii])" (*id.* at 454; *see* 18 NYCRR 387.1 [ak]).

Pursuant to the federal regulations, a student is ineligible for SNAP benefits unless he or she qualifies for one of the exemptions listed in 7 CFR 273.5 (b) (*see* 7 CFR 273.5 [a]). One exemption applies where the student is "physically or mentally unfit" (7 CFR 273.5 [b] [2]). Another exemption applies where the student was "assigned to or placed in an institution of higher education through or in compliance with . . . [a] program under the Job Training Partnership Act of 1974" (7 CFR 273.5 [b] [11] [i]). Similarly, the state regulation provides that a student may be eligible if he or she is physically or mentally unfit (*see* 18 NYCRR 387.1 [ak]). In addition, a student "who is physically and mentally fit" will be eligible for benefits if he or she meets "at least one" of a list of criteria, including that he or she "be assigned to or placed in an institution of higher education through . . . a Job Training Partnership Act program" (18 NYCRR 387.1 [ak] [7] [i]).

Thus, a student may be eligible for SNAP benefits if he or she is *either* physically or mentally unfit *or* was assigned to or placed in an institution of higher education as part of a Job Training Partnership Act (JTPA) program. We thus agree with petitioners that those are separate and distinct bases for eligibility and that respondent failed to determine whether participation in the Adult Career and Continuing Education Services, Vocational Rehabilitation program (ACCES-VR) rendered petitioners eligible for SNAP benefits under the JTPA exemption.

There is no dispute that, at the time of their initial application, petitioners were enrolled in the ACCES-VR program and were assigned to or placed in their college as part of that program, and we agree with petitioners that ACCES-VR qualifies as a JTPA program. "Acces-VR is a New York State run vocational rehabilitation program that 'assists individuals with disabilities to achieve and maintain employment and to support independent living through training, education, rehabilitation, and career development' " (*Marcia R. v Commissioner of Social Security*, — F Supp 3d —, 2021 WL 2379640, *4 n 4 [WD NY 2021], quoting New York State Education Department Adult Career & Continuing Ed Services, http://www.acces.nysed.gov/vr [last accessed Dec. 7, 2021]). ACCES-VR is a Workforce Innovation and Opportunity Act ([WIOA] 29 USC § 3101 *et seq.*) program (*see* OTDA Fair

Hearing Decision 8190571L at 4). The WIOA replaced the Workforce Investment Act of 1998 (29 USC § 2801 *et seq.*; *see Coastal Counties Workforce, Inc. v LePage*, 284 F Supp 3d 32, 38 [D. Maine 2018], *appeal dismissed* 2018 WL 3440030 [1st Cir 2018]; *Thomas v San Francisco Housing Auth.*, 2018 WL 1184762, *5 n 8 [ND Cal 2018], *affd* 765 Fed Appx 368 [9th Cir 2019]), which was the successor to the JTPA (29 USC § 1501 *et seq.*; *see Florida Agency for Workforce Innovation v United States Dept. of Labor*, 176 Fed Appx 85, 91 n 9 [11th Cir 2006]; *Thomas*, 2018 WL 1184762, *5 n 8; *Alvarado v Manhattan Worker Career Ctr.*, 2002 WL 31760208 *1 [SD NY 2002]).

We thus conclude that the determination that petitioners were ineligible college students was not " 'premised upon a reasonable interpretation of the relevant [regulatory] provisions' " (*Matter of Albino v Shah*, 111 AD3d 1352, 1354 [4th Dept 2013], quoting *Matter of Golf v New York State Dept. of Social Servs.*, 91 NY2d 656, 658 [1998]; *see* OTDA Fair Hearing Decision 8190571L at 3-4; *see also* OTDA Fair Hearing Decision 8194560H at 4-5) and, as a result, is not supported by substantial evidence (*see generally Matter of Marine Holdings, LLC v New York City Commn. on Human Rights*, 31 NY3d 1045, 1047 [2018], *rearg denied* 32 NY3d 903 [2018]; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]; *Albino*, 111 AD3d at 1354). We therefore annul the determination, grant the petition, and remit the matter to DSS to determine the amount of petitioners' retroactive benefits based on the date of their initial application.

In light of our determination, we need not address petitioners' remaining contentions.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

975

CA 20-01555

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

THOMAS D. HILTS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROGGIE FARMS, LLC, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, JAMESVILLE (LAUREN M. MILLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an amended order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered November 12, 2020. The amended order granted plaintiff's motion for partial summary judgment on the issue of liability.

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

Memorandum: Plaintiff commenced this common-law negligence action seeking damages for injuries he allegedly sustained when he slipped on debris covering the floor of the poultry barn in which he was working, causing him to fall into an uncovered industrial fan installed in the barn's wall and damage his hand. Defendant, the owner of the barn, appeals from an amended order granting plaintiff's motion for partial summary judgment on the issue of liability. We agree with defendant that the amended order must be reversed.

Even assuming, arguendo, that plaintiff met his initial burden on the motion of establishing entitlement to judgment as a matter of law (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]), we conclude that Supreme Court erred in granting the motion inasmuch as defendant raised a triable issue of fact with respect to liability through the submission of, inter alia, an affidavit from one of plaintiff's coworkers who stated that, on the date of the accident, plaintiff did not slip and fall into the unguarded fan as the complaint alleges, but instead reached into the fan and intentionally caused his own injuries (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

976

CA 21-00287

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

PHILIP JAKES-JOHNSON AND BENJAMIN JAKES-JOHNSON,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ROBERT C. GOTTLIEB, ESQ., AND GOTTLIEB &
JANEY, LLP, DEFENDANTS-APPELLANTS.

TRAUB LIEBERMAN STRAUS & SHREWSBERRY LLP, HAWTHORNE (J. PATRICK CARLEY, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE REHFUSS LAW FIRM, P.C., LATHAM (STEPHEN J. REHFUSS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered January 25, 2021. The order, among other things, denied the motion of defendants to dismiss the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the second through seventh causes of action in the amended complaint, and as modified, the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover monetary damages, alleging that defendants overcharged for legal services provided to plaintiff Benjamin Jakes-Johnson for their representation of him in a federal criminal prosecution. In their complaint, plaintiffs asserted causes of action for breach of contract, negligent misrepresentation, fraud, quantum meruit, unjust enrichment, and breach of fiduciary duty. In lieu of an answer, defendants moved to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). While defendants' motion was pending, plaintiffs cross-moved for leave to amend the complaint. Plaintiffs' proposed amended complaint included a seventh cause of action, alleging a violation of General Business Law § 349. Supreme Court denied the motion and granted the cross motion. Defendants now appeal.

Contrary to defendants' contention, the court properly denied the motion insofar as it sought dismissal of the first cause of action, for breach of contract. "[I]mplicit in every contract is a covenant of good faith and fair dealing" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *see Paramax Corp. v VoIP Supply, LLC*, 175 AD3d 939, 940 [4th Dept 2019]). The covenant "encompasses any

promise that a reasonable promisee would understand to be included" (*New York Univ.*, 87 NY2d at 318), and "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995] [internal quotation marks omitted]; *see Paramax Corp.*, 175 AD3d at 940). Accepting the facts as alleged in the amended complaint as true, as we must, and affording plaintiffs the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that plaintiffs sufficiently alleged a breach of the implied covenant of good faith and fair dealing. We further conclude that plaintiffs also sufficiently alleged a breach of the express terms of the subject retainer agreement (*see generally Alloy Advisory, LLC v 503 W. 33rd St. Assoc., Inc.*, 195 AD3d 436, 436 [1st Dept 2021]; *Barrett v Grenda*, 154 AD3d 1275, 1277 [4th Dept 2017]).

In reaching these conclusions, we reject defendants' contention that, because plaintiffs paid defendants' legal bills without objection, plaintiffs' first cause of action is barred by the doctrine of account stated (*see generally Atsco Footwear Holdings, LLC v KBG, LLC*, 193 AD3d 493, 494-495 [1st Dept 2021]; *An-Jung v Rower LLC*, 173 AD3d 488, 488 [1st Dept 2019]). "[W]here an account is rendered showing a balance, the party receiving it must, within a reasonable time, examine it and object, if he disputes its correctness. If he omits to do so, he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown" (*Cushman & Wakefield, Inc. v Kadmon Corp., LLC*, 175 AD3d 1141, 1142 [1st Dept 2019]; *see Chisholm-Ryder Co. v Sommer & Sommer*, 70 AD2d 429, 431 [4th Dept 1979]). Here, we conclude that plaintiffs alleged sufficient equitable considerations.

We agree with defendants, however, that the remaining causes of action in the amended complaint must be dismissed. Plaintiffs' cause of action for breach of fiduciary duty is duplicative of the breach of contract cause of action (*see Alfred-Almond Cent. Sch. Dist. v NY44 Health Benefits Plan Trust*, 175 AD3d 1010, 1011 [4th Dept 2019]; *An-Jung*, 173 AD3d at 488; *cf. Centerline/Fleet Hous. Partnership, L.P.—Series B v Hopkins Ct. Apts., LLC*, 176 AD3d 1596, 1597-1598 [4th Dept 2019]). Likewise, insofar as the causes of action for negligent misrepresentation and fraud are "predicated upon precisely the same purported wrongful conduct alleged in the breach of contract cause of action," i.e., the alleged misrepresentations in defendants' billing statements, they are also duplicative (*TJJK Props., LLC v A.E.Y. Eng'g D.P.C.*, 186 AD3d 1080, 1082 [4th Dept 2020] [internal quotation marks omitted]; *see OP Solutions, Inc. v Crowell & Moring, LLP,* 72 AD3d 622, 622 [1st Dept 2010]). To the extent that the negligent misrepresentation and fraud causes of action are based on defendants' alleged misrepresentations to induce plaintiff Philip Jakes-Johnson to sign the retainer agreement (*see Emby Hosiery Corp. v Tawil*, 196 AD3d 462, 464 [2d Dept 2021]), we conclude that defendants' statements do not constitute a misrepresentation of a present fact. Rather, they are nonactionable statements of prediction or expectation (*see ESBE*

Holdings, Inc. v Vanquish Acquisition Partners, LLC, 50 AD3d 397, 398 [1st Dept 2008]).

Plaintiffs' causes of action for quantum meruit and unjust enrichment are precluded by the existence of the valid and enforceable retainer agreement (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; *Hagman v Swenson*, 149 AD3d 1, 7 [1st Dept 2017]). To the extent that plaintiffs contend that those causes of action survive with respect to Benjamin Jakes-Johnson, who did not sign the retainer agreement, we reject that contention inasmuch as defendants were not allegedly enriched at his expense (*see generally GFRE, Inc. v U.S. Bank, N.A.*, 130 AD3d 569, 570 [2d Dept 2015]) and there was no performance of any kind on his part (*see generally Evans-Freke v Showcase Contr. Corp.*, 85 AD3d 961, 962 [2d Dept 2011], *lv denied* 18 NY3d 811 [2012]).

Finally, we conclude that plaintiffs' cause of action for a violation of General Business Law § 349 must be dismissed because plaintiffs' dispute with defendants is private in nature and does not "concern consumer-oriented conduct aimed at the public at large" (*Haygood v Prince Holdings 2012 LLC*, 186 AD3d 1157, 1158 [1st Dept 2020]). Plaintiffs' "conclusory allegations as to the effect of [defendants'] conduct on other consumers are insufficient to transform a private dispute into conduct with further-reaching impact" (*Scarola v Verizon Communications, Inc.*, 146 AD3d 692, 693 [1st Dept 2017]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

982

KA 21-00653

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN HIDALGO-HERNANDEZ, DEFENDANT-APPELLANT.

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered February 14, 2020. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the first degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress physical evidence seized from the residence is granted, the indictment is dismissed, and the matter is remitted to Onondaga County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). We agree with defendant that County Court erred in refusing to suppress evidence seized by the police as the result of a warrantless search of his residence.

Police officers initially responded to the subject residence following a 911 call made by a woman who stated that she had found her roommate unconscious on the floor of their residence. An initial group of police officers and medical personnel arrived at the residence, spoke to the 911 caller, discovered the unconscious woman in the bathroom, and determined that she had died.

Thereafter, an officer trained as an evidence technician arrived on the scene and was informed by those already present that the unconscious woman had been pronounced dead. The evidence technician then observed the woman’s body in the bathroom and proceeded to

conduct what she called a "cursory search" of the rest of the residence, taking photographs as she went. During that search, the evidence technician discovered a digital scale with powdery residue on it inside of a bedroom, and discovered a bag containing what she believed to be illegal drugs behind a door in another bedroom. Based on those discoveries, officers obtained a warrant to search the residence, which resulted in the discovery of the drugs and handgun underlying the counts for which defendant was ultimately indicted.

" '[S]ubject only to carefully drawn and narrow exceptions, a warrantless search of an individual's [residence] is per se unreasonable and hence unconstitutional' " (*People v Jenkins*, 24 NY3d 62, 64 [2014]), and no exception applies here. The court held that the initial search of the residence by the evidence technician was justified under the emergency exception to the warrant requirement, which permits a warrantless search in the presence of three elements: " '(1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property and this belief must be grounded in empirical facts; (2) the search must not be primarily motivated by an intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched' " (*People v Turner*, 175 AD3d 1783, 1783 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019], quoting *People v Doll*, 21 NY3d 665, 670-671 [2013], *rearg denied* 22 NY3d 1053 [2014], *cert denied* 572 US 1022 [2014]). We conclude, however, that the first and third elements of the emergency exception were not present at the time the evidence technician conducted her search (*see generally People v Liggins*, 64 AD3d 1213, 1215 [4th Dept 2009], *appeal dismissed* 16 NY3d 748 [2011]).

With respect to the first element, at the time the evidence technician performed her initial room-to-room search, she was already aware that the unresponsive woman had been pronounced dead. The court concluded that there was still a need for officers to secure the scene and ensure that the woman "had not been harmed by anyone who could have still be[en] residing in the house." Prior to engaging in her initial search, however, the evidence technician had observed the body in the bathroom, and her suppression hearing testimony did not include any observation suggesting that a crime had occurred, much less that an assailant was still in the home or that there was an ongoing risk of harm (*cf. People v Taylor*, 24 AD3d 1269, 1269-1270 [4th Dept 2005], *lv denied* 6 NY3d 818 [2006]; *People v Bradley*, 17 AD3d 1050, 1051 [4th Dept 2005], *lv denied* 5 NY3d 786 [2005]). Further, nothing in the 911 call or in the testimony of the officers who initially arrived at the residence suggested that the woman had been the victim of an attack (*cf. People v Samuel*, 152 AD3d 1202, 1204 [4th Dept 2017], *lv denied* 30 NY3d 983 [2017]). Based on the circumstances of this case, at the time the evidence technician began her initial search, there was no " 'emergency at hand,' " nor were there any " 'reasonable grounds' " based on "empirical facts" to believe that there was " 'an immediate need' " for assistance (*Turner*, 175 AD3d at 1783, quoting *Doll*, 21 NY3d at 670). Likewise, with respect to the third element, the evidence technician lacked a " 'reasonable basis, *approximating*

probable cause' " to associate any emergency that might have once existed, i.e., an unresponsive woman lying in the bathroom, to the search of the bedrooms of the residence (*Liggins*, 64 AD3d at 1215).

Because the warrantless search of defendant's residence was not justified under the emergency exception to the warrant requirement, the evidence seized as the result of that search, including the evidence seized pursuant to the search warrant that was subsequently issued, should have been suppressed (*see id.* at 1216). We therefore reverse the judgment, vacate the plea, grant that part of the omnibus motion of defendant seeking to suppress physical evidence seized from the residence, dismiss the indictment against defendant, and remit the matter to County Court for proceedings pursuant to CPL 470.45.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

985

CA 21-00255

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

JACQUELINE MASSEY-HUGHES, KELLY ATKINS AND CHRISTINE MASSEY,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

SHAWN MASSEY, INDIVIDUALLY, AS TRUSTEE OF THE EDWARD J. MASSEY, JR. TRUST, AS EXECUTOR OF THE ESTATE OF EDWARD J. MASSEY, JR., DECEASED, AND MASSEY'S FURNITURE BARN, INC.,
DEFENDANTS-RESPONDENTS-APPELLANTS.

SEARLES, SHEPPARD & GORNITSKY, PLLC, NEW YORK CITY (JOSHUA I. GORNITSKY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

HARRIS BEACH PLLC, SYRACUSE (JULIAN B. MODESTI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered January 8, 2021. The order granted in part the motion of defendants for summary judgment and denied the cross motion of plaintiffs for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiffs' cross motion in part and granting plaintiffs summary judgment on their first cause of action insofar as that cause of action sought an accounting and as modified the order is affirmed without costs.

Memorandum: Plaintiffs and Shawn Massey (defendant) are siblings and the children of Edward J. Massey, Jr. (decedent), who died in October 1998. Decedent's will appointed defendant as an executor of decedent's estate and as a trustee of the Edward J. Massey, Jr. Trust (trust), a testamentary trust. Plaintiffs are beneficiaries of the trust. The will devised ownership of defendant Massey's Furniture Barn, Inc. (MFBI) to defendant, devised certain real property to the trust, and authorized the trustee, i.e., defendant, "to rent said real estate" either to defendant or MFBI. In addition, the will acknowledged that decedent owed a debt to MFBI, and directed that the debt be paid by decedent's heirs. To that end, defendant, as executor of the estate, executed a promissory note from the estate to MFBI.

In January 2019, plaintiffs commenced the instant action, asserting, inter alia, causes of action for an accounting, the removal of defendant as trustee, breach of fiduciary duty, and breach of trust. The cause of action for breach of fiduciary duty is based on allegations that defendant misappropriated funds, i.e., rents paid by third-party tenants of real estate owned by the trust; fraudulently executed the promissory note on behalf of the estate; and wrongfully retained earnings in the trust and made improper tax deductions. The cause of action for breach of trust is similarly based upon defendant's retention of the rents paid by third-party tenants to defendant, allegedly in violation of the trust's provisions. Defendants moved for, inter alia, summary judgment dismissing the complaint, and plaintiffs cross-moved for summary judgment on the complaint. Plaintiffs now appeal and defendants cross-appeal from an order that granted defendants' motion in part, dismissed the causes of action for breach of fiduciary duty and breach of trust, and denied plaintiffs' cross motion.

At the outset, we note that, although Supreme Court stated in the second ordering paragraph that it was denying plaintiffs' cross motion in its entirety, in its decision the court stated that it was granting that part of plaintiffs' cross motion seeking summary judgment on the cause of action for an accounting for the six years preceding the filing of the complaint. We therefore modify the order accordingly to conform to the court's decision (*see 4545 Tr. LLC v Rocky's Big City Games & Sports Bar, Inc.*, 195 AD3d 1553, 1554 [4th Dept 2021]; *Kelly D. v Niagara Frontier Tr. Auth.*, 177 AD3d 1261, 1264 [4th Dept 2019]; *Ramirez Gabriel v Johnston's L.P. Gas Serv., Inc.*, 143 AD3d 1228, 1230 [4th Dept 2016]).

We agree with plaintiffs on their appeal, however, that the court erred in limiting the cause of action for an accounting to the six years preceding the filing of the complaint, and we therefore further modify the order accordingly. The statute of limitations for a cause of action seeking an accounting is six years (*see* CPLR 213 [1]; *Tydings v Greenfield, Stein & Senior, LLP*, 11 NY3d 195, 201 [2008]). It is well settled that the limitations period begins to run only when " 'the trustee openly repudiates his [or her] fiduciary obligations' " and " 'a mere lapse of time is insufficient without proof of an open repudiation' " (*Matter of Eisdorfer*, 188 AD3d 674, 676 [2d Dept 2020]; *see Matter of Behr*, 191 AD2d 431, 431 [2d Dept 1993]). "The party seeking the benefit of the statute of limitations defense bears the burden of proof on the issue of open repudiation" (*Eisdorfer*, 188 AD3d at 676), and "must establish that the repudiation was clear and made known to the beneficiaries" (*Behr*, 191 AD2d at 431). Here, defendants "failed to sustain their burden of establishing that [defendant] had openly repudiated [his] fiduciary obligations to [plaintiffs] so as to start the statute of limitations clock" (*Eisdorfer*, 188 AD3d at 676). Although defendant failed to provide plaintiffs with an accounting, he never outright refused to do so. Further, defendant continued to conduct his duties as trustee by handling the taxes and expenses for the trust, and making the necessary disbursements to plaintiffs as beneficiaries. Thus, the cause of action for an accounting had not accrued at the time plaintiffs commenced this action.

Contrary to plaintiffs' further contention, the court did not err in granting defendants' motion with respect to the causes of action for breach of fiduciary duty and breach of trust to the extent that they are based upon allegations that defendant misappropriated funds from the trust. It is well-settled that a " 'trust instrument is to be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself' " (*Golden Gate Yacht Club v Société Nautique de Genève*, 12 NY3d 248, 255 [2009], quoting *Mercury Bay Boating Club v San Diego Yacht Club*, 76 NY2d 256, 267 [1990]). "[R]esort to extrinsic evidence" may be had "only where the court determines the words of the trust instrument to be ambiguous" (*Mercury Bay Boating Club*, 76 NY2d at 267). Here, the language of the trust provision at issue is unambiguous. Under the terms of the trust, the trustee, i.e., defendant, is permitted to rent the real estate owned by the trust only to defendant or MFBI in exchange for three percent of the net sales from MFBI. Nothing in the trust provision prohibits either defendant or MFBI from renting property from the trust and then subleasing the trust's real estate to a third party and retaining the sublease income. Thus, defendants' retention of the rent paid by third-party tenants does not constitute a misappropriation of funds, and therefore the court properly granted those parts of defendants' motion for summary judgment dismissing the breach of fiduciary duty and breach of trust causes of action to the extent that they were premised upon defendant's alleged misappropriation of the trust's funds.

Further, the court properly granted defendants' motion with respect to the cause of action for breach of fiduciary duty to the extent that it was premised upon allegations that defendant fraudulently executed a promissory note indebting the estate to MFBI. The elements for a cause of action for breach of fiduciary duty are " 'the existence of a fiduciary duty, misconduct by the [fiduciary] and damages that were directly caused by [the fiduciary's] misconduct' " (*McGuire v Huntress* [appeal No. 2], 83 AD3d 1418, 1420 [4th Dept 2011], *lv denied* 17 NY3d 712 [2011]; *see Matter of JPMorgan Chase Bank N.A. [Roby]*, 122 AD3d 1274, 1277 [4th Dept 2014]). "The elements of a cause of action for fraud require a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Here, plaintiffs assert that the note must be fraudulent because it was dated prior to decedent's death. However, plaintiffs concede that the decedent owed a debt to MFBI. In their motion for summary judgment, defendants provided an affidavit from defendant detailing how the amount of the debt was determined, which established that there was no misrepresentation of fact. Plaintiffs' "submissions in opposition to that evidence, 'consist[ing] of nonspecific conclusory statements' . . . , did not raise a triable issue of fact" (*Mahuson v Ventraq, Inc.*, 118 AD3d 1267, 1268-1269 [4th Dept 2014]; *see Moser v Devine Real Estate, Inc. [Florida]*, 42 AD3d 731, 736 [3d Dept 2007]). Moreover, plaintiffs' allegations of fraud are time-barred. "A cause of action sounding in fraud must be commenced within 6 years from the date of the fraudulent act or 2 years from the date the party discovered the fraud or could, with due diligence, have

discovered it" (*Ghandour v Shearson Lehman Bros.*, 213 AD2d 304, 305 [1st Dept 1995], *lv denied* 86 NY2d 710 [1995]; *see* CPLR 213 [8]). Plaintiffs concede that they became aware of the allegedly fraudulent note as early as 2000, meaning that the cause of action accrued at that time and the limitations period expired before this action was commenced in 2019 (*see generally Ghandour*, 213 AD2d at 306).

Contrary to plaintiffs' contention in their appeal, the remainder of the breach of fiduciary duty cause of action, premised on defendant's allegedly wrongful retention of earnings in the trust and improper tax deductions, is also time-barred. We note that, although defendants contend in their cross appeal that the court erred in not granting that part of their motion, the record establishes that the court granted that part of defendants' motion and dismissed plaintiffs' breach of fiduciary duty cause of action in its entirety. Thus, defendants are not aggrieved by the order with respect to the breach of fiduciary duty cause of action (*see Matter of Grocholski Cady Rd., LLC v Smith*, 171 AD3d 102, 106 [4th Dept 2019]; *see generally* CPLR 5511).

"A cause of action for breach of fiduciary duty is governed . . . by a three-year statute of limitations where[, as here,] the only relief sought is money damages" (*Wiesenthal v Wiesenthal*, 40 AD3d 1078, 1079 [2d Dept 2007]; *see* CPLR 214 [4]; *Bouley v Bouley*, 19 AD3d 1049, 1051 [4th Dept 2005]). Here, in support of their motion, defendants submitted evidence that plaintiffs were aware that defendant retained earnings in the trust as early as 1999 and, at the latest, in 2002. Thus, defendants met their "initial burden of establishing prima facie that the time in which to sue has expired" and the burden shifted to plaintiffs "to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether plaintiff[s] actually commenced the action within the applicable limitations period" (*U.S. Bank N.A. v Brown*, 186 AD3d 1038, 1039 [4th Dept 2020] [internal quotation marks omitted]; *see Larkin v Rochester Hous. Auth.*, 81 AD3d 1354, 1355 [4th Dept 2011]; *Webster v Nupuf*, 286 AD2d 925, 925 [4th Dept 2001]).

Contrary to plaintiffs' contention, the doctrine of open repudiation does not toll the statute of limitations here inasmuch as plaintiffs seek only monetary damages on the breach of fiduciary duty cause of action (*see Matter of Kaszirer v Kaszirer*, 286 AD2d 598, 599 [1st Dept 2001]). Contrary to plaintiffs' further contention, the continuing wrong doctrine is not applicable. "The continuous wrong doctrine is an exception to the general rule that the statute of limitations runs from the time of the breach though no damage occurs until later" (*Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017] [internal quotation marks omitted]). The "doctrine tolls the running of the statute of limitations where there is a series of independent, distinct wrongs rather than a single wrong that has continuing effects" (*Ganzi v Ganzi*, 183 AD3d 433, 434 [1st Dept 2020]). "Thus, where a plaintiff asserts a single breach–with damages increasing as the breach continued–the continuing wrong theory does not apply" (*Henry*, 147 AD3d at 601-602). Here, defendants established that

defendant began retaining funds in the trust in 1999. The fact that the trust was allegedly unnecessarily taxed as a result of defendant's actions represents continuing damages from the alleged breach that occurred in 1999, not independent breaches that occurred on later dates (*see Matter of Salomon v Town of Wallkill*, 174 AD3d 720, 721-722 [2d Dept 2019]; *cf. Matter of Yin Shin Leung Charitable Found. v Seng*, 177 AD3d 463, 464 [1st Dept 2019]).

Finally, contrary to the contention of plaintiffs on their appeal and defendants on their cross appeal, the court properly denied defendants' motion and plaintiffs' cross motion with respect to plaintiffs' cause of action seeking the removal of defendant as trustee. " '[A]n individual seeking removal [of a trustee] bears the burden of establishing that the trustee has violated or threatens to violate his or her trust or is otherwise unsuitable to execute the trust' " (*Matter of Joan Moran Trust*, 166 AD3d 1176, 1179 [3d Dept 2018]; *see Matter of James H. Supplemental Needs Trusts*, 172 AD3d 1570, 1572-1573 [3d Dept 2019]). Removal of a trustee is a " 'drastic action not to be undertaken absent a clear necessity' " (*Matter of Rose BB.*, 243 AD2d 999, 1000 [3d Dept 1997]). A trustee may be removed without a hearing "where the misconduct is established by undisputed facts or concessions . . . [or] where the fiduciary's in-court conduct causes such facts to be within the court's knowledge" (*Matter of Duke*, 87 NY2d 465, 472 [1996]). Here, it is undisputed that defendant failed to provide an accounting since the inception of the trust, despite repeated requests by plaintiffs. Such failure may be grounds for removal (*see generally Matter of Weinraub*, 68 AD3d 679, 679 [1st Dept 2009]; *Kelly v Sassower*, 52 AD2d 539, 539 [1st Dept 1976], *appeal dismissed* 39 NY2d 942 [1976]). Further, to the extent that plaintiffs are able to prove that defendant mishandled the trust's earnings and tax deductions, such evidence may support removal. However, defendants submitted evidence establishing that defendant executed the trust in strict compliance with its terms for over 30 years prior to the commencement of the instant action. During that time, defendant was able to pay off two substantial debts, paid the mortgage to the trust properties from MFBI proceeds, and began earning a substantial profit for the beneficiaries. In addition, although no formal accounting was provided, defendant submitted evidence that at least one beneficiary was given detailed information regarding the estate and trust in response to her request for a quarterly report. Thus, there are issues of fact regarding whether there is a " 'clear necessity' " to remove defendant as trustee (*Rose BB.*, 243 AD2d at 1000). The court therefore properly denied that part of plaintiffs' cross motion for summary judgment on their cause of action seeking removal of defendant as trustee, and the court properly denied that part of defendants' motion for summary judgment dismissing that cause of action.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

995

KA 18-02020

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANDY SMITH, DEFENDANT-APPELLANT.

DANIELLE C. WILD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered May 30, 2018. The judgment convicted defendant upon a jury verdict of burglary in the second degree (two counts), grand larceny in the fourth degree (two counts), petit larceny (two counts) and criminal mischief in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of burglary in the second degree (Penal Law § 140.25 [2]), two counts of grand larceny in the fourth degree (§ 155.30 [4], [8]), two counts of petit larceny (§ 155.25), and one count of criminal mischief in the fourth degree (§ 145.00 [1]). We affirm.

Contrary to defendant's contention, he was not deprived of his right to represent himself at trial. It is well settled that a criminal defendant may invoke the right to proceed pro se, provided: " '(1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues' " (*People v Silburn*, 31 NY3d 144, 150 [2018], quoting *People v McIntyre*, 36 NY2d 10, 17 [1974]). With respect to the first prong, where a defendant does not "demonstrate an actual fixed intention and desire to proceed without professional assistance in his [or her] defense," the request is not unequivocal (*id.* [internal quotation marks omitted]). Here, defendant's single statement that he would rather represent himself than continue with his assigned counsel, "made in the alternative to his frequent and unsupported requests for substitution of assigned counsel," was not unequivocal (*People v Larkins*, 128 AD3d 1436, 1441 [4th Dept 2015], *lv denied* 27 NY3d 1001 [2016]). Thus, County Court

did not err in failing to conduct any further inquiry (*see Silburn*, 31 NY3d at 152).

Defendant further contends that the court erred in denying his for-cause challenges to two prospective jurors. Even assuming, arguendo, that the court erred in denying defendant's for-cause challenge to prospective juror number 16, we conclude that the error does not require reversal because "the People, not defendant, exercised a peremptory challenge to remove [that] prospective juror" (*People v Molano*, 70 AD3d 1172, 1174 n 1 [3d Dept 2010], *lv denied* 15 NY3d 776 [2010]; *see* CPL 270.20 [2]; *People v Dunkley*, 189 AD2d 776, 777 [2d Dept 1993], *lv denied* 81 NY2d 884 [1993]). With respect to defendant's for-cause challenge to prospective juror number 15, defendant used a peremptory challenge to remove that prospective juror, and defendant eventually exhausted all of his peremptory challenges. However, during voir dire, defendant did not raise his current contention that statements made by that prospective juror cast doubt on his ability to apply the proper standard relating to the burden of proof. Thus, that specific contention is unpreserved (*see People v Miller*, 153 AD3d 1652, 1652-1653 [4th Dept 2017], *lv denied* 30 NY3d 1062 [2017]; *People v Horton*, 79 AD3d 1614, 1615 [4th Dept 2010], *lv denied* 16 NY3d 859 [2011]; *People v Chatman*, 281 AD2d 964, 964-965 [4th Dept 2001], *lv denied* 96 NY2d 899 [2001]).

Defendant's sole preserved contention with respect to prospective juror number 15, i.e., that he should have been excused for cause based upon his statement that he would "feel better" if defendant testified, is without merit. CPL 270.20 (1) (b) provides that a party may challenge a prospective juror for cause if the prospective juror "has a state of mind that is likely to preclude him [or her] from rendering an impartial verdict based upon the evidence adduced at trial." Thus, "a prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the juror states unequivocally on the record that he or she can be fair and impartial" (*People v Warrington*, 28 NY3d 1116, 1119-1120 [2016] [internal quotation marks omitted]). Here, the court obtained the requisite unequivocal assurance from prospective juror number 15 that he would abide by the court's instruction that "the defendant that does not testify as a witness is not a factor from which any inference unfavorable to the defendant may be drawn" (*see People v Mitchell*, 144 AD3d 1598, 1599-1600 [4th Dept 2016]; *People v Ju Ju Jiang*, 99 AD3d 724, 725 [2d Dept 2012], *lv denied* 20 NY3d 1062 [2013]). We disagree with the dissent that "[t]here is no indication in the record that prospective juror number 15 was one of the two prospective jurors who were acknowledged by the court as having given some form of nonverbal assurance that they could follow its instructions." Only three prospective jurors were questioned by defense counsel regarding their desire to hear from defendant. In response to the court's follow-up questions, one prospective juror unequivocally indicated that he could not follow the court's instructions regarding defendant's failure to testify, and the court went on to ask, "[o]kay, anyone else? Can you follow that instruction whether you believe in it or not? I mean, obviously we talked about this. You *both* can? Okay. All right, thanks" (emphasis added). Having already spoken to one of the three

prospective jurors, it is clear that the court was addressing the remaining two prospective jurors who had expressed a desire to hear from defendant—including prospective juror number 15. Furthermore, in denying defense counsel's for-cause challenge, the court stated on the record that both prospective juror number 15 and prospective juror number 16 "said they could follow [its] instructions. I asked them exactly on that . . . but they said no, they could follow it."

In addition, the court must consider the "full record" in determining whether defendant's for-cause challenge should have been granted (*People v Johnson*, 94 NY2d 600, 615 [2000]). Here, prospective juror number 15 responded "[y]es" when asked by the court if he could assure the court that he would "be fair and impartial and render a verdict in accordance with the evidence and the law as [the court] explain[ed] it."

We reject defendant's related contention that defense counsel was ineffective for failing to raise a potential scheduling conflict of prospective juror number 15 as an additional ground for disqualification. Such a challenge would have had little or no chance of success inasmuch as the potential scheduling conflict "did not establish that the juror, who never directly asked to be excused for hardship or otherwise, had 'a state of mind that [was] likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial' " (*People v Manning*, 180 AD3d 605, 606 [1st Dept 2020], quoting CPL 270.20 [1] [b]; *see generally People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). 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 Turner*, 5 NY3d 476, 480 [2005]; *People v Baldi*, 54 NY2d 137, 147 [1981]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of counts one through four and six of the indictment as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to those counts is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although defendant contends that the testimony of a certain witness was incredible as a matter of law, 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 Delacruz*, 193 AD3d 1340, 1341 [4th Dept 2021]), and we see no reason to disturb the jury's resolution of those issues.

Defendant was properly determined to be a persistent violent felony offender. Contrary to defendant's contention, persistent violent felony offender status is based on recidivism alone (*see* Penal Law § 70.08 [1] [a]; *People v Barnes*, 156 AD3d 1417, 1420 [4th Dept 2017], *lv denied* 31 NY3d 1078 [2018]), and thus matters such as defendant's history and character were not relevant to that determination (*cf.* Penal Law § 70.10 [2]). Defendant's sentence is not unduly harsh or severe.

All concur except DeJoseph, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent because, although I agree with the majority with respect to the other issues raised on appeal, I do not agree that prospective juror number 15 stated unequivocally on the record that he could be fair and impartial (*see People v Warrington*, 28 NY3d 1116, 1119-1120 [2016]). During defense counsel's voir dire, prospective juror number 15 gave a nonverbal response, agreeing with another prospective juror, who stated that he would "like to hear [defendant] testify" and would "[p]ossibly" hold it against defendant if he did not testify. Prospective juror number 15 also stated that he would "feel better" if defendant testified, but that he would not hold it against defendant if he did not testify "as long as . . . somebody was fighting for him[.]" As the majority implicitly acknowledges, the statements made by prospective juror number 15 "raise[d] a serious doubt regarding [his] ability to be impartial" (*id.* at 1119 [internal quotation marks omitted]). Thus, County Court was required to excuse prospective juror number 15 unless he stated "unequivocally on the record" that he could be "fair and impartial" (*People v Clark*, 171 AD3d 1530, 1530 [4th Dept 2019] [internal quotation marks omitted]; *see People v Chambers*, 97 NY2d 417, 419 [2002]).

After defense counsel finished his round of voir dire, the court addressed the panel of prospective jurors, stating, "I do have one question for you on this. Once again, you'll be required to follow my instructions on the law whether you like it or not. And in particular, the instruction, the defendant that does not testify as a witness is not a factor from which any inference unfavorable to the defendant may be drawn. Can you all abide by that particular legal instruction?" After one prospective juror—who was successfully removed for cause—advised that he would not be able to follow the court's instruction, the court continued, "[o]kay, anyone else? Can you follow that instruction whether you believe in it or not? I mean, obviously we talked about this. You both can? Okay. All right, thanks."

There is no indication in the record that prospective juror number 15 was one of the two prospective jurors who were acknowledged by the court as having given some form of a nonverbal assurance that they could follow its instruction, and the nature of the nonverbal assurance provided by those prospective jurors is not identified in the record. I therefore disagree with the conclusion of the majority that the court "obtained the requisite unequivocal assurance" from prospective juror number 15 (*see People v Strassner*, 126 AD3d 1395, 1396 [4th Dept 2015]; *see also People v Padilla*, 191 AD3d 1347, 1348 [4th Dept 2021]; *People v Holmes*, 302 AD2d 936, 936 [4th Dept 2003]). I also disagree with the majority's further reliance on a previous assurance from prospective juror number 15 that he could be "fair and impartial and render a verdict in accordance with the evidence and the law as [the court] explain[ed] it." Although we must consider the "full record" in determining whether a challenge for cause should have been granted (*People v Johnson*, 94 NY2d 600, 615 [2000]), the prior assurance from prospective juror number 15 came before he made his statements that raised a serious doubt regarding his ability to be

impartial. Thus, in making his prior assurance, prospective juror number 15 was never forced to "confront the crucial question whether [he] could be fair to this defendant in light of [his] expressed predisposition" (*People v Arnold*, 96 NY2d 358, 363-364 [2001]).

Inasmuch as defendant peremptorily challenged prospective juror number 15 and thereafter exhausted all available peremptory challenges, I would reverse the judgment of conviction and grant defendant a new trial (*see* CPL 270.20 [2]; *People v Cobb*, 185 AD3d 1432, 1433 [4th Dept 2020]; *Clark*, 171 AD3d at 1531-1532).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1001

CAF 20-00198

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

IN THE MATTER OF MICHAEL JANOWSKY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

EMILY MONTE, RESPONDENT-RESPONDENT.

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

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

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered November 6, 2019 in a proceeding pursuant to Family Court Act article 6. The order denied the petition.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order that denied his petition seeking to modify a prior order of custody and visitation, entered upon consent, by affording him increased visitation with respect to the two subject children while he was incarcerated, as well as other ancillary relief. The appeal is moot with respect to the older child because she is now 18 years old (*see Matter of Richter v Richter*, 187 AD3d 1592, 1592-1593 [4th Dept 2020]).

With respect to the younger child, inasmuch as the father is no longer incarcerated, his request for prison visitation is moot (*see Matter of April L.S. v Joshua F.*, 173 AD3d 1675, 1677 [4th Dept 2019]; *Matter of Ryan M.B. v Mary R.*, 43 AD3d 1304, 1304 [4th Dept 2007]). As for the remaining relief sought by the father, where, as here, the parties' existing custody arrangement is based upon a consent order, Family Court "cannot modify that order unless a sufficient change in circumstances—since the time of the stipulation—has been established, and then only where a modification would be in the best interests of the child[ ]" (*Matter of Hight v Hight*, 19 AD3d 1159, 1160 [4th Dept 2005] [internal quotation marks omitted]; *see Matter of McKenzie v Polk*, 166 AD3d 1529, 1529 [4th Dept 2018]). Although the father established a change in circumstances under the terms specified in the prior consent order, we conclude that, contrary to the father's

contention, a “sound and substantial basis in the record” supports the court’s determination that the father failed to establish that the requested modifications would be in the best interests of the younger child (*Matter of Suarez v Williams*, 134 AD3d 1479, 1480 [4th Dept 2015]), and we therefore will not disturb that determination.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1003

CA 21-00424

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

ROBERT UHTEG, AS PERSONAL NEEDS AND PROPERTY MANAGEMENT GUARDIAN OF ROBERT E. SCHLEIP, AN INCAPACITATED PERSON,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

GARY M. KENDRA, FEDERAL EXPRESS CORPORATION,
DEFENDANTS-APPELLANTS-RESPONDENTS,
AND FEDEX CORPORATION, DEFENDANT.

BURDEN HAFNER & HANSEN, LLC, BUFFALO (SARAH E. HANSEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

O'BRIEN & FORD, P.C., BUFFALO (CHRISTOPHER J. O'BRIEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered March 19, 2021. The order, among other things, granted the motion of plaintiff insofar as it sought summary judgment on the issues of defendants' negligence and proximate cause, granted the cross motion of defendants insofar as it sought summary judgment on the issues whether Robert E. Schleip was negligent and whether that negligence was a proximate cause of the accident, and denied the cross motion of defendants insofar as it sought leave to amend their answer.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion insofar as it seeks summary judgment on the issues of negligence and proximate cause and by granting the cross motion insofar as it seeks leave to amend the answer, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, as personal needs and property management guardian of Robert E. Schleip, an incapacitated person, commenced this action seeking damages for injuries sustained by Robert E. Schleip (pedestrian) as a result of an accident in which the pedestrian, while crossing a street outside of a crosswalk, was struck by a delivery truck operated by defendant Gary M. Kendra during the course of his employment with defendant Federal Express Corporation (collectively, defendants). Defendants appeal and plaintiff cross-appeals from an order that, inter alia, granted plaintiff's motion insofar as it sought summary judgment on the issues of negligence, proximate cause, and serious injury; granted defendants' cross motion insofar as it

sought summary judgment determining that the pedestrian was negligent and that such negligence was a proximate cause of the accident; and denied defendants' cross motion insofar as it sought leave to amend the answer to assert an emergency doctrine defense.

Contrary to plaintiff's contention on his cross appeal, Supreme Court properly granted defendants' cross motion to the extent indicated above. Viewing the evidence in the light most favorable to plaintiff and affording him the benefit of every reasonable inference, as we must (*see Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that defendants established as a matter of law that the pedestrian was negligent for his unexcused violation of Vehicle and Traffic Law § 1152 (a) and that such negligence was a proximate cause of the accident (*see Pixtun-Suret v Gevinski*, 165 AD3d 715, 715 [2d Dept 2018]; *Balliet v North Amityville Fire Dept.*, 133 AD3d 559, 560 [2d Dept 2015]). The statute provides that "[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway" (Vehicle and Traffic Law § 1152 [a]). Here, defendants established that the pedestrian, shortly after leaving a bar where he was served several alcoholic beverages and during a time when it was dusk or dark outside, entered the roadway outside of a crosswalk and, in an attempt to cross two lanes of traffic in each direction and a center turning lane, moved at a swift pace across a street with a 40 miles per hour speed limit despite the presence of oncoming traffic, including the delivery truck and the vehicle of a nonparty witness (*see Balliet*, 133 AD3d at 560). The pedestrian's violation of the statute was unexcused inasmuch as the pedestrian, instead of using the marked crosswalk that was located farther down the street at an intersection, entered the roadway while moving at a swift pace while traffic was approaching despite having a view of the street and such traffic. Defendants thus established that the pedestrian's negligence was, at minimum, a proximate cause of the accident (*see generally id.*). Plaintiff failed to raise a triable issue of fact (*see id.*).

We further conclude, however, that the court properly denied the cross motion insofar as it sought summary judgment dismissing the amended complaint because, contrary to defendants' contention on their appeal, they failed to meet their initial burden of establishing that the pedestrian's negligence was the sole proximate cause of the accident (*see Luttrell v Vega*, 162 AD3d 1637, 1637 [4th Dept 2018]; *Chilinski v Maloney*, 158 AD3d 1174, 1175-1176 [4th Dept 2018]). Again viewing the evidence in the light most favorable to plaintiff and affording him the benefit of every reasonable inference (*see Luttrell*, 162 AD3d at 1637; *Esposito*, 28 AD3d at 1143), we conclude that defendants' own submissions raised triable issues of fact, including whether Kendra violated his " 'common-law duty to see that which he should have seen [as a driver] through the proper use of his senses' " (*Sauter v Calabretta*, 90 AD3d 1702, 1703 [4th Dept 2011]) and his statutory duty to "exercise due care to avoid colliding with any . . . pedestrian . . . upon any roadway" (Vehicle and Traffic Law § 1146 [a]; *see Luttrell*, 162 AD3d at 1637-1638). In particular, defendants' submissions, including the deposition testimony of Kendra, the

nonparty witness, and a responding police officer, raised triable issues of fact "whether [Kendra] could have seen [the pedestrian] before the accident and failed to exercise due care to avoid the accident" (*Sylvester v Velez*, 146 AD3d 599, 599 [1st Dept 2017]; *see Corina v Boys & Girls Club of Schenectady, Inc.*, 82 AD3d 1477, 1478 [3d Dept 2011]). Moreover, given the evidence that the pedestrian had already crossed a few lanes of traffic and had done so at a pace faster than a walk but not fully a run, and the testimony suggesting that there might have been some time for Kendra to see the pedestrian before impact, we conclude that, contrary to defendants' assertions, it cannot be said as a matter of law that this is a dart-out case in which Kendra was unable to avoid contact with the pedestrian (*compare Green v Hosley*, 117 AD3d 1437, 1437-1438 [4th Dept 2014], *with Corina*, 82 AD3d at 1478-1479).

Defendants also contend on their appeal that the court erred in granting plaintiff's motion insofar as it sought summary judgment on the issues of negligence and proximate cause against defendants because plaintiff's moving papers failed to eliminate all issues of fact with respect to those issues. We agree, and we therefore modify the order accordingly.

First, viewing the evidence in the light most favorable to defendants, as we must in evaluating plaintiff's motion (*see Esposito*, 28 AD3d at 1143), we conclude that plaintiff's submissions did not establish as a matter of law that Kendra was negligent (*see Sauter*, 90 AD3d at 1703-1704). According to Kendra's deposition testimony, he was proceeding eastbound toward his next pickup location, i.e., a gas station located on the north side of the street at the upcoming intersection, which would require him to make a left turn either into a connected parking lot prior to the intersection or farther up at the intersection itself. Kendra was traveling in the passing lane at or below the speed limit while constantly scanning the roadway and his mirrors. Then, while starting his approach into the center turning lane, Kendra scanned toward and looked in the general direction of the parking lot for two seconds or less in order to decide where he would make the left turn, at which point he saw the pedestrian quickly moving leftward on the right side of the delivery truck a split second before impact. Viewed in the appropriate light, that testimony does not support plaintiff's contention or the court's conclusion that Kendra took his eyes off the road and was therefore negligent as a matter of law on that basis (*cf. Outar v Sumner*, 164 AD3d 1356, 1356-1357 [2d Dept 2018]). Rather, given the conditions, as well as the location and pace at which the pedestrian attempted to cross the street, questions of fact remain with respect to Kendra's negligence, including whether he failed to see the pedestrian earlier in his scanning of the roadway (*see Corina*, 82 AD3d at 1478-1479; *see also Sauter*, 90 AD3d at 1703-1704). Second, we conclude that defendants' submissions, including the evidence of the conditions, the nature of Kendra's driving and observations, and the pedestrian's conduct in attempting to cross the street, failed to eliminate the question of fact whether the pedestrian's negligence was the sole proximate cause of the accident, i.e., plaintiff failed to establish as a matter of

law that any negligence by Kendra was a proximate cause of the accident (*cf. Edwards v Gorman*, 162 AD3d 1480, 1481 [4th Dept 2018]).

Finally, we agree with defendants that the court abused its discretion in denying the cross motion insofar as it sought leave to amend the answer to assert the emergency doctrine defense. We therefore further modify the order accordingly. "Leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*Nahrebeski v Molnar*, 286 AD2d 891, 891-892 [4th Dept 2001] [internal quotation marks omitted]; *see* CPLR 3025 [b]; *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015]). Here, defendants' proposed amendment is not patently lacking in merit inasmuch as there is evidence that Kendra may have been faced with a "sudden and unforeseen occurrence not of [his] own making" (*McGraw v Glowacki*, 303 AD2d 968, 969 [4th Dept 2003]; *see generally Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991], *rearg denied* 77 NY2d 990 [1991]), and the record does not support plaintiff's assertion of prejudice flowing from the proposed amendment (*see Greco v Grande*, 160 AD3d 1345, 1346 [4th Dept 2018]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1005

CA 21-00774

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

ALLEGHANY CONSTRUCTION INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHAUTAUQUA WOODS CORP. AND SHAANT INDUSTRIES, INC.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

COTTER & COTTER, BUFFALO (DAVID B. COTTER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WRIGHT, WRIGHT AND HAMPTON, JAMESTOWN (JOSEPH M. CALIMERI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), entered November 25, 2020. The order granted the motion of plaintiff for summary judgment and awarded plaintiff money damages.

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

Same memorandum as in *Alleghany Constr. Inc. v Chautauqua Woods Corp.* ([appeal No. 2] — AD3d — [Dec. 23, 2021] [4th Dept 2021]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1006

CA 21-00601

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

ALLEGHANY CONSTRUCTION INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHAUTAUQUA WOODS CORP. AND SHAANT INDUSTRIES, INC.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

COTTER & COTTER, BUFFALO (DAVID B. COTTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

WRIGHT, WRIGHT AND HAMPTON, JAMESTOWN (JOSEPH M. CALIMERI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), entered March 12, 2021. The order denied the motion of defendants for relief pursuant to CPLR 5015 and leave to serve an amended answer.

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

Memorandum: In this breach of contract action, defendants appeal, in appeal No. 1, from an order granting plaintiff's motion for summary judgment on the complaint and awarding plaintiff $47,523.02 in damages. Subsequent to the entry of the order in appeal No. 1, a judgment in that amount was entered in favor of plaintiff. In appeal No. 2, defendants appeal from an order denying their motion seeking "relief from the judgment or order" pursuant to CPLR 5015 and seeking leave to amend their answer pursuant to CPLR 3025 (b).

Initially, we dismiss the appeal from the order in appeal No. 1. The right to appeal from that order terminated upon entry of the judgment (*see Matter of Aho*, 39 NY2d 241, 248 [1976]; *McDonough v Transit Rd. Apts., LLC*, 164 AD3d 1603, 1603 [4th Dept 2018]; *see also* CPLR 5501 [a] [1]), and no appeal was taken therefrom.

With respect to appeal No. 2, we note that, inasmuch as defendants have not raised on appeal any issues with respect to the denial of that part of their motion seeking relief pursuant to CPLR 5015, they have abandoned any contentions with respect thereto (*see Friscia v Village of Geneseo*, 197 AD3d 848, 849 [4th Dept 2021]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We reject defendants' contention that Supreme Court erred in denying that part of their motion seeking leave to amend their answer. "[G]enerally, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a [pleading] is committed to the sound discretion of the court" (*Tag Mech. Sys., Inc. v V.I.P. Structures, Inc.*, 63 AD3d 1504, 1505 [4th Dept 2009] [internal quotation marks omitted]; *see* CPLR 3025 [b]; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]). Here, defendants sought leave to amend their answer to include a counterclaim based on breach of warranty. The contracts involved in the proposed counterclaim, however, were "not at issue in the complaint, and the proposed counterclaim [sought] affirmative relief unrelated to any matters addressed during the course of discovery" (*Tag Mech. Sys., Inc.*, 63 AD3d at 1506). Further, the proposed counterclaim would inevitably involve additional discovery and resulting delays (*see Ness Tech. SARL v Pactera Tech. Intl. Ltd.*, 180 AD3d 607, 608 [1st Dept 2020]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1007

CA 20-00992

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

MARY E. DURKIN, AS ADMINISTRATOR OF THE ESTATE OF HENRY L. REED, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN PETRIE, DEFENDANT-RESPONDENT.

FRANK A. ALOI, ROCHESTER, FOR PLAINTIFF-APPELLANT.

THE LAMA LAW FIRM, LLP, ITHACA (CIANO J. LAMA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Patrick F. McAllister, A.J.), entered June 25, 2020. The order granted the motion of defendant for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiff, as administrator of the estate of Henry L. Reed (decedent), commenced this action seeking, inter alia, a determination that a deed executed by decedent prior to his death, which conveyed decedent's interest in certain real property to defendant, was void ab initio based upon decedent's incompetence. Defendant moved for summary judgment dismissing the amended complaint. Supreme Court granted the motion, and we now affirm.

Plaintiff does not dispute that defendant met his initial burden on the motion and, contrary to plaintiff's contention, we conclude that she failed to raise a triable issue of fact in opposition (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). It is well settled that " '[a] party's competence is presumed and the party asserting incapacity bears the burden of proving incompetence' " (*Crawn v Sayah*, 31 AD3d 367, 368 [2d Dept 2006]; *see Matter of Mildred M.J.*, 43 AD3d 1391, 1392 [4th Dept 2007]). "A person is incompetent to authorize a transaction only if the person's mind was so affected as to render him [or her] wholly and absolutely incompetent to comprehend and understand the nature of the transaction" (*Mildred M.J.*, 43 AD3d at 1392 [internal quotation marks omitted]). Here, in opposition to the motion, plaintiff failed to raise a triable issue of fact with respect to decedent's mental capacity on the day that he signed the deed (*see Crawn*, 31 AD3d at 368). Although plaintiff

submitted various medical records showing that decedent had moments of confusion, such confusion does not create a presumption of incompetence or otherwise rebut the presumption of competence (*see Mildred M.J.*, 43 AD3d at 1392; *Feiden v Feiden*, 151 AD2d 889, 890 [3d Dept 1989]). Indeed, the record is devoid of evidence that, "because of the affliction, [decedent] was incompetent at the time of the challenged transaction" (*Mildred M.J.*, 43 AD3d at 1392 [internal quotation marks omitted]).

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1008

CA 21-00389

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

KATHLEEN M. MUSSMACHER, NOW KNOWN AS
KATHLEEN M. WINTERS, PLAINTIFF-RESPONDENT,

V ORDER

RICHARD C. MUSSMACHER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

NORMAN L. MASTROMORO, BROADALBIN, FOR DEFENDANT-APPELLANT.

KATHLEEN M. WINTERS, PLAINTIFF-RESPONDENT PRO SE.

Appeal from a corrected order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered October 29, 2020 in a divorce action. The corrected order granted the motion of plaintiff for retroactive arrearages due and owing from defendant's pension.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1009

CA 21-00616

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

KATHLEEN M. MUSSMACHER, NOW KNOWN AS
KATHLEEN M. WINTERS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD C. MUSSMACHER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

NORMAN L. MASTROMORO, BROADALBIN, FOR DEFENDANT-APPELLANT.

KATHLEEN M. WINTERS, PLAINTIFF-RESPONDENT PRO SE.

Appeal from a judgment of the Supreme Court, Oneida County (Erin P. Gall, J.), entered March 30, 2021 in a divorce action. The judgment awarded plaintiff a money judgment of $75,804.08, plus interest.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the amount of the award to $52,325.93, plus interest commencing January 7, 2021 and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff wife and defendant husband were divorced by a judgment entered in 1994 in Supreme Court, Fulton County. The judgment of divorce incorporated but did not merge the parties' written stipulation providing that defendant's pension plan shall be divided between the parties in accordance with the *Majauskas* formula (*see Majauskas v Majauskas*, 61 NY2d 481, 489-491 [1984]). Although a qualified domestic relations order (QDRO) was entered in Supreme Court, Fulton County, shortly thereafter, it apparently was never sent to defendant's employer, Niagara Mohawk Power Corporation (Niagara Mohawk). Defendant retired in 2003 after 32 years at Niagara Mohawk. At that time, his pension was in the "National Grid Incentive Thrift Plan II," with an option of "a maximum 10-year distribution period to commence at the election of, and in amounts determined by, the participant." Defendant elected to commence distributions in 2010, and the lump sum amount of his pension was transferred to Vanguard Fiduciary Trust Company (Vanguard) and distributed to him in approximately $25,000 increments until it was depleted at the end of 2018.

On July 29, 2019, plaintiff filed a motion in Supreme Court, Oneida County, seeking "retroactive arrearages" due and owing to her from defendant's pension. After a hearing, Supreme Court issued a

judgment awarding plaintiff the amount of $75,804.08, representing plaintiff's *Majauskas* share of the lump sum distribution of defendant's pension that was transferred to Vanguard in 2010, plus interest. We now modify.

Defendant first contends that the court erred in denying his cross motion to transfer the matter to Supreme Court, Fulton County. We agree with defendant that plaintiff should have filed her motion in that county, where the judgment of divorce was entered, rather than Oneida County, which is in a different judicial district and not contiguous to Fulton County (*see* CPLR 105 [r]; 2212 [a]). Nevertheless, under the circumstances of this case, the court did not err in denying the cross motion. Initially, inasmuch as Supreme Court has statewide jurisdiction, the filing of the motion in Oneida County was not a jurisdictional defect (*see Moran v Moran*, 77 AD3d 443, 446 [1st Dept 2010]; *Cwick v City of Rochester*, 54 AD2d 1078, 1079 [4th Dept 1976]). To enforce the terms of a stipulation that is incorporated but not merged into a judgment of divorce, a party can either commence a plenary action or move to enforce the judgment (*see Campello v Alexandre*, 155 AD3d 1381, 1381-1382 [3d Dept 2017]; *Anderson v Anderson*, 153 AD3d 1627, 1628 [4th Dept 2017]; *Gunsberg v Gunsberg*, 173 AD2d 232, 232 [1st Dept 1991]). Plaintiff chose the latter option, but the court, and this Court, had the authority to convert the motion to a plenary action (*see* CPLR 103 [c]; *Matter of State of New York [Essex Prop. Mgt., LLC]*, 152 AD3d 1169, 1170-1171 [4th Dept 2017]; *Didley v Didley*, 194 AD2d 7, 11 [4th Dept 1993]). Inasmuch as the plenary action could have been filed in Supreme Court, Oneida County, there is no reason to reverse the judgment on appeal and transfer the matter to Supreme Court, Fulton County.

We reject defendant's contention that the judgment on appeal should be reversed on the ground of laches. That defense " 'requires both delay in bringing an action and a showing of prejudice to the adverse party' " (*Beiter v Beiter*, 67 AD3d 1415, 1416 [4th Dept 2009]; *see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 816 [2003], *cert denied* 540 US 1017 [2003]; *Santillo v Santillo*, 155 AD3d 1688, 1689 [4th Dept 2017]; *Denaro v Denaro*, 84 AD3d 1148, 1149-1150 [2d Dept 2011], *lv dismissed* 17 NY3d 921 [2011]). We agree with defendant that there was an extensive delay by plaintiff in bringing the motion. Defendant, however, failed to make the requisite showing that he was prejudiced by plaintiff's delay in moving to enforce the terms of the stipulation (*see Beiter*, 67 AD3d at 1416; *see generally Matter of Sierra Club v Village of Painted Post*, 134 AD3d 1475, 1476 [4th Dept 2015]).

We agree with defendant, however, that the court improperly calculated the amount owing to plaintiff because the statute of limitations applies to plaintiff's motion seeking arrearages for her share of defendant's pension (*see Bielecki v Bielecki*, 106 AD3d 1454, 1454-1455 [4th Dept 2013], *lv dismissed* 22 NY3d 909 [2013], *lv dismissed* 25 NY3d 1035 [2015], *rearg denied* 26 NY3d 945 [2015]; *see generally Tauber v Lebow*, 65 NY2d 596, 598 [1985]). It is well settled that "[a] stipulation of settlement that is incorporated, but

not merged, into the judgment of divorce is a contract subject to the principles of contract construction and interpretation" (*Reber v Reber*, 173 AD3d 1651, 1652 [4th Dept 2019] [internal quotation marks omitted]), and an action seeking money damages for violation of a separation agreement is subject to the six-year statute of limitations for breach of contract actions (*see Woronoff v Woronoff*, 70 AD3d 933, 934 [2d Dept 2010], *lv denied* 14 NY3d 713 [2010]). Contrary to the court's determination, it is irrelevant that plaintiff sought the arrearages by way of motion rather than by commencement of a plenary action. Although motions to enforce the terms of a stipulation are not subject to the statute of limitations (*see Denaro*, 84 AD3d at 1149; *Fragin v Fragin*, 80 AD3d 725, 725 [2d Dept 2011]; *Beiter*, 67 AD3d at 1416-1417), in this case plaintiff was seeking arrearages, or money damages, for the amounts that she did not receive because the QDRO was never received by Niagara Mohawk. When a party is seeking arrearages or a money judgment, the statute of limitations applies whether a party commences a plenary action (*see Tauber*, 65 NY2d at 597-598; *Boylan v Dodge*, 42 AD3d 632, 632 [3d Dept 2007]) or, as here, simply moves for that relief (*see Bielecki*, 106 AD3d at 1455).

Thus, we conclude that plaintiff's claim is timely only to the extent that she seeks her share of pension payments made within six years prior to her motion filed on July 29, 2019. The financial records submitted by defendant show a balance of $127,983.20 in the Vanguard account as of October 1, 2013, which is the closest date to July 29, 2013 that is in the record. The record further establishes that defendant was employed at Niagara Mohawk for 32 years, or 384 months, and that he was employed there for 314 months during the marriage. Using the *Majauskas* formula, we conclude that plaintiff is entitled to a judgment in the amount of $52,325.93, plus interest, and we therefore modify the judgment accordingly.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1010

CA 21-00281

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

CHRISTINA M. MURRAY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

INGE K. SMINKEY, DEFENDANT-RESPONDENT
AND LISA M. STIO, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (BRENT C. SEYMOUR OF COUNSEL), FOR DEFENDANT-APPELLANT.

BUTTAFUOCO & ASSOCIATES, PLLC, WOODBURY (ELLEN BUCHHOLZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

LAW OFFICE OF DESTIN SANTACROSE, BUFFALO (DOMINIC J. POMPO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered September 1, 2020. The order, among other things, denied the motion of defendant Lisa M. Stio for summary judgment and granted the cross motion of plaintiff for partial summary judgment against said defendant on the issue of liability.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the cross motion seeking partial summary judgment on the issue of liability against defendant Lisa M. Stio and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle in which she was a passenger, which was operated by defendant Lisa M. Stio, attempted to make a left turn after having stopped at a stop sign and collided in an intersection with a vehicle operated by defendant Inge K. Sminkey, which had attempted to proceed straight through the intersection. Stio appeals from an order that, inter alia, denied her motion for summary judgment dismissing the complaint against her and granted that part of the cross motion of plaintiff for partial summary judgment against Stio on the issue of liability.

Stio contends that Supreme Court erred in denying her motion because she established, as a matter of law, that she was not negligent and that, instead, Sminkey's negligence was the sole proximate cause of the collision. We reject that contention. Stio, on her motion, "had the initial burden of establishing as a matter of

law either that she was not negligent or that any negligence on her part was not a proximate cause of the accident" (*Gilkerson v Buck*, 174 AD3d 1282, 1283 [4th Dept 2019]; *see Galletta v Delsorbo*, 188 AD3d 1641, 1642 [4th Dept 2020]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As relevant to Stio's potential liability here, "it is well settled that 'drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident' " (*Cupp v McGaffick*, 104 AD3d 1283, 1284 [4th Dept 2013]; *see Deering v Deering*, 134 AD3d 1497, 1499 [4th Dept 2015]). Additionally, subject to an exception not applicable here, drivers approaching a stop sign have a statutory duty to stop as required by law and, thereafter, to "yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection" (Vehicle and Traffic Law § 1142 [a]; *see* § 1172 [a]).

Here, viewing the evidence in the light most favorable to plaintiff and Sminkey and affording them the benefit of every reasonable inference (*see Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that Stio failed to meet her initial burden on her motion of establishing as a matter of law that Sminkey's negligence was the sole proximate cause of the accident (*see Luttrell v Vega*, 162 AD3d 1637, 1637 [4th Dept 2018]). Stio's own submissions contained conflicting accounts of the position of Sminkey's vehicle at the time of the collision. In particular, Stio testified at her deposition that Sminkey approached the intersection while traveling entirely within a right-turn-only lane—which was marked with a white painted arrow, the word "only," and an accompanying "right lane must turn right" sign—with her right turn signal activated. Conversely, Sminkey testified at her deposition that she proceeded forward from her position near the white painted arrow in the right-turn-only lane and had already fully merged into the non-turning, through lane by the time the collision occurred. We note that, contrary to the court's determination, Sminkey did not concede in her papers that she was in the wrong lane of traffic to proceed straight through the intersection. Given "the differing versions of which lane [Sminkey] was in at the time of the accident" (*Fayson v Rent-A-Center E., Inc.*, 166 AD3d 1569, 1570 [4th Dept 2018]), we conclude that Stio's own submissions raise triable issues of fact, including whether she violated her common-law duty "to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Deering*, 134 AD3d at 1499 [internal quotation marks omitted]; *see Galletta*, 188 AD3d at 1642; *Luttrell*, 162 AD3d at 1637-1638) and her statutory duty to yield the right of way to Sminkey's vehicle if it was approaching so closely as to constitute an immediate hazard (*see* Vehicle and Traffic Law § 1142 [a]).

We nonetheless agree with Stio that the court erred in granting that part of plaintiff's cross motion for partial summary judgment against Stio on the issue of liability. We therefore modify the order accordingly. Plaintiff relied on the same evidentiary submissions in support of her cross motion and, as previously discussed, the

conflicting accounts in those submissions raise triable issues of fact whether Stio was negligent and, if so, whether such negligence was a proximate cause of the collision.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1011

CA 21-00581

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

U.S. BANK NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS TRUSTEE FOR THE RMAC TRUST, SERIES 2016-CTT,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MATTHEW R. FARRELL, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS.

KNUCKLES, KOMOSINSKI & MANFRO, LLP, ELMSFORD (MAX T. SAGLIMBENI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WESTERN NEW YORK LAW CENTER, BUFFALO (PAMELA S. LANICH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered April 7, 2021. The order, insofar as appealed from, granted in part the motion of defendant Matthew R. Farrell and dismissed the complaint.

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

Memorandum: In 2009, plaintiff's predecessor in interest commenced a residential foreclosure action against defendant-respondent (defendant), among others (2009 action). That action remained dormant until 2018, when plaintiff moved for a default judgment and an order of reference, and defendant cross-moved to dismiss the complaint on grounds including failure to enter default within one year (*see* CPLR 3215 [c]). In an order entered April 1, 2019, Supreme Court (Colaiacovo, J.) granted defendant's cross motion and dismissed the complaint in the 2009 action. Plaintiff then commenced this foreclosure action against defendant, among others, on September 18, 2019 (2019 action), and served defendant on October 5, 2019. Defendant answered and moved for an order dismissing the complaint as barred by the six-year statute of limitations (*see* CPLR 213 [4]), as well as judgment on certain counterclaims that were asserted in his answer. Supreme Court (Feroleto, J.) granted the motion in part and dismissed the complaint. We affirm.

Even assuming, arguendo, that the savings provisions of CPLR 205 (a) apply inasmuch as the 2009 action was not dismissed for neglect to prosecute (*see Broadway Warehouse Co. v Buffalo Barn Bd., LLC*, 191

AD3d 1464, 1464-1465 [4th Dept 2021]; *see generally* CPLR 3216), we conclude that the court properly granted the motion and dismissed the 2019 action as time-barred. Insofar as is relevant here, following the termination of the 2009 action, plaintiff was entitled to "commence a new action upon the same transaction or occurrence . . . within six months after the termination[,] provided . . . that service upon defendant [was] effected within such six-month period" (CPLR 205 [a]; *see Broadway Warehouse Co.*, 191 AD3d at 1465). Generally, the six-month period starts running on the date of entry of the order dismissing the prior action (*see U.S. Bank N.A. v Navarro*, 188 AD3d 1282, 1283 [2d Dept 2020]; *Ross v Jamaica Hosp. Med. Ctr.*, 122 AD3d 607, 608 [2d Dept 2014]), not when the order is served with notice of entry (*see Burns v Pace Univ.*, 25 AD3d 334, 335 [1st Dept 2006], *lv denied* 7 NY3d 705 [2006]).

Here, the order dismissing the 2009 action was entered on April 1, 2019, yet service upon defendant was not effected until over six months later on October 5, 2019. Although plaintiff does not dispute either of those facts, it nevertheless contends that termination of the 2009 action did not occur on the date of entry, but upon expiration of its right to file a notice of appeal from the order dismissing that action. We reject that contention. Although plaintiff is correct that, if an aggrieved plaintiff takes an appeal from an order dismissing a prior action, the " 'termination' of the prior action occurs when appeals as of right are exhausted" (*Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. [Habiterra Assoc.]*, 5 NY3d 514, 519 [2005]), "this applies only where an appeal was available and was in fact taken" (Siegel & Connors, NY Prac § 52 [6th ed 2018]) and, here, no appeal was taken from the order dismissing the 2009 action (*cf. Andrea*, 5 NY3d at 519).

Finally, defendant's contention that he is entitled to judgment on his counterclaims is not properly before us inasmuch as defendant did not file a notice of appeal from the order on appeal (*see* CPLR 5513 [a]; *Matter of HSBC Bank USA, NA [Makowski]*, 72 AD3d 1515, 1516-1517 [4th Dept 2010]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1012

CA 20-01284

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

JACLYN CONNELL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION,
DEFENDANT-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (HEDWIG M. AULETTA OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARTIN J. ZUFFRANIERI, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered August 13, 2020. The order, insofar as appealed from, granted that part of plaintiff's motion seeking to compel discovery of quality assurance reports and denied that part of defendant's cross motion seeking a protective order with respect to those reports.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of plaintiff's motion seeking to compel production of the quality assurance reports is denied, and that part of defendant's cross motion seeking a protective order with respect to those reports is granted.

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries she sustained after she was attacked and injured by a fellow patient at defendant's facility. Thereafter, plaintiff moved to compel the production of certain documents, including quality assurance reports detailing the incident in which she was injured, as well as two unrelated incidents involving her attacker. Defendant opposed the motion and cross-moved for a protective order. As limited by its brief, defendant now appeals from an order insofar as it granted that part of the motion seeking to compel the production of the quality assurance reports and denied that part of the cross motion seeking a protective order with respect to those reports. We reverse the order insofar as appealed from.

We conclude that Supreme Court abused its discretion in granting the motion with respect to disclosure of the quality assurance reports and in denying the cross motion with respect to those reports (*see generally Pasek v Catholic Health Sys., Inc.*, 159 AD3d 1553, 1554 [4th Dept 2018]). Defendant met its burden of establishing that the quality assurance reports were privileged by demonstrating that the

information contained in those reports was "generated in connection with a quality assurance review function pursuant to Education Law § 6527 (3)" (*Learned v Faxton-St. Luke's Healthcare*, 70 AD3d 1398, 1399 [4th Dept 2010] [internal quotation marks omitted]; *cf. DeLeon v Nassau Health Care Corp.*, 178 AD3d 897, 898 [2d Dept 2019]). Thus, the information contained in those reports "is expressly exempted from disclosure under CPLR article 31 pursuant to the confidentiality conferred on information gathered by defendant in accordance with Education Law § 6527 (3)" (*Pasek*, 159 AD3d at 1554; *see* Public Health Law §§ 2805-j [1] [e]; 2805-l; Mental Hygiene Law § 29.29 [1]; *Katherine F. v State of New York*, 94 NY2d 200, 203-205 [1999]).

In light of our determination, defendant's remaining contentions are academic.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1013

CA 20-01190

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

FIELDS ENTERPRISES INC., AND BRISTOL HARBOUR MARINA, LLC, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

BRISTOL HARBOUR VILLAGE ASSOCIATION, INC., DEFENDANT-RESPONDENT-APPELLANT.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), NIXON PEABODY LLP, AND GOLDBERG SEGALLA LLP, BUFFALO, FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (R. ANTHONY RUPP, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Ontario County (J. Scott Odorisi, J.), entered August 26, 2020. The order denied in part the motion of plaintiffs for a preliminary injunction and denied the cross motion of defendant for sanctions.

It is hereby ORDERED that said cross appeal is dismissed and the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs own and operate the Bristol Harbour Marina on Canandaigua Lake. The marina is lakeside at the bottom of a steep cliff and is accessible only by an elevator or staircase, both of which are on real property owned by defendant. Plaintiffs commenced this action seeking, inter alia, a permanent injunction preventing defendant from limiting access to the elevator and staircase. Plaintiffs also moved for a preliminary injunction and temporary restraining order enjoining defendant from, inter alia, limiting such access. Defendant opposed the motion and cross-moved for sanctions. Plaintiffs now appeal and defendant cross-appeals from an order that, inter alia, denied in part plaintiffs' motion and denied defendant's cross motion.

Initially, defendant's notice of cross appeal recites that defendant is cross-appealing only to the extent that the order denied the cross motion. We dismiss the cross appeal inasmuch as defendant in its brief has not raised any contentions concerning the denial of the cross motion (*see generally Loveless Family Trust v Koenig*, 77 AD3d 1447, 1448 [4th Dept 2010]).

With respect to plaintiffs' appeal, it is well settled that,

"[u]pon a motion for a preliminary injunction, the party seeking the injunctive relief must demonstrate by clear and convincing evidence: (1) 'a probability of success on the merits;' (2) 'danger of irreparable injury in the absence of an injunction;' and (3) 'a balance of equities in its favor' " (*Cangemi v Yeager*, 185 AD3d 1397, 1398 [4th Dept 2020], quoting *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Plaintiffs contend that Supreme Court abused its discretion to the extent that it denied the motion. We reject that contention inasmuch as plaintiffs failed to demonstrate a danger of irreparable injury in the absence of the injunction (*see generally id.* at 1400; *Eastview Mall, LLC v Grace Holmes, Inc.*, 182 AD3d 1057, 1058 [4th Dept 2020]). We conclude that plaintiffs failed to show that they would sustain any harm other than economic loss, "which is compensable by money damages" and "does not constitute irreparable harm" (*Mangovski v DiMarco*, 175 AD3d 947, 949 [4th Dept 2019] [internal quotation marks omitted]). To the extent that plaintiffs alleged that they would suffer a loss of goodwill, we conclude that plaintiffs' allegations are conclusory and are insufficient to establish irreparable harm (*see John G. Ullman & Assoc., Inc. v BCK Partners, Inc.*, 139 AD3d 1358, 1359 [4th Dept 2016], *lv dismissed* 28 NY3d 943 [2016]). In light of our determination, plaintiffs' remaining contentions are academic.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1016

KA 20-01571

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERICK R. GOODWIN, DEFENDANT-APPELLANT.

CAITLIN M. CONNELLY, BUFFALO, FOR DEFENDANT-APPELLANT.

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Daniel R. King, J.), rendered July 19, 2019. The judgment convicted defendant, upon a plea of guilty, of predatory sexual assault against a child (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice, the plea is vacated, and the matter is remitted to Lewis County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of predatory sexual assault against a child (Penal Law § 130.96). During a court appearance at which County Court extended a plea offer that called for an aggregate sentence of 15 years to life imprisonment, the court informed defendant that "my policy is if a defendant gets convicted at trial, that means that individual has not accepted responsibility for the conduct that they've been convicted of, and . . . [i]n all likelihood the sentence [after trial] would not even be close to the 20 years [to life sought by the People], it would be much more – – many more years and you are looking at a potential [of] 100 years to life." The court issued a virtually identical admonition at the next appearance, and defendant subsequently accepted the court's offer of 15 years to life imprisonment.

Under the circumstances, we agree with defendant that the court's statements during plea negotiations did "not amount to a description of the range of the potential sentences but, rather, they constitute[d] impermissible coercion, 'rendering the plea involuntary and requiring its vacatur' " (*People v Flinn*, 60 AD3d 1304, 1305 [4th Dept 2009]; *see People v Rogers*, 114 AD3d 707, 707 [2d Dept 2014], *lv denied* 23 NY3d 1067 [2014]; *People v Wilson*, 245 AD2d 161, 163 [1st Dept 1997], *lv denied* 91 NY2d 946 [1998]). The court's coercive statements were "all the more serious" in light of its misleading

insinuation at the January 25, 2019 appearance that consecutive sentencing would be mandatory after trial (*People v Sung Min*, 249 AD2d 130, 132 [1st Dept 1998]; *see People v Christian* [appeal No. 2], 139 AD2d 896, 897 [4th Dept 1988], *lv denied* 71 NY2d 1024 [1988]). Contrary to the People's contention, the constitutional bar on coercing a guilty plea does not invariably turn on whether the court "utilized language that deduced to an absolute guarantee" of a maximum sentence after trial (*see e.g. Rogers*, 114 AD3d at 707; *Flinn*, 60 AD3d at 1305; *Wilson*, 245 AD2d at 163).

Thus, although defendant failed to preserve his challenge to the voluntariness of his plea, we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]), and we reverse the judgment, vacate the plea, and remit the matter to County Court for further proceedings on the indictment. We direct that all further proceedings in this case be conducted before a different judge (*see e.g. People v Zuniga*, 42 AD3d 474, 475 [2d Dept 2007], *lv denied* 9 NY3d 966 [2007]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1017

KA 15-01127

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAQUILL BATTLE, DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered June 23, 2015. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3] [felony murder]) in connection with the shooting death of the victim that occurred during a robbery or attempted robbery. We affirm.

Defendant contends that Supreme Court erred in refusing to suppress statements that he made to the police during an interrogation. Specifically, he argues that the challenged statements should have been suppressed because he was arrested without probable cause, he did not validly waive his *Miranda* rights, and the length of his detention rendered his statements involuntary. We reject those contentions. The police had probable cause to arrest defendant because they "had information sufficient to support a reasonable belief that an offense ha[d] been . . . committed by defendant" (*People v Collins*, 106 AD3d 1544, 1545 [4th Dept 2013], *lv denied* 21 NY3d 1072 [2013] [internal quotation marks omitted]; *see People v Shulman*, 6 NY3d 1, 25 [2005], *cert denied* 547 US 1043 [2006]), i.e., "statements [of one of his accomplices] implicating him in the crime" (*People v Mills*, 137 AD3d 1690, 1690 [4th Dept 2016], *lv denied* 27 NY3d 1136 [2016] [internal quotation marks omitted]; *see People v Berzups*, 49 NY2d 417, 427 [1980], *rearg denied* 73 NY2d 866 [1989]; *People v Luciano*, 43 AD3d 1183, 1183 [2d Dept 2007], *lv denied* 9 NY3d 991 [2007]). Contrary to defendant's contention, the accomplice's

statements did not lack indicia of reliability inasmuch as they were against the accomplice's penal interest (*see People v Fulton*, 133 AD3d 1194, 1195 [4th Dept 2015], *lv denied* 26 NY3d 1109 [2016], *reconsideration denied* 27 NY3d 997 [2016]; *People v Brito*, 59 AD3d 1000, 1000 [4th Dept 2009], *lv denied* 12 NY3d 814 [2009]).

To the extent that defendant challenges the validity of his *Miranda* waiver, we conclude that the video of the interrogation established that, at the very least, defendant implicitly waived his rights by agreeing to speak to the police immediately after the investigator read to him the *Miranda* warnings and after defendant confirmed that he understood his rights (*see People v Wallace*, 153 AD3d 1632, 1634 [4th Dept 2017]; *People v Harris*, 129 AD3d 1522, 1523 [4th Dept 2015], *lv denied* 27 NY3d 998 [2016]; *see generally People v Sirno*, 76 NY2d 967, 968 [1990]). We likewise reject defendant's contention that his statements were rendered involuntary due to the length of his detention (*see People v Huff*, 133 AD3d 1223, 1225 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]; *People v Clyburn-Dawson*, 128 AD3d 1350, 1351 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]). As the video of defendant's detention and interrogation shows, even though he was held in custody for approximately 23 hours, the police gave defendant the opportunity to eat and sleep, and the interrogation itself lasted only approximately 2½ hours (*see People v Johnston*, 192 AD3d 1516, 1518 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]; *Huff*, 133 AD3d at 1225; *cf. People v Guilford*, 21 NY3d 205, 208-212 [2013]).

Defendant also contends that the conviction is not supported by legally sufficient evidence because the People did not establish that the victim's death was caused "in the course of and in furtherance of" a robbery or attempted robbery or that defendant participated in any such predicate crime (Penal Law § 125.25 [3]). We reject that contention. The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), established that the victim was killed in the course of and in furtherance of either a robbery or attempted robbery. The deceased victim's body was found on the porch of a house that appeared to have been ransacked. A motor vehicle parked near the house was still running and appeared to have also been ransacked. The evidence also demonstrated that, in addition to being shot, the victim had sustained a laceration to his head and that there was a roll of duct tape by the victim's arm. Thus, there is legally sufficient evidence from which the jury could infer that the victim was assailed immediately upon arriving at the house and that the assailants had acted with the intent to forcibly steal property from the victim (*see generally* Penal Law § 160.00; *People v Duncan*, 46 NY2d 74, 77 [1978], *rearg denied* 46 NY2d 940 [1979], *cert denied* 442 US 910 [1979], *rearg dismissed* 56 NY2d 646 [1982]).

The evidence at trial also provides a valid line of reasoning and permissible inferences from which a rational jury could conclude that defendant was one of the assailants involved in the robbery that resulted in the victim's death (*see generally People v Reed*, 97 AD3d 1142, 1143 [4th Dept 2012], *affd* 22 NY3d 530 [2014], *rearg denied* 23

NY3d 1009 [2014]; *People v Danielson*, 9 NY3d 342, 349 [2007]). Witness testimony established that multiple men were involved in the incident, and defendant admitted during his interrogation that he was present at the scene of the robbery, although he denied knowledge of any plot to rob the victim. Defendant's ex-girlfriend testified that, on the night of the shooting, defendant told her he was going out to get some money. When she spoke to him later that night, he was out of breath and directed her to put on the news. Upon arriving at the ex-girlfriend's home, defendant appeared nervous and left under her television stand two cell phones, one of which bore the victim's first name, as well as a bandana concealing five bullets. Two of the bullets were empty shells, matching the number of projectiles recovered at the scene of the shooting. Thus, there is legally sufficient evidence that defendant participated in the robbery or attempted robbery resulting in the victim's death.

Further, viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 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 [1987]). Even if a different verdict would have been reasonable in light of the largely circumstantial nature of the evidence of defendant's guilt (*see generally Danielson*, 9 NY3d at 348; *Collins*, 106 AD3d at 1545-1546), we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495).

We reject defendant's contention that the court erred in denying several pretrial requests to represent himself without conducting the requisite searching inquiry. "A defendant in a criminal case may invoke the right to defend *pro se* provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues" (*People v McIntyre*, 36 NY2d 10, 17 [1974]; *see People v Crespo*, 32 NY3d 176, 178 [2018], *cert denied* — US —, 140 S Ct 148 [2019]). The court did not err in denying several of defendant's pretrial requests to proceed pro se because, at the time of those requests, defendant repeatedly engaged in "disruptive and obstreperous conduct" that "would prevent the fair and orderly exposition of the issues" and that resulted in defendant being escorted from the courtroom (*People v Wingate*, 184 AD3d 738, 738 [2d Dept 2020], *lv denied* 35 NY3d 1071 [2020], *reconsideration denied* 36 NY3d 932 [2020] [internal quotation marks omitted]; *cf. McIntyre*, 36 NY2d at 18-19). With respect to those pretrial requests to proceed pro se that were not accompanied by disruptive and obstreperous conduct, those requests were not unequivocal. Indeed, some requests appeared to have been abandoned. Thus, no searching inquiry was required with respect to those requests (*see generally People v Silburn*, 31 NY3d 144, 151 [2018]; *McIntyre*, 36 NY2d at 17).

We have reviewed defendant's remaining contentions and conclude

that none warrants reversal or modification of the judgment.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1018

KA 16-02270

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN J. PRESSLEY, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered September 13, 2016. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts) and resisting arrest.

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 criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and resisting arrest (§ 205.30). Contrary to defendant's contention, we conclude that Supreme Court did not err in discharging a juror over his objection. The trial court is generally "accorded latitude in making the findings necessary to determine whether a juror is grossly unqualified under CPL 270.35" (*People v Rodriguez*, 71 NY2d 214, 219 [1988]), and " '[a] determination whether a juror is . . . grossly unqualified, and subsequently to discharge such a juror, is left to the broad discretion of the court' " (*People v Jean-Philippe*, 101 AD3d 1582, 1582 [4th Dept 2012]). Here, upon the court's " 'probing and tactful inquiry' into the facts of the situation" (*People v Harris*, 99 NY2d 202, 213 [2002]), the juror admitted that he failed to appear for jury duty on two consecutive days because he overslept due to his overnight work schedule. Moreover, the juror admitted that he would be concerned about work while performing his duty as a juror. Recognizing that "[t]he decision to disqualify turns on the facts of each particular case, and according deference to the court's evaluation of the juror's answers and demeanor," we perceive no basis to disturb the court's determination (*People v Abdul-Jaleel*, 142 AD3d 1296, 1297 [4th Dept 2016], *lv denied* 29 NY3d 946 [2017] [internal quotation marks omitted]; *see People v Daniels*, 59 AD3d 730, 730-731 [2d Dept 2009], *lv denied* 12 NY3d 852 [2009]; *People v Cook*, 275 AD2d

1020, 1021 [4th Dept 2000], *lv denied* 95 NY2d 933 [2000]).

Defendant's contention that the court erred in denying his request for a missing witness charge with respect to an arresting officer is unpreserved for our review. While defendant indicated during a pretrial hearing and during certain testimony that he was going to request a missing witness charge, no such charge was actually requested (*see generally People v Roseboro*, 151 AD3d 526, 526 [1st Dept 2017], *lv denied* 30 NY3d 983 [2017]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1027

CA 20-01519

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

SAMANTHA CRUMP, ALSO KNOWN AS SHADAYI WALKER,
PLAINTIFF-RESPONDENT,

V ORDER

NICHOLAS V. JOHNSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER WITH CITY OF BUFFALO POLICE DEPARTMENT, ANDREW SHEA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER WITH CITY OF BUFFALO POLICE DEPARTMENT, CITY OF BUFFALO POLICE DEPARTMENT LIEUTENANT LONG, ALSO KNOWN AS POLICE OFFICER JOHN DOE #1, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER WITH CITY OF BUFFALO POLICE DEPARTMENT, CITY OF BUFFALO POLICE DEPARTMENT LIEUTENANT WITALSER, ALSO KNOWN AS POLICE OFFICER JOHN DOE #2, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER WITH CITY OF BUFFALO POLICE DEPARTMENT, CITY OF BUFFALO POLICE OFFICER JANE DOE #1, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS A POLICE OFFICER WITH THE CITY OF BUFFALO POLICE DEPARTMENT, CITY OF BUFFALO POLICE OFFICER JANE DOE #2, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS A POLICE OFFICER WITH THE CITY OF BUFFALO POLICE DEPARTMENT, CITY OF BUFFALO POLICE DEPARTMENT AND CITY OF BUFFALO,
DEFENDANTS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (MAEVE E. HUGGINS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered August 17, 2020. The order denied the motion of defendants to dismiss the action and granted the cross motion of plaintiff to deem the complaint timely served.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1031

TP 21-00955

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

IN THE MATTER OF RANDY WILLIAMS, PETITIONER,

V ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BEEZLY J. KIERNAN OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered July 1, 2021) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed (*see Matter of King v Venettozzi*, 152 AD3d 1115, 1116-1117 [3d Dept 2017]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1032

KA 19-00513

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY RUBINO, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered January 16, 2019. The judgment convicted defendant upon his plea of guilty of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). By failing to move to withdraw the plea or vacate the judgment of conviction, defendant failed to preserve for our review his contention that he did not knowingly, voluntarily, and intelligently enter the plea (*see People v Brinson*, 130 AD3d 1493, 1493 [4th Dept 2015], *lv denied* 26 NY3d 965 [2015]). Furthermore, this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (*see* 71 NY2d 662, 666 [1988]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1033

KA 19-01046

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN M. GRABOWSKI, ALSO KNOWN AS JOHN MICHAEL GRABOWSKI, ALSO KNOWN AS JOHN GRABOWSKI, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered April 26, 2019. The judgment convicted defendant, upon a plea of guilty, of rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his *Alford* plea of guilty, of rape in the first degree (Penal Law § 130.35 [4]). We agree with defendant that his "waiver of the right to appeal was invalid, because [it] encompassed post-conviction motions" (*People v Suarez-Montoya*, 183 AD3d 765, 765 [2d Dept 2020]; *see People v Byrd*, 181 AD3d 1183, 1184 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020]). The sentence, however, is not unduly harsh or severe. Defendant's contention that County Court improperly penalized him at sentencing for taking an *Alford* plea is unpreserved for appellate review (*see generally People v Hurley*, 75 NY2d 887, 888 [1990]). Finally, the certificate of conviction incorrectly states that defendant pleaded guilty on April 25, 2019, and it must therefore be amended to reflect the correct date of March 25, 2019.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1035

KA 20-00249

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRAVIS CARTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (James H. Cecile, A.J.), rendered January 7, 2020. The judgment convicted defendant upon a plea of guilty of grand larceny in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of grand larceny in the third degree (Penal Law § 155.35 [1]), defendant contends that the sentence imposed is unduly harsh and severe and that the waiver of the right to appeal does not foreclose his challenge to the severity of the sentence. We agree with defendant that he did not validly waive his right to appeal "because County Court's oral colloquy utterly mischaracterized the nature of the right to appeal . . . , inasmuch as the court's advisement as to the rights relinquished [and retained by defendant] was incorrect and irredeemable under the circumstances" (*People v Crogan*, 181 AD3d 1212, 1212 [4th Dept 2020], *lv denied* 35 NY3d 1026 [2020] [internal quotation marks omitted]; *see People v Thomas*, 34 NY3d 545, 562, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Wiggins*, 196 AD3d 1067, 1067-1068 [4th Dept 2021]). We nevertheless perceive no basis in the record for the exercise of our authority to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1037

KA 19-01650

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DON LEWIS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered September 10, 2018. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that Supreme Court erred in denying his challenge for cause to a prospective juror whose statements during voir dire cast doubt on the prospective juror's ability to be impartial. We agree.

It is well established that " '[p]rospective jurors who make statements that cast serious doubt upon their ability to render an impartial verdict, and who have given less-than-unequivocal assurances of impartiality, must be excused' " (*People v Mitchum*, 130 AD3d 1466, 1467 [4th Dept 2015]; *see People v Warrington*, 28 NY3d 1116, 1119-1120 [2016]; *People v Clark*, 171 AD3d 1530, 1530 [4th Dept 2019]). Here, the statement of a prospective juror during voir dire with respect to the credibility of the testimony of police officers or bias in favor of the police cast serious doubt on his ability to render an impartial verdict, and that prospective juror failed to provide " 'unequivocal assurance that [he could] set aside any bias and render an impartial verdict based on the evidence' " (*Mitchum*, 130 AD3d at 1467; *see People v Nicholas*, 286 AD2d 861, 861-862 [4th Dept 2001], *affd* 98 NY2d 749 [2002]; *People v Lewis*, 71 AD3d 1582, 1583 [4th Dept 2010]).

In light of our determination, we do not address defendant's

remaining contentions.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1040

CAF 20-00193

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

IN THE MATTER OF MARCUS WRIGHT, PETITIONER-RESPONDENT,

V ORDER

CHRISTINE HEARD, RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

DEBORAH J. SCINTA, ORCHARD PARK, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (REBECCA L. CONSIDINE OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered December 30, 2019 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.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1041

CAF 21-00511

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

IN THE MATTER OF DANIEL P. YOUNT, II,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SARAH A. YOUNT, RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Jefferson County (Donald VanStry, R.), entered September 15, 2020 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner visitation with 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, respondent mother appeals from an order that modified a prior custody and visitation order by, inter alia, granting petitioner father visitation with the subject child during a specified period each summer. Contrary to the mother's contention, Family Court did not abuse its discretion in awarding the father extended visitation during the child's summer school break. Although the result of the order is that the child will spend "a good part of [her] summer vacation with [her] father" (*Matter of Neeley v Ferris*, 63 AD3d 1258, 1260 [3d Dept 2009]), the father had relocated out of state, which had significantly reduced his visitation during the school year, and the order directs that the father return the child sufficiently before the school year begins to permit the child and the mother to adjust their schedules (*see generally Matter of Alvarado v Cordova*, 158 AD3d 794, 795 [2d Dept 2018]). Consequently, there is a sound and substantial basis in the record for the determination "that expanded [summer] visitation with the father would serve the [child's] best interests" (*Matter of Nicholas v Nicholas*, 107 AD3d 899, 900 [2d Dept 2013]; *see also Matter of Winston v Gates*, 64 AD3d 815, 818 n 2 [3d Dept 2009]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1042

OP 21-00853

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

IN THE MATTER OF BRETT B. TRUETT, JOSEPH CERINI, AND 418 LAFAYETTE ST. CORP., PETITIONERS,

V MEMORANDUM AND ORDER

ONEIDA COUNTY, RESPONDENT.

MCPHILLIPS, FITZGERALD & CULLUM, LLP, GLENS FALLS (DENNIS J. PHILLIPS OF COUNSEL), FOR PETITIONERS.

WHITEMAN OSTERMAN & HANNA, LLP, ALBANY (CHRISTOPHER M. MCDONALD OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul a determination of respondent. The determination resolved to condemn certain real properties.

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

Memorandum: Petitioners commenced this original proceeding pursuant to EDPL 207 seeking to annul the determination of respondent to condemn certain real properties by eminent domain for the construction of a public parking facility in the City of Utica, Oneida County. Pursuant to EDPL 207 (C), this Court "shall either confirm or reject the condemnor's determination and findings." Our scope of review is limited to "whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with [the State Environmental Quality Review Act (SEQRA)] and EDPL article 2; and (4) the acquisition will serve a public use" (*Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 546 [2006]; *see* EDPL 207 [C]; *Matter of Butler v Onondaga County Legislature*, 39 AD3d 1271, 1271 [4th Dept 2007]).

We reject petitioners' contention that respondent failed to comply with the requirements of SEQRA or the procedural requirements of the EDPL by relying on the findings set forth by the designated lead agency for the purposes of SEQRA (*see Matter of Turkewitz v Planning Bd. of City of New Rochelle*, 24 AD3d 790, 791 [2d Dept 2005], *lv denied* 6 NY3d 713 [2006]). Contrary to petitioners' further contention, respondent properly determined that the condemnation of the properties will serve the public use of mitigating parking and traffic congestion, notwithstanding the fact that the need for the

parking facility is, at least in part, due to a nearby private construction project, i.e., the construction of a hospital (*see generally* General Municipal Law § 72-j [1]; *Matter of Waldo's, Inc. v Village of Johnson City*, 74 NY2d 718, 720-721 [1989]).

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1045

CA 21-00431

PRESENT: SMITH, J.P., NEMOYER, CURRAN, AND WINSLOW, JJ.

ROBERT MALONEY AND MARILYN MALONEY,
PLAINTIFFS-RESPONDENTS,

V ORDER

DEAN DEROBERTS, M.D., JENA MURPHY, FNP-C, AND
DEROBERTS PLASTIC SURGERY, PLLC, NOW KNOWN AS
SYRACUSE PLASTIC SURGERY, PLLC,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

ADDELMAN CROSS & BALDWIN, PC, BUFFALO (JESSE B. BALDWIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROBERT E. LAHM, PLLC, SYRACUSE (ROBERT E. LAHM OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered February 9, 2021. The order denied the motion of defendants Dean DeRoberts, M.D., Jena Murphy, FNP-C, and DeRoberts Plastic Surgery, PLLC, now known as Syracuse Plastic Surgery, PLLC, to dismiss in part the amended complaint against them.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1046

CA 20-01181

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

IN THE MATTER OF LAWRENCE PEREZ,
PETITIONER-APPELLANT,

V ORDER

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

JUSTIN C. BONUS, FOREST HILLS, FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered February 19, 2020 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the Memorandum and Judgment at Supreme Court (*see also Matter of Perez v Annucci*, 187 AD3d 1640, 1640-1641 [4th Dept 2020]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1049

CA 20-01229

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

NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA, NATIONWIDE GENERAL INSURANCE COMPANY, NATIONWIDE INSURANCE COMPANY OF AMERICA, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE ASSURANCE COMPANY, NATIONWIDE PROPERTY AND CASUALTY, TITAN INDEMNITY COMPANY, VICTORIA FIRE & CASUALTY COMPANY, VICTORIA AUTOMOBILE INSURANCE COMPANY, AND ANY AND ALL OF THEIR SUBSIDIARIES, AFFILIATES AND/OR PARENT COMPANIES, PLAINTIFFS-RESPONDENTS,

V ORDER

RIDGEWOOD DIAGNOSTIC LABORATORY LLC, DEFENDANT-APPELLANT.

ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, FORMATO, FERRARA, WOLF & CARONE, LLP, WHITE PLAINS (ROBERT A. SPOLZINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOLLANDER LEGAL GROUP, P.C., MELVILLE (ALLAN S. HOLLANDER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered June 29, 2020. The order and judgment granted the motion of plaintiffs for summary judgment.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1052

KA 18-01924

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LATOYA D. RAYMOND, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered July 9, 2018. The judgment convicted defendant upon a plea of guilty of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]), defendant contends that her waiver of the right to appeal is invalid and that her sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of her challenge to the severity of her sentence (*see People v Hoffman*, 191 AD3d 1262, 1263 [4th Dept 2021], *lv denied* 36 NY3d 1097 [2021]), we conclude that the sentence is not unduly harsh or severe.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1055

KA 16-00797

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN A. ASHBY, DEFENDANT-APPELLANT.

ANTHONY F. BRIGANO, UTICA, FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered April 15, 2016. The judgment convicted defendant upon a jury verdict of insurance fraud in the third degree and attempted grand larceny in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, insurance fraud in the third degree (Penal Law § 176.20), defendant contends that the indictment is jurisdictionally defective. We reject that contention. The failure of the first count of the indictment to recite all the elements of the crime in full "did not constitute a jurisdictional defect because that count specifically referred to the applicable section of the Penal Law" (*People v Shanley*, 15 AD3d 921, 922 [4th Dept 2005], *lv denied* 4 NY3d 856 [2005]; *see People v Taylor*, 158 AD3d 1095, 1097 [4th Dept 2018], *lv denied* 32 NY3d 941 [2018], *reconsideration denied* 32 NY3d 1178 [2019], *cert denied* — US —, 140 S Ct 482 [2019]; *cf. People v Mathis*, 185 AD3d 1094, 1095 [3d Dept 2020]).

Although defendant further contends that each count of the indictment is legally insufficient because the counts do not set forth sufficient factual allegations, he failed to preserve his contention for our review (*see People v Raad*, 166 AD3d 907, 908 [2d Dept 2018], *lv denied* 33 NY3d 952 [2019]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also contends that count one of the indictment was impermissibly amended (*see generally* CPL 200.70). Contrary to defendant's contention, we conclude that he was required to preserve that contention for our review (*see People ex rel. Prince v Brophy*,

273 NY 90, 99 [1937]; *Mathis*, 185 AD3d at 1097; *People v Peals*, 143 AD3d 535, 535 [1st Dept 2016], *lv denied* 28 NY3d 1149 [2017]; *cf. People v Ercole*, 308 NY 425, 434 [1955]; *People v Placido*, 149 AD3d 1157, 1158 [3d Dept 2017]). Although past cases of this Court have not required preservation of such a contention (*see e.g. People v Vickers*, 148 AD3d 1535, 1537 [4th Dept 2017], *lv denied* 29 NY3d 1088 [2017]; *People v Powell*, 153 AD2d 54, 58 [4th Dept 1989], *lv denied* 75 NY2d 969 [1990]), they are no longer to be followed (*cf. People v Hursh*, 191 AD3d 1453, 1454 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]; *see generally People v Allen*, 24 NY3d 441, 449-450 [2014]). Here, defendant failed to preserve his contention for our review (*see Prince*, 273 NY at 99; *Mathis*, 185 AD3d at 1097), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1058

KA 18-00407

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HECTOR I. PAGAN, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered March 22, 2017. The judgment convicted defendant, upon a plea of guilty, of criminal sale of a controlled substance in the third degree (three counts).

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 three counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that his waiver of the right to appeal is unenforceable. We agree. The waiver of the right to appeal is invalid because, among other reasons, County Court's oral waiver colloquy and the written waiver together mischaracterized the waiver "as an 'absolute bar' to the taking of an appeal" (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2019]), "as well as a bar to all postconviction relief" (*People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]).

Nevertheless, defendant failed to preserve for our review his contention that his plea was "improperly" entered because he provided only "yes" and "no" responses to questions asked of him during the plea colloquy (*see People v Turner*, 175 AD3d 1783, 1784 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]). In any event, defendant's contention lacks merit (*see People v Bennett*, 165 AD3d 1624, 1625 [4th Dept 2018]).

Finally, we perceive no basis in the record for us to exercise our power to modify the negotiated sentence as a matter of discretion

in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1059

KA 19-01453

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD BROWN, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered July 15, 2019. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, County Court properly determined that his statement at the precinct was attenuated from his allegedly illegal arrest (*see United States v Cobb*, 182 F3d 933, *3 [10th Cir 1999]; *United States v Edmondson*, 791 F2d 1512, 1515-1516 [11th Cir 1986]; *People v Bradford*, 15 NY3d 329, 333-334 [2010]; *see also Rawlings v Kentucky*, 448 US 98, 110 [1980]). The court thus properly refused to suppress that statement (*see Bradford*, 15 NY3d at 333-334).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1060

KA 18-01097

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANCIS L. DISTEFANO, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered January 3, 2018. The judgment convicted defendant upon a jury verdict of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that the evidence of intent to cause physical injury is legally insufficient. Defendant failed to preserve that contention for our review because his motion for a trial order of dismissal was not " 'specifically directed' " at the alleged error (*People v Gray*, 86 NY2d 10, 19 [1995]). Nevertheless, we necessarily review the evidence adduced as to each of the elements of the crime in the context of our review of defendant's further contention that the verdict is against the weight of the evidence (*see People v Singleton*, 192 AD3d 1536, 1536-1537 [4th Dept 2021]) and, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1061

CAF 20-01477

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

IN THE MATTER OF SYLVIN N.L. AND JALIYA P.L.

DAVID H. FRECH, ESQ., ATTORNEY FOR THE CHILDREN, PETITIONER-APPELLANT;

ORDER

SYLVIN C.P., RESPONDENT-RESPONDENT.

AUDREY ROSE HERMAN, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 20, 2020 in a proceeding pursuant to Family Court Act article 10. The order dismissed the petition.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1062

CAF 20-01144

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

IN THE MATTER OF ASHLEY NAROLIS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LORNE B. LEWIS, JR., RESPONDENT-APPELLANT.

IN THE MATTER OF LORNE B. LEWIS, JR.,
PETITIONER-APPELLANT,

V

ASHLEY NAROLIS, RESPONDENT-RESPONDENT.

SCOTT T. GODKIN, WHITESBORO, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered August 17, 2020 in proceedings pursuant to Family Court Act article 6. The order, among other things, adjudged that the parties share joint custody of the subject child with the child's primary residence with petitioner-respondent Ashley Narolis.

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, respondent-petitioner father appeals from an order that, inter alia, granted petitioner-respondent mother's petition to modify a prior order of custody by granting her primary residential custody of the child. "The court's determination in a custody matter is entitled to great deference and will not be disturbed where, as here, it is based on a careful weighing of appropriate factors" (*Matter of Stevenson v Smith*, 145 AD3d 1598, 1598 [4th Dept 2016] [internal quotation marks omitted]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 172-174 [1982]). As Family Court noted in its decision, both parents love the subject child, but both parents have their challenges. Many of the factors do not favor one parent over the other, but we agree with the court's conclusion that the evidence

presented at the hearing establishes that the mother is better able to provide for the child's educational and medical needs (*see generally Matter of Schram v Nine*, 193 AD3d 1361, 1361-1362 [4th Dept 2021], *lv denied* 37 NY3d 905 [2021]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1063

CAF 21-00214

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

IN THE MATTER OF DELBERT W. HARGIS, JR.,
PETITIONER-APPELLANT,

V ORDER

VICTORIA ANN PRITTY-PITCHER,
RESPONDENT-RESPONDENT.

IN THE MATTER OF VICTORIA ANN PRITTY-PITCHER,
PETITIONER-RESPONDENT,

V

DELBERT W. HARGIS, JR., RESPONDENT-APPELLANT,
AND NICOLE E. HARGIS, RESPONDENT-RESPONDENT.

IN THE MATTER OF VICTORIA ANN PRITTY-PITCHER,
PETITIONER-RESPONDENT,

V

DELBERT W. HARGIS, JR., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

AMBER R. POULOS, WILLIAMSVILLE, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR RESPONDENT-RESPONDENT VICTORIA ANN PRITTY-PITCHER AND PETITIONER-RESPONDENT.

EILEEN PERRY, FALMOUTH, MASSACHUSETTS, FOR RESPONDENT-RESPONDENT NICOLE E. HARGIS.

KIMBERLY A. WOOD, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered December 11, 2020 in proceedings pursuant to Family Court Act article 6. The order, among other things, denied the petitions seeking modification of a prior custody order.

It is hereby ORDERED that the order so appealed from is

unanimously affirmed without costs.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1064

CAF 21-00215

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

IN THE MATTER OF DELBERT W. HARGIS, JR.,
PETITIONER-APPELLANT,

V ORDER

VICTORIA ANN PRITTY-PITCHER, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

AMBER R. POULOS, WILLIAMSVILLE, FOR PETITIONER-APPELLANT.

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

KIMBERLY A. WOOD, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered December 16, 2020 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Chendo O.*, 175 AD3d 635, 635 [4th Dept 1991]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1067

CA 21-00675

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

IN THE MATTER OF ROTH & ROTH, LLP,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, RESPONDENT-APPELLANT.

TIMOTHY R. CURTIN, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROTH & ROTH, LLP, NEW YORK CITY (ELLIOT D. SHIELDS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (James J. Piampiano, J.), entered December 29, 2020 in a proceeding pursuant to CPLR article 78. The judgment, among other things, granted the petition to compel responses to a Freedom of Information Law request.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the third through sixth and eighth through eleventh decretal paragraphs and as modified the judgment is affirmed without costs.

Memorandum: In this proceeding pursuant to CPLR article 78, respondent appeals from a judgment that, inter alia, granted in part a petition seeking to compel responses to petitioner's application pursuant to the Freedom of Information Law ([FOIL] Public Officers Law § 84 *et seq.*). In the decision upon which that judgment is based, Supreme Court granted the petition "to the extent that" it sought to compel respondent to produce copies of "all records" set forth in the FOIL request that "do not fall within any of the exemptions of Public Officers Law § 87," found that respondent "lacked a reasonable basis for denying the . . . FOIL request," granted petitioner's request for attorney's fees and costs, and otherwise denied "[a]ny additional relief" sought by the parties. The judgment, by contrast, included several paragraphs granting additional relief to petitioner. We agree with respondent that the judgment impermissibly expanded the relief granted to petitioner in the decision. Where, as here, "there is a conflict between the order [or judgment] and the decision upon which it is based, the decision controls . . . , and the order [or judgment] 'must be modified to conform to the decision' " (*Del Nero v Colvin*, 111 AD3d 1250, 1253 [4th Dept 2013]; *see Matter of Calm Lake Dev. v Town Bd. of Town of Farmington*, 213 AD2d 979, 980 [4th Dept 1995]).

We therefore modify the judgment accordingly.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1069

CA 21-00242

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND BANNISTER, JJ.

ROBSHAW & VOELKL, P.C., PLAINTIFF,

V ORDER

JENNIFER KRYSTYNA STANKIEWICZ, ALSO KNOWN AS JENNIFER STANKIEWICZ RODRIGUEZ, DEFENDANT.

JENNIFER KRYSTYNA STANKIEWICZ, ALSO KNOWN AS JENNIFER STANKIEWICZ RODRIGUEZ, THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT,

V

JEFFREY F. VOELKL, ESQ., LL.M, THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN GUYDER FELTER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

BOUVIER LAW, LLP, BUFFALO (JOHN P. LUHR OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered May 16, 2019. The order, among other things, granted in part the third-party defendant's motion to dismiss the third-party complaint.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1075

KA 19-01432

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EUGENE H. SCOTT, DEFENDANT-APPELLANT.

TODD HUNTER SLOAN, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (ERICH D. GROME OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered May 30, 2019. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree and rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [9]) and rape in the third degree (§ 130.25 [2]). As a preliminary matter, we conclude that defendant's waiver of the right to appeal is invalid because "the perfunctory inquiry made by County Court was insufficient to establish that the court engage[d] . . . defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Soutar*, 170 AD3d 1633, 1634 [4th Dept 2019], *lv denied* 34 NY3d 938 [2019] [internal quotation marks omitted]; *see generally People v Thomas*, 34 NY3d 545, 561 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Defendant contends that the court erred in imposing an enhanced sentence without holding an evidentiary hearing on his alleged violation of the conditions of the plea agreement. That contention is not preserved for our review inasmuch as defendant "failed to request such a hearing and did not move to withdraw his plea on that ground" (*People v Scott*, 101 AD3d 1773, 1773 [4th Dept 2012], *lv denied* 21 NY3d 1019 [2013]; *see* CPL 470.05 [2]; *People v Peckham*, 195 AD3d 1437, 1438 [4th Dept 2021], *lv denied* 37 NY3d 994 [2021]). In any event, we conclude that the court was not required to conduct an evidentiary hearing under the circumstances here and that the court conducted a sufficient inquiry inasmuch as "[b]oth defendant and his counsel were given ample opportunity to refute the court's assertions that defendant had violated the plea terms" (*People v Albergotti*, 17 NY3d

748, 750 [2011]; *see People v Coker*, 133 AD3d 1218, 1219 [4th Dept 2015], *lv denied* 27 NY3d 995 [2016]; *cf. People v Stanley*, 128 AD3d 1472, 1475 [4th Dept 2015]).

Defendant further contends that the court erred in imposing the enhanced sentence because he did not violate the conditions of the plea agreement. We reject that contention. " '[T]he violation of an explicit and objective . . . condition [of a sentence promise] that was accepted by the defendant can result in the imposition of an enhanced sentence' " (*Stanley*, 128 AD3d at 1474; *see People v Hicks*, 98 NY2d 185, 189 [2002]). Indeed, " 'a failure to abide by a condition of a [sentence promise] to truthfully answer questions asked by the probation department is an appropriate basis for the enhancement of the defendant's sentence' " (*Stanley*, 128 AD3d at 1474; *see Hicks*, 98 NY2d at 189). Here, given its review of the presentence investigation interview and its inquiry at sentencing, during which defendant effectively repeated the statements he made during the interview, the court properly determined with respect to both counts that, "in violation of the express conditions of the plea agreement, defendant gave the [p]robation [d]epartment an account of his criminal conduct which was inconsistent with statements made during the plea allocution and failed to accept responsibility for his actions" (*People v Coffey*, 77 AD3d 1202, 1203 [3d Dept 2010], *lv denied* 18 NY3d 882 [2012]; *see People v Bragg*, 96 AD3d 1071, 1071-1072 [2d Dept 2012]; *see generally Hicks*, 98 NY2d at 189).

Finally, the enhanced sentence is not unduly harsh or severe.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1076

KA 20-01184

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SID HARRISON, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN, NEW YORK PROSECUTORS TRAINING INSTITUTE, INC., ALBANY (DAWN CATERA LUPI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered September 10, 2020. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree and criminally using drug paraphernalia in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]), and two counts of criminally using drug paraphernalia in the second degree (§ 220.50 [1], [3]). Contrary to defendant's contention, County Court properly admitted evidence of his prior uncharged drug sale inasmuch as it was relevant to establish his intent to sell in connection with the crimes charged and its probative value outweighed its prejudicial effect (*see People v Kims*, 24 NY3d 422, 439 [2014]; *People v Credell*, 161 AD3d 1563, 1564 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018], *reconsideration denied* 32 NY3d 1110 [2018]; *People v Whitfield*, 115 AD3d 1181, 1182 [4th Dept 2014], *lv denied* 23 NY3d 1044 [2014]).

We agree with defendant, however, that the court erred in denying his challenge for cause to a prospective juror whose statements during voir dire cast doubt on his ability to be impartial. "[P]rospective jurors who make statements that cast serious doubt on their ability to render an impartial verdict, and who have given less-than-unequivocal assurances of impartiality, must be excused" (*People v Mitchum*, 130 AD3d 1466, 1467 [4th Dept 2015] [internal quotation marks omitted]; *see People v Warrington*, 28 NY3d 1116, 1119-1120 [2016]; *People v*

Clark, 171 AD3d 1530, 1530 [4th Dept 2019]). Here, the statement of the prospective juror during voir dire with respect to the credibility of the testimony of police officers or bias in favor of the police cast serious doubt on his ability to render an impartial verdict, and the prospective juror failed to provide "unequivocal assurance that [he could] set aside any bias and render an impartial verdict based on the evidence" (*Mitchum*, 130 AD3d at 1467 [internal quotation marks omitted]; *see People v Nicholas*, 286 AD2d 861, 861-862 [4th Dept 2001], *affd* 98 NY2d 749 [2002]; *People v Lewis*, 71 AD3d 1582, 1583 [4th Dept 2010]). Specifically, after the prospective juror stated that he was a former correction officer and had "a lot of friends and family members" in law enforcement, he agreed that he would "be inclined to give more credibility to an officer than [he] would a lay person," explained that, based on his experiences, he found police to be "honest people," and specifically described one of the officers who would later testify for the People as "an honest person." Although the court inquired further of the prospective juror, we conclude that the prospective juror's answers to the questions asked by the court were "insufficient to constitute . . . an unequivocal declaration" that he could set aside any bias and render an impartial verdict (*Mitchum*, 130 AD3d at 1467 [internal quotation marks omitted]). Because defendant exercised a peremptory challenge to excuse that prospective juror and thereafter exhausted his peremptory challenges, we must reverse the judgment and grant defendant a new trial (*see* CPL 270.20 [2]; *People v Cobb*, 185 AD3d 1432, 1433 [4th Dept 2020]). In light of our determination, we do not address defendant's remaining contentions.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1078

KA 20-00591

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK K. MCDERMOTT, DEFENDANT-APPELLANT.

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

MARK K. MCDERMOTT, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered February 21, 2020. The judgment convicted defendant upon a jury verdict of burglary in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fourth degree and criminal mischief in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]), grand larceny in the fourth degree (§ 155.30 [4]), criminal possession of stolen property in the fourth degree (§ 165.45 [2]), and criminal mischief in the fourth degree (§ 145.00 [1]). We affirm.

Defendant's contention that the evidence is legally insufficient to support the conviction is unpreserved for our review because defendant's general motion for a trial order of dismissal was not " 'specifically directed' at" any alleged shortcoming in the evidence now raised on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Ford*, 148 AD3d 1656, 1657 [4th Dept 2017], *lv denied* 29 NY3d 1079 [2017]). Nevertheless, " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence

(*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). An acquittal would have been unreasonable on this record given the largely uncontested evidence establishing that, within minutes of the burglary, defendant was found near the crime scene by the police, walking away from the crime scene towards his own residence, and that he appeared to have dropped the distinctive aqua-colored purse that the victim testified had just been stolen by an intruder who forced his way into her home. Further, defendant matched the general description of the intruder reported by the victim, and the tread of his boot was similar to the boot print left on the victim's door. Even assuming, arguendo, that an acquittal would not have been unreasonable, we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*id.*).

We conclude that the sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions, including those raised in his pro se supplemental brief, and we conclude that none warrants modification or reversal of the judgment.

Finally, we note that the certificate of disposition incorrectly reflects that defendant was sentenced to 25 years to life imprisonment on count one of the indictment, and it must therefore be amended to reflect that he was sentenced to 22 years to life for that count (*see People v Coffie*, 192 AD3d 1641, 1643 [4th Dept 2021], *lv denied* 37 NY3d 963 [2021]; *People v Cruz-Rivera*, 174 AD3d 1512, 1514 [4th Dept 2019], *lv denied* 34 NY3d 1127 [2020]; *People v Correa*, 145 AD3d 1640, 1641 [4th Dept 2016]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1079

KA 20-00144

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRAMMELL BROWN, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered January 2, 2020. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting defendant upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that he was coerced into pleading guilty by County Court. That contention is unpreserved for our review inasmuch as defendant failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Rockwell*, 137 AD3d 1586, 1586 [4th Dept 2016]*; see generally People v Ali*, 96 NY2d 840, 841 [2001]). 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]).

We reject defendant's contention that the court failed to conduct a minimal inquiry into his requests for new counsel. "[A] defendant may be entitled to new assigned counsel upon showing 'good cause for a substitution,' such as a conflict of interest or other irreconcilable conflict with counsel" (*People v Sides*, 75 NY2d 822, 824 [1990]; *see People v Medina*, 44 NY2d 199, 207 [1978]). "Where a defendant makes a 'seemingly serious request[]' for new assigned counsel, the court is obligated to 'make some minimal inquiry' " (*People v Graham*, 153 AD3d 1634, 1635 [4th Dept 2017], *lv denied* 30 NY3d 1060 [2017], quoting *Sides*, 75 NY2d at 824-825). Here, the court "afforded defendant the opportunity to express his objections concerning [defense counsel], and . . . thereafter reasonably concluded that defendant's . . . objections had no merit or substance" (*People v Singletary*, 63 AD3d

1654, 1654 [4th Dept 2009], *lv denied* 13 NY3d 839 [2009] [internal quotation marks omitted]; *see Graham*, 153 AD3d at 1635).

We further conclude that defendant's sentence is not unduly harsh or severe.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1084

KA 17-01091

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL RODRIGUEZ-RICARDO, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KAYLAN PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered March 21, 2017. The judgment convicted defendant upon a plea of guilty of criminal contempt in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]), defendant contends that Supreme Court erred in issuing a no-contact order of protection on behalf of the victim, who indicated at sentencing that she wanted only a no-offensive-contact order of protection. We reject that contention. The sentencing court had authority "to issue an order of protection, and set the terms thereof, even in the absence of the victim's consent" (*People v Richardson*, 134 AD3d 1566, 1567 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016] [internal quotation marks omitted]; *see People v Lilley*, 81 AD3d 1448, 1448 [4th Dept 2011], *lv denied* 17 NY3d 860 [2011]). Under the circumstances of this case, including the nature of the underlying crime, the court did not err in issuing the no-contact order of protection (*see People v Walker*, 151 AD3d 1730, 1731 [4th Dept 2017], *lv denied* 29 NY3d 1135 [2017], *reconsideration denied* 30 NY3d 984 [2017]).

Defendant further contends that the court erred in setting the expiration date of the order of protection by failing to take into account the time he served in jail prior to sentencing. As defendant correctly concedes, his contention is unpreserved for our review inasmuch as he did not object to the duration of the order of protection at sentencing (*see People v Hoyt*, 107 AD3d 1426, 1426 [4th Dept 2013], *lv denied* 21 NY3d 1042 [2013]), and we decline to exercise

our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1086

CAF 20-00951

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF BRIANNA E. AND BROOKLYNN H.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JEREMIAH H., RESPONDENT-APPELLANT.

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

KRISTOPHER STEVENS, WATERTOWN, FOR PETITIONER-RESPONDENT.

KIMBERLY A. WOOD, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered June 29, 2020 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent abused one of the subject children and derivatively neglected the other 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 10, respondent appeals from an order of fact-finding and disposition that, inter alia, determined that he abused his stepdaughter.

Contrary to respondent's contention, Family Court's determination is supported by the requisite preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]; *Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011]). "A child's out-of-court statements may form the basis for a finding of [abuse] as long as they are sufficiently corroborated by [any] other evidence tending to support their reliability," and courts have "considerable discretion in determining whether a child's out-of-court statements describing incidents of abuse have been reliably corroborated and whether the record as a whole supports a finding of abuse" (*Nicholas J.R.*, 83 AD3d at 1490 [internal quotation marks omitted]; *see Matter of Crystal S. [Patrick P.]*, 193 AD3d 1353, 1354 [4th Dept 2021]). Here, the out-of-court statements of the child were sufficiently corroborated by, inter alia, the testimony of petitioner's validation expert, a psychologist who evaluated the child and opined that the child's consistent statements made to the psychologist, an investigator, and a therapist were credible and

consistent with those of a child who has been abused (*see Matter of Lydia C. [Albert C.]*, 89 AD3d 1434, 1435 [4th Dept 2011]; *Matter of Elizabeth G.*, 255 AD2d 1010, 1011-1012 [4th Dept 1998], *lv dismissed* 93 NY2d 848 [1999], *lv denied* 93 NY2d 814 [1999]). Furthermore, although "repetition of an accusation by a child does not corroborate the child's prior account of [abuse] . . . , the consistency of the child['s] out-of-court statements describing respondent's sexual conduct enhances the reliability of those out-of-court statements" (*Matter of Yorimar K.-M.*, 309 AD2d 1148, 1149 [4th Dept 2003] [internal quotation marks omitted]; *see Nicholas J.R.*, 83 AD3d at 1490-1491).

We likewise reject respondent's contention that the court erred in determining that he derivatively neglected his daughter. Contrary to respondent's contention, "[t]he record supports the determination of the court that [his] sexual abuse of [his stepdaughter] demonstrated fundamental flaws in [his] understanding of the duties of parenthood and warranted a finding of derivative neglect with respect to [his daughter]" (*Matter of Lylly M.G. [Theodore T.]*, 121 AD3d 1586, 1588 [4th Dept 2014], *lv denied* 24 NY3d 913 [2015]; *see Matter of Skyler D. [Joseph D.]*, 185 AD3d 1515, 1517 [4th Dept 2020]; *Matter of Michelle M.*, 52 AD3d 1284, 1284 [4th Dept 2008]).

By failing to object to certain validation testimony of petitioner's expert at trial, respondent failed to preserve for our review his contention that the court erred in allowing the expert to testify as to the credibility of the child's disclosure (*see generally Yorimar K.-M.*, 309 AD2d at 1148).

We have considered respondent's remaining contention regarding the sufficiency of the court's decision and conclude that it lacks merit.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1091

CA 20-00267

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

NORMAN K., INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DANIELLE K., DECEASED, AND AS PARENT AND NATURAL GUARDIAN OF DEVYN K., BRIANE M., AND TYLER A.M., PLAINTIFF-APPELLANT,

V ORDER

ALAN POSNER, M.D., KALEIDA HEALTH, INDIVIDUALLY AND DOING BUSINESS AS BUFFALO GENERAL HOSPITAL, AND AS BARIATRIC PROGRAM, AND AS MINIMALLY INVASIVE SURGERY, AND AS WEIGHT LOSS PROGRAM, UNIVERSITY OF BUFFALO SURGEONS, INC., DEFENDANTS-RESPONDENTS,
MARY BROWN, ET AL., DEFENDANTS.

VINAL & VINAL, P.C., BUFFALO (JEANNE M. VINAL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (AMANDA C. ROSSI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ALAN POSNER, M.D. AND UNIVERSITY OF BUFFALO SURGEONS, INC.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (KATE LORRAINE HARTMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT KALEIDA HEALTH, INDIVIDUALLY AND DOING BUSINESS AS BUFFALO GENERAL HOSPITAL, AND AS BARIATRIC PROGRAM, AND AS MINIMALLY INVASIVE SURGERY, AND AS WEIGHT LOSS PROGRAM.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), dated January 27, 2020. The order granted the motion of defendant Kaleida Health, individually and doing business as Buffalo General Hospital, and as Bariatric Program, and as Minimally Invasive Surgery, and as Weight Loss Program for leave to reargue its opposition to plaintiff's motion to compel disclosure and, upon reargument, denied plaintiff's motion to compel disclosure of a particular document.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1095

CA 20-01510

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

NOAH R. PFEIFFER, PLAINTIFF,

V ORDER

JOHN P. KARLQUIST, ET AL., DEFENDANTS.

JOHN P. KARLQUIST, ANNETT HOLDINGS, INC., INDIVIDUALLY AND DOING BUSINESS AS TMC TRANSPORTATION, AND NATIONAL TRUCK FUNDING, LLC, THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

LAURIE MARSFELDER, THIRD-PARTY DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

SCHNITTER CICCARELLI MILLS, PLLC, WILLIAMSVILLE (PATRICIA S. CICCARELLI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (PETER D. CANTONE OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Ronald D. Ploetz, A.J.), entered November 5, 2020. The order denied the motion of third-party defendant for summary judgment dismissing the third-party complaint.

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

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1096

CA 20-01511

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

KAYLEE MARSFELDER, PLAINTIFF,

V ORDER

JOHN P. KARLQUIST, ET AL., DEFENDANTS.

JOHN P. KARLQUIST, ANNETT HOLDINGS, INC., INDIVIDUALLY AND DOING BUSINESS AS TMC TRANSPORTATION, AND NATIONAL TRUCK FUNDING, LLC, THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

LAURIE MARSFELDER, THIRD-PARTY DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

SCHNITTER CICCARELLI MILLS, PLLC, WILLIAMSVILLE (PATRICIA S. CICCARELLI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (PETER D. CANTONE OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Ronald D. Ploetz, A.J.), entered November 5, 2020. The order denied the motion of third-party defendant for summary judgment dismissing the third-party complaint.

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

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1107

CA 20-01239

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, AND WINSLOW, JJ.

MOHAWK VALLEY HEALTH SYSTEM, PLAINTIFF-APPELLANT,

V ORDER

MARK SMITH, CHERYL MATTERN, SAMUEL WESTMORELAND, MOHAMMED KAASHMIRI, FREDERIC JOYCE, JONATHAN ELI-PHILLIPS, REGINA FARRELL, TINA ANN MAXIAN, KENNETH KIM, JORGE FERREIRO, LEROY COOLEY, ANKUR CHAWLA, MARIO CARRILLO, MARGARET ALBANESE, NATALIE JONES, EMIR HODZIC, ROBERT WASICZKO, MARK WILLIAMS, JOHN SPERLING, KENNETH ORTEGA, COMPUTERSHARE TRUST COMPANY, N.A., DEFENDANTS-RESPONDENTS.

HARRIS BEACH PLLC, PITTSFORD (KYLE D. GOOCH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COHEN COMPAGNI BECKMAN APPLER & KNOLL, PLLC, SYRACUSE (LAURA L. SPRING OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MARK SMITH, SAMUEL WESTMORELAND, FREDERIC JOYCE, JONATHAN ELI-PHILLIPS, REGINA FARRELL, TINA ANN MAXIAN, KENNETH KIM, JORGE FERREIRO, LEROY COOLEY, ANKUR CHAWLA, MARIO CARRILLO, MARGARET ALBANESE, ROBERT WASICZKO, MARK WILLIAMS, JOHN SPERLING, AND KENNETH ORTEGA.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered September 3, 2020. The judgment, among other things, denied plaintiff’s motion for summary judgment.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1112

CA 20-01241

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, AND WINSLOW, JJ.

ST. ELIZABETH MEDICAL CENTER,
PLAINTIFF-APPELLANT,

V ORDER

CLIFFORD B. SOULTS, M.D., DEFENDANT-RESPONDENT,
AND COMPUTERSHARE TRUST COMPANY, N.A., DEFENDANT.
(APPEAL NO. 1.)

HARRIS BEACH PLLC, PITTSFORD (KYLE D. GOOCH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COHEN, COMPAGNI, BECKMAN, APPLER & KNOLL, PLLC, SYRACUSE (LAURA L. SPRING OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered September 3, 2020. The judgment, among other things, denied plaintiff's motion for summary judgment and granted the cross motion of defendant Clifford B. Soults, M.D. for summary judgment.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1113

CA 20-01245

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, AND WINSLOW, JJ.

ST. ELIZABETH MEDICAL CENTER,
PLAINTIFF-APPELLANT,

V ORDER

CLIFFORD B. SOULTS, M.D., DEFENDANT-RESPONDENT,
AND COMPUTERSHARE TRUST COMPANY, N.A., DEFENDANT.
(APPEAL NO. 2.)

HARRIS BEACH PLLC, PITTSFORD (KYLE D. GOOCH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COHEN, COMPAGNI, BECKMAN, APPLER & KNOLL, PLLC, SYRACUSE (LAURA L. SPRING OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a corrected judgment (denominated corrected order) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered September 17, 2020. The corrected judgment, among other things, denied plaintiff's motion for summary judgment and granted the cross motion of defendant Clifford B. Soults, M.D. for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1115

CA 21-00073

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF ELIZABETH MCCULLOCH,
PETITIONER-RESPONDENT,

V ORDER

CORNERSTONE COMMUNITY FEDERAL CREDIT UNION
RESPONDENT-APPELLANT,
ET AL., RESPONDENT.

ILECKI & OSTROWSKI, LLP, BUFFALO (WILLIAM ILECKI OF COUNSEL), FOR RESPONDENT-APPELLANT.

FIDELITY NATIONAL LAW GROUP, NEW YORK CITY (VANESSA R. ELLIOTT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered January 6, 2021. The judgment, inter alia, declared that a judgment obtained by respondent Cornerstone Community Federal Credit Union has no lienhold effect on the subject real property.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1122

KA 17-01109

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DWAYNE R. GREER, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered March 1, 2017. The judgment convicted defendant, upon a plea of guilty, of attempted assault in the first degree.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1123

KA 20-01182

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ALBERT APPLETON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID BUREAU, SYRACUSE (TYLER BUGDEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered September 3, 2020. The judgment convicted defendant, upon a plea of guilty, of attempted robbery in the first degree.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1128

KA 16-00330

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSIAH J. CHANDLER, DEFENDANT-APPELLANT.

KATHLEEN A. KUGLER, CONFLICT DEFENDER, LOCKPORT (JESSICA J. BURGASSER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered September 14, 2015. The judgment convicted defendant upon a plea of guilty of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that County Court erred in accepting his plea. Defendant failed to preserve his contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Sierra-Garcia*, 195 AD3d 1574, 1574 [4th Dept 2021]), and this case does not fall within the narrow exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666 [1988]). To the extent that defendant's further contention that he was denied effective assistance of counsel survives his plea (*see People v Molski*, 179 AD3d 1540, 1540 [4th Dept 2020], *lv denied* 35 NY3d 972 [2020]; *see generally People v Rivera*, 195 AD3d 1591, 1591 [4th Dept 2021], *lv denied* 37 NY3d 995 [2021]), we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1135

CA 20-00588

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

JOSEPH A. DOWELL AND LINDA DOWELL,
PLAINTIFFS-APPELLANTS,

V ORDER

EST TRISH, LLC, DOING BUSINESS AS STANLEY STEEMER OF SYRACUSE, STANLEY STEEMER INTERNATIONAL, INC., DICKINSON ENVIRONMENTAL CONSULTING, LLC, ST. JOSEPH'S HOSPITAL HEALTH CENTER, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

MCMAHON KUBLICK, P.C., SYRACUSE (W. ROBERT TAYLOR OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (THOMAS J. DEBERNARDIS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS EST TRISH, LLC, DOING BUSINESS AS STANLEY STEEMER OF SYRACUSE, AND STANLEY STEEMER INTERNATIONAL, INC.

PILLINGER, MILLER & TARALLO, SYRACUSE (MARIA T. MASTRIANO OF COUNSEL), FOR DEFENDANT-RESPONDENT DICKINSON ENVIRONMENTAL CONSULTING, LLC.

GALE GALE & HUNT, LLC, FAYETTEVILLE (ANDREW R. BORELLI OF COUNSEL), FOR DEFENDANT-RESPONDENT ST. JOSEPH'S HOSPITAL HEALTH CENTER.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered September 6, 2019. The order, insofar as appealed from, granted the motions of defendants EST Trish, LLC, doing business as Stanley Steemer of Syracuse, Stanley Steemer International, Inc., Dickinson Environmental Consulting, LLC, and St. Joseph's Hospital Health Center for summary judgment dismissing plaintiffs' complaint as against them.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1140

CA 21-00340

PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND BANNISTER, JJ.

IN THE MATTER OF ARBITRATION BETWEEN
CITY OF LOCKPORT, PETITIONER-APPELLANT,

AND ORDER

LOCKPORT DEPARTMENT HEAD ASSOCIATION,
AFFILIATED WITH OFFICE AND PROFESSIONALS
INTERNATIONAL UNION, LOCAL 153,
RESPONDENT-RESPONDENT.

JOHN J. DELMONTE, NIAGARA FALLS, FOR PETITIONER-APPELLANT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (IAN HAYES OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered October 7, 2020. The order vacated a temporary restraining order, denied the petition and amended petition for a stay of arbitration and granted the cross motion of respondent to compel arbitration.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1152

CAF 21-00082

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

IN THE MATTER OF NICHOLAS B.-C. AND DEVAN B.-C.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

ORDER

ELIZABETH C., RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (SUSAN CHRISTINE PLANO DUPRA OF COUNSEL), FOR PETITIONER-RESPONDENT.

MAUREEN N. POLEN, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered December 18, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order denied respondent's motion to vacate a default judgment.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1154

CA 20-01293

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

KYSEAN STROUD, PLAINTIFF-APPELLANT,

V ORDER

ALIX HOMES, LLC, ET AL., DEFENDANTS,
AND JANICE ALIX, DEFENDANT-RESPONDENT.

DOLCE FIRM, BUFFALO (ANNE M. WHEELER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (KEVIN J. KRUPPA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered September 29, 2020. The order, among other things, granted the cross motion of defendant Janice Alix for summary judgment.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1155

CA 21-00710

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

DAVID IMPELLIZZERI, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 128673.)

COTE & VAN DYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Richard E. Sise, J.), entered October 25, 2019. The order granted the motion of defendant to dismiss the claim and denied the cross motion of claimant for summary judgment.

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: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1156

CA 20-01665

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

SYRACUSE SECURITIES, INC., PLAINTIFF-APPELLANT,

V ORDER

HOMESTEAD FUNDING CORP., DEFENDANT-RESPONDENT.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (PETER C. PAPAYANAKOS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF RICHARD C. MILLER, PLLC, ALBANY (RICHARD C. MILLER, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered December 9, 2020. The order denied plaintiff's motion for summary judgment.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1157

CA 21-00412

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

JEFFREY E. ALLINGTON AND STACIE MILLER,
PLAINTIFFS,

V ORDER

TEMPLETON FOUNDATION, CARE OF THE MARY IMOGENE BASSETT HOSPITAL, DOING BUSINESS AS BASSETT MEDICAL CENTER, AND PULVER ROOFING CO., INC.,
DEFENDANTS.

TEMPLETON FOUNDATION, CARE OF THE MARY IMOGENE BASSETT HOSPITAL, DOING BUSINESS AS BASSETT MEDICAL CENTER, THIRD-PARTY PLAINTIFF,

V

PULVER ROOFING CO., INC., THIRD-PARTY DEFENDANT.

TEMPLETON FOUNDATION, CARE OF THE MARY IMOGENE BASSETT HOSPITAL, DOING BUSINESS AS BASSETT MEDICAL CENTER, THIRD-PARTY PLAINTIFF-APPELLANT,

V

WELLIVER MCGUIRE, INC., DOING BUSINESS AS WELLIVER, THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

BARCLAY DAMON LLP, ROCHESTER (JOSEPH A. WILSON OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT.

VAHEY LAW OFFICES, ROCHESTER (JARED K. COOK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Patrick F. McAllister, A.J.), entered March 1, 2021. The order, among other things, denied the motion of third-party plaintiff for summary judgment as against third-party defendant Welliver McGuire, Inc., doing business as Welliver.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1158

CA 21-00582

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

JEFFREY E. ALLINGTON AND STACIE MILLER,
PLAINTIFFS,

V ORDER

TEMPLETON FOUNDATION, CARE OF THE MARY IMOGENE BASSETT HOSPITAL, DOING BUSINESS AS BASSETT MEDICAL CENTER, AND PULVER ROOFING CO., INC.,
DEFENDANTS.

TEMPLETON FOUNDATION, CARE OF THE MARY IMOGENE BASSETT HOSPITAL, DOING BUSINESS AS BASSETT MEDICAL CENTER, THIRD-PARTY PLAINTIFF,

V

PULVER ROOFING CO., INC., THIRD-PARTY DEFENDANT.

TEMPLETON FOUNDATION, CARE OF THE MARY IMOGENE BASSETT HOSPITAL, DOING BUSINESS AS BASSETT MEDICAL CENTER, THIRD-PARTY PLAINTIFF-APPELLANT,

V

WELLIVER MCGUIRE, INC., DOING BUSINESS AS WELLIVER, THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

BARCLAY DAMON LLP, ROCHESTER (JOSEPH A. WILSON OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT.

VAHEY LAW OFFICES, ROCHESTER (JARED K. COOK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Kevin Nasca, J.), entered September 11, 2020. The order denied the motion of third-party plaintiff for summary judgment as against third-party defendant Welliver McGuire, Inc., doing business as Welliver.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see GEICO Indem. v Roth*, 56 AD3d 1244, 1244 [4th Dept 2008]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1159

CA 21-00756

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

LISA ELIBOL, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.

THE BARNES FIRM, P.C., ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Debra A. Martin, J.), entered October 2, 2020. The order denied the motion of claimant for leave to file a late notice of claim.

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: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1160

CA 21-00086

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

MARCIA L. GOW, PLAINTIFF-RESPONDENT,

V ORDER

DENNIS D. GALENSKI, DEFENDANT-APPELLANT.

DENNIS D. GALENSKI, THIRD-PARTY PLAINTIFF-APPELLANT,

V

JOHN C. BERRY AND DANIEL P. BERRY, THIRD-PARTY DEFENDANTS-RESPONDENTS.

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

THE DIETRICH LAW FIRM, P.C., BUFFALO (BRIAN R. WOOD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

LAW OFFICES OF JENNIFER S. ADAMS, YONKERS (SABRINA A. VICTOR OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered December 7, 2020. The order granted in part the motion of third-party defendants for summary judgment and denied the cross motion of defendant-third-party plaintiff for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 21, 2021,

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1161

CA 21-00006

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

JAMALAH S. DUBAISHI AND HUSSEIN DUBAISHI,
INDIVIDUALLY AND AS HUSBAND AND WIFE,
PLAINTIFFS-RESPONDENTS,

V ORDER

BRINNA K. TAYLOR AND MAREN E. TAYLOR,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF JOHN WALLACE, BUFFALO (BETSY F. VISCO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered December 9, 2020. The order, insofar as appealed from, denied that part of the motion of defendants seeking summary judgment dismissing the complaint.

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1162

CA 21-00069

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

IN THE MATTER OF EDWARD MITCHELL,
PETITIONER-APPELLANT,

V ORDER

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

KAREN MURTAGH, EXECUTIVE DIRECTOR, PRISONERS' LEGAL SERVICES OF NEW YORK, BUFFALO (ANDREW STECKER OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered December 8, 2020 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 24, 2021,

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

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1172

KA 18-02197

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CAMELL OLIVER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KATHY E. MANLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered July 31, 2018. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from two separate judgments convicting him, upon his guilty pleas, of two separate and distinct counts of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). Defendant contends in both appeals, and the People correctly concede, that the waiver of the right to appeal, which covered both pleas, is invalid (*see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Although defendant contends that his sentences were improperly enhanced, defendant failed to preserve his contention for our review "inasmuch as he did not object to [County Court's] imposition of the enhanced sentence[s] and did not move to withdraw his plea[s] or vacate the judgment[s] of conviction" (*People v Moore*, 182 AD3d 1032, 1032 [4th Dept 2020]; *see People v Dumbleton*, 150 AD3d 1688, 1688 [4th Dept 2017], *lv denied* 29 NY3d 1019 [2017]). Considering that defendant agreed to the enhanced sentences in return for dismissal of a new felony charge that had been lodged against him, we decline to exercise our power to review his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Contrary to defendant's remaining contention, the sentences are not unduly harsh or severe.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court

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

1173

KA 21-00045

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CAMELL OLIVER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KATHY E. MANLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered July 31, 2018. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Same memorandum as in *People v Oliver* ([appeal No. 1] — AD3d — [Dec. 23, 2021] [4th Dept 2021]).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court