SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS IN ATTORNEY DISCIPLINARY MATTERS

MARCH 14, 2025

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED MARCH 14, 2025

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

597

KA 23-00541

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARRETT D. COLE, DEFENDANT-APPELLANT.

ROSENBERG LAW FIRM, BROOKLYN (JONATHAN ROSENBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (MORGAN R. MAYER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered June 29, 2022. The judgment convicted defendant upon his plea of guilty of attempted robbery in the second degree, attempted criminal use of a firearm in the second degree and grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [1]), attempted criminal use of a firearm in the second degree (§§ 110.00, 265.08 [2]), and grand larceny in the fourth degree (§ 155.30 [1]). We affirm. Defendant contends that his waiver of the right to appeal is invalid and that his 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 his challenge to the severity of the sentence (*see People v Wilson*, 201 AD3d 1354, 1354 [4th Dept 2022]), we conclude that the sentence is not unduly harsh or severe.

Defendant's further contention that his admissions during the allocution were insufficient to establish his guilt for the crimes to which he pleaded guilty is a challenge to the factual sufficiency of the plea allocution and is not preserved for our review inasmuch as defendant did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Parsons*, 199 AD3d 1486, 1486 [4th Dept

2021], *lv denied* 37 NY3d 1163 [2022]; *People v Lathrop*, 136 AD3d 1314, 1314-1315 [4th Dept 2016], *lv denied* 27 NY3d 1134 [2016]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

603

CAF 23-00589

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, GREENWOOD, AND HANNAH, JJ.

IN THE MATTER OF SHAKEMA R.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MESHA B., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered November 29, 2022, 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 modified on the law by striking the third ordering paragraph requiring respondent to submit proof that he is engaged in and compliant with mental health counseling with a psychiatrist as a prerequisite to filing a modification petition and substituting therefor a provision requiring respondent to comply with that condition as a component of supervised visitation, and as modified the order is affirmed without costs.

Memorandum: In appeal No. 1, respondent father appeals from an order entered in a proceeding pursuant to Family Court Act article 6 that, inter alia, granted sole custody of the subject child to petitioner in appeal No. 1, the subject child's mother, Shakema R., and ordered that the father have supervised visitation with the child. In appeal No. 2, the father appeals from an order issued in a proceeding pursuant to Family Court Act article 6 that, inter alia, ordered that petitioner in appeal No. 2, the subject child's mother, Charde P., continue to have sole custody of subject child, and ordered that father have supervised visitation with the child. In appeal Nos. 3 and 4, the father appeals from two orders of fact-finding and disposition entered in proceedings pursuant to Family Court Act article 10, each of which adjudged that the father neglected the respective subject child. The four orders were entered after Family Court jointly held the hearings on the article 6 custody and visitation petitions and the article 10 neglect petitions.

We reject the father's contention in all four appeals that the court abused its discretion in denying his request to adjourn the combined hearing to allow him more time to secure witness testimony. " '[T]he determination whether to grant a request for an adjournment for any purpose is a matter resting within the sound discretion of the trial court' " (*Matter of Jaylin B. [Mariah S.]*, 221 AD3d 1418, 1420 [4th Dept 2023], *lv denied* 41 NY3d 905 [2024]). Here, the court did not abuse its discretion in denying the father's request for an adjournment inasmuch as the father's counsel stated that she contacted all of the people on the father's proposed witness list and none of those proposed witnesses had information about the case (*see Matter of Steven B.*, 6 NY3d 888, 889 [2006]).

Next, in appeal Nos. 3 and 4 the father contends that the findings of neglect are not supported by a preponderance of the evidence. We reject that contention. A neglected child is defined, in relevant part, as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the child's] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof . . . or by any other acts of a similarly serious nature requiring the aid of the court" (Family Ct Act § 1012 [f] [i] [B]). "The statute thus imposes two requirements for a finding of neglect, which must be established by a preponderance of the evidence . . . First, there must be proof of actual (or imminent danger of) physical, emotional or mental impairment to the child . . . Second, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care . . . This is an objective test that asks whether a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances" (*Matter of Barry G., Jr. [Barry G.]*, 221 AD3d 1596, 1596 [4th Dept 2023], *lv denied* 41 NY3d 904 [2024] [internal quotation marks omitted]). " 'A respondent's mental condition may form the basis of a finding of neglect if it is shown by a preponderance of the evidence that his or her condition resulted in imminent danger to the child[ ],' " although " '[p]roof of mental illness alone will not support a finding of neglect . . . The evidence must establish a causal connection between the parent's condition, and actual or potential harm to the child[ ]' " (*Matter of Lil B. J.-Z. [Jessica N.J.]* [appeal No. 2], 194 AD3d 1413, 1414 [4th Dept 2021]).

Here, the agency "established, by a preponderance of the evidence, the existence of a causal connection between [the father's actions] and actual or potential harm to the child[ren]" based upon the father's "repeated unfounded allegations of [sexual and physical] abuse . . . , necessitating that the children undergo . . . interviews regarding intimate issues" (*Matter of Tyler W. [Janice B.]*, 149 AD3d 968, 969 [2d Dept 2017]; *see Matter of Leilani D. [Linsford D.]*, 190 AD3d 478, 478 [1st Dept 2021]; *Matter of Morgan P.*, 60 AD3d 1362, 1362 [4th Dept 2009]; *see generally Matter of Elizabeth W. [Theresa W.]*, 74 AD3d 1787, 1788 [4th Dept 2010], *lv denied* 16 NY3d 704 [2011]). Thus,

the record establishes that there was a risk of imminent emotional harm to the children that was caused by the father's conduct (*see Matter of Juliette R. [Jordan R.T.]*, 203 AD3d 1678, 1679 [4th Dept 2022]; *Matter of Salvatore M. [Nicole M.]*, 104 AD3d 769, 769 [2d Dept 2013], *lv denied* 21 NY3d 858 [2013]). We therefore conclude in appeal Nos. 3 and 4 that the court's findings of neglect have a sound and substantial basis in the record (*see Lil B. J.-Z.*, 194 AD3d at 1414; *see generally Matter of Ahren B.-N. [Gary B.-N.]*, 222 AD3d 1403, 1404 [4th Dept 2023], *lv denied* 41 NY3d 909 [2024]).

Contrary to the father's contention in appeal No. 2, although the court modified the prior custody order in that appeal without making an express finding of a change in circumstances sufficient to warrant an inquiry in the subject child's best interests (*see Matter of Kirkland v Crawford*, 225 AD3d 1127, 1127-1128 [4th Dept 2024], *lv denied* 42 NY3d 901 [2024]; *see generally Matter of Osborne v Tulwits*, 227 AD3d 1541, 1541-1542 [4th Dept 2024]), upon our own review of the record, we nevertheless conclude that the mother in appeal No. 2 established the requisite change in circumstances. Specifically, the father's resort to self-help in withholding the child in appeal No. 2 from her mother after the alleged disclosures made by that child constituted a change in circumstances (*see Matter of Patricia Y. v Justin X.*, 219 AD3d 1586, 1587 [3d Dept 2023]; *Matter of Fox v Fox*, 93 AD3d 1224, 1225 [4th Dept 2012]).

In all four appeals, we reject the father's challenges to the determinations that it is in the best interests of the subject children to award sole custody to their respective mothers, with supervised visitation for the father. Where, as here, the court "jointly hear[s] the hearing on the custody and visitation petition[s] under [article 6] and the dispositional hearing on the petition[s] under article [10] . . . , the court must determine the custody and visitation petition[s] in accordance with the terms of . . . article [6]" (Family Ct Act § 651 [c-1]; *see* § 1055-b [a-1]; *Matter of Lillyana B. [Brittney B.]*, 221 AD3d 1522, 1522-1523 [4th Dept 2023]).

Although the court did not expressly state which factors it considered in conducting its best interests analyses, reversal is not warranted on that ground with respect to either child inasmuch as the record is adequate for this Court to make a best interests determination, and it supports the result reached by the hearing court (*see Matter of Bailey v Bailey*, 213 AD3d 1329, 1330 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023]; *Matter of Montalbano v Babcock*, 155 AD3d 1636, 1638 [4th Dept 2017], *lv denied* 31 NY3d 912 [2018]). "A custody determination by the trial court must be accorded great deference . . . and should not be disturbed where . . . it is supported by a sound and substantial basis in the record" (*Matter of Benson v Smith*, 178 AD3d 1430, 1431 [4th Dept 2019] [internal quotation marks omitted]). "In making a custody determination, the court must consider all factors that could impact the best interests of the child, including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of [the parties] to provide for the child's emotional and intellectual development and the wishes of the child . . . No one factor is

determinative because the court must review the totality of the circumstances" (*Sheridan v Sheridan*, 129 AD3d 1567, 1568 [4th Dept 2015] [internal quotation marks omitted]; *see Eschbach v Eschbach*, 56 NY2d 167, 171-173 [1982]).

Here, the court's determinations with respect to custody and visitation have a sound and substantial basis in the record inasmuch as the evidence at the hearing established that the children are currently thriving in the care of their respective mothers, and there is a risk that the father will unreasonably keep the children in his custody if allowed to visit them unsupervised (*see generally Matter of Owens v Garner*, 63 AD3d 1585, 1586 [4th Dept 2009]). With respect to the determinations that the father have only supervised visitation with each subject child, such visitation is in the children's best interests because the father's relentless pursuit of uncovering sexual or physical abuse is not beneficial to either child (*see generally Braverman v Braverman*, 140 AD3d 413, 413 [1st Dept 2016], *lv denied* 28 NY3d 910 [2016]). Furthermore, both mothers testified to having close relationships with the father's mother, who would be supervising the father's visitation, and the mothers stated that they were willing to work with the father's mother to organize visits, demonstrating that they were willing to foster a positive relationship between the children and the father (*see Matter of Muriel v Muriel*, 228 AD3d 1345, 1347 [4th Dept 2024]; *Matter of Cameron C.*, 283 AD2d 946, 947 [4th Dept 2001], *lv denied* 97 NY2d 606 [2001]; *see generally Matter of LaFountain v Gabay*, 69 AD3d 994, 995 [3d Dept 2010]).

Finally, we agree with the father in appeal Nos. 1 and 2 that the court erred in conditioning his right to file modification petitions with respect to the order of custody in appeal No. 1 and the order of custody and visitation in appeal No. 2. "It is well established that a court lacks authority to condition any future application for modification of a parent's [custody or] visitation on [that parent's] participation in mental health treatment" (*Benson*, 178 AD3d at 1432; *see Matter of Allen v Boswell*, 149 AD3d 1528, 1529 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]). We therefore modify the order in appeal No. 1 by striking the provision requiring that the father submit proof that he is engaged in and compliant with mental health counseling with a psychiatrist as a prerequisite to filing a modification petition and providing instead that the father comply with that condition as a component of supervised visitation (*see Matter of Ordona v Cothern*, 126 AD3d 1544, 1546 [4th Dept 2015]). We likewise modify the order in appeal No. 2 by striking the provision requiring that the father complete or comply with a mental health evaluation and recommended treatment as a prerequisite to filing a modification petition, and providing instead that the father comply with that condition as a component of supervised visitation (*see id.*).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

604

CAF 23-00590

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, GREENWOOD, AND HANNAH, JJ.

IN THE MATTER OF CHARDE P.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MESHA B., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered November 29, 2022, in a proceeding pursuant to Family Court Act article 6. The order, among other things, directed that petitioner shall retain sole custody of the subject child and that respondent have supervised visitation.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by striking the fourth ordering paragraph requiring respondent to complete or substantially comply with a mental health evaluation and recommended treatment as a prerequisite to filing a modification petition and substituting therefor a provision requiring respondent to comply with that condition as a component of supervised visitation, and as modified the order is affirmed without costs.

Same memorandum as in *Matter of Shakema R. v Mesha B.* ([appeal No. 1] — AD3d — [Mar. 14, 2025] [4th Dept 2025]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

605

CAF 23-00591

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, GREENWOOD, AND HANNAH, JJ.

IN THE MATTER OF MAHSAYAH B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MESHA B., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered February 1, 2023, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject child.

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

Same memorandum as in *Matter of Shakema R. v Mesha B.* ([appeal No. 1] — AD3d — [Mar. 14, 2025] [4th Dept 2025]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

606

CAF 23-00592

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, GREENWOOD, AND HANNAH, JJ.

IN THE MATTER OF MAHLIA B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MESHA B., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

BENJAMIN E. MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered February 1, 2023, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject child.

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

Same memorandum as in *Matter of Shakema R. v Mesha B.* ([appeal No. 1] — AD3d — [Mar. 14, 2025] [4th Dept 2025]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

616

CA 23-01789

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, GREENWOOD, AND HANNAH, JJ.

IN THE MATTER OF KARA WALAWENDER, UNIT CHIEF, CENTRAL NEW YORK PSYCHIATRIC CENTER, AUBURN CORRECTIONAL FACILITY SATELLITE UNIT, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ANTONIO T., RESPONDENT-APPELLANT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (RACHEL RAIMONDI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered September 27, 2023. The order, among other things, granted petitioner's application to medicate respondent over his objection.

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

Memorandum: Respondent appeals from an order granting petitioner's application for authorization to administer antipsychotic medications to respondent, who is currently an involuntary patient at a psychiatric center. In accordance with the order, respondent is receiving inpatient treatment over his objection pursuant to the parens patriae power of the State of New York (*see Matter of Sawyer [R.G.]*, 68 AD3d 1734, 1734 [4th Dept 2009]; *see generally Rivers v Katz*, 67 NY2d 485, 496-498 [1986], *rearg denied* 68 NY2d 808 [1986]). The order authorizes petitioner to, inter alia, administer the medication regime that includes an antipsychotic medication, Abilify Maintena, in doses of up to 400 milligrams by intramuscular injection every three weeks or less, as well as Benadryl as needed for managing side effects. The order further authorizes petitioner, as a reasonable alternative to the regime, to administer two alternative antipsychotic medications as well as two alternative medications for managing side effects. We conclude that Supreme Court properly granted the application.

Contrary to respondent's contention, petitioner met her burden of establishing by clear and convincing evidence that respondent lacks "the capacity to make a reasoned decision with respect to [the]

proposed treatment" (*Rivers*, 67 NY2d at 497). Petitioner's evidence demonstrated that respondent suffered from schizoaffective disorder, bipolar type and that respondent lacked insight regarding his mental illness (*see Matter of Schlee [Clarence E.]*, 194 AD3d 1365, 1366 [4th Dept 2021]). Indeed, petitioner established that without the medication respondent engaged in behaviors, such as hunger strikes and delusional outbursts, and acted verbally and physically aggressive toward peers and staff. Petitioner further established that respondent did not believe that he needed medication for his mental illness, which highlighted his inability to fully appreciate his diagnosis and its effect on him and those around him (*see id.*; *Matter of Paris M. v Creedmoor Psychiatric Ctr.*, 30 AD3d 425, 426 [2d Dept 2006]).

Contrary to respondent's further contention, petitioner also established by clear and convincing evidence that the proposed two-year treatment plan was "narrowly tailored to give substantive effect to [respondent's] liberty interest" (*Rivers*, 67 NY2d at 497; *see Schlee*, 194 AD3d at 1366). Petitioner presented, at a hearing before the court, the expert testimony of respondent's treating psychiatrist who testified that respondent had four prior court orders authorizing the treatment of respondent over his objections. The psychiatrist testified that petitioner was seeking authorization of the same medication regime as in the prior orders inasmuch as the Abilify Maintena was successful in preventing some of respondent's most challenging behaviors. He further testified that the medication regime included the monitoring of respondent's blood levels for possible side effects and dosage purposes. The psychiatrist explained the common side effects of Abilify Maintena and concluded that any risks associated with Abilify Maintena and Benadryl were outweighed by the benefits. He also explained the common side effects of the recommended alternative medication, that the mentioned side effects were a potential for all antipsychotic medications, and that the benefits of the prescribed medications outweighed its risks. He testified that the proposed medication regime was the least restrictive yet efficacious treatment providing respondent with the maximum benefit. The psychiatrist acknowledged the physical symptoms reported by respondent while on Abilify Maintena but testified that those side effects were not common and unlikely a result of that medication and, in any event, respondent's side effects were being monitored. He opined that without the medication regime, respondent will suffer a negative outcome. No other medical witness testified.

Based on that evidence, we conclude that petitioner established by clear and convincing evidence that the proposed course of treatment was narrowly tailored by petitioner to give substantive effect to respondent's liberty interest, after taking into consideration all relevant circumstances, including his best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment, and the alternative treatments (*see Sawyer*, 68 AD3d at 1735; *see generally Rivers*, 67 NY2d at 497-498).

All concur except OGDEN, J., who dissents and votes to reverse in accordance with the following memorandum: For the reasons identified

by the majority, I agree that petitioner established by clear and convincing evidence that respondent lacks the capacity to make a reasoned decision with respect to the proposed treatment. However, I disagree with the majority's conclusion that petitioner established by clear and convincing evidence that the treatment plan was "narrowly tailored to give substantive effect to [respondent's] liberty interest" (*Matter of Dill v Brian S.*, 221 AD3d 1497, 1498 [4th Dept 2023] [internal quotation marks omitted]; *see Rivers v Katz*, 67 NY2d 485, 497 [1986], *rearg denied* 68 NY2d 808 [1986]).

Here, the order appealed from authorizes petitioner to, inter alia, administer a first-line antipsychotic medication, Abilify Maintena, in doses of up to 400 milligrams by intramuscular injection every three weeks, as well as to administer Benadryl as needed for managing side effects. The order further authorizes petitioner to administer two alternative antipsychotic medications as well as two alternative medications for managing side effects.

In determining whether a treatment plan is narrowly tailored, a court must "take into consideration all relevant circumstances, including the patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive alternative treatments" (*Dill*, 221 AD3d at 1498 [internal quotation marks omitted]; *see Rivers*, 67 NY2d at 497-498). In contrast to the majority, I cannot conclude that there is legally sufficient evidence to determine whether the benefits of respondent's treatment outweigh the side effects that he actually experiences while using the long-acting antipsychotic medication Abilify Maintena and whether that treatment is in his best interests.

As an initial matter, respondent's medical records were not introduced in evidence at the hearing (*see Matter of Michael L.*, 26 AD3d 381, 382 [2d Dept 2006]), nor were the evaluation reports of the treating physician and reviewing physician (*cf. Matter of Harper v Louis M.* [appeal No. 2], 196 AD3d 1086, 1087 [4th Dept 2021]). Although those reports were attached to the petition, they are not evidence that petitioner may now rely on to demonstrate that she met her burden (*see Matter of Radcliffe M.*, 155 AD3d 956, 958 [2d Dept 2017]). Petitioner's proof consisted solely of the hearing testimony of respondent's treating physician, a psychiatrist who had been respondent's healthcare provider for just over one month.

The psychiatrist's testimony failed to establish why Abilify Maintena was authorized over other antipsychotic medications (*see Matter of Tyrone M.*, 186 AD3d 604, 606 [2d Dept 2020]). First, respondent had been taking Abilify Maintena for years and, although it significantly improved some of his symptoms, he continued to experience delusions and auditory hallucinations while taking it. The psychiatrist testified that he expected respondent to "continue to have some level of psychosis no matter what treatment he's on," but the psychiatrist did not discuss the anticipated results of any other antipsychotic medication (*see id.*).

Furthermore, respondent reported numerous side effects while

taking Abilify Maintena. He experienced a hand tremor, sluggishness, high cholesterol, high blood pressure, and an episode of chest pain and bradycardia. The psychiatrist testified that, although those side effects vary widely with respect to how commonly they occur, all of them are known potential risks of Abilify Maintena. The complained-of side effects are generally also known potential risks of other antipsychotic medications, but the record is devoid of any indication that respondent would actually experience those symptoms if he were to be given one of those medications in lieu of Abilify Maintena.

In addition, although the psychiatrist set forth a plan for monitoring the adverse side effects of Abilify Maintena—specifically, that respondent was scheduled to have "a stress test and echocardiogram and an appointment with a cardiologist" two days after the hearing and that the psychiatrist would monitor respondent's lipid panel, fasting glucose, electrolytes, and complete blood count with differential—the psychiatrist offered no testimony about how he would treat the symptoms that respondent already experienced on Abilify Maintena. The psychiatrist also failed to identify what circumstances would trigger the use of alternative medications given that respondent already experienced adverse side effects (*see id.*; *Radcliffe M.*, 155 AD3d at 958; *cf. Matter of Guttmacher [James M.]*, 181 AD3d 1313, 1314 [4th Dept 2020]). Although the psychiatrist testified that Benadryl would be administered to manage side effects, he provided no testimony about the benefits, if any, of Benadryl. He also testified, in a conclusory manner, that the unidentified benefits of Benadryl to respondent outweighed any unidentified risk of administering Benadryl to him (*see generally Wrobel v Tops Mkts., LLC*, 155 AD3d 1591, 1592 [4th Dept 2017]; *Costanzo v County of Chautauqua*, 110 AD3d 1473, 1473 [4th Dept 2013]).

Moreover, petitioner failed to establish a factual basis for the authorized dosage of Abilify Maintena on this record. The psychiatrist did not identify the precise amount and frequency of the Abilify Maintena that he would administer to respondent. Instead, he testified that the amount and frequency to be administered would depend on respondent's clinical response to the drug, as well as its level in his blood. Petitioner had not previously been monitoring the level of Abilify Maintena in respondent's blood. The psychiatrist had ordered testing to ensure that respondent was not "a slow metabolizer of it" with "excessively high" levels of the medication in his system, but the results of his blood level test were "pending" at the time of the hearing. Thus, no explanation exists on this record to justify the amount of Abilify Maintena that should be administered to respondent, nor is there any explanation for the frequency of its administration (*see Tyrone M.*, 186 AD3d at 606; *cf. Guttmacher*, 181 AD3d at 1314). Similarly, no factual support exists on this record for the frequency or amount of Benadryl or the alternative medications to be administered (*see Radcliffe M.*, 155 AD3d at 958). Petitioner offered nothing more than a conclusory assertion that the benefits of the alternative medications would outweigh the side effects (*see generally Wrobel*, 155 AD3d at 1592; *Costanzo*, 110 AD3d at 1473).

In sum, petitioner failed to establish by clear and convincing

evidence that the authorized first-line treatment or any alternative treatments are in respondent's best interests, that the benefits of respondent taking Abilify Maintena outweigh the risks associated with the actual side effects that he experiences on that drug, and that the benefits of respondent using Abilify Maintena exceed the benefits of the use of another antipsychotic medication (*cf. Dill*, 221 AD3d at 1498). Under these circumstances, I would reverse the order and remit the matter to Supreme Court for a new hearing on the issue whether the proposed treatment is narrowly tailored to preserve respondent's liberty interest and, thereafter, for a new determination of the application (*see Tyrone M.*, 186 AD3d at 606).

Entered: March 14, 2025

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 23-01119

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, GREENWOOD, AND HANNAH, JJ.

NORA ZAPPIA AND ANTHONY ZAPPIA,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JOHN JUN CAI, M.D., AND JOHN J. CAI, M.D., PLLC,
DEFENDANTS-APPELLANTS.

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

CAMPBELL & ASSOCIATES, HAMBURG (JOHN T. RYAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered May 24, 2023. The order denied the motion of defendants for summary judgment.

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

Memorandum: In this medical malpractice action, defendants appeal from an order denying their motion for summary judgment dismissing the complaint. We affirm. Plaintiffs commenced this action seeking damages for injuries that Nora Zappia (plaintiff) allegedly sustained when defendant John Jun Cai, M.D. (Dr. Cai) performed an electrophysiology (EP) study and atrial fibrillation (AF) ablation on plaintiff, who was 27 years old at the time. Subsequently, plaintiff developed inappropriate sinus tachycardia, which necessitated the implementation of a pacemaker and resulted in various injuries. Plaintiffs allege that Dr. Cai "was negligent in recommending and then performing" the EP study and AF ablation.

"It is well settled that, on a motion for summary judgment, a defendant in a medical malpractice action bears the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries" (*Bagley v Rochester Gen. Hosp.*, 124 AD3d 1272, 1273 [4th Dept 2015]; *see Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]). In order to meet their initial burden on a summary judgment motion in a medical malpractice action, a defendant is required to "present factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that [they] complied with the

accepted standard of care or did not cause any injury to the patient" (*Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015] [internal quotation marks omitted]). A defendant physician may submit their own affidavit to meet that burden, but that affidavit "must be detailed, specific and factual in nature and [must] not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (*Isensee v Upstate Orthopedics, LLP*, 174 AD3d 1520, 1521 [4th Dept 2019] [internal quotation marks omitted]; *see Webb*, 133 AD3d at 1386). Furthermore, "the expert affidavit must address each of the specific factual claims of negligence raised in [the] plaintiff[s'] bill of particulars" (*Isensee*, 174 AD3d at 1521 [internal quotation marks omitted]; *see Wulbrecht v Jehle*, 89 AD3d 1470, 1471 [4th Dept 2011]). "Once the defendant meets [their] burden, the burden shifts to [the] plaintiff to raise an issue of fact by submitting a physician's affidavit" (*Groff v Kaleida Health*, 161 AD3d 1518, 1520 [4th Dept 2018] [internal quotation marks omitted]); the burden shifts "only as to the elements on which the defendant met the prima facie burden" (*Bubar*, 177 AD3d at 1359 [internal quotation marks omitted]).

Assuming, arguendo, that defendants met their initial burden on their motion, we reject defendants' contention that Supreme Court erred in determining that the affidavit of plaintiffs' expert raised a triable issue of fact sufficient to defeat defendants' motion. "Where, as here, a nonmovant's expert affidavit squarely opposes the affirmation of the moving parties' expert, the result is a classic battle of the experts that is properly left to a jury for resolution" (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1258 [4th Dept 2019] [internal quotation marks omitted]; *see Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]).

We similarly reject defendants' contention that the court should have dismissed the claim of negligence relating to the EP study (i.e., the pre-ablation claim) specifically. Defendants contend that they met their initial burden with respect to that claim and that plaintiffs' expert did not address it. Initially, we note that we have previously rejected the proposition that medical malpractice defendants are entitled to "partial summary judgment dismissing each of the particularized factual allegations contained in the bill of particulars that [are] not expressly addressed by [the] plaintiff[s'] expert in opposition" (*Carroll v Niagara Falls Mem. Med. Ctr.*, 218 AD3d 1373, 1375 [4th Dept 2023] [emphasis omitted]). "Instead, summary judgment is properly granted only as to the distinct theor[ies] or claim[s] of malpractice that were unaddressed by the plaintiff's expert in opposition" (*Van Hook v Doak*, 227 AD3d 1537, 1539 [4th Dept 2024] [internal quotation marks omitted], quoting *Carroll*, 218 AD3d at 1376). Here, plaintiffs' expert sufficiently opined that Dr. Cai's performance of the EP study—deviated from the standard of care, inasmuch as the resulting unsustained arrhythmia was

not clinically significant to a degree sufficient to justify performing the ablation.

Entered: March 14, 2025

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 24-00186

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, NOWAK, AND KEANE, JJ.

JAMES MAIORANA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LORI A. GREEN, DEFENDANT-RESPONDENT.

ROSENBAUM & ROSENBAUM, P.C., NEW YORK CITY, THE LAW OFFICE OF MICHAEL JAMES PRISCO PLLC, MASSAPEQUA (MICHAEL J. PRISCO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALEXANDRIA TWINEM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Patrick F. McAllister, A.J.), entered July 27, 2023. The order, insofar as appealed from, granted the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries that he allegedly sustained in a motor vehicle accident when his vehicle collided with a vehicle owned by the State of New York and driven by defendant in the scope of her employment as a parole officer with the Department of Corrections and Community Supervision (DOCCS). As limited by her brief, plaintiff now appeals from that part of an order granting defendant's motion to dismiss the complaint pursuant to CPLR 3211 on the ground that Correction Law § 24 deprived Supreme Court of jurisdiction over the matter. We agree with plaintiff that the court erred in granting the motion, and we therefore reverse the order insofar as appealed from.

"The Court of Claims has limited jurisdiction to hear actions against the State itself, or actions naming State agencies or officials as defendants, where the action is, in reality, one against the State--i.e., where the State is the real party in interest. Generally, actions against State officers acting in their official capacity in the exercise of governmental functions are deemed to be, in essence, claims against the State and, therefore, suable only in the Court of Claims" (*Morell v Balasubramanian*, 70 NY2d 297, 300 [1987]). "Not every suit against an officer of the State, however, is a suit against the State" (*id.* at 301). "A suit against a State

officer will be held to be one which is really asserted against the State when it arises from actions or determinations of the officer made in his or her official role and involves rights asserted, not against the officer individually, but solely against the State" (*id.*). If, however, "the suit against the State agent or officer is in tort for damages arising from the breach of a duty owed individually by such agent or officer directly to the injured party, the State is not the real party in interest--even though it could be held secondarily liable for the tortious acts under respondeat superior" (*id.*).

Correction Law § 24 (2) provides that claims for damages "arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties" of any State employee shall be brought in the Court of Claims as claims against the State. Thus, Correction Law § 24 "places actions for money damages against [DOCCS] employees within the jurisdiction of the Court of Claims only where the conduct alleged is within the scope of the officer's employment *and* in the discharge of his or her official duties" (*Woodward v State of New York*, 23 AD3d 852, 855 [3d Dept 2005], *lv dismissed* 6 NY3d 807 [2006] [emphasis added]). "The conditioning of the statute's effect upon these criteria reflects the common-law principle that the State is the real party in interest where an action against a State officer is for conduct undertaken in an official capacity and in the exercise of an official governmental function" (*id.* at 855-856, citing, inter alia, *Morell*, 70 NY2d at 300). "If, however, the [DOCCS] officer's conduct is a breach of an individual duty and not in the exercise of an official governmental function, then the State is not the real party in interest and section 24 is not applicable" (*id.* at 856; *see generally Morell*, 70 NY2d at 300).

Here, the complaint asserts a single cause of action based on allegations that defendant operated the vehicle in a negligent manner, i.e., that defendant's alleged negligence arises from her violation of a duty she owed plaintiff as a fellow driver, and not as a DOCCS employee. Thus, plaintiff's action is "against . . . defendant individually for an alleged breach of a duty of care owed by the defendant directly to [plaintiff], and not one against State officers as representatives of the State in their official capacity which had to be brought in the Court of Claims pursuant to Correction Law § 24" (*Crist v Rosenberger*, 219 AD3d 569, 570-571 [2d Dept 2023]; *see Mark v Vasseur*, 213 AD2d 927, 927 [3d Dept 1995], *lv dismissed* 85 NY2d 1032 [1995]; *see generally Morell*, 70 NY2d at 302). We therefore conclude that defendant failed to establish on her motion that Correction Law § 24 deprived Supreme Court of jurisdiction over the matter.

Entered: March 14, 2025

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 23-01893

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, NOWAK, AND KEANE, JJ.

IN THE MATTER OF ARON LAW PLLC,
PETITIONER-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

ROCHESTER CITY SCHOOL DISTRICT,
RESPONDENT-RESPONDENT-APPELLANT.

ARON LAW, PLLC, BROOKLYN (JOSEPH H. ARON OF COUNSEL), FOR PETITIONER-APPELLANT-RESPONDENT.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR RESPONDENT-RESPONDENT-APPELLANT.

Appeal and cross-appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Sam L. Valleriani, J.), dated October 23, 2023, in a proceeding pursuant to CPLR article 78. The judgment granted in part and denied in part the petition and denied the motion of respondent to dismiss the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the petition insofar as it seeks disclosure of communications, subject to redaction pursuant to particularized and specific justification under Public Officers Law § 87 (2) and granting the petition to that extent, and by reinstating the petition insofar as it seeks an award of attorney's fees and costs pursuant to Public Officers Law § 89 (4) (c), and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondent to disclose records pursuant to the Freedom of Information Law ([FOIL] Public Officers Law § 84 *et seq*.)—including video footage, police reports, and certain communications—concerning a shooting that took place at or near Franklin High School in the City of Rochester. Petitioner also sought an award of attorney's fees. Petitioner appeals and respondent cross-appeals from a judgment that granted the petition only to the extent that it sought to compel disclosure of the requested video footage and police reports, subject to redaction.

Under FOIL, "[a]ll government records are . . . presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87 (2)" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274-275 [1996]; *see*

Matter of Abdur-Rashid v New York City Police Dept., 31 NY3d 217, 225 [2018], *rearg denied* 31 NY3d 1125 [2018]). The exemptions are to be " 'narrowly construed' " (*Gould*, 89 NY2d at 275; *see Matter of Hawley v Village of Penn Yan*, 35 AD3d 1270, 1271 [4th Dept 2006], *amended on rearg* 38 AD3d 1371 [4th Dept 2007]), and the government agency bears the burden of demonstrating that " 'the material requested falls squarely within the ambit of one of [the] . . . exemptions' " (*Abdur-Rashid*, 31 NY3d at 225; *see Matter of National Lawyers Guild, Buffalo Ch. v Erie County Sheriff's Off.*, 196 AD3d 1195, 1196 [4th Dept 2021]). To invoke one of the exemptions, the government agency "must articulate 'particularized and specific justification' for not disclosing requested documents" (*Gould*, 89 NY2d at 275; *see Matter of Nix v New York State Div. of Criminal Justice Servs.*, 167 AD3d 1524, 1525 [4th Dept 2018], *lv denied* 33 NY3d 908 [2019]).

Addressing first the cross-appeal, we reject respondent's contention that Supreme Court erred in granting the petition insofar as it sought to compel disclosure of the requested video footage and police reports, and we conclude that the court properly determined that redaction of certain portions of those materials may be appropriate. To the extent that the video footage constitutes an education record that is specifically exempted from disclosure by federal statute (*see* Public Officers Law § 87 [2] [a]), here the Federal Educational Rights and Privacy Act, respondent should redact any personally identifiable information contained in those records (*see* 20 USC § 1232g [b] [2]; 34 CFR 99.31 [b] [1]; *Easton Area Sch. Dist. v Miller*, 659 Pa 606, 627-632, 232 A3d 716, 728-731 [2020]; *Matter of Jewish Press, Inc. v Kingsborough Community Coll.*, 201 AD3d 547, 549 [1st Dept 2022]) and submit the redacted records to the court to conduct an in camera comparison of the redacted and original records. Although respondent contends that the video footage and police reports are exempt from disclosure under Public Officers Law § 87 (2) (e) (i) and (f), we conclude that respondent's broad allegation "is insufficient to overcome the presumption that the records are open for inspection . . . and categorically deny petitioner all access to the requested material" (*Matter of Konigsberg v Coughlin*, 68 NY2d 245, 251 [1986]). Respondent may, however, submit the video footage and police reports to the court for an in camera comparison of the redacted records to the originals if it believes certain material is contained within them is exempt from disclosure under Public Officers Law § 87 (2) (e) (i) and (f). If respondent establishes that the requested records contain material exempt under Public Officers Law § 87 (2) (a), (e) (i), or (f), "the appropriate remedy is . . . 'disclosure of all nonexempt, appropriately redacted material' " (*Matter of Pflaum v Grattan*, 116 AD3d 1103, 1105 [3d Dept 2014], quoting *Gould*, 89 NY2d at 275).

We agree with petitioner on its appeal that the court erred in denying the petition insofar as it sought to compel respondent to provide petitioner with access to the requested communications, and we therefore modify the judgment accordingly. In response to petitioner's FOIL request, respondent failed to demonstrate that the requested material qualifies for an exemption inasmuch as it did not articulate a " 'particularized and specific justification' for not

disclosing" the requested communications (*Gould*, 89 NY2d at 275). Respondent now asserts for the first time that the requested communications were not reasonably described. Our review of the administrative determination, however, is limited to the grounds invoked by the agency in denying the FOIL request (*see Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 74-75 [2017]; *Matter of Barry v O'Neill*, 185 AD3d 503, 505 [1st Dept 2020]). Respondent therefore must provide the requested communications to petitioner "subject to any redactions or exemptions pursuant to a particularized and specific justification" for exempting any portion thereof (*Matter of New York Civ. Liberties Union v City of Syracuse*, 210 AD3d 1401, 1407 [4th Dept 2022]).

In light of our determination, we agree with petitioner that the court erred in denying that part of the petition seeking attorney's fees and costs pursuant to Public Officers Law § 89 (4) (c), and we therefore further modify the judgment by reinstating the petition to that extent. Nevertheless, we further conclude that petitioner's contention that the court erred in failing to grant that part of the petition seeking attorney's fees and costs pursuant to Public Officers Law § 89 (4) (c) is premature (*see Matter of Lane v Port Wash. Police Dist.*, 221 AD3d 698, 708 [2d Dept 2023]; *see also Matter of Forsyth v City of Rochester* [appeal No. 1], 185 AD3d 1499, 1500-1501 [4th Dept 2020]).

Entered: March 14, 2025

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 23-01374

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND HANNAH, JJ.

THOMAS C. KINGSTON, AS EXECUTOR OF THE ESTATE OF MARCELLA KINGSTON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TENNYSON COURT, TENNYSON COURT, LLC, SALEM BUFFALO, LLC, AND JAMES T. HANDS, DEFENDANTS-APPELLANTS.

LIPPES MATHIAS LLP, BUFFALO (MEGHANN N. ROEHL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (JESSE A. DRUMM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered August 1, 2023. The order denied defendants' motion to dismiss plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion in part and dismissing the second and third causes of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, as executor of the estate of Marcella Kingston (decedent), commenced this action alleging, inter alia, that defendants were negligent while decedent was a resident of a facility (Tennyson Court), and that such negligence caused decedent to suffer physical injuries, including a displaced elbow fracture, nasal bone fractures, and "other fall/incident injuries," and ultimately resulted in her death. Plaintiff alleged in the first cause of action that decedent's injuries and death were caused by defendants' negligence, gross negligence, carelessness, and recklessness, and plaintiff further alleged in the second and third causes of action that defendants recklessly deprived decedent of her rights and benefits in violation of Public Health Law §§ 2801-d and 2803-c. Defendants appeal from an order that denied their pre-answer motion to dismiss the complaint.

We agree with defendants that Supreme Court erred in denying their motion with respect to the second and third causes of action. We have held that an assisted living facility licensed pursuant to Public Health Law article 46-B, such as Tennyson Court, could operate as a de facto residential health care facility subject to liability

under Public Health Law article 28 if it provides health-related services (*see Cunningham v Mary Agnes Manor Mgt., L.L.C.*, 188 AD3d 1560, 1562 [4th Dept 2020]; *cf. DeRusso v Church Aid of the Prot. Episcopal Church in the Town of Saratoga Springs, Inc.*, — AD3d —, 2025 NY Slip Op 00008, *1-2 [3d Dept 2025]; *Broderick v Amber Ct. Assisted Living*, 200 AD3d 840, 841-842 [2d Dept 2021]; *see also* Public Health Law § 2801 [3]). We conclude that, unlike the complaint in *Cunningham*, the complaint here failed to "sufficiently allege[ ] facts to overcome defendants' argument that the facility is an assisted living facility and not subject to . . . sections [2801-d and 2803-c] of the Public Health Law" (188 AD3d at 1562). We therefore modify the order by granting defendants' motion in part and dismissing the second and third causes of action.

Our concurring colleagues would on this appeal overrule *Cunningham* in relevant part and dismiss the second and third causes of action on the ground that a facility licensed as an assisted living facility can never be statutorily liable under Public Health Law article 28. We respectfully disagree with that approach. Overturning precedent is unnecessary to resolve the appeal before us because, even under *Cunningham*, the second and third causes of action cannot survive defendants' motion to dismiss. " '[T]he doctrine of stare decisis should not be departed from except under compelling circumstances' " (*Eastern Consol. Props. v Adelaide Realty Corp.*, 95 NY2d 785, 787 [2000]), and none are present here. Whether *Cunningham* should be overruled in favor of our concurring colleagues' statutory analysis should await an appropriate case in which it is necessary to resolve the viability of that precedent (*see generally People v Barboni*, 21 NY3d 393, 407 [2013]).

We nevertheless reject defendants' challenges to the viability of the first cause of action. Contrary to defendants' contention, the court properly determined that the complaint is "sufficiently particular to give the court and [defendants] notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of [the first] cause of action" (CPLR 3013; *see generally Reynolds v Ferrante*, 107 AD3d 1424, 1425-1426 [4th Dept 2013]). The court also properly determined that defendants failed to conclusively establish that they were immune from liability pursuant to the Emergency or Disaster Treatment Protection Act (Public Health Law former art 30-D, §§ 3080-3082) as in effect at the time of decedent's residency at Tennyson Court (*see Holder v Jacob*, 231 AD3d 78, 86-89 [1st Dept 2024]). Finally, we have considered defendants' remaining contentions and conclude that they do not require further modification or reversal of the order.

All concur except CURRAN and HANNAH, JJ., who concur in the result in the following memorandum: We respectfully concur with the result reached by the majority, namely that the order must be modified to the extent of granting the motion in part and dismissing the second and third causes of action. We write separately, however, to express our disagreement with the majority insofar as it modifies the order on the basis that plaintiff failed to allege sufficient facts to "overcome defendants' argument that the facility is an assisted living facility

and not subject to . . . sections [2801-d and 2803-c] of the Public Health Law" as it pertained to the second and third causes of action (*Cunningham v Mary Agnes Manor Mgt., L.L.C.*, 188 AD3d 1560, 1562 [4th Dept 2020]). In making that determination, the majority reaffirms the validity of our prior decision in *Cunningham*, where, as the majority notes, we held "that an assisted living facility licensed pursuant to Public Health Law article 46-B . . . could operate as a de facto residential health care facility subject to liability under Public Health Law article 28 if it provides health-related services." For the reasons that follow, we respectfully disagree that *Cunningham* should be followed, would overrule that decision as inconsistent with the governing statutory framework, and, consequently, would grant the motion to the same extent solely on the basis that defendant Tennyson Court, LLC (Tennyson Court) is *not* a facility against which a private right of action under Public Health Law article 28 may be maintained (*see DeRusso v Church Aid of the Prot. Episcopal Church in the Town of Saratoga Springs, Inc.*, — AD3d —, 2025 NY Slip Op 00008, *1-2 [3d Dept 2025]; *Broderick v Amber Ct. Assisted Living*, 200 AD3d 840, 841 [2d Dept 2021]; *see generally* Public Health Law § 4651 [1] [a]).

Here, it is undisputed that Tennyson Court is an adult home-assisted living facility licensed pursuant to article 46-B of the Public Health Law. Article 46-B of the Public Health Law defines an "assisted living" facility as, inter alia, "an entity which provides or arranges for housing, on-site monitoring, and personal care services and/or home care services (either directly or indirectly), in a home-like setting to five or more adult residents unrelated to the assisted living provider" (§ 4651 [1]). Crucially, however, the same provision also expressly states, unequivocally and in no uncertain terms, that "[a]ssisted living and enhanced assisted living [facilities] *shall not include* . . . [, inter alia,] *residential health care facilities . . . licensed under article twenty-eight of this chapter*" (§ 4651 [1] [a] [emphasis added]). That statutory language specifies that the terms "assisted living" facility and "residential health care" facility are mutually exclusive. In short, the relevant statute provides that, under the Public Health Law, a facility can be one or another of those two entities, but it *cannot simultaneously be both*.

Consequently, once it is determined that an entity like Tennyson Court is an "assisted living" facility licensed under Public Health Law article 46-B, that completely precludes any potential absolute liability against it as a residential health care facility licensed under Public Health Law article 28—even if it provides health-related services. Given the fact that Tennyson Court is indisputably licensed under Public Health Law article 46-B, there is no set of circumstances whereby plaintiff could establish that Tennyson Court was *also* a facility covered by article 28—de facto or otherwise. Inasmuch as the statute makes that mutual exclusivity plain, the majority's analysis of whether Tennyson Court, or any other assisted living facility, may morph into a de facto residential health care facility is entirely unnecessary. Indeed, recent decisions from both the Second and Third Departments agree with our interpretation of the relevant statutory framework, and support our conclusion that the causes of action

predicated on Public Health Law article 28 should be dismissed given Tennyson Court's licensure as an assisted living facility under article 46-B (*see DeRusso*, — AD3d at —, 2025 NY Slip Op 00008, *1-2; *Broderick*, 200 AD3d at 841).

In light of the foregoing, and unlike the majority, we would overrule our prior decision in *Cunningham* to the extent that it authorizes a cause of action under article 28 of the Public Health Law against an assisted living facility indisputably licensed pursuant to article 46-B of the Public Health Law. Although the majority offers an inferential reference to the clear conflict on the subject between our decision in *Cunningham* and the Second and Third Departments' decisions in *Broderick* (200 AD3d at 841) and *DeRusso* (— AD3d at —, 2025 NY Slip Op 00008, *1-2), it does not seriously grapple with that conflict, to say nothing about *Cunningham*'s conflict with relevant statutory text. As noted above, however, we agree with the rationale in *DeRusso* and *Broderick* and conclude that the logic of those decisions presents a more faithful application of the clear statutory definition of an assisted living facility, which wholly precludes a finding that such a facility could also be a de facto residential health care facility under article 28. It is well settled that, "[w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning" (*State of New York v Patricia II.*, 6 NY3d 160, 162 [2006] [internal quotation marks omitted]; *see Pultz v Economakis*, 10 NY3d 542, 547 [2008]; *Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 91 [2001]). In concluding that Tennyson Court, as a licensed assisted living facility, is not a facility under Public Health Law article 28, we merely give effect to the unambiguous and clear statutory terms (*see* Public Health Law § 4651 [1] [a]).

While seeming to invite a challenge to *Cunningham* in an appropriate case, the majority nevertheless chides us for unwarrantedly departing from the venerable doctrine of stare decisis given the absence of any compelling circumstances in this case. We respectfully disagree. "[A]lthough due deference should be accorded the doctrine of stare decisis in order to promote consistency and stability in the decisional law, we should not blindly follow an earlier ruling [that] has been demonstrated to be unsound simply out of respect for that doctrine" (*Kash v Jewish Home & Infirmary of Rochester, N.Y., Inc.*, 61 AD3d 146, 150 [4th Dept 2009] [internal quotation marks omitted]; *see Goodwin v Pretorius*, 105 AD3d 207, 215 [4th Dept 2014]; *see also Wiggins v City of New York*, 201 AD3d 22, 26 [1st Dept 2021]). One such compelling reason to overrule precedent is "where it can be shown that the law has been misunderstood or misapplied" (*Kash*, 61 AD3d at 150 [internal quotation marks omitted]; *see Wiggins*, 201 AD3d at 26; *see generally Rumsey v New York & New England R.R. Co.*, 133 NY 79, 85 [1892]). That is precisely the case here, inasmuch as we conclude that *Cunningham*'s determination that an assisted living facility licensed under Public Health Law article 46-B can, in some circumstances, simultaneously be a de facto residential health care facility under article 28 is a misapplication of the relevant law because it contradicts the unambiguous text of Public

Health Law § 4651 (1) (a).

Although we are mindful that the doctrine of stare decisis applies with special force in the context of reevaluating precedent involving statutory interpretation (*see Matter of Eckart*, 39 NY2d 493, 499 [1976]; *Goodwin*, 105 AD3d at 215; *see generally People v Hobson*, 39 NY2d 479, 489 [1976]), that generally wise caution does not apply in the circumstances here, where the precedent in question did not interpret a statute, but rather conflicts with the statute's express command. Had the legislature intended to "permit[ ] some overlap between assisted living facilities and residential health care facilities" it could have easily done so, "and [t]he failure of the [l]egislature to include a matter within a particular statute is an indication that its exclusion was intended" (*DeRusso*, — AD3d at —, 2025 NY Slip Op 00008, *2 [internal quotation marks omitted]; *see Goodwin*, 105 AD3d at 215-216).

Ultimately, the bench and the bar are entitled to clear guidance on this issue, and we respectfully conclude that the majority's decision—particularly its failure to reconcile *Cunningham* with the clear and controlling statutory text of Public Health Law § 4651 (1) (a)—does not provide it.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

738

KA 17-01051

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID A. BERRY, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (ALEXANDER PRIETO OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AERON SCHWALLIE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered March 22, 2017. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree (six counts), criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree and criminally using drug paraphernalia in the second degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him, after a jury trial, of six counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]), one count of criminal possession of a weapon in the second degree (§ 265.03 [3]), one count of criminal possession of a weapon in the third degree (§ 265.02 [3]), and three counts of criminally using drug paraphernalia in the second degree (§ 220.50 [1], [2], [3]). We affirm.

Initially, we agree with defendant that defense counsel's general challenge with respect to the existence of probable cause for the relevant search warrant was sufficient to preserve defendant's contention that the confidential informant evidence in the warrant application failed to satisfy the *Aguilar-Spinelli* test inasmuch as there is no dispute that the test applies here (*cf. People v Murray*, 194 AD3d 1360, 1362 [4th Dept 2021]) and Supreme Court expressly ruled that the warrant was supported by probable cause (*see People v Colon*, 192 AD3d 1567, 1568 [4th Dept 2021], *lv denied* 37 NY3d 955 [2021]; *see generally People v Parker*, 32 NY3d 49, 57 [2018]). Nevertheless, we conclude that "the hearsay information supplied in the search warrant application satisfied the two prongs of the *Aguilar-Spinelli* test and

that the search warrant[in question was] issued upon probable cause" (*People v Jones*, 224 AD3d 1348, 1349 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024] [internal quotation marks omitted]). The deputy sheriff who authored the supporting affidavit averred that the confidential informant was aware of the ongoing presence of narcotics at the subject location because the informant had been present at that location on multiple occasions, including for at least one drug transaction. "Affording great deference to the determination of the issuing [Justice] and reviewing the application in a common-sense and realistic fashion" (*People v Humphrey*, 202 AD3d 1451, 1451 [4th Dept 2022], *lv denied* 38 NY3d 951 [2022] [internal quotation marks omitted]), we conclude that the evidence is sufficient to establish both the source of the confidential informant's knowledge and the reliability of the informant (*cf. People v Rodriguez*, 303 AD2d 783, 784-785 [3d Dept 2003]; *People v Candella*, 171 AD2d 329, 331 [4th Dept 1991]; *see generally People v Myhand*, 120 AD3d 970, 973-974 [4th Dept 2014], *lv denied* 25 NY3d 952 [2015]), and to establish that the "state of facts . . . continue[d] to exist at the time the application for a search warrant [wa]s made" (*People v Coleman*, 26 AD3d 773, 774 [4th Dept 2006], *lv denied* 7 NY3d 754 [2006] [internal quotation marks omitted]).

We reject defendant's contention that he was denied effective assistance of counsel. Defendant's argument that defense counsel did not adequately challenge the search warrant on the record is without merit inasmuch as "[t]here can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to make a motion or argument that has little or no chance of success" (*People v Barksdale*, 191 AD3d 1370, 1371 [4th Dept 2021], *lv denied* 36 NY3d 1118 [2021] [internal quotation marks omitted]; *see also People v Brown*, 181 AD3d 1301, 1303-1304 [4th Dept 2020], *lv denied* 35 NY3d 1064 [2020]). While we agree with defendant that he would have been entitled to a *Darden* hearing with respect to the confidential informant who purchased heroin from defendant had defense counsel requested one (*see People v Edwards*, 95 NY2d 486, 489 [2000]; *see generally People v Darden*, 34 NY2d 177, 181 [1974], *rearg denied* 34 NY2d 995 [1974]), a single error rises to the level of ineffective assistance only in the rare instance when the error " 'involve[s] an issue that is so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it, and it [is] evident that the decision to forgo the contention could not have been grounded in a legitimate trial strategy' " (*People v Keschner*, 25 NY3d 704, 723 [2015]). Here, "because there is no indication in the record that the confidential informant was 'wholly imaginary' or that his communications to the police were 'entirely fabricated' . . . , defendant has failed to establish that he would have been entitled to any relief had a *Darden* hearing been conducted" (*People v Nellons*, 187 AD3d 1574, 1575-1576 [4th Dept 2020], *lv denied* 36 NY3d 1058 [2021]).

Finally, in light of our conclusions, defendant's remaining contention is academic.

All concur except OGDEN and NOWAK, JJ., who dissent and vote to

modify in the following memorandum: We respectfully dissent because, in our view, the search warrant executed at 205 Curtis Street in the City of Rochester was not supported by probable cause. We conclude that Supreme Court should have suppressed the evidence obtained at 205 Curtis Street, which constitutes all of the evidence supporting the crimes charged in counts 3, 6, 7, and 8 of the indictment. We would therefore modify the judgment by suppressing that evidence, reversing those parts of the judgment convicting defendant of counts 3, 6, 7, and 8 of the indictment, and dismissing those counts. We would further modify the judgment by vacating the sentences imposed on the remaining counts, and we would remit the matter to Supreme Court for resentencing on those counts inasmuch as the court considered the seized firearm under count 7, charging criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), when it sentenced defendant.

As an initial matter, we agree with the majority that defendant's contention regarding the validity of the search warrant for 205 Curtis Street is preserved, and we likewise reject defendant's contention that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). However, we disagree with the majority's conclusion "that 'the hearsay information supplied in the search warrant application satisfied the two prongs of the *Aguilar-Spinelli* test and that the search warrant[in question was] issued upon probable cause' (*People v Jones*, 224 AD3d 1348, 1349 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024] [internal quotation marks omitted])."

Under the *Aguilar-Spinelli* test, "a tip from a hearsay informant . . . may not be used [to establish probable cause] unless the source of [the informant's] knowledge is revealed and the informant is of known reliability" (*People v Edwards*, 95 NY2d 486, 495 [2000]). "The separate basis of knowledge and veracity requirements of *Aguilar/Spinelli* are analytically independent and each must be satisfied" (*People v DiFalco*, 80 NY2d 693, 697 [1993]). "The 'basis-of-knowledge' prong of the test may be satisfied upon a showing that the information furnished is so detailed as to make it clear that it must have been based upon personal knowledge" (*People v Jean-Charles*, 226 AD2d 395, 396 [2d Dept 1996], *lv denied* 88 NY2d 987 [1996]; *see People v Parris*, 83 NY2d 342, 350 [1994]). In other words, "[t]he basis of knowledge component . . . requires that the information provided by the informant be corroborated or confirmed through details sufficient in number and suggestive of, or directly related to, the criminal activity informed about" (*Delgado v City of New York*, 86 AD3d 502, 507 [1st Dept 2011]; *see Parris*, 83 NY2d at 350).

Here, the warrant application in question concerned two addresses, i.e., 205 Curtis Street and 215 Curtis Street, but contained a mere two statements based on the confidential informant's claimed knowledge regarding 205 Curtis Street. Specifically, it stated that "[t]he [confidential informant] has been inside 205 Curtis St[reet] on multiple occasions and is aware that narcotics are kept inside the location," and that "[t]he [confidential informant] . . .

has been to 205 and 215 Curtis Street multiple times for narcotics transactions." The remaining contents of the six-page, single-spaced warrant application focused on 215 Curtis Street.

For the reasons that follow, we agree with defendant that the hearsay information regarding 205 Curtis Street does not provide the requisite basis of knowledge justifying the issuance of the search warrant for that address (*see generally People v Gordon*, 36 NY3d 420, 431 [2021]). First, we note that the application neither details any transaction that occurred at 205 Curtis Street, nor specifies the type of narcotic exchanged during such transaction. Second, no time frame is provided for the hearsay statements concerning 205 Curtis Street, and it is therefore entirely possible that the unspecified drug transaction occurred years or decades ago. In fact, the warrant application entirely fails to set forth what was actually observed by the informant at 205 Curtis Street or when it was observed (*cf. People v Hanlon*, 36 NY2d 549, 558 [1975]). On this record, we conclude that there is no basis provided to support the informant's claimed awareness of narcotics at 205 Curtis Street.

Although police observations can provide the corroborating details required to properly infer a basis of knowledge, no such details are present here. Indeed, the police provided no additional corroborating observations to support issuance of the warrant (*cf. People v Middleton*, 283 AD2d 663, 665 [3d Dept 2001], *lv denied* 96 NY2d 922 [2001]; *People v Maldonado*, 80 AD2d 563, 563 [2d Dept 1981]). The search warrant application does not contain any averments establishing that the police conducted surveillance of 205 Curtis Street, that they attempted to conduct controlled buys at 205 Curtis Street, or that they otherwise had information corroborating the incriminating information concerning 205 Curtis Street supplied by the confidential informant (*see Delgado*, 86 AD3d at 509; *Maldonado*, 80 AD2d at 563).

We acknowledge that search warrant applications must be "accorded all reasonable inferences" (*Hanlon*, 36 NY2d at 559). However, given the wealth of information about 215 Curtis Street, which spanned six single-spaced pages and included granular details about what was observed, and the comparative paucity of information regarding 205 Curtis Street, we are unable to reasonably infer that the confidential informant had the requisite basis of knowledge concerning 205 Curtis Street to establish probable cause for the issuance of the warrant at that address. In our view, the only reasonable inference that can be drawn is that the warrant application was drafted as well as it could have been based on the confidential informant's knowledge inasmuch as it lacked the requisite particularity regarding any timely observation of criminal activity at 205 Curtis Street. We therefore conclude that the search warrant was not supported by probable cause.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

742

KA 23-00484

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH C. JONES, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (TONYA PLANK OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMY N. WALENDZIAK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered March 25, 2019. 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 modified on the law by vacating the sentence and, as modified, the judgment is affirmed and the matter is remitted to Supreme Court, Monroe County, for resentencing in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). Preliminarily, as the People correctly concede, defendant's waiver of the right to appeal is invalid because Supreme Court's colloquy and the written waiver "used overbroad language that mischaracterized the waiver as an absolute bar to the taking of an appeal" (*People v Terry*, 217 AD3d 1582, 1582 [4th Dept 2023], *lv denied* 40 NY3d 1041 [2023] [internal quotation marks omitted]; *see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Contrary to defendant's contention, however, the court did not err in refusing to suppress the physical evidence recovered incident to his arrest. Two investigators from the New York State Department of Corrections and Community Supervision testified at the suppression hearing as members of an apprehension team assigned to locate and arrest a parole absconder for whom a valid arrest warrant had been issued. The evidence at the suppression hearing established that the apprehension team was advised by the absconder's girlfriend that he might be near the intersection of Flanders Street and Post Avenue in the City of Rochester. Upon arriving approximately 45 minutes later in two separate vehicles, the apprehension team immediately observed an individual walking from the 100 block of Flanders Street toward

Post Avenue who closely matched the height and weight provided in the description of the absconder. That individual was wearing a ski mask that covered his face. When two members of the apprehension team pulled their vehicle alongside the masked individual, the man immediately ran away and fled into the backyards of homes on Post Avenue. One of the investigators in the trailing vehicle then stopped and exited his vehicle, and began pursuing the fleeing individual on foot, along with the other investigator who was in that vehicle. During the pursuit, one of the investigators observed what appeared to be a black handgun in the man's right hand that he tossed while attempting to climb over a fence. That investigator then arrested the masked individual, who was subsequently identified as defendant and not the absconder. During a search of defendant following the arrest, the investigator recovered a medicine bottle with six vials containing a white rock substance, and a search of the surrounding area led to the recovery of a black handgun on the other side of the fence and a second, silver handgun a short distance away along the path on which defendant had fled.

While defendant is correct that under *De Bour* the police may not generally initiate a pursuit of an individual without "a reasonable suspicion that a crime has been, is being, or is about to be committed" (*People v Martinez*, 80 NY2d 444, 447 [1992]; *see People v Watkins*, 221 AD3d 1430, 1431-1432 [4th Dept 2023], *affd* 42 NY3d 1074 [2024]; *People v De Bour*, 40 NY2d 210, 223 [1976]), the pursuit of defendant here was based upon the arresting officer's mistaken belief that defendant was someone else for whom a valid arrest warrant had been issued. It is well settled that "[t]he arrest of a person who is mistakenly thought to be someone else is valid if the arresting officer (a) has probable cause to arrest the person sought, and (b) reasonably believed the person arrested was the person sought" (*People v Dortch*, 186 AD3d 1114, 1115 [4th Dept 2020] [internal quotation marks omitted]; *see People v Tejada*, 270 AD2d 655, 657 [3d Dept 2000], *lv denied* 95 NY2d 805 [2000]).

With respect to the first element, there is no dispute that the apprehension team had probable cause to arrest the parole absconder inasmuch as an arrest warrant had been issued. As for the second element, "[t]he reasonableness of the arresting officers' conduct must be determined by considering the totality of the circumstances surrounding the arrest" (*Dortch*, 186 AD3d at 1115 [internal quotation marks omitted]), and "great deference should be given to the determination of the suppression court, which had the opportunity to observe the demeanor of the witnesses and to assess their credibility, and its factual findings should not be disturbed unless clearly erroneous" (*People v Layou*, 134 AD3d 1510, 1511 [4th Dept 2015], *lv denied* 27 NY3d 1070 [2016], *reconsideration denied* 28 NY3d 932 [2016]). Even though "[f]light alone . . . is insufficient to justify [a] pursuit" (*People v Holmes*, 81 NY2d 1056, 1058 [1993]), we conclude that under the totality of the circumstances present here the arresting officer's testimony establishes that he reasonably believed that defendant was the absconder when he initiated his pursuit. Defendant closely matched the height and weight provided in the parole absconder's description, covered his face with a ski mask, was in the

location provided by the absconder's girlfriend, and immediately fled upon being approached by one of the apprehension team's unmarked vehicles. Inasmuch as the initial pursuit and subsequent arrest of defendant—which occurred after he was observed holding and then discarding a handgun—were lawful, the court did not err in refusing to suppress the physical evidence recovered during the post-arrest search of defendant and the surrounding area (*see People v Daniels*, 68 AD3d 1711, 1712 [4th Dept 2009], *lv denied* 14 NY3d 887 [2010]; *People v Hampton*, 50 AD3d 1605, 1606 [4th Dept 2008], *lv denied* 10 NY3d 959 [2008]).

Finally, we agree with defendant that, as the People correctly concede, the court erred in sentencing him as a predicate felon inasmuch as " 'the People failed to satisfy their burden of establishing that defendant was convicted of an offense in a foreign jurisdiction that is equivalent to a felony in New York' " (*People v Gozdziak*, 211 AD3d 1603, 1605 [4th Dept 2022], quoting *People v Yancy*, 86 NY2d 239, 247 [1995]). Because we cannot permit an illegal sentence to stand (*see People v Stubbs*, 96 AD3d 1448, 1450 [4th Dept 2012], *lv denied* 19 NY3d 1001 [2012]), we modify the judgment by vacating the sentence and remit the matter to Supreme Court for resentencing in accordance with the law (*see Gozdziak*, 211 AD3d at 1608; *see also People v Milon*, 114 AD3d 1130, 1131 [4th Dept 2014]).

All concur except OGDEN and NOWAK, JJ., who dissent and vote to reverse in accordance with the following memorandum: We agree with the majority that defendant did not validly waive his right to appeal. However, we respectfully disagree with the majority's conclusion that the parole officers had a reasonable belief that defendant was the person for whom they had an arrest warrant, and thus, we would suppress the tangible evidence recovered and dismiss the indictment. We conclude that an officer's reasonable belief must be founded upon specific and articulable facts testified to at the suppression hearing. Where, as here, it is not, any evidence obtained must be suppressed. Thus, we respectfully dissent.

On a cold, late December morning, New York State Department of Corrections and Community Supervision parole officers were attempting to locate a parole absconder for whom they had an arrest warrant. To accomplish that task, the parole officers were provided with the parolee's last known address and basic background information, including the height and weight of the parolee—six feet, one inch and 180 pounds—together with his photograph. After visiting with the parolee's girlfriend, the parole officers learned that the parolee may be located not at a specific address, but generally near the 100 block of Flanders Street. Despite being only a short distance away, the parole officers arrived on Flanders Street nearly an hour later. When they arrived, defendant—who was walking from the 100 block of Flanders Street toward Post Avenue wearing a ski mask—was approached by one group of parole officers (the approaching officers). Defendant fled, and there is no evidence that the approaching officers did anything to pursue defendant.

The second set of parole officers (the pursuing officers)—in a

separate unmarked vehicle some 20 to 30 yards away—gave chase. They ultimately caught up to defendant and arrested him. Thereafter, the parole officers recovered two guns as well as narcotics. The record is devoid of any evidence as to the number of other people in the general vicinity where defendant was approached.

On this record, there is no dispute that the existence of a valid arrest warrant provided probable cause to arrest the parole absconder (*see People v Dortch*, 186 AD3d 1114, 1115 [4th Dept 2020]). In our view, however, it does not appear that the pursuing officers had even a subjectively reasonable belief that defendant was the parolee for whom they had an arrest warrant. Indeed, the People, who are "put to the burden of going forward to show the legality of the police conduct in the first instance" (*People v Berrios*, 28 NY2d 361, 367 [1971] [internal quotation marks & emphasis omitted]; *see People v Walker*, 221 AD3d 1568, 1568 [4th Dept 2023]), failed to adduce anything other than that defendant matched the generic height and weight of the average male in the general population. Notably, the People failed to call the approaching officers, and thus adduced no testimony with respect to their actions, observations, or whether they believed—reasonably or not—that defendant was the parole absconder, particularly in the absence of any evidence that they chased defendant when he fled.

The officers who *did* testify at the suppression hearing—the pursuing officers—testified simply that defendant roughly matched the height and weight of the parolee and that he fled. As set forth above, the pursuing officers did not testify that the approaching officers gave chase when defendant fled. Coupled with the pursuing officer's testimony that at the point when defendant fled, he was "free to leave," the record at the suppression hearing undercuts any possible claim that the pursuing officers were not simply chasing a man who fled, but that they actually believed defendant to be the parolee for whom they had an arrest warrant.

Even if the pursuing officers did believe that defendant was the parolee, we conclude that their belief was not objectively reasonable. In our view, for an officer's belief to be reasonable, it must be founded upon specific and articulable facts testified to at the suppression hearing. In *Dortch*, upon which the majority relies, the defendant was mistaken for his brother (186 AD3d at 1114-1115). However, in that case we did not reach the issue of whether the police reasonably believed the defendant was his brother, inasmuch as the majority concluded that the People failed to establish the validity of the underlying arrest warrant (*see id.* at 1115-1116).

In *People v Tejada* (270 AD2d 655 [3d Dept 2000], *lv denied* 95 NY2d 805 [2000]), another case upon which the majority relies, there were a number of specific and articulable facts, not present here, that supported the conclusion that the police had an objectively reasonable belief that the defendant was the subject of an outstanding arrest warrant—the defendant could not provide any written form of identification during a traffic stop and a warrant check revealed an outstanding arrest warrant for an individual who shared the same first

and last names as defendant, who was of the same race as defendant, and who had a birth date only seven days apart from the date of birth provided by the defendant (*id.* at 656-657).

Here, however, the People failed to offer any specific and articulable facts that would support the conclusion that the pursuing officers reasonably believed defendant to be the parolee. Notably, the pursuing officers conceded at the hearing that it was not unusual for defendant to be wearing a ski mask on a cold December morning. Given the presence of the ski mask, they could not discern defendant's race. Moreover, contrary to the majority's conclusion, defendant's height and weight did not "closely match[ ]" that of the parole absconder. The pursuing officers had never met the parole absconder or defendant before the encounter, and were provided only with a one-page "arrest and booking data" document consisting of a single headshot, together with a written physical description of the parolee.

The physical description on that one-page document listed the parolee's height and weight as six feet, one inch and 180 pounds, and that document was marked as an exhibit and received in evidence at the hearing. Despite this, one of the pursuing parole officers appears to have affirmatively misrepresented what the document said, changing the parolee's height and weight from six feet, one inch and 180 pounds to 5 feet 11 inches and 185 pounds, respectively. In doing so, the parole officer made it appear that defendant—whom he testified was 5 feet, 11 inches, and 185 to 200 pounds—more closely matched the physical description of the parolee, instead of admitting that defendant was shorter and somewhat heavier.

In our view, the People's contention that the parole officers reasonably believed defendant was the parolee—based upon nothing more than the assertion that defendant purportedly "matched" the generic height and weight of the parolee—does not withstand scrutiny, particularly where the pursuing officers could not see defendant's face or even discern defendant's race given that they were 20 to 30 yards away from defendant who was, reasonably, wearing a ski mask on a cold December day. While the actual difference in height and weight between the two men is not dramatic, their respective heights and weights are not at all distinctive relative to the general public.

To that end, the majority's conclusion is tantamount to holding that the parole investigators had a reasonable belief sufficient to stop and arrest any average-sized man, of any race, in the general area where the parolee may have been. Inasmuch as the People failed to adduce any specific and articulable facts that would support the conclusion that the parole officers reasonably believed defendant to be the parolee, we would reverse the judgment, vacate defendant's guilty plea, grant that part of his omnibus motion seeking to suppress tangible evidence, and dismiss the indictment.

In light of our determination, it is not necessary to address defendant's remaining contention.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

763

KA 19-00665

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KELVIN A. IVEY, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (FABIENNE N. SANTACROCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered February 5, 2019. The judgment convicted defendant upon his plea of guilty of identity theft 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 identity theft in the second degree (Penal Law § 190.79 [1]).

Defendant correctly contends, and the People correctly concede, that defendant's waiver of the right to appeal is invalid inasmuch as County Court's oral colloquy and the written waiver of the right to appeal mischaracterized the waiver as an "absolute bar" to the taking of an appeal (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Shea'honnie D.*, 217 AD3d 1419, 1420 [4th Dept 2023]).

Defendant further contends that the court erred in failing to make a minimal inquiry into his request for substitution of counsel. That contention "is encompassed by the plea . . . except to the extent that the contention implicates the voluntariness of the plea" (*People v Lafferty*, 227 AD3d 1480, 1481 [4th Dept 2024], *lv denied* 42 NY3d 928 [2024] [internal quotation marks omitted]; *see People v Harris*, 182 AD3d 992, 994 [4th Dept 2020], *lv denied* 35 NY3d 1066 [2020]). In any event, even assuming, arguendo, that the letter defendant sent to the court amounted to a request for substitution of counsel, we conclude that defendant abandoned that request when he decided to plead guilty while still being represented by the same attorney (*see People v Wellington*, 169 AD3d 1440, 1441 [4th Dept 2019], *lv denied* 33 NY3d 982

[2019]; *see also People v Molina*, 208 AD3d 1641, 1642-1643 [4th Dept 2022], *lv denied* 39 NY3d 964 [2022]). Here, not only did defendant fail to raise that request at subsequent appearances before the court, of which there were several, but he also affirmatively stated that he was satisfied by defense counsel's representation during the plea colloquy.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

776

KA 22-00040

PRESENT: WHALEN, P.J., CURRAN, OGDEN, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMETRIUS DAVIS, JR., DEFENDANT-APPELLANT.

MICHAEL JOS. WITMER, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Sam L. Valleriani, J.), rendered October 16, 2020. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sexual act in the first degree.

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

Memorandum: Defendant appeals from a judgment, convicting him, upon his plea of guilty, of attempted criminal sexual act in the first degree (Penal Law §§ 110.00, former 130.50 [1]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of any of his contentions on this appeal, we nevertheless affirm the judgment (*see People v Williams*, 225 AD3d 1130, 1130 [4th Dept 2024], *lv denied* 42 NY3d 973 [2024]; *see also People v Howard*, 210 AD3d 1383, 1383 [4th Dept 2022], *lv denied* 39 NY3d 1111 [2023]).

Defendant contends that County Court erred in denying his motion to withdraw his plea inasmuch as it was not knowingly, voluntarily, and intelligently entered due to the People's failure to comply with the CPL article 245 disclosure requirements. We reject that contention. "[P]ermission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Dale*, 142 AD3d 1287, 1289 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017] [internal quotation marks omitted]; *see People v Davis*, 129 AD3d 1613, 1614 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]). CPL 245.25 (2) provides that, at least seven days before any plea offer is set to expire, the People must disclose "all items and information that would be discoverable prior to trial." Where, as here, the defendant makes a motion based on the People's violation of that

provision, "the court must consider the impact of any violation on the defendant's decision to accept or reject a plea offer" (*id.*). Here, defendant failed to establish that the People's purported discovery violation "had any impact on his decision to accept the plea offer" (*People v Hewitt*, 201 AD3d 1041, 1044 [3d Dept 2022], *lv denied* 38 NY3d 928 [2022]; *see generally* CPL 245.25 [2]), and he has not shown that there was any " 'evidence of innocence, fraud, or mistake in inducing' " his guilty plea (*People v Fox*, 204 AD3d 1452, 1453 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]).

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

789

CA 23-01484

PRESENT: CURRAN, J.P., OGDEN, DELCONTE, AND HANNAH, JJ.

VINCENT CREHAN AND KATHRYN EHRIG,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JEFFREY B. RICHARDSON, RON GIZA, KAREN NOVO AND PATRICK DALTON, IN THEIR CAPACITIES AS TRUSTEES OF AMALGAMATED TRANSIT UNION LOCAL 1342 NIAGARA FRONTIER TRANSIT METRO SYSTEM PENSION FUND, AMALGAMATED TRANSIT UNION LOCAL 1342 NIAGARA FRONTIER TRANSIT METRO SYSTEM PENSION FUND, AMALGAMATED TRANSIT UNION LOCAL 1342 NIAGARA FRONTIER TRANSIT METRO SYSTEM PENSION PLAN,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BLITMAN & KING LLP, SYRACUSE (BRIAN J. LACLAIR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered August 16, 2023. The order granted the motion of defendants-respondents to dismiss the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion of defendants Jeffrey B. Richardson, Ron Giza, Karen Novo, Patrick Dalton, in their capacities as trustees of the Amalgamated Transit Union Local 1342 Niagara Frontier Transit Metro System Pension Fund, Amalgamated Transit Union Local 1342 Niagara Frontier Transit Metro System Pension Fund, and Amalgamated Transit Union Local 1342 Niagara Frontier Transit Metro System Pension Plan is denied, and the complaint is reinstated against those defendants.

Memorandum: Plaintiffs were employees of the Niagara Frontier Transit Metro System who took leaves of absence from their respective positions to serve as officers of their union, Amalgamated Transit Union Local 1342 (Union). During their service as Union officers, plaintiffs applied for and were granted early retirement and began

collecting their pension benefits. Following a determination by the Internal Revenue Service that plaintiffs were not eligible to receive pension benefits while they were still working for the Union, plaintiffs' monthly pension income was prospectively reduced in order to recoup payments that allegedly had been improperly made in prior years. Plaintiffs thereafter commenced this action, asserting causes of action for declaratory judgment, injunctive relief, breach of contract, and equitable estoppel against defendants Jeffrey B. Richardson, Ron Giza, Karen Novo, and Patrick Dalton, in their capacities as trustees of the Amalgamated Transit Union Local 1342 Niagara Frontier Transit Metro System Pension Fund (Trustees), Amalgamated Transit Union Local 1342 Niagara Frontier Transit Metro System Pension Fund, and Amalgamated Transit Union Local 1342 Niagara Frontier Transit Metro System Pension Plan (collectively, Fund defendants). Plaintiffs also asserted causes of action against the Trustees for breach of fiduciary duty and negligence and against defendants Jules L. Smith and Mark L. Stulmaker (collectively, attorney defendants) for breach of fiduciary duty and negligence/malpractice. In appeal No. 1, plaintiffs appeal from an order granting the Fund defendants' motion to dismiss the complaint against them. In appeal No. 2, plaintiffs appeal from an order and judgment granting Smith's motion to dismiss the complaint against him. In appeal No. 3, plaintiffs appeal from an order granting Stulmaker's motion to dismiss the complaint against him.

Plaintiffs contend in appeal No. 1 that Supreme Court erred in granting the Fund defendants' motion. We agree. On a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (7), "[i]t is axiomatic that plaintiff[s'] complaint is to be afforded a liberal construction, that the facts alleged therein are accepted as true, and that plaintiff[s] [are] to be afforded every possible favorable inference in order to determine whether the facts alleged in the complaint 'fit within any cognizable legal theory' " (*Palladino v CNY Centro, Inc.*, 70 AD3d 1450, 1451 [4th Dept 2010], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see generally Holbrook v National Fuel Gas Distrib. Corp.*, 11 AD3d 1040, 1041-1042 [4th Dept 2004]). Similarly, dismissal under CPLR 3211 (a) (1) is appropriate only if defendants' documentary evidence " 'utterly refutes the plaintiff[s'] factual allegations, conclusively establishing a defense as a matter of law' " (*Eccles v Shamrock Capital Advisors, LLC*, 42 NY3d 321, 343 [2024], quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). We conclude that plaintiffs' first cause of action adequately states a claim for a declaration that plaintiffs are entitled to their full, previously awarded benefits due to the arbitrary and capricious nature of the underlying determination to reduce their monthly pension income, and we further conclude that the Fund defendants' submissions do not conclusively disprove plaintiffs' claim (*see generally Hartshorne v Roman Catholic Diocese of Albany, N.Y.*, 200 AD3d 1427, 1429-1431 [3d Dept 2021]). The court erred in granting the Fund defendants' motion with respect to the second cause of action, seeking a permanent injunction, inasmuch as it is based on the same substantive allegations as the first cause of action (*see generally Pickard v Campbell*, 207 AD3d 1105, 1110 [4th Dept 2022], *lv denied* 39 NY3d 910 [2023]). Plaintiffs' third cause of action adequately states

a claim for breach of contract and defendants' documentary evidence does not conclusively establish a defense as a matter of law (*see Eccles*, 42 NY3d at 343), and the court thus erred in granting the Fund defendants' motion with respect thereto (*see generally Hartshorne*, 200 AD3d at 1429-1430; *Pacella v Town of Newburgh Volunteer Ambulance Corps. Inc.*, 164 AD3d 809, 813 [2d Dept 2018]). Inasmuch as the Fund defendants did not offer separate or distinct arguments for dismissing the fourth, fifth, and seventh causes of action, we conclude that the court erred in granting the Fund defendants' motion with respect to those causes of action.

Contrary to plaintiffs' contentions in appeal Nos. 2 and 3, the court did not err in granting the motions of the attorney defendants. With respect to plaintiffs' sixth cause of action, for breach of fiduciary duty, we note that "[t]he 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' " (*Kaleida Health v Hyland*, 200 AD3d 1654, 1655 [4th Dept 2021]; *see Wells v Hurlburt Rd. Co., LLC*, 145 AD3d 1486, 1487 [4th Dept 2016]; *Matter of Lorie DeHimer Irrevocable Trust*, 122 AD3d 1352, 1352-1353 [4th Dept 2014]). A fiduciary relationship is "grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 593 [2012], *rearg denied* 19 NY3d 1065 [2012] [internal quotation marks omitted]). "[C]ourts should not ordinarily transport [the parties] to [that] higher realm of relationship and fashion a stricter duty for them" where the parties have not themselves created such a relationship (*id.*). "[E]ssential elements of a fiduciary relation are . . . reliance, . . . de facto control and dominance" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 11 NY3d 146, 158 [2008] [internal quotation marks omitted]; *see Marmelstein v Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 NY3d 15, 21 [2008]). Stated differently, "[a] fiduciary relationship exists when confidence is reposed on one side and there is resulting superiority and influence on the other" (*AG Capital Funding Partners, L.P.*, 11 NY3d at 158). Determining whether a fiduciary relationship exists is necessarily a fact-specific inquiry (*see Oddo Asset Mgt.*, 19 NY3d at 593; *AG Capital Funding Partners, L.P.*, 11 NY3d at 158). Here, however, the complaint merely alleged, in conclusory terms, the existence of a fiduciary duty to plaintiffs "as [p]ension [p]lan participants and beneficiaries." There are no factual allegations supporting a greater duty than that typically owed, and indeed the complaint itself suggests a customary arm's length and indirect relationship between plan attorneys and plan participants. Plaintiffs do not allege that the attorney defendants had discretionary authority or control over the management or administration of the plan, and the complaint does not set forth allegations suggesting that a higher level of trust or control had been established between the attorney defendants and plaintiffs (*cf. Roni LLC v Arfa*, 18 NY3d 846, 848-849 [2011]; *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 20 [2005]). A plaintiff cannot show that a fiduciary relationship existed "by merely stating, in a conclusory fashion, that [a defendant] acted as a

fiduciary and that a relationship of trust existed" (*Marmelstein*, 11 NY3d at 21). Rather, it is incumbent on a plaintiff to "articulate specific facts that will allow a court to distinguish a viable claim of breach of fiduciary duty" from nonactionable conduct (*id.* at 21-22).

With respect to plaintiffs' eighth cause of action, for malpractice, "[i]t is well established that, '[t]o recover damages for legal malpractice, a plaintiff must prove, inter alia, the existence of an attorney-client relationship' " (*Spring v County of Monroe*, 151 AD3d 1694, 1695 [4th Dept 2017]; *see Berry v Utica Natl. Ins. Group*, 66 AD3d 1376, 1376 [4th Dept 2009]). Here, plaintiffs' complaint does not set forth sufficient facts from which the existence of an attorney-client relationship may be demonstrated or inferred. Instead, the complaint itself states that the attorney defendants provided their services "to the [plan] [t]rustees" and to the plan itself but does not assert the existence of an attorney-client relationship between the attorney defendants and plaintiffs. We reject plaintiffs' contention that an exception to the attorney-client requirement is alleged in the complaint. On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the facts pleaded are presumed to be true and are accorded every favorable inference, but "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration" (*Rhodes v Honigman*, 131 AD3d 1151, 1152 [2d Dept 2015]; *see Matter of Niagara County v Power Auth. of State of N.Y.*, 82 AD3d 1597, 1599 [4th Dept 2011], *lv dismissed in part & denied in part* 17 NY3d 838 [2011]). Here, to the extent that the complaint can be viewed to include allegations of circumstances warranting application of an exception to the attorney-client relationship requirement (*see generally Bluntt v O'Connor*, 291 AD2d 106, 114 [4th Dept 2002], *lv denied* 98 NY2d 605 [2002]), those allegations are flatly contradicted by the record.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

790

CA 23-01485

PRESENT: CURRAN, J.P., OGDEN, DELCONTE, AND HANNAH, JJ.

VINCENT CREHAN AND KATHRYN EHRIG,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JEFFREY B. RICHARDSON, ET AL., DEFENDANTS,
AND JULES L. SMITH, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HAGERTY & BRADY, BUFFALO (MICHAEL A. BRADY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered August 16, 2023. The order and judgment granted the motion of defendant Jules L. Smith to dismiss the complaint against him.

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

Same memorandum as in *Crehan v Richardson* ([appeal No. 1] — AD3d — [Mar. 14, 2025] [4th Dept 2025]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

791

CA 23-01486

PRESENT: CURRAN, J.P., OGDEN, DELCONTE, AND HANNAH, JJ.

VINCENT CREHAN AND KATHRYN EHRIG,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JEFFREY B. RICHARDSON, ET AL., DEFENDANTS,
AND MARK L. STULMAKER, DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, BUFFALO (BRIAN SUTTER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered August 16, 2023. The order granted the motion of defendant Mark L. Stulmaker to dismiss the complaint against him.

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

Same memorandum as in *Crehan v Richardson* ([appeal No. 1] — AD3d — [Mar. 14, 2025] [4th Dept 2025]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

793

KA 23-01423

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM L. CRANE, DEFENDANT-APPELLANT.

LAW OFFICE OF MAURICE J. VERRILLO, P.C., ROCHESTER (MAURICE J. VERRILLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Steuben County Court (Chauncey J. Watches, J.), dated July 31, 2023. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing points against him under risk factors 11 and 13 of the risk assessment instrument (RAI) because the People failed to prove by the requisite clear and convincing evidence that he was abusing alcohol at the time of the offensive conduct or that his conduct was unsatisfactory while confined (*see generally* § 168-n [3]; *People v Mingo*, 12 NY3d 563, 571 [2009]). We agree.

Offenders may be assessed 15 points under risk factor 11 if they have a history of drug or alcohol abuse (*see People v Palmer*, 20 NY3d 373, 377-378 [2013]). The People sought the assessment of points under risk factor 11 based on defendant's use of alcohol at the time of offensive conduct that occurred in 2016. As relevant here, "[i]n order to demonstrate that [defendant] was abusing . . . alcohol at the time of the offense, the People [were required to] show by clear and convincing evidence that [defendant] used alcohol in excess . . . at the time of the crime" (*id.* at 378 [internal quotation marks omitted]). Here, the victim informed a caseworker that, on the night of that incident, defendant had been "outside by the fire drinking." Defendant's ex-wife also indicated in her victim impact statement that

defendant was "drunk" on the night of that incident, but it is unclear whether the source of her information was the victim or hearsay from an unidentified third-party with whom the victim had spoken and whose reliability could not be tested (*see Mingo*, 12 NY3d at 574). In contrast, the victim denied that defendant had been drinking at the time of the second incident and indicated that defendant "normally doesn't drink." In his interview with probation, defendant denied "current alcohol or substance use and . . . any current or past treatment for such." We conclude that there is no indication in the record that defendant abused alcohol by drinking in excess, that defendant became intoxicated, or that alcohol affected his behavior during the incident (*see Palmer*, 20 NY3d at 379). Nor is it "clear from the record what time the drinking occurred, how much [defendant] had to drink, and how much time passed before he abused [the] victim" (*id.*). The People thus failed to establish that defendant abused alcohol at the time of the offensive conduct, and the court erred in assessing 15 points under risk factor 11 (*see id.*; *People v Currington*, 219 AD3d 1701, 1703 [4th Dept 2023]; *People v Kowal*, 175 AD3d 1057, 1058 [4th Dept 2019]).

With respect to the assessment of points under risk factor 13, the Sex Offender Registration Act: Risk Assessment Guidelines and Commentary (2006) (Guidelines) note that an "offender's conduct while in custody or under supervision [may be] a predictor of future behavior" (Guidelines at 16). The Guidelines specifically reference offenders who engage in misconduct while in custody and those who engage in misconduct while "on probation or parole" (*id.*). Here, we conclude that defendant was not in custody or under supervision at the time of the alleged misconduct, and we agree with defendant that the court thus erred in assessing points under risk factor 13 (*cf. People v Spencer*, 197 AD3d 1004, 1005 [4th Dept 2021], *lv denied* 37 NY3d 1099 [2021]; *People v Miller*, 186 AD3d 1095, 1097 [4th Dept 2020], *lv denied* 36 NY3d 903 [2020]; *People v Houck*, 170 AD3d 1642, 1642 [4th Dept 2019], *lv denied* 33 NY3d 910 [2019]).

Inasmuch as the court erred in assessing 15 points on the RAI for risk factor 11 and 10 points for risk factor 13, defendant's score on the RAI must be reduced from 120 to 95, rendering him a presumptive level two risk (*see generally People v Maund*, 181 AD3d 1331, 1332 [4th Dept 2020]). We therefore modify the order accordingly.

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

798

KA 21-00624

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY M. ANDERSON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (CLEA WEISS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered April 15, 2021. 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 conviction arises from defendant's possession of a handgun on the premises of a gas station convenience store.

Defendant contends that his conviction is not supported by legally sufficient evidence because the People failed to establish that the gas station convenience store was not defendant's place of business. We reject that contention. "Where, as here, the defendant contends that [their] conviction is not supported by legally sufficient evidence, we review the evidence in a light most favorable to the People, and will not disturb [the] conviction as long as there exists 'any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial' " (*People v Galindo*, 23 NY3d 719, 724 [2014], quoting *People v Bleakley*, 69 NY2d 490, 495 [1987]; *see People v Moorhead*, 224 AD3d 1225, 1226 [4th Dept 2024], *lv denied* 41 NY3d 1003 [2024]). As relevant here, a person is guilty of criminal possession of a weapon in the second degree when that person knowingly possesses any loaded firearm and such possession did not take place in such person's home or place of business (*see* Penal Law § 265.03 [3]; CJI2d[NY] Penal Law § 265.03 [3]). "Although the place of business exception is not statutorily defined, it has been construed narrowly

by the courts in an effort to balance the State's strong policy to severely restrict possession of any firearm . . . with its policy to treat with leniency persons attempting to protect certain areas in which they have a possessory interest and to which members of the public have limited access" (*People v Wallace*, 147 AD3d 1494, 1494 [4th Dept 2017], *affd* 31 NY3d 503 [2018] [internal quotation marks omitted]).

Here, inasmuch as the evidence at trial established that defendant possessed the weapon on a sidewalk adjacent to the gas station convenience store's parking lot, we conclude that, even assuming, arguendo, that the gas station convenience store was defendant's place of business, the evidence of possession outside of the gas station convenience store was legally sufficient to support the conviction (*see People v Hawkins*, 110 AD3d 1242, 1242-1243 [3d Dept 2013], *lv denied* 22 NY3d 1041 [2013]; *People v Laing*, 66 AD3d 1353, 1354 [4th Dept 2009], *lv denied* 13 NY3d 908 [2009]; *see also People v White*, 75 AD3d 109, 120-122 [2d Dept 2010], *lv denied* 15 NY3d 758 [2010]). Contrary to defendant's further contention, 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 conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that Penal Law § 265.03 (3) is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). Defendant failed to raise a constitutional challenge to the statute during the proceedings in Supreme Court, and therefore any such contention is unpreserved for our review (*see People v Cabrera*, 41 NY3d 35, 42-43 [2023]; *People v Garcia*, 41 NY3d 62, 66 [2023]; *People v Williams*, 228 AD3d 1314, 1316 [4th Dept 2024]). We decline to exercise our power to review defendant's constitutional challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that the sentence is unduly harsh and severe. We have considered defendant's remaining contention and conclude that it does not warrant reversal or modification of the judgment.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

800

CA 23-01338

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, AND KEANE, JJ.

JAMES R. CAPUTO, M.D., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD S. TUBIOLO, ESQ., BRYAN S. KORNFIELD, ESQ., AND HIRSCH & TUBIOLO, P.C., DEFENDANTS-RESPONDENTS.

JAMES R. CAPUTO, M.D., PLAINTIFF-APPELLANT PRO SE.

BARCLAY DAMON LLP, ROCHESTER (TARA J. SCIORTINO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered July 21, 2023. The order and judgment granted the motion of defendants for summary judgment, dismissed the complaint and denied the cross-motion of plaintiff seeking, inter alia, leave to amend the complaint.

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

Memorandum: Plaintiff, a medical doctor, commenced this legal malpractice action alleging that defendants were negligent in their representation of plaintiff with respect to charges asserted against him by the New York State Office of Professional Medical Conduct (OPMC). Supreme Court granted defendants' motion seeking summary judgment dismissing the complaint and denied plaintiff's cross-motion seeking, inter alia, leave to amend the complaint to conform the pleadings to the proof and summary judgment on the complaint. We affirm.

We conclude that defendants met their initial burden on their motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "In order to establish their entitlement to judgment as a matter of law, defendants had to present evidence in admissible form establishing that plaintiff[ ] [is] 'unable to prove at least one necessary element of the legal malpractice action' " (*Seubert v Marchioni*, 112 AD3d 1370, 1371 [4th Dept 2013], *lv denied* 22 NY3d 865 [2014]), e.g., that defendants " 'failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal community' " (*Phillips v Moran & Kufta, P.C.*, 53 AD3d 1044, 1044-1045 [4th Dept 2008]; *see Scartozzi v Potruch*, 72 AD3d 787, 789-790 [2d Dept 2010]; *see generally Rudolf v Shayne, Dachs, Stanisci, Corker &*

Sauer, 8 NY3d 438, 442 [2007]). Here, plaintiff alleges that defendants deviated from the standard of care by failing to timely answer the statement of charges asserted by OPMC in a professional misconduct proceeding, and the evidence that defendants submitted in support of their motion establishes that defendants did not have an attorney-client relationship with plaintiff at the time of the default (*see Berry v Utica Natl. Ins. Group*, 66 AD3d 1376, 1376 [4th Dept 2009]). Plaintiff's unilateral belief that he was defendants' client is insufficient to confer that status upon him (*see id.*). We further conclude that defendants established that any negligence on their part was not a proximate cause of plaintiff's alleged damages (*see Dabiri v Porter*, 227 AD3d 860, 861 [2d Dept 2024]; *Casey v Exum*, 219 AD3d 456, 457 [2d Dept 2023]). In opposition to the motion, plaintiff failed to raise an issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

We reject plaintiff's contention that the court abused its discretion in denying that part of his cross-motion seeking leave to amend the pleading to conform to the evidence pursuant to CPLR 3025 (c) (*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 [a pleading] 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 generally Guest v City of Buffalo, Dept. of Sts. Sanitation*, 109 AD2d 1080, 1081 [4th Dept 1985]). Here, plaintiff seeks to amend his complaint to include allegations that he had an attorney-client relationship with defendants on or before the deadline for submitting an answer to the charges in the professional malpractice proceeding. As previously noted, however, defendants established on their motion that plaintiff did not have an attorney-client relationship with defendants on or before the date the answer was due, and thus the proposed amendment is without merit (*see generally Knight v Realty USA.COM, Inc.*, 96 AD3d 1443, 1445 [4th Dept 2012]).

We have reviewed plaintiff's remaining contentions and conclude that none warrants modification or reversal of the order and judgment.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

864

CA 24-00484

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND KEANE, JJ.

JOSEPH DERSAM AND LINDA DERSAM,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ONTARIO INSURANCE COMPANY, DEFENDANT-RESPONDENT.

THE COPPOLA FIRM, BUFFALO (DAVID M. GOODMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BARCLAY DAMON LLP, ROCHESTER (MARK T. WHITFORD, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered September 18, 2023. The judgment granted in part the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying that part of defendant's motion seeking to dismiss the second cause of action insofar as it relates to the building and other structures, reinstating the second cause of action to that extent, vacating the declaration, and denying that part of defendant's motion seeking to dismiss the third cause of action and reinstating that cause of action, and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs are the owners of real property that they insured with a homeowner's policy issued by defendant, which included coverage for the building, related structures, contents, and rental income. After the property sustained extensive damage in a fire, defendant disclaimed coverage for the building and related structures based on plaintiffs' failure to submit a sworn statement in proof of loss form within 60 days of defendant's demand. Plaintiffs commenced the instant action, asserting causes of action for breach of contract, breach of the duty of good faith and fair dealing, bad faith, and a declaration that, pursuant to the policy, defendant is obligated to pay for all losses sustained by plaintiffs as a result of the fire.

Defendant moved to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (a) (7). Supreme Court granted the motion in part, dismissed the causes of action for breach of contract and declaratory relief insofar as they relate to plaintiffs' claim of damage to the building and other structures, declared that defendant was not

obligated to provide insurance coverage for the building and other structures, and dismissed the causes of action for breach of the duty of good faith and fair dealing and for bad faith. Plaintiffs appeal.

We agree with plaintiffs that the court erred in granting that part of defendant's motion seeking to dismiss the breach of contract cause of action insofar as it relates to the building and other structures pursuant to CPLR 3211 (a) (1). "A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claims" (*Baumann Realtors, Inc. v First Columbia Century-30, LLC*, 113 AD3d 1091, 1092 [4th Dept 2014] [internal quotation marks omitted]; *see Wells Fargo Bank, N.A. v Zahran*, 100 AD3d 1549, 1550 [4th Dept 2012], *lv denied* 20 NY3d 861 [2013]). "The defendant bears the burden of demonstrating that the proffered evidence conclusively refutes the plaintiff's factual allegations" (*Salus v Berke*, 221 AD3d 1390, 1391 [3d Dept 2023] [internal quotation marks omitted]). "When an insurer gives its insured written notice of its desire that proof of loss under a policy of fire insurance be furnished and provides a suitable form for such proof, failure of the insured to file proof of loss within 60 days after receipt of such notice . . . is an absolute defense to an action on the policy, absent waiver of the requirement by the insurer or conduct on its part estopping its assertion of the defense" (*Igbara Realty Corp. v New York Prop. Ins. Underwriting Assn.*, 63 NY2d 201, 209-210 [1984]; *see* Insurance Law § 3407 [a]; *Armstrong v United Frontier Mut. Ins. Co.*, 181 AD3d 1332, 1333 [4th Dept 2020]).

Here, defendant's documentary evidence included a printed copy of an email from its claims representative to plaintiff Linda Dersam that, according to defendant, included an attached blank sworn statement in proof of loss form. Defendant also submitted documents establishing that plaintiffs did not submit a sworn statement in proof of loss form within 60 days of their receipt of the email. Even assuming, arguendo, that an email may constitute documentary evidence for purposes of CPLR 3211 (a) (1) (*see Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 105 n 3 [2018]; *4720 Third Ave. Hous. LLC v CA Ventures LLC*, 211 AD3d 417, 418 [1st Dept 2022]; *Binn v Muchnick, Golieb & Golieb, P.C.*, 180 AD3d 598, 598 [1st Dept 2020]; *cf. Phoenix Grantor Trust v Exclusive Hospitality, LLC*, 172 AD3d 923, 924-925 [2d Dept 2019]; *Stone v Bloomberg L.P.*, 163 AD3d 1028, 1029, 1031 [2d Dept 2018]), here, the email does not conclusively establish a defense as a matter of law inasmuch as the printed copy of the email does not establish that a sworn statement in proof of loss form was actually attached to the email (*see generally Bailey v Nationwide Mut. Fire Ins. Co.*, 133 AD2d 915, 916 [3d Dept 1987]). We therefore modify the judgment by denying that part of the motion seeking to dismiss the second cause of action insofar as it relates to the building and other structures, reinstating the second cause of action to that extent, and vacating the declaration.

Contrary to plaintiffs' contention, however, the court did not err in granting that part of defendant's motion seeking to dismiss the

declaratory judgment cause of action insofar as it relates to the building and other structures inasmuch as it is "duplicative of the breach of contract cause of action" (*Fitzgerald v SMS/800, Inc.*, 132 AD3d 1259, 1260 [4th Dept 2015]; *see Upfront Megatainment, Inc. v Thiam*, 215 AD3d 576, 578 [1st Dept 2023]).

Plaintiffs further contend that the court erred in granting that part of the motion seeking to dismiss pursuant to CPLR 3211 (a) (7) the third cause of action for breach of the duty of good faith and fair dealing. We agree, and we therefore further modify the judgment accordingly. "In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). "In the context of insurance contracts specifically, the implied covenant of good faith and fair dealing includes a duty on the part of the insurer to investigate in good faith and pay covered claims" (*Brown v Erie Ins. Co.*, 207 AD3d 1144, 1145 [4th Dept 2022] [internal quotation marks omitted]). The insurer "must not manufacture factually incorrect reasons to deny insurance coverage, must not deviate from its own practices or from industry practices, and must not act with 'gross disregard' of the insured's interests" (*East Ramapo Cent. Sch. Dist. v New York Schs. Ins. Reciprocal*, 199 AD3d 881, 884 [2d Dept 2021] [internal quotation marks omitted]). "Even if a party is not in breach of its express contractual obligations, it may be in breach of the implied duty of good faith and fair dealing when it exercises a contractual right as part of a scheme to . . . deprive the other party of the fruit or benefit of its bargain" (*Brown*, 207 AD3d at 1145 [internal quotation marks omitted]). In the context of a cause of action for breach of the duty of good faith and fair dealing, in order to establish a prima facie case that an insurer acted in bad faith, "the plaintiff must establish that the insurer's conduct constituted a 'gross disregard' of the insured's interests—that is, a deliberate or reckless failure to place on equal footing the interests of the insured with the insurer's own interests" (*id.*).

Here, in the complaint, plaintiffs allege that defendant failed to pay the minimum sum that it had determined plaintiffs are owed under the policy, that defendant unreasonably refused to extend plaintiffs' time to submit the sworn statement in proof of loss, and that defendant handled plaintiffs' claim with respect to the building differently than it handled plaintiffs' claim with respect to the contents of the building. In addition, we may consider affidavits submitted in opposition to the motion to remedy any defects in the complaint (*see Divito v Fiandach*, 160 AD3d 1356, 1357 [4th Dept 2018]), including the affidavit of Linda Dersam, who averred that it was unfair of defendant to reject her request for additional time to complete the form that defendant failed to provide to her, and the affidavit of plaintiffs' adjuster, who averred that defendant deviated from industry practices when handling plaintiffs' claim. Accepting the facts as alleged in the complaint as true, as we must on a motion to dismiss pursuant to CPLR 3211 (a) (7) (*see Eccles v Shamrock Capital Advisors, LLC*, 42 NY3d 321, 342 [2024]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that plaintiffs stated a cause of

action for a breach of the duty of good faith and fair dealing (*see East Ramapo Cent. Sch. Dist.*, 199 AD3d at 885).

Finally, we reject plaintiffs' contention that the court erred in granting the motion with respect to the cause of action for bad faith. " '[T]here is no separate cause of action in tort for an insurer's bad faith failure to perform its obligations' under an insurance contract" (*Zawahir v Berkshire Life Ins. Co.*, 22 AD3d 841, 842 [2d Dept 2005]; *see Morales v Arrowood Indem. Co.*, 203 AD3d 1603, 1606 [4th Dept 2022]). Further, plaintiffs "failed to allege or demonstrate 'the creation of a relationship or duty between [themselves] and [defendant] separate from [the] contractual obligation; therefore, no independent tort claim lies' " (*Morales*, 203 AD3d at 1606).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

890

KA 23-00977

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TENELL I. COLLINS, DEFENDANT-APPELLANT.

JOHN R. LEWIS, SLEEPY HOLLOW, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ELISABETH DANNAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Theodore H. Limpert, J.), rendered May 18, 2023. The judgment convicted defendant upon a jury verdict of use of a child in a sexual performance, possessing a sexual performance by a child (seven counts), and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count of use of a child in a sexual performance as a sexually motivated felony (Penal Law §§ 130.91, 263.05), seven counts of possessing a sexual performance by a child (§ 263.16), and one count of endangering the welfare of a child (§ 260.10 [1]). The conviction stems from the discovery of pornographic pictures of a 13-year-old child on defendant's cell phone.

Defendant contends that County Court violated his right to present a defense by improperly limiting his cross-examination of the child. To the extent that defendant's contention is preserved for our review (*see generally People v Lane*, 7 NY3d 888, 889 [2006]; *People v Jones*, 193 AD3d 1410, 1412 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]), we conclude that it lacks merit (*see generally People v Patterson*, 188 AD3d 1673, 1673-1674 [4th Dept 2020], *lv denied* 36 NY3d 1053 [2021]; *People v Adeyemi*, 32 AD3d 755, 756 [1st Dept 2006], *lv denied* 7 NY3d 865 [2006]; *People v Wegman*, 2 AD3d 1333, 1335 [4th Dept 2003], *lv denied* 2 NY3d 747 [2004]).

Contrary to defendant's further contention, the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction with respect to the counts of possessing a sexual performance by a

child (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

905

KA 24-00794

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICARDO R. COUSINS, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (MORGAN R. MAYER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered October 25, 2023. The judgment convicted defendant, upon a jury verdict, of attempted criminal possession of a controlled substance in the first degree and attempted criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of attempted criminal possession of a controlled substance in the first degree (Penal Law §§ 110.00, 220.21 [1]) and attempted criminal possession of a controlled substance in the third degree (§§ 110.00, 220.16 [1]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Under the circumstances of this case, however, we agree with defendant that defense counsel was ineffective, and we therefore reverse the judgment and grant defendant a new trial.

"Every defendant is constitutionally entitled to effective assistance of counsel, meaning under our state standards that 'so long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met' " (*People v Wright*, 25 NY3d 769, 779 [2015], quoting *People v Baldi*, 54 NY2d 137, 147 [1981]). "The task of a reviewing court is to '[c]onsider[ ] the seriousness of the [alleged] errors in their totality' " (*id.*). Under the New York standard, it is defendant's burden " 'to demonstrate the absence of strategic or other legitimate explanations' for counsel's

alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Baker*, 14 NY3d 266, 270-271 [2010]). However, it is well established "that the right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense" (*People v Droz*, 39 NY2d 457, 462 [1976]). "Essential to any representation, and to the attorney's consideration of the best course of action on behalf of the client, is the attorney's investigation of the law, the facts, and the issues that are relevant to the case" (*People v Oliveras*, 21 NY3d 339, 346 [2013]). Indeed, "[a]n attorney's strategy is shaped in significant part by the results of the investigation stage of the representation" (*id.*).

Here, the record reveals that on several occasions as the case neared trial, including during the *Mapp* and *Molineux* hearings, and subsequently at the trial defense counsel was unfamiliar with and had not reviewed relevant and critical discovery obtained from defendant's cell phones following the execution of a search warrant. For example, defense counsel initially failed to object to the admission of a flash drive containing the entire contents of defendant's cell phones, but, when the People later isolated a portion of the cell phone contents as a separate exhibit for the jury, defense counsel objected—although the contents had already been admitted—and acknowledged that he had not had a chance to review "the exact exhibit." Defense counsel also failed to object to the portion of those contents containing voice notes, which constituted improper hearsay (*see People v Deleon*, 262 AD2d 421, 421-422 [2d Dept 1999], *lv denied* 93 NY2d 1017 [1999]). Additionally, defense counsel's failure to review the contents of defendant's cell phones had the result that he could not appreciate how important certain text messages and other communications were to the People's case. Defense counsel belatedly sought to admit certain physical evidence of financial transactions that had not previously been disclosed during discovery to counter the communications presented by the People. County Court, however, precluded that physical evidence. Furthermore, defense counsel never sought a limiting instruction on the *Molineux* evidence that the People were permitted to introduce (*see generally People v Williams*, 231 AD2d 868, 868 [4th Dept 1996], *lv denied* 89 NY2d 868 [1996]; *People v Forbes*, 203 AD2d 609, 610-611 [3d Dept 1994]). We conclude that "[t]here is simply no legitimate explanation for" defense counsel's failure to properly investigate the law, facts, and issues relevant to the case and that "[t]his failure seriously compromised defendant's right to a fair trial" (*Oliveras*, 21 NY3d at 348).

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

907

KA 22-01558

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROGER L. BALLARD, JR., DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR DEFENDANT-APPELLANT.

VINCENT A. HEMMING, ACTING DISTRICT ATTORNEY, WARSAW (CHELSIE A. HAMILTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered February 24, 2022. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child, 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 affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of predatory sexual assault against a child (Penal Law former § 130.96), sexual abuse in the first degree (§ 130.65 [1]), and endangering the welfare of a child (§ 260.10 [1]). The conviction arose from defendant's sexual abuse of his half-sister, which occurred over a number of years and when she was at least as young as eight years old.

We reject defendant's contention that County Court's evidentiary rulings deprived him of a fair trial. Contrary to defendant's contention, we conclude that the court did not err in admitting evidence of a prior uncharged crime, i.e., that defendant previously sexually abused the complainant when defendant was 13 years old. That evidence "was 'relevant to provide background information concerning the context and history of defendant's relationship with [the complainant]' " (*People v Wertman*, 114 AD3d 1279, 1280 [4th Dept 2014], *lv denied* 23 NY3d 969 [2014]; *see People v Maxey*, 129 AD3d 1664, 1665 [4th Dept 2015], *lv denied* 27 NY3d 1002 [2015], *reconsideration denied* 28 NY3d 933 [2016]; *cf. People v Leonard*, 29 NY3d 1, 7-8 [2017]; *see also People v Hu Sin*, 217 AD3d 1439, 1439 [4th Dept 2023]), including the reason why the complainant was not to be left alone with defendant as part of an established safety plan. Additionally, the evidence concerning the prior abuse and defendant's admissions to the police about those acts were "inextricably

interwoven with the evidence of the charged crime[s]" and were "necessary to comprehend that evidence" (*People v Robb*, 23 AD3d 1116, 1117 [4th Dept 2005], *lv denied* 6 NY3d 780 [2006] [internal quotation marks omitted]). The evidence was also relevant to explain why the complainant's disclosure of the abuse was delayed and incremental (*see People v Presha*, 83 AD3d 1406, 1407 [4th Dept 2011]). We conclude that the prejudicial effect of the evidence "did not outweigh its probative value . . . , and the court provided . . . limiting instruction[s that] minimized any prejudice to defendant" (*People v King*, 181 AD3d 1233, 1235 [4th Dept 2020], *lv denied* 35 NY3d 1027 [2020]; *see People v Tosca*, 98 NY2d 660, 661 [2002]; *Hu Sin*, 217 AD3d at 1440).

Defendant further contends that the court erred in admitting certain alleged hearsay testimony from the investigating officer. We reject that contention. The testimony was not hearsay because it was not offered for its truth (*see People v Thomas*, 174 AD3d 1430, 1432 [4th Dept 2019]), but rather to explain the officer's state of mind and the investigative process (*see People v Ludwig*, 24 NY3d 221, 231-232 [2014]; *People v Austen*, 197 AD3d 861, 861 [4th Dept 2021], *lv denied* 37 NY3d 1095 [2021]). Likewise, the complainant's testimony regarding what her friend told her about certain comments made by defendant was not hearsay because it was offered to show the complainant's state of mind upon hearing the comments (*see People v Hyland*, 168 AD3d 1096, 1097 [2d Dept 2019], *lv denied* 33 NY3d 977 [2019]; *People v Hamm*, 42 AD3d 550, 551 [2d Dept 2007], *lv denied* 9 NY3d 961 [2007]; *People v Daniels*, 265 AD2d 909, 910 [4th Dept 1999], *lv denied* 94 NY2d 878 [2000]). As to the testimony of the complainant's mother that the complainant told her that something happened at the house of the complainant's father, the court properly determined that the statement fell within the prompt outcry exception to the hearsay rule because it was a report of sexual abuse made at the first suitable opportunity after the abuse occurred (*see People v Rath*, 192 AD3d 1600, 1601 [4th Dept 2021], *lv denied* 37 NY3d 959 [2021]; *see generally People v McDaniel*, 81 NY2d 10, 17 [1993]; *People v Kornowski*, 178 AD2d 984, 984 [4th Dept 1991], *lv denied* 89 NY2d 1096 [1997]).

Defendant contends that the evidence is legally insufficient to support his conviction of endangering the welfare of a child (Penal Law § 260.10 [1]). Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support that conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant failed to preserve his contention that the evidence is legally insufficient to support the conviction of predatory sexual assault against a child (former § 130.96; *see generally People v Gray*, 86 NY2d 10, 19 [1995]).

Defendant also contends, however, that the verdict is against the weight of the evidence, and "we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of [defendant's contention]" (*People v Arroyo*, 111 AD3d 1299,

1299 [4th Dept 2013], *lv denied* 23 NY3d 960 [2014] [internal quotation marks omitted]). 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 Bleakley*, 69 NY2d at 495).

Defendant's contention that the court gave an improper jury instruction is unpreserved for appellate review (*see People v Autry*, 75 NY2d 836, 838-839 [1990]; *People v VanGorden*, 147 AD3d 1436, 1440 [4th Dept 2017], *lv denied* 29 NY3d 1037 [2017]) and, in any event, is without merit.

Additionally, defendant's contention that the verdict is repugnant is unpreserved (*see People v Alfaro*, 66 NY2d 985, 987 [1985]; *People v Brooks*, 139 AD3d 1391, 1392 [4th Dept 2016], *lv denied* 28 NY3d 1026 [2016]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that the sentence is unduly harsh and severe. We note, however, that the certificate of disposition incorrectly recites that defendant was convicted of one count of sexual abuse in the first degree under Penal Law § 130.65 (4), and it must therefore be amended to reflect that he was instead convicted of one count of sexual abuse in the first degree under Penal Law § 130.65 (1) (*see People v Brown*, 115 AD3d 1204, 1206 [4th Dept 2014], *lv denied* 23 NY3d 1060 [2014]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

916

CA 24-00026

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, DELCONTE, AND HANNAH, JJ.

MARK W. OSWALD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DURUVA RAMESH AND VISWAMBAL RAMESH,
DEFENDANTS-APPELLANTS.

HAGELIN SPENCER LLC, BUFFALO (JOAN M. RICHTER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SCHIFFMACHER CINELLI ADOFF LLP, BUFFALO (AARON M. ADOFF OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Michael Siragusa, A.J.), entered December 7, 2023. The order granted those parts of the motion of plaintiff seeking summary judgment on the issue of negligence and seeking to dismiss defendants' first, fourth and sixth affirmative defenses.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained when the motorcycle he was operating was rear-ended by a vehicle driven by defendant Duruva Ramesh. Supreme Court thereafter granted those parts of plaintiff's motion seeking summary judgment on the issue of negligence and to dismiss defendants' first, fourth and sixth affirmative defenses. Defendants now appeal.

We reject defendants' contention that the court erred in granting that part of the motion seeking summary judgment on the issue of negligence. "It is well settled that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle" (*Macri v Kotrys*, 164 AD3d 1642, 1643 [4th Dept 2018] [internal quotation marks omitted]; *see Rodriguez v First Student, Inc.*, 163 AD3d 1425, 1427 [4th Dept 2018]; *Tate v Brown*, 125 AD3d 1397, 1398 [4th Dept 2015]). In order to rebut the presumption of negligence, "the driver of the rear vehicle must submit a [nonnegligent] explanation for the collision" (*Shah v Nowakowski*, 203 AD3d 1737, 1740 [4th Dept 2022] [internal quotation marks omitted]; *see Macri*, 164 AD3d at 1643; *Tate*, 125 AD3d at 1398). Here, plaintiff met his initial burden on the issue of negligence by establishing that his motorcycle was stopped at an intersection when it was rear-ended by defendants' vehicle and, in opposition,

defendants failed to submit any "nonnegligent explanation for the collision" (*Ruzycki v Baker*, 301 AD2d 48, 49 [4th Dept 2002]). Indeed, "[f]ar from constituting a nonnegligent explanation for the crash, the driver's deposition testimony conclusively establishes [his] own negligence, i.e., that [he] breached [the] duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Sims v Ciccone-Burton*, 167 AD3d 1541, 1543 [4th Dept 2018] [internal quotation marks omitted]; *see Cupp v McGaffick*, 104 AD3d 1283, 1284 [4th Dept 2013]; *Roberts v Hall*, 248 AD2d 845, 845 [3d Dept 1998]).

We also reject defendants' contention that the court erred in granting those parts of the motion seeking summary judgment dismissing the first, fourth and sixth affirmative defenses. With respect to the first affirmative defense, asserting application of the emergency doctrine, plaintiff met his initial burden of establishing that the emergency doctrine is not applicable to the facts of this case, and defendants failed to raise a triable issue of fact in opposition (*see Niedzwiecki v Yeates*, 175 AD3d 903, 905 [4th Dept 2019]; *see generally Herdendorf v Polino*, 43 AD3d 1429, 1429-1430 [4th Dept 2007]). With respect to the fourth affirmative defense, asserting comparative negligence on the part of plaintiff, plaintiff met his initial burden of establishing that he was free from comparative negligence, and defendants failed to raise a triable issue of fact in opposition (*see Yawagyentsang v Safeway Constr. Enters., LLC,* 225 AD3d 827, 827-828 [2d Dept 2024]; *Niedzwiecki*, 175 AD3d at 905). Finally, with respect to the sixth affirmative defense, asserting that the plaintiff was unlicensed and lacked the necessary training and experience to operate a motorcycle, " 'the absence or possession of a driver's license is not relevant to the issue of negligence' in the operation of a motor vehicle" (*Graham v Jones*, 147 AD3d 1369, 1372 [4th Dept 2017]) and defendants' "mere speculation" that plaintiff lacked the necessary training and experience to operate a motorcycle "is insufficient to defeat plaintiff's entitlement to dismissal of the [sixth] affirmative defense" (*Stickney v Alleca*, 52 AD3d 1214, 1215 [4th Dept 2008]; *see generally Gill v Braasch*, 100 AD3d 1415, 1416 [4th Dept 2012]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

923

TP 24-01023

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, NOWAK, AND KEANE, JJ.

IN THE MATTER OF WILLIE BRIGHT, PETITIONER,

V MEMORANDUM AND ORDER

DANIEL F. MARTUSCELLO, III, 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 (DOUGLAS E. WAGNER 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 [Melissa Lightcap Cianfrini, A.J.], entered June 28, 2024) to review determinations of respondent. The determinations found after tier III hearings that petitioner violated various incarcerated individual rules.

It is hereby ORDERED that the determination dated August 7, 2023, is unanimously annulled on the law without costs, the amended petition is granted in part, respondent is directed to expunge from petitioner's institutional record all references to the violation of incarcerated individual rule 107.11 (7 NYCRR 270.2 [B] [8] [ii]), and the matter is remitted to respondent for a new hearing as to the alleged violation of incarcerated individual rule 107.20 (7 NYCRR 270.2 [B] [8] [iii]); the determination dated August 8, 2023, is modified on the law and the amended petition is granted in part by annulling that part of the determination finding that petitioner violated incarcerated individual rules 107.10 (7 NYCRR 270.2 [B] [8] [i]) and 107.11 (7 NYCRR 270.2 [B] [8] [ii]), and vacating the penalty and as modified the determination is confirmed without costs, respondent is directed to expunge from petitioner's institutional record all references to the violation of those incarcerated individual rules, and the matter is remitted to respondent for the imposition of an appropriate penalty on the remaining violation; the determination dated September 14, 2023, is annulled on the law without costs, the amended petition is granted in part, and respondent is directed to expunge from petitioner's institutional record all references to the violation of incarcerated individual rules 107.10 (7 NYCRR 270.2 [B] [8] [i]), 107.11 (7 NYCRR 270.2 [B] [8] [ii]), and

107.20 (7 NYCRR 270.2 [B] [8] [iii]) and the recommended loss of good time is vacated; the determination dated October 13, 2023, is confirmed without costs and the amended petition with respect to that determination is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul four determinations, following four separate tier III hearings based on separate misbehavior reports, that he violated various incarcerated individual rules.

As respondent correctly concedes with respect to the August 7, 2023 determination, the finding that petitioner violated incarcerated individual rule 107.11 (7 NYCRR 270.2 [B] [8] [ii] [harassment]) is not supported by substantial evidence. We therefore grant the amended petition in part and annul that part of the determination finding that petitioner violated rule 107.11, and we direct respondent to expunge from petitioner's institutional record all references thereto. With respect to the finding that petitioner violated incarcerated individual rule 107.20 (7 NYCRR 270.2 [B] [8] [iii] [false statement]), we agree with petitioner that he was denied due process when the Hearing Officer refused to allow him an opportunity to view the video relied on by the author of the underlying misbehavior report. An incarcerated individual is "allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals" (*Wolff v McDonnell*, 418 US 539, 566 [1974]; *see Matter of Hillard v Coughlin*, 187 AD2d 136, 139 [3d Dept 1993], *lv denied* 82 NY2d 651 [1993]). Here, there was some confusion at the hearing as to the date on which the incident occurred, and petitioner initially requested a video from an earlier date. When petitioner realized the mistake, he requested the video from the correct date, i.e., the video on which the author of the misbehavior report relied in alleging that petitioner had made a false report of sexual harassment. The Hearing Officer refused on the ground that petitioner had already used his "one opportunity to ask for assistance." Inasmuch as the Hearing Officer did not "articulate institutional safety or correctional goals sufficient to justify denying petitioner's right to reply to evidence against him," a new hearing with respect to petitioner's alleged violation of rule 107.20 is required (*Matter of Proctor v Annucci*, 205 AD3d 1253, 1255 [3d Dept 2022]), and we remit to respondent for a new hearing. In light of our determination, we do not address petitioner's remaining challenges to the August 7, 2023 determination.

With respect to the August 8, 2023 determination, respondent correctly concedes that the finding that petitioner violated incarcerated individual rules 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with employee]) and 107.11 should be annulled because it is not supported by substantial evidence. We note that, although respondent failed to issue a decision on petitioner's administrative appeal of that determination, " '[a]n administrative body's failure to render a decision on an administrative appeal does not necessarily preclude a party from obtaining judicial review of the underlying

determination' " (*Matter of Ayuso v Graham*, 177 AD3d 1389, 1390 [4th Dept 2019]; *see Matter of Meehan v Annucci*, 144 AD3d 1278, 1279 [3d Dept 2016]). We therefore modify the determination by granting the amended petition in part and annulling that part of the determination finding that petitioner violated incarcerated individual rules 107.10 and 107.11, and we direct respondent to expunge from petitioner's institutional record all references to the violation of those rules. Because a single penalty was imposed for all three violations charged and the record fails to specify any relation between the violations and that penalty, we further modify the determination by vacating the penalty, and we remit the matter to respondent for imposition of an appropriate penalty on the remaining violation (*see Matter of Colon v Fischer*, 83 AD3d 1500, 1502 [4th Dept 2011]; *Matter of Pena v Goord*, 6 AD3d 1106, 1106-1107 [4th Dept 2004]).

As respondent correctly concedes, the September 14, 2023 determination must be annulled in its entirety because petitioner was denied his right to call witnesses (*see Matter of Barnes v LeFevre*, 69 NY2d 649, 650 [1986]; *Matter of Elder v Fischer*, 115 AD3d 1177, 1178 [4th Dept 2014]; *see also* 7 NYCRR 254.5 [a]).

The October 13, 2023 determination that petitioner violated incarcerated individual rule 113.10 (7 NYCRR 270.2 [B] [14] [i] [weapon]) is supported by substantial evidence, and we therefore confirm that determination.

Petitioner failed to exhaust his administrative remedies with respect to his remaining contention, and this Court thus "has no discretionary power to reach" it (*Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071 [4th Dept 1992], *appeal dismissed* 81 NY2d 834 [1993]; *see Matter of Gray v Annucci*, 144 AD3d 1613, 1614 [4th Dept 2016], *lv denied* 29 NY3d 901 [2017]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

934

CA 23-01865

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, NOWAK, AND KEANE, JJ.

CALEB MCCUDDEN, ON BEHALF OF HIMSELF AND
ALL OTHERS SIMILARLY SITUATED,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

CANISIUS COLLEGE, DEFENDANT-RESPONDENT-APPELLANT.

LEEDS BROWN LAW, P.C., CARLE PLACE (MICHAEL A. TOMPKINS OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

CULLEN AND DYKMAN LLP, UNIONDALE (NICOLE A. DONATICH OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered September 7, 2023. The order denied in part and granted in part the motion of defendant to dismiss the amended complaint.

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

Memorandum: In the spring of 2020, plaintiff was an undergraduate student at defendant Canisius College (Canisius). On or about March 13, 2020, in response to the COVID-19 pandemic, Canisius ceased all in-person classes and implemented alternative delivery modalities—i.e., remote online classes. The spring 2020 semester ended on or about April 30, 2020. Plaintiff commenced this action, individually and on behalf of a putative class of similarly situated individuals, seeking to recover tuition and mandatory fees paid to Canisius and asserting causes of action for breach of contract, unjust enrichment, and conversion. Canisius moved to dismiss the amended complaint pursuant to CPLR 3211 (a) (1) and (7). Supreme Court granted the motion insofar as it sought to dismiss the breach of contract cause of action to the extent that it sought recovery of tuition and insofar as it sought to dismiss the unjust enrichment and conversion causes of action. The court denied the motion, however, insofar as it sought to dismiss the breach of contract cause of action to the extent that it sought recovery of mandatory fees. As limited by his brief, plaintiff appeals from the order to the extent that it granted the motion with respect to the breach of contract cause of action, as it related to tuition, and with respect to the unjust enrichment cause of action. We note that, inasmuch as plaintiff has not raised on appeal any issue with respect to that part of the order

granting the motion insofar as it sought to dismiss his conversion cause of action, he has abandoned any contention with respect thereto (*see Smith v Triad Mfg. Group*, 255 AD2d 962, 963 [4th Dept 1998]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). As limited by its brief, Canisius cross-appeals from the same order to the extent that it denied the motion with respect to the breach of contract cause of action as it related to mandatory fees. We now affirm.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction . . . [and the court will] 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 alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see Falso v Children & Family Servs.*, 227 AD3d 1466, 1467 [4th Dept 2024]). "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration . . . Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-142 [2017] [internal quotation marks omitted]).

Plaintiff contends on his appeal that the court erred in granting the motion insofar as it sought to dismiss the breach of contract cause of action to the extent it sought recovery of the tuition he paid to Canisius for the spring 2020 semester. "New York courts have long recognized that the relationship between a university and its students is contractual in nature . . . , and that specific promises set forth in a school's bulletins, circulars and handbooks, which are material to the student's relationship to the school, can establish the existence of an implied contract" (*Rynasko v New York Univ.*, 63 F4th 186, 197 [2d Cir 2023] [internal quotation marks omitted]; *see Croce v St. Joseph's Coll. of N.Y.*, 219 AD3d 693, 695 [2d Dept 2023]; *Keefe v New York Law School*, 71 AD3d 569, 570 [1st Dept 2010]). Here, however, we reject plaintiff's contention because "the amended complaint contains only conclusory allegations of an implied contract to provide *exclusively* in-person learning during the spring 2020 semester which are unsupported by any specific promise that is material to" plaintiff's relationship with Canisius (*Croce*, 219 AD3d at 695 [emphasis added]). We agree with the Second Department that, in this context, the cause of action for breach of contract requires an allegation of "a specific promise to provide the plaintiff with exclusively in-person learning" (*id.* at 696). The amended complaint also fails to state, in anything more than a conclusory fashion, the manner in which plaintiff's unspecified course of study was impacted by Canisius's shift to remote operations (*see id.*).

As part of his showing that he was promised and deprived of the benefit of in-person education at Canisius, plaintiff alleges that, during the spring 2020 semester, he was specifically scheduled to participate in an internship program through a criminal justice

seminar that was scuttled by the shift to remote operations. In our view, however, allegations that plaintiff was promised but could not participate in one internship—even assuming, arguendo, that such a program constituted in-person learning provided *by Canisius*—does not suffice to show that Canisius promised and failed to provide plaintiff with an *exclusively* in-person experience that was material to his relationship with the college (*see id.* at 695-696). This case is markedly different factually from *Rynasko*, relied on by our dissenting colleagues, where the proposed additional plaintiff—a dance major—was able to state a claim for breach of an implied contract by her university inasmuch as "suspension of in-person services dramatically altered the experience for which [she], as a student majoring in dance, had contracted" (63 F4th at 198-199). Consequently, we conclude that, accepting the allegations in the amended complaint as true and according plaintiff the benefit of every favorable inference (*see Leon*, 84 NY2d at 87-88), the amended complaint failed to state a cause of action for breach of contract as it pertains to the tuition that plaintiff paid to Canisius.

Respectfully, our dissenting colleagues provide no explanation for their decision to elevate the approach of the Second Circuit's split decision in *Rynasko*—and its focus on whether a defendant vaguely promised to "provide *generally* in-person courses" (63 F4th at 198 [emphasis added])—over the Second Department's approach in *Croce*, which adheres to well-established New York law requiring a *specific* promise by a defendant to provide *exclusively* in-person learning (*see* 219 AD3d at 695-696). In *Croce*, by citing to *Rynasko* and yet referring no fewer than three times to *exclusively* in-person learning, the Second Department implicitly rejected the idea that an implied contract could be established merely by a promise to provide *generally* in-person courses—i.e., one that was not a sufficiently specific promise to sustain such a claim (*see Croce*, 219 AD3d at 695-696).

Indeed, the requirement that there be a *specific* promise is consistent with the broader legal principles of judicial review applicable in the present context, inasmuch as permitting such a cause of action on the basis that there was merely a promise of *generally* in-person courses necessarily would require courts to parse vague promises in an effort to ascertain the extent and relative value of the education provided by a defendant. That is a task from which the courts of this state have emphatically refrained (*see generally Maas v Cornell Univ.*, 94 NY2d 87, 92 [1999]; *Matter of Olsson v Board of Higher Educ. of City of N.Y.*, 49 NY2d 408, 413 [1980]; *Matter of Hansbrough v College of St. Rose*, 209 AD3d 1168, 1170-1171 [3d Dept 2022]), even in the cases relied upon by our dissenting colleagues to support the proposition that there may be an implied contract between students and an educational institution (*Olsson*, 49 NY2d at 414; *Matter of Carr v St. John's Univ., N.Y.*, 17 AD2d 632, 633 [2d Dept 1962], *affd* 12 NY2d 802 [1962]). As the Second Department recognized in *Croce*, that same policy of non-interference with, and deference to, the decisions of educational institutions underlies the law's requirement that, in a cause of action for breach of contract against an educational institution, a *specific* promise of performance must be

alleged (*see Croce*, 219 AD3d at 695-696; *see also Keefe*, 71 AD3d at 570). Thus, unlike our dissenting colleagues, we opt to follow the Second Department's approach in *Croce* as the accurate elucidation of New York law on this issue. We further note that our dissenting colleagues make no effort to distinguish the amended complaint in this case from the operative complaint in *Croce*. In our view, there is no material difference between the two documents, and therefore, the same result should obtain.

Our dissenting colleagues also assert that "there is no need to give deference to any decision by Canisius." It is precisely, however, the propriety of defendant's decision to cease all in-person learning, as opposed to some or none, that plaintiff seeks to put in issue here, and that the plaintiff sought to do in *Croce*. Deference to that decision might not be required if plaintiff had alleged, and sought to establish, a specific promise by defendant to provide an exclusively in-person education, but here they merely alleged only a general promise to provide some vague form of in-person education, the precise contours of which would require deference.

Plaintiff also contends on his appeal that the court erred in granting the motion insofar as it sought to dismiss the unjust enrichment cause of action. "Where, as here, the existence of a controlling contract between the parties has not been conceded by the parties or determined by the motion court, the assertion of a cause of action for breach of contract does not preclude a plaintiff from asserting in the alternative a cause of action for unjust enrichment" (*Omar v Moore*, 171 AD3d 1533, 1534 [4th Dept 2019]). To recover under an unjust enrichment theory, "[a] plaintiff must show that (1) the other party was enriched, (2) at [the plaintiff's] expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks omitted]; *see Columbia Mem. Hosp. v Hinds*, 38 NY3d 253, 275 [2022]). Here, we conclude that the amended complaint contains only conclusory allegations that Canisius's decision to cease in-person operation in favor of remote operations saved it any money (*see Croce*, 219 AD3d at 697; *see generally Mandarin Trading Ltd.*, 16 NY3d at 183; *City of Olean v New York State Envtl. Facilities Corp.*, 213 AD2d 1018, 1020 [4th Dept 1995]). Indeed, as the amended complaint acknowledges, Canisius provided in-person education for the earlier portion of the spring 2020 semester and, thereafter, did provide virtual services to its students until the semester's end. Consequently, we conclude that the facts as alleged by plaintiff fail to demonstrate that Canisius was unjustly enriched at plaintiff's expense (*see Croce*, 219 AD3d at 697).

On its cross-appeal, Canisius contends that the court erred in denying its motion to the extent that it sought to dismiss the breach of contract cause of action with respect to the mandatory fees that plaintiff seeks to recover. Canisius contends that the amended complaint failed to allege a specific promise that those fees would be designated to in-person programs, rather than remote operations. According to the amended complaint, the mandatory fees included, inter

alia, a "[c]ollege [f]ee" that supplied "partial support for the library, athletic facilities use, ID card, transportation, graduation, and transcripts," a "[t]echnology [f]ee" that supplied "partial support for classroom technology and on-line student services," and a "[w]ellness [f]ee" that supplied funds "used for operating expenses in the Student Health and Student Counseling Center." Even assuming that some of the services provided by some of those fees could be provided virtually, we conclude that some of the services, as pleaded, could only be provided through in-person operation. In short, the amended complaint, insofar as it pertains to the alleged breach of implied contract based on the mandatory fees, was not "devoid of allegations as to what services were owed by [Canisius] in exchange for those fees" (*Croce*, 219 AD3d at 696). Consequently, we conclude that the court did not err in denying Canisius's motion to that limited extent.

We have reviewed the parties' remaining contentions and conclude that none warrants reversal or modification of the order.

All concur except WHALEN, P.J., and GREENWOOD, J., who dissent in part and vote to modify in accordance with the following memorandum: We respectfully dissent in part. Plaintiff was an undergraduate student at defendant Canisius College (Canisius) in the spring of 2020 when, in response to the COVID-19 pandemic, Canisius ceased all in-person classes and operations and transitioned to online-only distance learning through at least the end of the spring semester. Canisius did not refund any amount of the tuition or mandatory fees. Plaintiff commenced this action on behalf of himself and others similarly situated seeking to recover tuition and mandatory fees he paid to Canisius based on theories of breach of contract, unjust enrichment, and conversion. Canisius moved to dismiss the amended complaint pursuant to CPLR 3211 (a) (1) and (7). Supreme Court denied the motion insofar as it sought dismissal of the breach of contract cause of action to the extent that it sought to recover mandatory fees but otherwise granted the motion. Plaintiff now appeals and Canisius cross-appeals.

We agree with the majority that plaintiff abandoned his conversion cause of action and that Canisius's contention in its cross-appeal that the court erred to the extent that it denied the motion is without merit. We agree with plaintiff, however, that the court erred in granting that part of the motion seeking dismissal of the breach of contract cause of action to the extent that it sought to recover tuition and that part of the motion seeking dismissal of the unjust enrichment cause of action, and we would modify the order accordingly.

"On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), [w]e accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] [internal quotation marks omitted]; *see Burns v C.R.B. Holdings, Inc.*, 229 AD3d 1084, 1084-1085

[4th Dept 2024]). "Whether a plaintiff can ultimately establish [their] allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]).

New York courts have acknowledged that in certain circumstances an implied contract exists between a college and its students (*see Matter of Olsson v Board of Higher Educ. of City of N.Y.*, 49 NY2d 408, 414 [1980]; *Matter of Carr v St. John's Univ., N.Y.*, 17 AD2d 632, 633 [2d Dept 1962], *affd* 12 NY2d 802 [1962]). Generally, "the existence of an implied contract is a question of fact" (*Shapira v United Med. Serv.*, 15 NY2d 200, 210 [1965]).

In the amended complaint, plaintiff alleges that Canisius highlighted on its website and in marketing materials, advertisements, the course catalog, and other documents that in-person and on-campus educational services were invaluable to plaintiff's educational experience, and that he paid tuition for the benefit of those in-person and on-campus services. For example, plaintiff alleges that Canisius's website touted the college's immersive learning experience by stating that "academic rigor is strengthened through meaningful, hands-on learning." Plaintiff registered for classes that were to be taught in person and on campus, not online, and alleges that he would not have paid as much tuition had he known that the classes would not be taught in person. One class that plaintiff registered for was a criminal justice internship that provided the "[o]pportunity for selected students to participate in daily work of law enforcement agencies, courts, law firms, and social agencies." When in-person classes ceased, students like plaintiff were also denied access to facilities such as libraries, laboratories, computer labs, and study rooms. Plaintiff alleges that the remote learning deprived students like him of the opportunity for collaborative learning and in-person dialogue, feedback, and critique and denied access to activities offered by campus life.

We agree with plaintiff that the allegations of the amended complaint are sufficient to state a cause of action for breach of an implied contract to the extent that it sought to recover tuition. Plaintiff alleges in the amended complaint that Canisius breached the implied contract by failing to provide the promised in-person and on-campus live education. We conclude that "a reasonable factfinder could find that [Canisius] impliedly agreed to provide students in-person services" (*Rynasko v New York Univ.*, 63 F4th 186, 197 [2d Cir 2023]). The implied contract stems from Canisius's marketing, course catalog, and other materials (*see Keefe v New York Law School*, 71 AD3d 569, 570 [1st Dept 2010]; *Vought v Teachers Coll., Columbia Univ.*, 127 AD2d 654, 655 [2d Dept 1987]), which would support a finding that Canisius had "a general obligation to provide in-person courses, activities, services, and facilities" (*Rynasko*, 63 F4th at 197).

We disagree with the majority's view that the amended complaint contains only conclusory allegations and its reliance on *Croce v St. Joseph's Coll. of N.Y.* (219 AD3d 693, 695 [2d Dept 2023]) in

determining that here a breach of contract cause of action requires a specific promise to provide plaintiff with *exclusively* in-person learning. Rather, we agree with the Second Circuit that there need only be an implied contract to "provide *generally* in-person courses" (*Rynasko*, 63 F4th at 198 [emphasis added]). The majority criticizes our reliance on *Rynasko*, but we do not share the majority's view that *Rynasko* is factually distinguishable and legally inaccurate under New York law.

First, the majority concludes that this case is "markedly different factually" from the student at issue in the relevant part of *Rynasko*, who was a dance major. Certainly the Second Circuit pointed out that the student at issue in *Rynasko* had a unique need to access in-person instruction (*see id.* at 198-199), but a careful reading of the entirety of the majority opinion in *Rynasko* supports the conclusion that the student's chosen major was not determinative of whether a cause of action for breach of contract was stated (*see id.* at 197-201). This reading is borne out by subsequent decisions of courts that followed the holding of *Rynasko* and determined that various students had stated a cause of action for breach of contract, without relying on the particulars of the student's chosen major, if any (*see e.g. Yodice v Touro Coll. & Univ. Sys.*, 2024 WL 3466546, *2, 2024 US App LEXIS 17775, *4 [2d Cir 2024]; *Meng v New Sch.*, 686 FSupp3d 312, 317-318 [SD NY 2023]; *Carstairs v University of Rochester*, 2023 WL 12007543, *9-10, 2023 US Dist LEXIS 245582, *22-24 [WD NY 2023]).

Second, the Second Circuit in *Rynasko* was applying New York law in its thoughtful, well-reasoned, and thorough decision. The court accurately stated that, under New York law, an implied contract may be formed between a student and a school based on the school's bulletins, circulars, and handbooks (63 F4th at 197, citing *Keefe*, 71 AD3d at 570) and that the existence of an implied contract is a question of fact (*id.* at 198, citing *Shapira*, 15 NY2d at 210). In our view, the majority mischaracterizes the Second Circuit in stating that the court determined that a mere "vague" promise made by a school regarding in-person learning would be sufficient to state a cause of action for breach of contract.

The majority chooses to follow the Second Department's approach in *Croce* because, in the majority's view, the *Croce* court "adheres to well-established New York law requiring a *specific* promise by a defendant to provide *exclusively* in-person learning." We disagree that there is such "well-established" law in this state. Indeed, only the court in *Croce* has required an allegation of a promise of *exclusively* in-person learning, and we conclude that such a requirement is unduly restrictive, particularly in the procedural posture of a motion to dismiss. Moreover, the crux of the decision in *Croce* is that the amended complaint in that case was infirm because it was based on "only conclusory allegations" (219 AD3d at 695), and we conclude that the allegations in the amended complaint in this case consist of more than " 'bare legal conclusions' " and include "factual allegations and inferences to be drawn from them" that state a cause

of action for breach of contract (*Connaughton*, 29 NY3d at 141-142).

The majority believes that allowing plaintiff to assert a cause of action for breach of contract on the ground of a promise to provide generally in-person learning "necessarily would require courts to parse vague promises in an effort to ascertain the extent and relative value of the education provided by a defendant. That is a task from which the courts of this state have emphatically refrained." As noted earlier, generally, "the existence of an implied contract is a question of fact" (*Shapira*, 15 NY2d at 210), and thus it would be for a jury to examine Canisius's marketing, course catalog, and other materials to determine whether there was an implied promise to provide students with in-person learning.

Further, we disagree with the majority's reliance on cases in which courts have shown deference to educational institutions inasmuch as those cases are not at all similar to the facts of this case. In *Maas v Cornell Univ.* (94 NY2d 87 [1999]), a professor commenced a breach of contract action regarding the university's alleged failure to follow the procedures it had promulgated and used for resolution of sexual harassment claims brought by students against him (*id.* at 90). In *Olsson*, a student commenced a CPLR article 78 proceeding to compel the college to award him a diploma after a dispute over an examination score (*Olsson*, 49 NY2d at 412). In *Matter of Hansbrough v College of St. Rose* (209 AD3d 1168 [3d Dept 2022]), professors commenced a hybrid CPLR article 78 proceeding and breach of contract action after programs and their positions were eliminated (*Hansbrough*, 209 AD3d at 1169-1170). In *Keefe*, a student commenced a breach of contract action seeking to require the law school to change its grading system from letter grades to pass/fail (71 AD3d at 570). Although deference was given to the academic institutions in those cases regarding internal administrative decisions (*Maas*, 94 NY2d at 92; *Hansbrough*, 209 AD3d at 1170-1171) and a student's academic qualifications and performance (*Olsson*, 49 NY2d at 413; *Keefe*, 71 AD3d at 570), here there is no need to give deference to any decision by Canisius.

Regarding the cause of action for unjust enrichment, we further agree with plaintiff that the allegations of the amended complaint are sufficient to state a cause of action for unjust enrichment. Plaintiff alleges that Canisius assessed plaintiff with tuition that covered the cost of upkeep and maintenance of its facilities and services, yet failed to provide plaintiff and class members access to any on-campus facility during the relevant period. Contrary to the majority's determination, we conclude that plaintiff's allegations consist of more than " 'bare legal conclusions' " and do not fail to assert "facts in support of an element of the claim" (*Connaughton*, 29 NY3d at 141-142).

In sum, we conclude that the pleading here "meets [the] minimal standard necessary to resist dismissal of a complaint" (*Armstrong v Simon & Schuster*, 85 NY2d 373, 379 [1995]).

Entered: March 14, 2025 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 23-02002

PRESENT: SMITH, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

MICHELLE FURLONG AND JEFF FURLONG,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

SADASHIV S. SHENOY, M.D., SADASHIV S. SHENOY, M.D., PLLC, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

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

ADDELMAN CROSS & BALDWIN, P.C., BUFFALO (JESSE B. BALDWIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mario A. Giacobbe, A.J.), entered November 17, 2023. The order, inter alia, granted in part the cross-motion of defendants Sadashiv S. Shenoy, M.D., and Sadashiv S. Shenoy, M.D., PLLC, to sever the first and second causes of action in the complaint into separate actions.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying without prejudice that part of the cross-motion seeking to sever the first and second causes of action from each other, and as modified the order is affirmed without costs.

Memorandum: In this medical malpractice action, plaintiffs allege, in their first cause of action, that defendants Sadashiv S. Shenoy, M.D. (Shenoy) and Sadashiv S. Shenoy, M.D., PLLC (collectively, Shenoy defendants) are liable for Shenoy's negligence in performing a lumbar spine diagnostic procedure at defendant Kaleida Health, doing business as Millard Fillmore Suburban Hospital (hospital), which is within the healthcare network of defendant Kaleida Health. Plaintiffs further allege, in their second cause of action, that Kaleida Health negligently credentialed Shenoy after he was previously found not competent to practice medicine following a required examination. Plaintiffs now appeal from an order that, inter alia, granted the Shenoy defendants' cross-motion, made prior to the service of an answer by Kaleida Health and the hospital, insofar as the cross-motion sought to sever the first and second causes of action into separate actions pursuant to CPLR 603.

A court's exercise of discretion in determining a request for a

severance pursuant to CPLR 603 will not be disturbed on appeal "absent [an] abuse of discretion or prejudice to a party's substantial rights" (*Caruana v Padmanabha*, 77 AD3d 1307, 1307 [4th Dept 2010] [internal quotation marks omitted]; *see Sunshine Imaging Assn./WNY MRI v Government Empls. Ins. Co.*, 66 AD3d 1419, 1420 [4th Dept 2009]). Nonetheless, a court's discretion to grant a request for a severance should be "exercised sparingly" inasmuch as "[f]ragmentation increases litigation and places an unnecessary burden on court facilities by requiring two separate trials instead of one" (*Shanley v Callanan Indus.*, 54 NY2d 52, 57 [1981]). Thus, "[t]he burden is on the party seeking the severance to show that a joint trial would result in substantial prejudice" (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 106 AD3d 1453, 1453 [4th Dept 2013] [internal quotation marks omitted]).

Here, we agree with plaintiffs that the record is insufficiently developed for Supreme Court to conclude that the Shenoy defendants established substantial prejudice to warrant a severance (*see Allen v General Elec. Co.*, 11 AD3d 993, 994 [4th Dept 2004]). We conclude that the court should have denied the cross-motion, without prejudice, insofar as it sought to sever the first and second causes of action from each other, and we therefore modify the order accordingly. "[O]nce discovery is completed and the facts and issues are fully brought to light, the court can more intelligently exercise its discretion in deciding whether" a severance is warranted (*id.*), while taking into consideration whether the "potential prejudice identified by [the Shenoy defendants] could be prevented by the trial court's instructions to the jury" (*Hopper v Regional Scaffolding & Hoisting Co.*, 272 AD2d 242, 242 [1st Dept 2000]).

Entered: March 14, 2025

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 22-01170

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROCKIE J. HOOSE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN (RICHARD SULLIVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered May 3, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

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

Memorandum: Defendant appeals, in appeal No. 1, from a judgment convicting him, upon a plea of guilty, of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]) and, in appeal No. 2, from a judgment convicting him, upon a plea of guilty, of assault in the second degree (§ 120.05 [7]).

In appeal No. 1, defendant contends that County Court abused its discretion in denying his motion to withdraw his plea. We reject that contention. "[P]ermission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing [a] plea" (*People v Alexander*, 203 AD3d 1569, 1570 [4th Dept 2022], *lv denied* 38 NY3d 1031 [2022] [internal quotation marks omitted]). Furthermore, " '[o]nly in the rare instance will a defendant be entitled to an evidentiary hearing; often a limited interrogation by the court will suffice. The defendant should be afforded [a] reasonable opportunity to present [their] contentions and the court should be enabled to make an informed determination' " (*People v Harris*, 206 AD3d 1711, 1711-1712 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022], quoting *People v Tinsley*, 35 NY2d 926, 927 [1974]; *see People v Weems*, 203 AD3d 1684, 1684 [4th Dept 2022], *lv denied* 38 NY3d 1036 [2022]). "[W]hen a motion to withdraw a plea is patently insufficient on its face, a court may simply deny the motion" (*People v Mitchell*, 21 NY3d

964, 967 [2013]; *see People v Brooks*, 187 AD3d 1587, 1589 [4th Dept 2020], *lv denied* 36 NY3d 1049 [2021]). Moreover, "a court does not abuse its discretion in denying a motion to withdraw a guilty plea where the defendant's allegations in support of the motion are belied by the defendant's statements during the plea proceeding" (*People v Fox*, 204 AD3d 1452, 1453 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022] [internal quotation marks omitted]; *see Alexander*, 203 AD3d at 1570).

Here, defendant was provided with a reasonable opportunity to present his contentions in support of his motion to withdraw the plea. However, defendant's conclusory and unsubstantiated assertions that he pleaded guilty due to pressure or inadequate representation from defense counsel were belied by the statements that defendant made during the plea colloquy, and therefore his request was patently without merit (*see People v Riley*, 182 AD3d 998, 998-999 [4th Dept 2020], *lv denied* 35 NY3d 1069 [2020], *reconsideration denied* 36 NY3d 931 [2020]; *People v Lewicki*, 118 AD3d 1328, 1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]; *see also Fox*, 204 AD3d at 1453). We thus perceive no abuse of discretion in the court's summary denial of defendant's motion to withdraw his plea (*see Alexander*, 203 AD3d at 1570; *People v Gizowski*, 182 AD3d 989, 990 [4th Dept 2020], *lv denied* 35 NY3d 1027 [2020]).

In both appeals, defendant contends that the respective waivers of the right to appeal were invalid. We reject those contentions. Here, the record establishes that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent in each of the plea proceedings (*see People v Cunningham*, 213 AD3d 1270, 1270 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), and we note that the court used the appropriate model colloquy with respect to the waiver of the right to appeal during both colloquies (*see generally Thomas*, 34 NY3d at 567; *People v Osgood*, 210 AD3d 1426, 1427 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]). To the extent that defendant contends that the written waiver forms executed by defendant were defective because they omitted certain information contained in the model colloquy, the two separate oral colloquies, each of which followed the appropriate model colloquy, "cured that [alleged] defect" (*People v Clark*, 221 AD3d 1550, 1551 [4th Dept 2023]; *see People v Yeara*, 227 AD3d 1517, 1518 [4th Dept 2024], *lv denied* 42 NY3d 1082 [2025]). We further reject defendant's contention that the waivers of the right to appeal were invalid because "some of defendant's responses to the court's inquiries were monosyllabic" (*People v Brown*, 41 AD3d 1234, 1234 [4th Dept 2007], *lv denied* 9 NY3d 873 [2007] [internal quotation marks omitted]). "No 'particular litany' is required for a waiver of the right to appeal to be valid" (*People v Wood*, 217 AD3d 1407, 1408 [4th Dept 2023], *lv denied* 30 NY3d 1000 [2023], quoting *People v Lopez*, 6 NY3d 248, 256 [2006]; *see also People v Parker*, 151 AD3d 1876, 1876 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]).

Defendant's further contention that the pleas were "not voluntarily entered because [he] provided only monosyllabic responses

to [the court's] questions is actually a challenge to the factual sufficiency of the plea allocution" (*People v Hendrix*, 62 AD3d 1261, 1262 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009]), which is encompassed by the valid waivers of the right to appeal (*see People v Alsaifullah*, 162 AD3d 1483, 1485 [4th Dept 2018], *lv denied* 32 NY3d 1062 [2018]). The waivers of the right to appeal also encompass his challenge to the severity of his sentence (*see Lopez*, 6 NY3d at 255-256).

Entered: March 14, 2025

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 23-01092

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM L. HOULE, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered February 23, 2023. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Ontario County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment which convicted him, upon a jury verdict, of assault in the second degree (Penal Law § 120.05 [2]), following an incident where defendant physically assaulted his daughter's boyfriend with a brick and baseball bat.

Contrary to defendant's contentions, County Court did not err in failing to sua sponte order a CPL 730.30 examination. "[A] defendant in a criminal proceeding 'is presumed to be competent' " (*People v Robinson*, 225 AD3d 1266, 1267 [4th Dept 2024], *lv denied* 42 NY3d 1021 [2024]), and "[t]he determination whether to order a competency examination, either sua sponte or upon defense counsel's request, lies within the sound discretion of the court" (*People v Powell*, 194 AD3d 1423, 1424 [4th Dept 2021], *lv denied* 37 NY3d 967 [2021]). In reviewing a court's determination for an abuse of discretion, "[t]he test to be applied has been formulated as follows: Did the . . . judge receive information which, objectively considered, should reasonably have raised a doubt about [the] defendant's competency and alerted [the judge] to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid [the defendant's] attorney in [the] defense" (*People v Winebrenner*, 96 AD3d 1615, 1616 [4th Dept 2012], *lv denied* 19 NY3d 1029 [2012] [internal quotation marks omitted]). Here, there is no indication in the record that defendant "was unable to understand the proceedings or that he was mentally incompetent" (*People v Williams*, 35 AD3d 1273, 1275 [4th Dept 2006], *lv denied* 8

NY3d 928 [2007]). Defendant's statement that he "ended up in the hospital the other day because [he was] so overwhelmed" did not call into question defendant's competence to proceed, particularly where, as here, defendant's other statements demonstrated a clear understanding of the proceedings and where the court previously questioned defendant regarding his mental ability and was thereafter satisfied that defendant had the mental ability to proceed.

Defendant's contention regarding the legal sufficiency of the evidence is unpreserved for our review because defendant made only a general motion for a trial order of dismissal (*see People v Ortiz*, 89 AD3d 1482, 1483 [4th Dept 2011], *lv denied* 18 NY3d 885 [2012]). Although defendant failed to preserve that contention for our review, 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 Stephenson*, 104 AD3d 1277, 1278 [4th Dept 2013], *lv denied* 21 NY3d 1020 [2013], *reconsideration denied* 23 NY3d 1025 [2014] [internal quotation marks omitted]). 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 conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Arnold*, 107 AD3d 1526, 1528 [4th Dept 2013], *lv denied* 22 NY3d 953 [2013]).

We reject defendant's contention that he received ineffective assistance of counsel. With respect to defendant's contention that defense counsel was ineffective for failing to adduce testimony regarding defendant's medical status and his alleged inability to physically participate in the assault, that contention involves matters outside the record and must be raised by way of a CPL article 440 motion (*see People v Defio*, 200 AD3d 1672, 1674 [4th Dept 2021], *lv denied* 38 NY3d 949 [2022]). With respect to defendant's remaining allegations of ineffective assistance of counsel, defendant failed to meet his burden of demonstrating " 'the absence of strategic or other legitimate explanations' for counsel's allegedly deficient conduct" (*People v Caban*, 5 NY3d 143, 152 [2005]).

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

As defendant contends and the People correctly concede, however, the court erred in failing to rule on that part of the omnibus motion seeking inspection of the grand jury minutes and dismissal of the indictment on the ground that the grand jury proceeding was defective (*see People v Jones*, 103 AD3d 1215, 1217 [4th Dept 2013], *lv dismissed* 21 NY3d 944 [2013]). The court's failure to issue a ruling on that part of the motion "cannot be deemed a denial thereof" (*id.*; *see generally People v Concepcion*, 17 NY3d 192, 197-198 [2011]). We therefore hold the case, reserve decision, and remit the matter to County Court for a ruling on that part of the omnibus motion.

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

Entered: March 14, 2025

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 22-00759

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMETRISH PUGH, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (STEPHANIE M. STARE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered October 13, 2021. The judgment convicted defendant, upon a jury verdict, 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, following a jury trial, of robbery in the second degree (Penal Law § 160.10 [1]) and sentencing him as a persistent violent felony offender.

Defendant contends that County Court erred in denying his motion for a mistrial because the People failed to turn over videos taken by investigators' body cameras until after several witnesses had already testified. We reject that contention. "It is well settled that the decision to declare a mistrial rests within the sound discretion of the trial court, which is in the best position to determine if this drastic remedy is truly necessary to protect the defendant's right to a fair trial" (*People v Lewis*, 247 AD2d 866, 866 [4th Dept 1998], *lv denied* 93 NY2d 1021 [1999] [internal quotation marks omitted]; *see* CPL 245.80; *People v Ortiz*, 54 NY2d 288, 292 [1981]). Here, the court imposed sanctions in the form of adverse inference instructions and the preclusion of testimony from two prosecution witnesses. The court further offered defendant additional remedies, including time to review the newly provided evidence and an opportunity to recall witnesses for further cross-examination (*see generally People v Boler*, 4 AD3d 768, 768 [4th Dept 2004], *lv denied* 2 NY3d 761 [2004]). We conclude that the court did not abuse its discretion in fashioning an appropriate sanction (*see People v Bookman*, 224 AD3d 1269, 1270 [4th Dept 2024]).

Defendant also contends that the conviction is not supported by legally sufficient evidence that he was "aided by another person actually present," an element of robbery in the second degree under Penal Law § 160.10 (1). We reject that contention. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish that element inasmuch as it demonstrated that defendant " 'committed the robbery in the full view of his companion, who acted as a lookout and was in a position to render immediate assistance to defendant' " (*People v McIntosh*, 158 AD3d 1289, 1290 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *see People v Wilkerson*, 189 AD2d 592, 592 [1st Dept 1993], *lv denied* 81 NY2d 849 [1993]).

Defendant further contends that certain automatic discovery provisions of CPL 245.20 are applicable in persistent violent felony offender hearings (*see* CPL 245.20 [f], [j]). We reject that contention. There is "no evidence, in the plain language of the amendments or the legislative history, that the legislature intended to–or did–" expand CPL 245.20's disclosure provisions to persistent violent felony offender hearings (*People v King*, 42 NY3d 424, 428 [2024]).

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

Entered: March 14, 2025

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 22-01171

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROCKIE J. HOOSE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN (RICHARD SULLIVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered May 3, 2022. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Same memorandum as in *People v Hoose* ([appeal No. 1] — AD3d — [Mar. 14, 2025] [4th Dept 2025]).

Entered: March 14, 2025

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 23-00502

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, NOWAK, AND KEANE, JJ.

IN THE MATTER OF JOHN N. SANTORO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TONYA M. MEYERS, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

BENJAMIN L. NELSON, UTICA, FOR PETITIONER-APPELLANT.

THOMAS L. PELYCH, HORNELL, FOR RESPONDENT-RESPONDENT.

SHARON P. O'HANLON, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered February 1, 2023, 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.

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals, in appeal No. 1, from an order which dismissed his petition without prejudice based upon his refusal to be produced from prison and appear for trial. In appeal No. 2, the father appeals from a subsequent order which denied the father's pro se motion to vacate the order of dismissal and reinstate his petition. Following entry of the orders in appeal Nos. 1 and 2, the father refiled the petition, and a hearing on the new petition is presently pending in Family Court.

Contrary to the father's contentions, these appeals have been rendered moot by virtue of the father refiling the petition. It is well settled that "[t]he jurisdiction of this Court extends only to live controversies . . . [, and w]e are thus prohibited from giving advisory opinions or ruling on academic, hypothetical, moot, or otherwise abstract questions" (*Matter of Medical Professionals for Informed Consent v Bassett*, 220 AD3d 1157, 1158 [4th Dept 2023] [internal quotation marks omitted]; *see Matter of Sportsmen's Tavern LLC v New York State Liq. Auth.*, 195 AD3d 1557, 1558 [4th Dept 2021]). As a result, courts are generally "precluded 'from considering questions which, although once live, have become moot by passage of time or change in circumstances' " (*City of New York v Maul*, 14 NY3d 499, 507 [2010], quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707,

714 [1980]). "[A]n 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 Maul*, 14 NY3d at 507; *Medical Professionals for Informed Consent*, 220 AD3d at 1158).

Here, if successful, the father would be entitled to have his prior petition reinstated. However, the father is presently proceeding under a new petition that seeks identical relief as the petition that was dismissed. Thus, the father has already obtained any relief to which he would be entitled on these appeals by refiling the same petition (*see generally Matter of Smith v Visker,* 153 AD3d 1656, 1657 [4th Dept 2017]; *Matter of Farrington v Annucci*, 125 AD3d 1513, 1514 [4th Dept 2015]), and inasmuch as our decision will have no immediate or practical consequences to the parties (*see Coleman*, 19 NY3d at 1090), our decision in this case would be entirely academic.

Entered: March 14, 2025

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 23-01951

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, NOWAK, AND KEANE, JJ.

IN THE MATTER OF DR. ROBERT PERRY
AND LINDA BALDI-PERRY,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

HANOVER INSURANCE GROUP, RESPONDENT-APPELLANT.

MURA LAW GROUP, PLLC, BUFFALO (ROY A. MURA OF COUNSEL), FOR RESPONDENT-APPELLANT.

THE LAW OFFICE OF DAVID P. MARCUS, PLLC, WILLIAMSVILLE (DAVID P. MARCUS OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Craig D. Hannah, J.), entered November 3, 2023. The order, insofar as appealed from, granted the petition in part and denied the cross-motion of respondent insofar as it sought to dismiss the petition.

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

Memorandum: Petitioners commenced this special proceeding seeking, inter alia, an order directing that an appraisal panel calculate the replacement cost of petitioners' home, which was damaged in a fire and declared a total loss, in accordance with their interpretation of the terms of a policy issued by respondent. As limited by its brief, respondent appeals from an order to the extent that it granted the petition in part and denied that part of respondent's cross-motion seeking to dismiss the petition. We reverse the order insofar as appealed from.

Respondent's policy included an endorsement providing that respondent would provide full replacement cost insurance for the dwelling insured, with the amount to be "no more than the amount spent to repair or replace all or part of the 'residence premises' with the same type of construction at the same location." Petitioners decided to have a redesigned home built at the same location after their architect determined that reconstruction of the original design was not economically feasible or practical due to the subsequent enactment of the New York State Building Code. Petitioners obtained bids for the construction and consulted with a representative from respondent throughout the process. After construction of the home began,

respondent issued several payments on the policy, but then stopped making payments and invoked the appraisal provision in the policy to determine the replacement cost value. Petitioners and respondent selected their respective appraisers, and the appraisers agreed upon an umpire to complete the appraisal panel. The appraisal panel made a determination as to the replacement cost value of the dwelling and the actual cost value, but left to be determined at a later date the "increased cost due to code." That award was signed by respondent's appraiser and the umpire.

Petitioners objected to the appraisal, informed respondent that an "appraisal of the costs of replicating the original home is irrelevant," and requested the appraisal panel to determine the actual expenses incurred in replacing the home. The umpire notified the appraisers that resolution of the disputed issues was "not within the scope of this appraisal process" and requested either a joint agreement between the parties or a court order before the appraisal panel determined the amount of loss.

Petitioners commenced this special proceeding pursuant to CPLR 7601 and Insurance Law § 3408 seeking, inter alia, that Supreme Court order "the appraisal panel to proceed with the replacement cost appraisal in accordance with the terms of the policy and policy endorsement, by appraising the actual amount expended by petitioners to replace the home." Petitioners argued that the terms of the policy dictated that methodology be used and further argued that respondent had waived any appraisal of the hypothetical cost of rebuilding the original home because it authorized construction of the redesigned home. Respondent cross-moved to, inter alia, dismiss the petition. The court granted the petition in part and denied the cross-motion.

We agree with respondent that neither CPLR 7601 nor Insurance Law § 3408 authorizes the relief sought by petitioners. Insurance Law § 3408 is applicable to appraisal provisions contained in fire insurance policies such as the one at issue here. Subdivisions (a) and (b) provide, as relevant, that whenever there is an application for the selection of an umpire pursuant to those appraisal provisions, it shall be made to the court and that the court shall appoint an umpire if the parties' appraisers are unable to agree upon and select one. Here, the parties' appraisers were able to select an umpire, and thus petitioners did not seek relief pursuant to Insurance Law § 3408 (a) and (b). Insurance Law § 3408 (c) provides that a party may apply to the court for an order directing the other party to comply with a demand for appraisal. Petitioners did not seek that relief either. CPLR 7601 may be used to confirm, modify, or vacate an appraisal award (*see generally Matter of Penn Cent. Corp. [Consolidated Rail Corp.]*, 56 NY2d 120, 129-130 [1982]; *Matter of Stanz v New York Cent. Mut. Fire Ins. Co.*, 221 AD3d 1479, 1480 [4th Dept 2023]; *Coral Crystal, LLC v Federal Ins. Co.*, 2020 WL 5350306, *16 & n 17 [SD NY, Sept. 3, 2020, No. 17-CV-1007-LTS-BCM]), but petitioners are not seeking that relief.

We conclude that the relief sought by petitioners may be obtained only in a plenary action (*see generally 425 W. Main Assoc. LP v Selective Ins. Co. of S. Carolina*, 66 Misc 3d 1220[A], 2018 NY Slip Op

52003 [U], *1 [Sup Ct, Genesee County 2018], *affd* 179 AD3d 1447 [4th Dept 2020], *lv denied* 36 NY3d 902 [2020]; *Matter of Merrimack Mut. Fire Ins. Co. v Seibert*, 31 Misc 3d 523, 526 [Sup Ct, Monroe County 2011]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

14

CAF 23-01415

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, NOWAK, AND KEANE, JJ.

IN THE MATTER OF JOHN N. SANTORO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TONYA M. MEYERS, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

BENJAMIN L. NELSON, UTICA, FOR PETITIONER-APPELLANT.

SHARON P. O'HANLON, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered July 28, 2023, in a proceeding pursuant to Family Court Act article 6. The order denied the motion of petitioner to vacate an order of dismissal and to reinstate the petition.

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

Same memorandum as in *Matter of Santoro v Meyers* ([appeal No. 1] — AD3d — [Mar. 14, 2025] [4th Dept 2025]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

15

CA 24-00221

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, NOWAK, AND KEANE, JJ.

IN THE MATTER OF STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

AUSTIN A., RESPONDENT-APPELLANT.

TODD G. MONAHAN, LITTLE FALLS, FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oswego County (Gregory R. Gilbert, J.), entered January 29, 2024, in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10 determining, following a dispositional hearing, that he is a dangerous sex offender requiring confinement (*see* § 10.03 [e]) and committing him to a secure treatment facility. We affirm.

As relevant here, a " '[d]angerous sex offender requiring confinement' " is a detained sex offender "suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined" (*id.*). Only where the offender is "presently 'unable' to control [their] sexual conduct" may they be confined under section 10.03 (e) (*Matter of State of New York v George N.*, 160 AD3d 28, 33 [4th Dept 2018]; *see Matter of State of New York v Mahwee S.*, 232 AD3d 1325, 1325 [4th Dept 2024]).

Initially, we note that respondent, who has been diagnosed with, inter alia, delusional disorder, hypersexuality, antisocial personality disorder with strong psychopathic traits, narcissistic personality disorder, exhibitionistic disorder, and substance abuse disorders, has abandoned any challenge to the determination that he is a detained sex offender who has a mental abnormality (*see generally Matter of State of New York v Tony A.*, 212 AD3d 1056, 1057 [3d Dept 2023]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Contrary to respondent's contention, petitioner met its burden of proving by clear and convincing evidence that respondent is presently unable to control his sexual conduct and is a dangerous sex offender requiring confinement (*see Mahwee S.*, 232 AD3d at 1325-1326; *Matter of Juan U. v State of New York*, 149 AD3d 1300, 1302-1303 [3d Dept 2017]; *Matter of State of New York v Armstrong*, 119 AD3d 1431, 1432 [4th Dept 2014]). Petitioner presented the testimony of three experts who, relying upon several risk assessments, agreed that respondent was a dangerous sex offender requiring confinement in a secure treatment facility. The experts opined that respondent had made minimal progress in treatment (*see Matter of Ezra B. v State of New York*, 221 AD3d 1597, 1598 [4th Dept 2023]; *Matter of Nushawn W. v State of New York*, 215 AD3d 1227, 1229 [4th Dept 2023], *lv denied* 40 NY3d 901 [2023]). The experts also identified numerous dynamic risk factors, which respondent had yet to meaningfully address, that underscored his dangerousness and indicated that respondent posed an enhanced risk of reoffending in the community, including his hypersexuality, deviant sexual interest, exhibitionism, offense-supportive attitudes, grievance thinking, lack of emotionally intimate relationships with adults, impulsivity, aggression, poor problem solving skills, cannabis and cocaine substance use disorders, noncompliance with rules and supervision, and lack of community or family-based support (*see Matter of State of New York v Walter W.*, 94 AD3d 1177, 1179 [3d Dept 2012], *lv denied* 19 NY3d 810 [2012]). One of the experts testified that she additionally found no "protective factors" that would mitigate respondent's risk of committing a new sex offense.

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

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TP 24-00518

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, NOWAK, AND KEANE, JJ.

IN THE MATTER OF MICHAEL T. STANZ,
DOING BUSINESS AS DUNCAN MOTOR CARS
SALES & SERVICE, INC., PETITIONER,

V MEMORANDUM AND ORDER

STATE OF NEW YORK DEPARTMENT OF
MOTOR VEHICLES, RESPONDENT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (JON F. MINEAR OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Emilio Colaiacovo, J.], entered March 22, 2024) to review a determination of respondent. The determination suspended petitioner's dealership license for a period of 60 days.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and in the exercise of discretion and the petition is granted in part by reducing the penalty to a 10-day suspension of petitioner's dealership license, and as modified the determination is confirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul that part of a determination of respondent that suspended his dealer registration for a period of 60 days. After conducting a hearing, an Administrative Law Judge sustained 11 of the 12 charges alleged against petitioner. The charges stemmed from, inter alia, petitioner's failure to keep appropriate records pursuant to the regulations regarding preparation of sales forms and the issuance of temporary registrations to purchasers of vehicles (*see* 15 NYCRR part 78). We note at the outset that petitioner does not raise a substantial evidence issue, and thus Supreme Court erred in transferring the proceeding to this Court (*see Matter of Lynch v New York State Dept. of Motor Vehs. Appeals Bd.*, 125 AD3d 1326, 1326 [4th Dept 2015]; *Matter of Smeraldo v Rater*, 55 AD3d 1298, 1299 [4th Dept 2008]). In the interest of judicial economy, however, we address the merits of the issue raised by petitioner (*see Lynch*, 125 AD3d at 1326).

We agree with petitioner that, in light of all the circumstances, the suspension portion of the penalty imposed " 'is so disproportionate to the offense as to be shocking to one's sense of fairness' " (*Matter of Waldren v Town of Islip*, 6 NY3d 735, 736 [2005], quoting *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 237 [1974]). We conclude that the maximum period of suspension warranted against petitioner in this case is 10 days, and in the exercise of our discretion we therefore modify the determination accordingly (*see generally Matter of Giambrone v Grannis*, 88 AD3d 1272, 1273-1274 [4th Dept 2011]; *Matter of Ralph Oldsmobile, Inc. v Adduci*, 170 AD2d 454, 455 [2d Dept 1991]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

17

CA 23-01750

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, NOWAK, AND KEANE, JJ.

BRIAN C. PRUSIK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LIBERTY MUTUAL INSURANCE GROUP, INC., DEFENDANT,
AND GEDDES FEDERAL SAVINGS AND LOAN ASSOCIATION,
DEFENDANT-RESPONDENT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ANDREW J. RYAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered September 28, 2023. The order granted the motion of defendant Geddes Federal Savings and Loan Association to, inter alia, strike a note of issue.

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

Memorandum: Plaintiff appeals from an order that granted defendant Geddes Federal Savings and Loan Association's motion seeking, inter alia, to strike the note of issue and obtain further discovery. The right to appeal from an intermediate order terminates upon the entry of a final order resolving the case (*see Matter of Aho*, 39 NY2d 241, 248 [1976]; *see generally* CPLR 5501 [a] [1]). Because the record of this case in the New York State Courts Electronic Filing System establishes that a final order was entered on July 1, 2024, of which we take judicial notice (*see McCann v Gordon*, 204 AD3d 1449, 1449 [4th Dept 2022], *appeal dismissed* 38 NY3d 1158 [2022]), plaintiff's appeal from the intermediate order must be dismissed (*see Triest v Nixon Equip. Servs., Inc.* [appeal No. 2], 224 AD3d 1364, 1365 [4th Dept 2024]; *McDonough v Transit Rd. Apts., LLC*, 164 AD3d 1603, 1603 [4th Dept 2018]).

Entered: March 14, 2025

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 20-01570

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

INDALECCIO RODRIGUEZ, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLISON V. MCMAHON OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered March 11, 2020. The judgment convicted defendant upon a jury verdict of attempted 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: On appeal from a judgment convicting him following a jury trial of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]), defendant contends that Supreme Court erred in failing to suppress the victim's identification of him as unreliable. As defendant correctly concedes, however, he did not move to suppress on that ground and his contention is therefore unpreserved for our review (*see* CPL 470.05 [2]; *People v Wilson*, 213 AD3d 1217, 1218 [4th Dept 2023], *lv denied* 39 NY3d 1158 [2023]).

Contrary to defendant's further contention, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Notably, and contrary to defendant's contention, testimony from the shooting victim reflected that the victim recognized his assailant as his friend's neighbor, i.e., defendant, prior to shots being fired. 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 conclude that, although an acquittal would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

We likewise reject defendant's further contention that he was denied a fair trial when the prosecutor allegedly engaged in improper burden-shifting during closing argument. Contrary to defendant's contention, the prosecutor did not improperly suggest that defendant needed to establish an alibi in order to demonstrate his innocence, and instead the prosecutor's remarks were directed at arguing to the jury that the alibi that defendant provided was not credible (*see generally People v Jarvis*, 113 AD3d 1058, 1060 [4th Dept 2014], *affd* 25 NY3d 968 [2015]). In any event, even if improper, the prosecutor's limited remarks "were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Jones*, 114 AD3d 1239, 1241 [4th Dept 2014], *lv denied* 23 NY3d 1038 [2014], *lv denied* 25 NY3d 1166 [2015]; *see People v Sivertson*, 129 AD3d 1467, 1469 [4th Dept 2015], *affd* 29 NY3d 1006 [2017], *cert denied* 583 US 926 [2017]). Defendant failed to preserve for our review his remaining contentions regarding alleged instances of prosecutorial misconduct during trial, and we decline to reach those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, we conclude that he received effective assistance of counsel. Defense counsel's failure to call an expert regarding the reliability of eyewitness identifications (*see People v Freeman*, 206 AD3d 1694, 1695 [4th Dept 2022]), his decisions regarding the cross-examination of the victim (*see generally People v Keane*, 221 AD3d 1586, 1588 [4th Dept 2023]), and his decision to pursue a *Wade* hearing but not a *Rodriguez* hearing (*see People v Hoffman*, 162 AD3d 1753, 1756 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018]) were all matters of trial strategy for which counsel cannot be deemed ineffective. In light of the theory of the defense, i.e., that defendant did not commit any crime and that he had been misidentified, it was likewise not ineffective for defense counsel to fail to argue that the counts of which defendant was convicted should have been presented to the jury in the alternative (*see People v Collins*, 167 AD3d 1493, 1498 [4th Dept 2018], *lv denied* 32 NY3d 1202 [2019]). To the extent that defendant asserts that defense counsel was ineffective for failing to address alleged deficiencies in the People's notices pursuant to CPL 710.30, we note that defense counsel moved for a *Wade* hearing on the ground that the identification procedure was unnecessarily suggestive, the court held that hearing, and "[t]he purpose of [CPL 710.30 was] served" (*People v Simpson*, 35 AD3d 1182, 1183 [4th Dept 2006], *lv denied* 8 NY3d 990 [2007]; *see People v Maltese*, 148 AD3d 1780, 1782 [4th Dept 2017], *lv denied* 29 NY3d 1093 [2017]), rendering "any alleged deficiency in the notice provided by the People . . . irrelevant" (*People v Smith*, 138 AD3d 1430, 1431 [4th Dept 2016], *lv denied* 27 NY3d 1155 [2016]). Although defendant is correct that defense counsel failed to move to redact a portion of a recorded interview played for the jury that mentioned defendant's prior incarceration, defense counsel's omission did not constitute ineffective assistance in light of counsel's prompt motion for a mistrial, which resulted in the court granting a curative instruction (*see generally People v Meyers*, 182 AD3d 1037, 1039 [4th Dept 2020], *lv denied* 35 NY3d 1028 [2020]). Furthermore, contrary to defendant's contention, defense counsel was not ineffective for

failing to object to certain instances of alleged misconduct by the prosecutor at trial (*see People v Wragg*, 26 NY3d 403, 412 [2015]; *People v Collins*, 167 AD3d 1493, 1497-1498 [4th Dept 2018], *lv denied* 32 NY3d 1202 [2019]).

Contrary to defendant's further contention, we conclude that the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). We likewise decline to grant defendant's related request that we exercise our discretion to dismiss the assault count in the interest of justice.

Entered: March 14, 2025

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 24-00261

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF CINDY L. LACHENAUER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LAURA M. LACHENAUER-MYERS, RESPONDENT-APPELLANT.

SCOTT A. OTIS, WATERTOWN, FOR RESPONDENT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-RESPONDENT.

STEPHANIE N. DAVIS, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Eugene R. Renzi, A.J.), entered February 5, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner primary physical custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order following a hearing that, inter alia, awarded petitioner step-grandmother primary physical custody of the subject child and awarded the mother supervised visitation with the child as the parties mutually agree. We affirm.

" '[A]s between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances . . . . The nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child' " (*Matter of Orlowski v Zwack*, 147 AD3d 1445, 1446 [4th Dept 2017]; *see Matter of Bennett v Jeffreys*, 40 NY2d 543, 545-546 [1976]; *Matter of Byler v Byler*, 207 AD3d 1072, 1072-1073 [4th Dept 2022], *lv denied* 39 NY3d 901 [2022]). "The extraordinary circumstances analysis must consider the cumulative effect of all issues present in a given case . . . , including, among others, the length of time the child has lived with the nonparent, the quality of that relationship and the length of time the . . . parent allowed such custody to continue without trying to assume the primary parental role" (*Matter of Tuttle v Worthington* [appeal No. 2], 219 AD3d 1142,

1144 [4th Dept 2023] [internal quotation marks omitted]).

"Affording great deference to the determination of the hearing court with its superior ability to evaluate the credibility of the testifying witnesses" (*Matter of Miner v Torres*, 179 AD3d 1490, 1491 [4th Dept 2020]), we conclude that the finding of extraordinary circumstances here is supported by evidence that, inter alia, the mother put the subject child at risk when she drove while intoxicated with the child in her car, struck the child with a lacrosse stick and bit him, verbally abused the child, repeatedly sent the child to live with the step-grandmother for prolonged periods of time, and failed to get appropriate substance abuse and mental health treatment, juxtaposed against the supportive and caring environment provided by the step-grandmother and the bond that has developed between the step-grandmother and the child (*see Tuttle*, 219 AD3d at 1144-1145; *Byler*, 207 AD3d at 1075; *Matter of Lucore v Lucore*, 280 AD2d 959, 959 [4th Dept 2001]). We note that the mother does not dispute that there was a sufficient change in circumstances since the prior order nor that it is in the best interests of the child to remain in the custody of the step-grandmother.

We also reject the mother's contention that Family Court improperly limited her visitation with the subject child. "Visitation decisions are generally left to Family Court's sound discretion, requiring reversal only where the decision lacks a sound and substantial basis in the record" (*Matter of Nicole J.R. v Jason M.R.*, 81 AD3d 1450, 1451 [4th Dept 2011], *lv denied* 17 NY3d 701 [2011] [internal quotation marks omitted]). The court's determination here was based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, which is entitled to great weight (*see Matter of Harder v Phetteplace*, 93 AD3d 1199, 1200 [4th Dept 2012], *lv denied* 19 NY3d 808 [2012]), and we conclude that it is supported by a sound and substantial basis in the record (*see Matter of Green v Bontzolakes*, 111 AD3d 1282, 1284 [4th Dept 2013]). The mother inflicted physical and verbal abuse upon the child on multiple occasions, leaving him fearful of being with her, and the child's therapist testified at the hearing that any visitation should be supervised at first. Additionally, although "[a] court cannot delegate its authority to determine visitation to either a parent or a child" (*Matter of Merkle v Henry*, 133 AD3d 1266, 1268 [4th Dept 2015] [internal quotation marks omitted]), it may—as it did here—"order visitation as the parties may mutually agree so long as such an arrangement is not untenable under the circumstances" (*Matter of Kelley v Fifield*, 159 AD3d 1612, 1613 [4th Dept 2018]; *see Matter of Pierce v Pierce*, 151 AD3d 1610, 1611 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]). If the mother is unable to obtain an agreement as to visitation, she "may file a petition seeking to enforce or modify the order" (*Matter of Thomas v Small*, 142 AD3d 1345, 1346 [4th Dept 2016]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

32

CA 24-00220

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF FRANCISCO R.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (NATHANIEL V. RILEY OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN LUSIGNAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Gregory R. Gilbert, J.), entered January 22, 2024, in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued the confinement of petitioner to a secure treatment facility.

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

Memorandum: Petitioner appeals from an order, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement under section 10.03 (e) and directing that he continue to be confined to a secure treatment facility (*see* § 10.09 [h]). We reject petitioner's contention that the determination that he requires continued confinement (*see* § 10.03 [e]), rather than release to strict and intensive supervision (*see* § 10.03 [r]) as he requests, is against the weight of the evidence. Respondent's expert witness testified that petitioner's engagement with treatment had not resulted in insight into his offending behavior, that petitioner had not fully engaged with treatment, that his continued behavior reflected that petitioner's impulsivity and sexual impulses had persisted despite his age, and that petitioner continued to fall within the well above average range for risk of reoffending based upon his scores on the Violence Risk Scale-Sex Offender Version and the Static-99 (*see Matter of Wayne J. v State of New York*, 184 AD3d 1133, 1135 [4th Dept 2020], *lv denied* 36 NY3d 906 [2021]; *see also Matter of Francisco R. v State of New York*, 214 AD3d 1409, 1410 [4th Dept 2023]). The fact that petitioner's expert testified that petitioner was a candidate for release to strict and intensive supervision (*see* § 10.03 [r]) "merely raised a credibility issue for the court to resolve, and its determination is entitled to great deference given its opportunity to

evaluate [first-hand] the weight and credibility of [the] conflicting [expert] testimony" (*Matter of State of New York v Robert T.*, 214 AD3d 1405, 1407 [4th Dept 2023], *lv denied* 41 NY3d 902 [2024] [internal quotation marks omitted]; *see Matter of State of New York v Orlando T.*, 184 AD3d 1149, 1150 [4th Dept 2020]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

34

CA 24-00002

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

MARGARET P. BAUMAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS R. BAUMAN, BACK HILLS FARM CORP.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

BACK HILLS FARM CORP., THIRD-PARTY
PLAINTIFF-APPELLANT,

V

MARGARET P. BAUMAN, NORMAN C. BAUMAN, III,
THOMAS S. KALMAN, AS EXECUTOR OF THE ESTATE
OF LAURIE L. KALMAN, AIMEE MCKNIGHT AND
MATTHEW B. BAUMAN, THIRD-PARTY
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

SALCEDO APPEALS PLLC, BUFFALO (STEVEN B. SALCEDO OF COUNSEL), FOR DEFENDANT-APPELLANT DENNIS R. BAUMAN.

BARRY J. DONOHUE, TONAWANDA, FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT BACK HILLS FARM CORP.

ROBERT R. RADEL ATTORNEYS AT LAW, BUFFALO (ROBERT R. RADEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT AND THIRD-PARTY DEFENDANTS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (Kelly A. Vacco, J.), entered October 17, 2023. The order, upon the motion of plaintiff and third-party defendants, granted plaintiff summary judgment on her first cause of action against defendant Dennis R. Bauman and dismissed the third-party complaint.

It is hereby ORDERED that said appeal by defendant Dennis R. Bauman is unanimously dismissed and the order is affirmed without costs.

Memorandum: Plaintiff-third-party defendant Margaret P. Bauman (plaintiff) commenced this action against defendant Dennis R. Bauman (defendant), defendant Blue River Equipment, Inc., and defendant-third-party plaintiff Back Hills Farm Corp. (Back Hills Farm),

asserting, inter alia, causes of action against defendant for breach of a commercial promissory note and breach of an oral contract concerning defendant's access to, and use of, a credit card account. Plaintiff is the mother of defendant. Back Hills Farm, which employed defendant and operated a farm on real property owned by plaintiff, subsequently commenced a third-party action.

In appeal No. 1, defendant, as limited by his brief, appeals from an order insofar as it granted the motion of plaintiff and the four other third-party defendants (collectively, third-party defendants) to the extent that it sought summary judgment on plaintiff's cause of action for breach of the promissory note, and Back Hills Farm separately appeals from the same order insofar as it granted the same motion to the extent that it sought summary judgment dismissing the four causes of action in Back Hills Farm's third-party complaint, asserting a prescriptive easement, tortious interference with contract, wrongful eviction, and conversion.

In appeal No. 2, defendant, as limited by his brief, appeals from an order insofar as it granted the motion of plaintiff to the extent that it sought summary judgment on her cause of action for breach of the oral contract regarding the credit card account.

In appeal No. 3, defendant, as limited by his brief, appeals from an order insofar as it denied his motion to the extent that it sought summary judgment dismissing the abovementioned causes of action in plaintiff's complaint and summary judgment on his illegal eviction counterclaim.

In appeal No. 4, defendant appeals from a statement for judgment awarding plaintiff damages against defendant on her causes of action concerning the promissory note and credit card agreement.

Preliminarily, we note that defendant's appeal from the order in appeal No. 1 must be dismissed, the appeal from the order in appeal No. 2 must be dismissed, and the appeal from the order in appeal No. 3 must be partially dismissed. Specifically, in appeal Nos. 1 and 2, defendant appeals from those parts of Supreme Court's orders granting plaintiff summary judgment on her causes of action for breach of the promissory note and breach of contract and, in appeal No. 3, defendant appeals, inter alia, from the part of the order denying his motion with respect to those causes of action, and defendant's right to appeal from those parts of the orders terminated upon the subsequent entry of the judgment in appeal No. 4 (*see Counsel Fin. II LLC v Bortnick*, 214 AD3d 1388, 1389 [4th Dept 2023]; *see generally* CPLR 5501 [a] [1]). Nonetheless, the appeal from the judgment in appeal No. 4 brings up for review the propriety of those parts of the orders in appeal Nos. 1, 2, and 3 (*see Matter of Aho*, 39 NY2d 241, 248 [1976]; *Counsel Fin. II LLC*, 214 AD3d at 1389; *see also* CPLR 5501 [a] [1]). Moreover, the part of the order in appeal No. 1 that dismissed the causes of action in the third-party complaint and the part of the order in appeal No. 3 that denied defendant's motion to the extent that it sought summary judgment on his illegal eviction counterclaim do not necessarily affect the final judgment and, thus, the appeals

from those parts of those orders are properly before us (*see generally* CPLR 5501 [a] [1]; *Bonczar v American Multi-Cinema, Inc.*, 38 NY3d 1023, 1026 [2022]).

Contrary to defendant's contention in appeal No. 3, the court properly denied his motion to the extent that it sought summary judgment on his counterclaim for illegal eviction inasmuch as plaintiff's affidavit submitted in opposition to defendant's motion and in further support of her motions raises a triable issue of fact whether defendant abandoned plaintiff's premises after being served with a notice terminating his leasehold interest in that real property (*see generally Smith v NGM Ins. Co.*, 221 AD3d 1450, 1454 [4th Dept 2023]; *Bozewicz v Nash Metalware Co.*, 284 AD2d 288, 288 [2d Dept 2001]).

Contrary to defendant's contention in appeal No. 4, the court properly granted summary judgment to plaintiff on her cause of action for breach of the promissory note. Plaintiff met her initial burden on the motion through the submission of the promissory note and her sworn averment in an affidavit in support of the motion that defendant defaulted by failing to pay the balance due after plaintiff elected to accelerate the note in 2020 pursuant to its terms based upon defendant's insolvency and the appointment of a receiver (*see Springwood Vil., LLC v Stanley Holdings LLC*, 201 AD3d 1342, 1343 [4th Dept 2022]). Plaintiff was not required to disprove a statute of limitations defense in order to meet her initial burden inasmuch as defendant's answer only raised that defense with respect to plaintiff's breach of contract cause of action relating to the credit card (*see generally Preferred Capital v PBK, Inc.*, 309 AD2d 1168, 1168 [4th Dept 2003]).

Although defendant did not submit an opposition to plaintiff's motions seeking summary judgment on her causes of action for breach of the promissory note and breach of contract concerning the credit card, he simultaneously filed his own motion for summary judgment dismissing those causes of action, and as such the court properly deemed defendant's submissions in support of his motion for summary judgment as though they were also "made in opposition to" plaintiff's motions for summary judgment (*Matter of Long Beach Professional Firefighters Assn. v City of Long Beach*, 214 AD3d 735, 737 [2d Dept 2023]). Nonetheless, we conclude that defendant failed to demonstrate by admissible evidence the existence of a triable issue of fact whether plaintiff accelerated the promissory note in 2009 based upon her belief that defendant had failed to make payments required under it at that time, thereby barring plaintiff's cause of action under the statute of limitations (*see generally Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Specifically, defendant avers in his motion papers that he made all payments required under the promissory note, which implies that, by its terms, the promissory note could not have been accelerated for nonpayment in 2009 (*see generally Wilmington Sav. Fund Socy. FSB v Deliberto*, 184 AD3d 1081, 1084 [4th Dept 2020]).

Contrary to defendant's final contention in appeal No. 4, the court properly granted summary judgment to plaintiff on her cause of

action for breach of contract concerning the credit card. Plaintiff met her initial burden on the motion through her averment that defendant orally agreed to pay for all of the charges on the credit card account in exchange for being allowed to use it—which defendant does not dispute—and the submission of unpaid credit card statements showing the amount due. Defendant's contention that damages should be reduced to reflect a cash back reward available on the account fails to create an issue of fact inasmuch as he is bound by his admission in plaintiff's first notice to admit, which he did not respond to, that he "agreed to pay the amount due on the credit card . . . each month" (*see Danielle W. v Jentsch & Co., Inc.*, 217 AD3d 1472, 1474 [4th Dept 2023]). Additionally, although "the right to [statutory prejudgment] interest may be lost on equitable principles of estoppel, such as a refusal by a creditor to accept a tender" (*Knab Bros. v Town of Lewiston*, 58 AD2d 1016, 1017 [4th Dept 1977]; *see Feldman v Brodsky*, 12 AD2d 347, 350 [1st Dept 1961], *affd* 11 NY2d 692 [1962]), even assuming that defendant was unable to access the online account to make a payment, defendant failed to establish that he was otherwise precluded from paying the amount that he owed by another method (*see Knab Bros.*, 58 AD2d at 1017; *see generally* CPLR 5001 [a]; *J. D'Addario & Co., Inc. v Embassy Indus., Inc.*, 20 NY3d 113, 117 [2012]).

Contrary to Back Hills Farm's contentions, the court properly granted third-party defendants' motion to the extent that it sought summary judgment dismissing Back Hills Farm's cause of action seeking a declaration that it has a prescriptive easement over a secondary driveway on plaintiff's property to access an adjacent parcel of land that plaintiff had leased from a public utility company until the lease was terminated in 2020. In order to acquire an easement by prescription, a party is "required to establish by clear and convincing evidence [use] that was hostile and under a claim of right; actual; open and notorious; and continuous for the required period of 10 years" (*Meyers v Berl*, 213 AD3d 1233, 1234 [4th Dept 2023] [internal quotation marks & emphasis omitted]; *see Beutler v Maynard*, 80 AD2d 982, 982 [4th Dept 1981], *affd* 56 NY2d 538 [1982]). "The 'hostile and under a claim of right' element . . . 'require[s] that the possession [or use] be truly adverse to the rights of the party holding record title' " (*Meyers*, 213 AD3d at 1234). Back Hills Farm was incorporated in 2018, and thus would only be able to satisfy the requisite statutory time period "by tacking the time that [it used] the property onto the time that [its] predecessor [used] the property" (*Kopp v Rhino Room, Inc.*, 192 AD3d 1690, 1691 [4th Dept 2021] [internal quotation marks omitted]; *see Pierce v Frost*, 295 AD2d 894, 895 [4th Dept 2002]). However, third-party defendants met their initial burden on the motion by establishing that Back Hills Farm's alleged predecessor, defendant, was allowed to use the secondary driveway pursuant to his residential lease agreement, so that his use was permissive, not hostile (*see City of Kingston v Knaust*, 287 AD2d 57, 61 [3d Dept 2001]), and Back Hills Farm failed to raise a triable issue of fact in opposition.

We also conclude that the court properly granted third-party defendants' motion to the extent that it sought summary judgment

dismissing Back Hills Farm's cause of action for tortious interference with contract based upon third-party defendants' alleged interference with contracts between Back Hills Farm and its customers for the purchase of farm products. In order to prevail on a tortious interference with contract claim, a plaintiff must establish the existence of a valid contract between it and a third party, the defendant's intentional and unjustified procurement of the third party's breach of the contract, the actual breach of the contract, and resulting damages (*see Jim Ball Chrysler LLC v Marong Chrysler-Plymouth, Inc.*, 19 AD3d 1094, 1095 [4th Dept 2005], *lv denied* 5 NY3d 709 [2005]; *see also Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424-425 [1996]). Third-party defendants met their initial burden on the motion by establishing, inter alia, that no valid contracts were executed between Back Hills Farm and its customers. In opposition, Back Hills Farm asserted that third-party defendants had induced a public utility company to breach a lease agreement, a contention that had not been made in its third-party complaint or bill of particulars. Inasmuch as "[a third-party] plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting a new theory of liability . . . for the first time in opposition to the motion" (*Cannon v Amarante*, 19 AD3d 1144, 1145 [4th Dept 2005] [internal quotation marks omitted]), the court properly rejected the contention. Although Back Hills Farm had previously raised this theory of liability in a response to plaintiff's notice to admit, we note that a notice to admit is a discovery device intended "to eliminate from dispute those matters about which there can be no controversy" (*Pasek v Catholic Health Sys., Inc.*, 195 AD3d 1477, 1477 [4th Dept 2021] [internal quotation marks omitted]), not to raise new theories of liability not originally asserted in the complaint (*see generally Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770 [4th Dept 2010], *affd* 16 NY3d 729 [2011]). Similarly, Back Hills Farm's contention that it has alleged a cause of action for tortious interference with precontractual relations "is raised for the first time on appeal and thus is not preserved for our review" (*Remodeling Constr. Servs. v Minter*, 78 AD3d 1677, 1679 [4th Dept 2010]).

With respect to Back Hills Farm's cause of action for alleged illegal eviction from a storage barn on plaintiff's property, its contention that third-party defendants failed to meet their initial burden on the motion because they did not submit a supporting affidavit from an individual with personal knowledge of the facts underlying the motion is also raised for the first time on appeal and, thus, not preserved for our review (*see id.*). In any event, third-party defendants met their initial burden by submitting evidentiary proof in admissible form attached to their counsel's affirmation in support of their motion (*see generally Aur v Manhattan Greenpoint Ltd.*, 132 AD3d 595, 595 [1st Dept 2015]), which established that Back Hills Farm was not a tenant but, rather, a licensee, with respect to the barn (*see Felli v Catholic Charities of Steuben County*, 175 AD3d 1065, 1066 [4th Dept 2019]), and Back Hills Farm failed to raise a triable issue of fact in opposition.

Finally, with respect to Back Hills Farm's cause of action for

conversion of equipment that it allegedly left in the barn, "[i]n order to succeed on a cause of action to recover damages for conversion, a plaintiff must show (1) legal ownership or an immediate right of possession to a specific identifiable thing and (2) that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's right" (*Cretaro v Huntington*, 203 AD3d 1696, 1697-1698 [4th Dept 2022] [internal quotation marks omitted]). "Where the original possession is lawful, a conversion does not occur until the defendant refuses to return the property after demand by the property's rightful owner" (*Simpson & Simpson, PLLC v Lippes Mathias Wexler Friedman LLP*, 130 AD3d 1543, 1545 [4th Dept 2015] [internal quotation marks omitted]). Third-party defendants met their initial burden on their motion by establishing, inter alia, that Back Hills Farm failed to respond to plaintiff's offer to make arrangements for the return of any equipment belonging to it, and Back Hills Farm failed to raise a triable issue of fact in opposition.

Entered: March 14, 2025

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 24-00698

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

MARGARET P. BAUMAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS R. BAUMAN, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

SALCEDO APPEALS PLLC, BUFFALO (STEVEN B. SALCEDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROBERT R. RADEL ATTORNEYS AT LAW, BUFFALO (ROBERT R. RADEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kelly A. Vacco, J.), entered October 17, 2023. The order, insofar as appealed from, granted that part of the motion of plaintiff seeking summary judgment on her second cause of action.

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

Same memorandum as in *Bauman v Bauman* ([appeal No. 1] — AD3d — [Mar. 14, 2025] [4th Dept 2025]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

36

CA 24-00699

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

MARGARET P. BAUMAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS R. BAUMAN, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 3.)

SALCEDO APPEALS PLLC, BUFFALO (STEVEN B. SALCEDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROBERT R. RADEL ATTORNEYS AT LAW, BUFFALO (ROBERT R. RADEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kelly A. Vacco, J.), entered October 17, 2023. The order denied the motion of defendant Dennis R. Bauman for summary judgment.

It is hereby ORDERED that said appeal from the order insofar as it denied those parts of the motion of defendant Dennis R. Bauman seeking summary judgment dismissing the first and second causes of action is unanimously dismissed and the order is affirmed without costs.

Same memorandum as in *Bauman v Bauman* ([appeal No. 1] — AD3d — [Mar. 14, 2025] [4th Dept 2025]).

Entered: March 14, 2025

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 24-00704

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

MARGARET P. BAUMAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS R. BAUMAN, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 4.)

SALCEDO APPEALS PLLC, BUFFALO (STEVEN B. SALCEDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROBERT R. RADEL ATTORNEYS AT LAW, BUFFALO (ROBERT R. RADEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Kelly A. Vacco, J.), entered November 6, 2023, which awarded plaintiff money damages against defendant Dennis R. Bauman on plaintiff's first and second causes of action.

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

Same memorandum as in *Bauman v Bauman* ([appeal No. 1] — AD3d — [Mar. 14, 2025] [4th Dept 2025]).

Entered: March 14, 2025

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 23-02108

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, AND HANNAH, JJ.

DAVID BARKER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY V. GERVERA, AMANDA D. GERVERA,
AND FARM CREDIT EAST, ACA,
DEFENDANTS-RESPONDENTS.
(ACTION NO. 1.)

DAVID BARKER, PLAINTIFF-APPELLANT,

V

ANTHONY V. GERVERA, AMANDA D. GERVERA,
AND FARM CREDIT EAST, ACA,
DEFENDANTS-RESPONDENTS.
(ACTION NO. 2.)

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (MATTHEW W. O'NEIL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ANTHONY V. GERVERA AND AMANDA D. GERVERA.

HANCOCK & ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT FARM CREDIT EAST, ACA.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered November 27, 2023. The order, insofar as appealed from, granted in part the motion of defendants Anthony V. Gervera and Amanda D. Gervera to dismiss plaintiff's first through third claims against them, and granted the motion of defendant Farm Credit East, ACA, for summary judgment dismissing the amended complaints against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendant Farm Credit East, ACA, reinstating the amended complaints against that defendant, denying those parts of the motion of defendants Anthony V. Gervera and Amanda D. Gervera seeking dismissal of the first claim against them insofar as it is based on a theory of unilateral mistake with fraud, the second claim against them, and the third claim against them insofar as it is based on a theory of constructive trust and

reinstating those parts of the amended complaints in their entirety and as modified the order is affirmed without costs.

Memorandum: Plaintiff sold his 300-acre farm, situated in Oswego and Jefferson Counties, to his daughter and son-in-law, defendants Amanda D. Gervera and Anthony V. Gervera (collectively, Gervera defendants). Defendant Farm Credit East, ACA (Farm Credit) holds a mortgage on that real property. As summarized in our decision on the prior appeals in this matter (*Barker v Gervera* [appeal No. 1], 218 AD3d 1159 [4th Dept 2023]; *Barker v Gervera* [appeal No. 2], 218 AD3d 1163 [4th Dept 2023]), plaintiff believed he would be given a life estate from the Gervera defendants as part of the transfer but later learned that no life estate had been created. Plaintiff commenced identical actions in Oswego and Jefferson Counties by service of summonses with notice, seeking, inter alia, reformation of the deeds that transferred ownership of the farm to the Gervera defendants. The Gervera defendants and Farm Credit moved to dismiss the actions pursuant to CPLR 3012 (b).

Supreme Court in each action granted Farm Credit's motion in its entirety and granted the Gervera defendants' motion in part, leaving intact only plaintiff's conversion causes of action against the Gervera defendants. On the prior appeals by plaintiff, we reversed both orders insofar as appealed from and denied the motions, thus reinstating the remaining causes of action (*Barker*, 218 AD3d at 1159-1160; *id.*, 218 AD3d at 1163).

Plaintiff filed amended complaints asserting, in addition to conversion, claims for reformation or rescission and damages based on "mutual mistake or unilateral mistake with fraud"; undue influence; and "unjust enrichment/constructive trust." After issue was joined but before any meaningful discovery occurred, the Gervera defendants moved to dismiss those additional claims under CPLR 3211 (a) (1) and (7), and Farm Credit moved for summary judgment dismissing the amended complaints under CPLR 3212, relying almost exclusively on the submissions of the Gervera defendants. Plaintiff opposed the motions and filed a cross-motion to join the actions.

Supreme Court, Jefferson County, granted the Gervera defendants' motion in part. Specifically, the court granted the motion insofar as it sought dismissal of the claims asserting " 'mutual mistake or unilateral mistake with fraud' and . . . 'undue influence' " and insofar as it sought dismissal of the claim asserting " 'unjust enrichment/constructive trust,' " except "to the extent that [p]laintiff claims to have relied upon an unfulfilled promise that he could 'live in his house until he dies.' " The court also granted Farm Credit's motion, dismissing the amended complaints against it. Although the court denied plaintiff's cross-motion for joinder, the court ordered that the two actions be consolidated in Supreme Court, Jefferson County. Plaintiff, as limited by his brief, appeals from the order to the extent that it granted the motions.

Preliminarily, we note that, although the Gervera defendants moved for dismissal pursuant to CPLR 3211 (a) (1) and (7), the court

determined that the Gervera defendants' motion was "in actuality, one for summary judgment," and treated the motion as such (*see* CPLR 3211 [c]). We conclude that the court erred in converting the Gervera defendants' motion to a CPLR 3212 motion. A court may treat a CPLR 3211 motion made under subdivision (a) or (b) as a motion for summary judgment "*after adequate notice to the parties*" (CPLR 3211 [c] [emphasis added]). On this record, we conclude that "no such notice was given" (*Corle v Allstate Ins. Co.*, 162 AD3d 1489, 1490 [4th Dept 2018]; *see Pitts v City of Buffalo*, 298 AD2d 1003, 1004-1005 [4th Dept 2002]), and that there is no evidence that the parties (aside from Farm Credit) "deliberately charted a summary judgment course" (*Matter of Gorelick v Suffolk County Comptroller's Off.*, 186 AD3d 1518, 1519 [2d Dept 2020]; *see Corle*, 162 AD3d at 1490).

Moreover, "conversion is inappropriate where a motion for summary judgment would be premature" (*Russo v Crisona*, 219 AD3d 920, 921 [2d Dept 920]). Here, in an attorney affirmation in opposition to the motions, plaintiff contended that he "should . . . , at the very least, be allowed the opportunity to conduct depositions of the parties and the witnesses involved, to support [his] claims" (*see* CPLR 3212 [b]). We conclude that plaintiff has established that he "had no reasonable opportunity to conduct discovery, and [that] discovery may result in disclosure of evidence relevant to the [claims] asserted in the complaint" (*Menche v CDx Diagnostics, Inc.*, 199 AD3d 678, 680 [2d Dept 2021]). Inasmuch as there was no notice of the court's intention to convert the Gervera defendants' motion, the failure of plaintiff to object to the court's procedure is not fatal to his contention (*cf. id.*).

We thus address this appeal insofar as it relates to the Gervera defendants using the standard of review applicable to a CPLR 3211 (a) motion.

"When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiff[ ] with the benefit of every favorable inference . . . Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018] [internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Pottorff v Centra Fin. Group, Inc.*, 192 AD3d 1552, 1553 [4th Dept 2021]). "In reviewing a motion under CPLR 3211 (a) (7), 'a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint . . . and the criterion is whether the proponent of the pleading has a cause of action, not whether [the proponent] has stated one' " (*Potempa v Potempa*, 229 AD3d 1191, 1192-1193 [4th Dept 2024], quoting *Leon*, 84 NY2d at 88).

The Gervera defendants also moved to dismiss under CPLR 3211 (a) (1), contending that documentary evidence, i.e., the contract and the deeds, established a complete defense to the claims (*see Davis v Evangelical Lutheran Church In Am.*, 204 AD3d 1515, 1516 [4th Dept

2022]). Our role in reviewing the evidence " 'is not to interpret the contract [or deeds], but to determine whether defendants met their burden of proffering documentary evidence conclusively refuting plaintiff['s] allegations' " (*Howard v Reserve at Spaulding Green*, 225 AD3d 1232, 1233 [4th Dept 2024]; *see University Hill Realty, Ltd. v Akl*, 214 AD3d 1467, 1468 [4th Dept 2023]). Here, the documents submitted by the Gervera defendants "failed to 'utterly refute . . . plaintiff's allegations [that the contract was procured by mistake, fraud, or undue influence] or conclusively establish a defense as a matter of law' " (*University Hill Realty, Ltd.*, 214 AD3d at 1469; *see Davis*, 204 AD3d at 1516).

With respect to the claim based on a mutual mistake or unilateral mistake with fraud, "[i]t is the general rule that where a written instrument fails to conform to the agreement between the parties in consequence of the mutual mistake of the parties however induced, or of the mistake of one party and fraud of the other, a court will reform the instrument so as to make it conform to the actual agreement between the parties" (*Janowitz Bros. Venture v 25-30 120th St. Queens Corp.*, 75 AD2d 203, 214 [2d Dept 1980]; *see Iskalo Elec. Tower LLC v Stantec Consulting Servs., Inc.*, 219 AD3d 1157, 1160 [4th Dept 2023]; *EGW Temporaries, Inc. v RLI Ins. Co.*, 83 AD3d 1481, 1481 [4th Dept 2011]).

We reject plaintiff's contention that he stated a valid claim for mutual mistake. Plaintiff alleged that the Gervera defendants tricked or deceived him into transferring a property allegedly valued at over $750,000 for a price of $250,000, and there is no contention in the amended complaints that the Gervera defendants operated under any mistake (*see Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]; *EGW Temporaries, Inc.*, 83 AD3d at 1481-1482; *see generally Pickard v Campbell*, 207 AD3d 1105, 1107-1108 [4th Dept 2022], *lv denied* 39 NY3d 910 [2023]). That claim was thus properly dismissed.

We reach a different conclusion with respect to the claim that there was a unilateral mistake with fraud. Initially, we note that "[a] bare claim of unilateral mistake by [a] plaintiff, unsupported by legally sufficient allegations of fraud on the part of defendants, does not state a cause of action for reformation" (*Barclay Arms v Barclay Arms Assoc.*, 74 NY2d 644, 646 [1989]; *see Portnoy v Allstate Indem. Co.*, 82 AD3d 1196, 1198 [2d Dept 2011]; *1225 Realty Owner LLC v Mocal Enters., Inc.*, 66 AD3d 602, 602 [1st Dept 2009]). The allegations "must overcome the presumption that the written instrument correctly set forth the true intentions of the parties" (*Town of German Flats v Aetna Cas. & Sur. Co.*, 174 AD2d 1003, 1004 [4th Dept 1991], *lv denied* 78 NY2d 860 [1991]). The issue therefore distills to whether plaintiff made "legally sufficient allegations of fraud on the part of defendants" (*Barclay Arms*, 74 NY2d at 646). "Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]; *see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]). " 'The elements of a cause of action for fraud require a material

misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff[,] and damages' " (*Carlson v American Intl. Group, Inc.*, 30 NY3d 288, 310 [2017], quoting *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *see Lama Holding Co. v Smith Barney,* 88 NY2d 413, 421 [1996]; *Northland E., LLC v J.R. Militello Realty, Inc.*, 163 AD3d 1401, 1404 [4th Dept 2018]). Here, we conclude that plaintiff made legally sufficient allegations not only of a unilateral mistake but also of all the elements of a cause of action for fraud with respect to the Gervera defendants (*see generally* CPLR 3016 [b]; *Northland E., LLC*, 163 AD3d at 1404). We therefore reinstate the unilateral mistake with fraud claim.

With respect to the claim for reformation or rescission on the ground of undue influence, we agree with plaintiff that defendants have not met their burden of conclusively establishing a defense as a matter of law, and we reject defendants' assertion that the concept of undue influence is limited to invalidating a will. Although we noted in *Nice v Combustion Eng'g* (193 AD2d 1088, 1090 [4th Dept 1993]) that " 'undue influence' is a ground for invalidating a will" (*id.*), New York courts have invalidated deeds on the ground of undue influence (*see e.g. Matter of Nurse*, 160 AD3d 745, 748 [2d Dept 2018]; *Peters v Nicotera*, 248 AD2d 969, 969-970 [4th Dept 1998]) or have otherwise entertained the theory of undue influence to challenge a deed or contract (*see e.g. Weinberg v Sultan*, 142 AD3d 767, 768-769 [1st Dept 2016]; *Rudge v Latopolski*, 57 AD3d 964, 964 [2d Dept 2008]; *Call v Ellenville Natl. Bank*, 5 AD3d 521, 525-526 [2d Dept 2004]; *see generally Adams v Irving Natl. Bank of N.Y.*, 116 NY 606, 613-614 [1889]). We therefore conclude that plaintiff may pursue a claim for undue influence in his action to reform the contract and deeds.

It is well established that there is a "need to protect vulnerable incapacitated individuals and their rightful heirs from overreaching and undue influence," as well as "to protect the integrity of the courts themselves" (*Campbell v Thomas*, 73 AD3d 103, 119 [2d Dept 2010]). "It is an old, old principle that a court, even in the absence of express statutory warrant, must not allow itself to be made the instrument of wrong, no less on account of its detestation of every thing conducive to wrong than on account of that regard which it should entertain for its own character and dignity" (*id.* [internal quotation marks omitted]).

To establish undue influence, a party is required to establish that an individual "was actually constrained to act against [their] own free will and desire by identifying the motive, opportunity and acts allegedly constituting the influence, as well as when and where such acts occurred" (*Matter of Colverd*, 52 AD3d 971, 973 [3d Dept 2008] [internal quotation marks omitted]; *see Matter of Haley*, 189 AD3d 2000, 2002 [3d Dept 2020]). We conclude that plaintiff's allegations are sufficient to withstand the Gervera defendants' CPLR 3211 (a) (7) motion to dismiss. We therefore reinstate the claim of undue influence.

With respect to the claim of unjust enrichment or constructive

trust, we reject plaintiff's contention that the court erred to the extent that it dismissed the unjust enrichment claim. "The elements of an unjust enrichment cause of action are that (1) the defendant was enriched; (2) the enrichment was at the expense of the plaintiff; and (3) it would be inequitable to allow the defendant to retain that which is claimed by the plaintiff" (*OneWest Bank, FSB v Spencer*, 145 AD3d 1488, 1489-1490 [4th Dept 2016]; *see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). "[T]he theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, *in the absence of an actual agreement between the parties*" (*Georgia Malone & Co., Inc.*, 19 NY3d at 516 [emphasis added & internal quotation marks omitted]; *see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009], *rearg denied* 12 NY3d 889 [2009]). Where, as here, "the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded" (*IDT Corp.*, 12 NY3d at 142; *see Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607 [2008]).

With respect to plaintiff's claim for a constructive trust, we agree with plaintiff that no portion of that claim should have been dismissed. "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee" (*Toobian v Golzad*, 193 AD3d 778, 781 [2d Dept 2021] [internal quotation marks omitted]; *see Matter of Thomas*, 124 AD3d 1235, 1237 [4th Dept 2015]). A constructive trust may be imposed where there is "(1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment" (*Bankers Sec. Life Ins. Socy. v Shakerdge*, 49 NY2d 939, 940 [1980], *rearg denied* 50 NY2d 929 [1980]; *see Toobian*, 193 AD3d at 781; *Rossi v Morse*, 153 AD3d 1637, 1638 [4th Dept 2017]).

"Inasmuch as a constructive trust is an equitable remedy, however, 'courts do not rigidly apply the elements but use them as flexible guidelines' " (*Beason v Kleine*, 96 AD3d 1611, 1613 [4th Dept 2012]; *see Rossi*, 153 AD3d at 1638). Indeed, the "elements serve only as a guideline, [and] a constructive trust may still be imposed even if all of the elements are not established" (*Galasso, Langione & Botter, LLP v Galasso*, 176 AD3d 1176, 1184 [2d Dept 2019] [internal quotation marks omitted]; *see Thomas*, 124 AD3d at 1239; *see also Counihan v Allstate Ins. Co.*, 194 F3d 357, 361-362 [2d Cir 1999]).

We conclude that plaintiff's allegations are sufficient to state all of the elements of a constructive trust with respect to his claim of a life estate in the property. "In determining whether a confidential relationship exists, 'the existence of a family relationship does not, per se, create a presumption of undue influence; there must be evidence of other facts or circumstances showing inequality or controlling influence' . . . The existence of

such a relationship will ordinarily be a question of fact" (*Matter of Nealon*, 104 AD3d 1088, 1089 [3d Dept 2013], *affd* 22 NY3d 1045 [2014]). Nevertheless, it has been held that a "familial relationship between the parties is sufficient to demonstrate a confidential relationship" (*Peebles v Peebles*, 40 AD3d 1388, 1390 [3d Dept 2007], *lv dismissed* 9 NY3d 892 [2007], *lv dismissed* 10 NY3d 893 [2008], *rearg denied* 11 NY3d 751 [2008]; *see Delidimitropoulos v Karantinidis*, 186 AD3d 1489, 1491 [2d Dept 2020]; *Millard v Wyche*, 164 AD3d 778, 779 [2d Dept 2018]). We conclude that plaintiff's allegations are sufficient to survive a CPLR 3211 (a) (7) motion (*see generally Enzien v Enzien*, 96 AD3d 1136, 1137-1138 [3d Dept 2012]).

We further conclude that the allegations in the amended complaints are sufficient to state the elements regarding a promise and a transfer made in reliance on that promise. Indeed, those elements were not the subject of any dispute on the motion.

With respect to the element of unjust enrichment, we highlight the distinction between a stand-alone claim for unjust enrichment and the element of unjust enrichment in a claim for a constructive trust. Although a stand-alone claim for unjust enrichment is barred where, as here, there is a valid written contract (*see IDT Corp.*, 12 NY3d at 142; *Cox,* 10 NY3d at 607), that does not act as a bar to a constructive trust claim. Indeed, there are several examples of cases involving constructive trusts where there were underlying written contracts (*see e.g. Enzien*, 96 AD3d at 1138-1139; *Hornett v Leather*, 145 AD2d 814, 816 [3d Dept 1988], *lv denied* 74 NY2d 603 [1989]).

"The salutary purpose of the constructive trust remedy is to prevent unjust enrichment . . . A person may be deemed to be unjustly enriched if [they have] received a benefit, the retention of which would be unjust . . . A conclusion that one has been unjustly enriched is essentially a legal inference drawn from the circumstances surrounding the transfer of property and the relationship of the parties. It is a conclusion reached through the application of principles of equity" (*Sharp v Kosmalski*, 40 NY2d 119, 123 [1976]). Here, as in *Sharp*, "[t]his case seems to present the classic example of a situation where equity should intervene to scrutinize a transaction pregnant with opportunity for abuse and unfairness. It was for just this type of case that there evolved equitable principles and remedies to prevent injustices" (*id.*).

We agree with plaintiff that the Statute of Frauds (General Obligations Law § 5-703) " 'is not a defense to a properly pleaded cause of action to impose a constructive trust on real property' " (*Toobian,* 193 AD3d at 780). We conclude that the Gervera defendants failed to conclusively establish a defense as a matter of law (*see generally id.*; *Galasso, Langione & Botter, LLP*, 176 AD3d at 1184) and that the court erred in dismissing any part of the constructive trust claim.

In its order, the court denied the Gervera defendants' motion to dismiss "on the issue of 'unjust enrichment/constructive trust' to the extent that [p]laintiff claims to have relied upon an unfulfilled

promise that he could 'live in his house until he dies.' " Neither the Gervera defendants nor Farm Credit appealed from the order and, as a result, we are precluded from granting them any affirmative relief (*see Matter of Baker Hall v City of Lackawanna Zoning Bd. of Appeals*, 109 AD3d 1096, 1097 [4th Dept 2013]; *see generally Hecht v City of New York*, 60 NY2d 57, 61 [1983]). We therefore do not address the merits of defendants' contention challenging the portion of the order that declined to dismiss part of the "unjust enrichment/constructive trust" claim.

Based on our determination, we agree with plaintiff that the amended complaints should be reinstated against Farm Credit as mortgagee of the property and therefore a necessary party (*see generally* CPLR 1001 [a]).

We therefore modify the order by denying Farm Credit's motion, reinstating the amended complaints against that defendant, denying in part the Gervera defendants' motion, and reinstating the "mutual mistake or unilateral mistake with fraud" claim insofar as it seeks relief based on a unilateral mistake with fraud, the undue influence claim, and the "unjust enrichment/constructive trust" claim insofar as it seeks relief for a constructive trust.

Entered: March 14, 2025

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 24-00741

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF THE ESTATE OF JOHN R. SHANOR, JR., ALSO KNOWN AS JOHN "JACK" SHANOR, ALSO KNOWN AS JOHN SHANOR, JR., DECEASED.

RICHARD J. SHANOR AND AREN LADELFA, PETITIONERS-APPELLANTS;

JEFFREY F. VOELKL AND ROBERT GLASER, RESPONDENTS-RESPONDENTS.

MEMORANDUM AND ORDER

TIVERON LAW PLLC, AMHERST (DIANE R. TIVERON OF COUNSEL), AND BLANK ROME LLP, NEW YORK CITY, FOR PETITIONERS-APPELLANTS.

VOELKL LAW PC, WILLIAMSVILLE (JEFFREY F. VOELKL OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Surrogate's Court, Erie County (Acea M. Mosey, S.), entered October 17, 2023. The order dismissed the claim of Richard J. Shanor and Aren LaDelfa.

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

Memorandum: Petitioners' parents died in a boating accident in 2003. The boat was operated by petitioners' paternal uncle, John Shanor III (John III), and owned by their paternal grandfather, John R. Shanor, Jr. (decedent). Petitioners' parents' estates thereafter brought a wrongful death action against John III and decedent. During the course of that action, the estates, the guardians for petitioners, decedent, and John III entered into a "Stipulated Settlement and Agreement Not to Execute" (agreement). The agreement identified four insurance policies covering decedent and John III, noting that two of those policies had tendered their full policy value and that the other two had disclaimed coverage. In the agreement, decedent and John III agreed that they would not contest liability in the wrongful death action. In exchange, the estates of petitioners' parents and the guardians for petitioners agreed that they, inter alia, "will not record any judgment granted in the [wrongful death action] against [John III or decedent], and will not execute the judgment against any of the assets of [John III or decedent], except to the extent of insurance benefits under the [insurance policies of the disclaiming insurers]." They further agreed that they "will pursue recovery only to the extent of the coverage afforded by the [insurance policies of

the disclaiming insurers] to satisfy any judgment, and will not pursue collection from the individual assets of [John III or decedent]."

Decedent died in 2022, and petitioners filed a claim against his estate, seeking recovery of the balance on the judgment. The estate rejected the claim, and petitioners filed the instant petition seeking an order, inter alia, directing decedent's estate to satisfy the claim. Respondents, the co-executors of the estate, moved to dismiss the claim. Relying on the terms of the agreement, Surrogate's Court dismissed the claim. Petitioners appeal.

Contrary to petitioners' contention, the Surrogate did not err by improperly deciding a disputed factual issue on a motion to dismiss. A settlement agreement is a contract subject to the same principles of interpretation as other contracts (*see Brad H. v City of New York*, 17 NY3d 180, 185 [2011]; *Gardner v Zammit*, 185 AD3d 1405, 1406 [4th Dept 2020]; *Kash v Jewish Health Care Sys. of Rochester, Inc.*, 98 AD3d 1275, 1276 [4th Dept 2012]). Here, the Surrogate based her decision upon what the Surrogate characterized as the unambiguous terms of the agreement. "Whether an agreement is ambiguous is a question of law for the courts . . . and, consequently, a court may conclude that an agreement is ambiguous [or not] even if the parties contend otherwise" (*Corter-Longwell v Juliano*, 200 AD3d 1578, 1581 [4th Dept 2021] [internal quotation marks omitted]). "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Anderson v Anderson*, 120 AD3d 1559, 1560 [4th Dept 2014], *lv denied* 24 NY3d 913 [2015], quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002] [internal quotation marks omitted]). Rather than deciding a factual issue in dispute, the Surrogate based her decision upon a legal determination that the agreement was unambiguous and required dismissal of the claim (*see generally* CPLR 3211 [a] [1]). We likewise reject petitioners' contention that, on the merits, the Surrogate erred in holding that the agreement was unambiguous and precluded the instant claim. The agreement unambiguously permitted recovery "to satisfy any judgment" "only to the extent of the coverage afforded by the [insurance policies of the disclaiming insurers]" and, in violation of that clause, petitioners here are seeking recovery against decedent's estate, i.e., something that is not either of those policies.

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

43

CA 24-00114

PRESENT: LINDLEY, J.P., OGDEN, DELCONTE, AND HANNAH, JJ.

PATRICK RIMAR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTRY CLUB OF BUFFALO, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

LIPPES MATHIAS LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

KADISH & FIORDALISO, BUFFALO (ROBERT A. FIORDALISO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered December 4, 2023. The order denied the motion of defendant Country Club of Buffalo to dismiss the amended complaint.

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

Memorandum: Plaintiff, a former member of defendant Country Club of Buffalo (CCB) commenced this action after two anonymous letters were allegedly disseminated amongst the board and management of CCB accusing plaintiff of, inter alia, sexually molesting a child and CCB subsequently revoked plaintiff's membership. The amended complaint seeks monetary damages only and asserts causes of action against CCB and certain unknown individuals for defamation as well as negligence, breach of contract, and breach of CCB's constitution and bylaws. CCB moved to dismiss the amended complaint pursuant to CPLR 3211 (a) (5) and (7), contending that the defamation causes of action failed to state a cause of action and the remaining causes of action were time-barred under the four-month statute of limitations applicable to a CPLR article 78 proceeding under CPLR 217. Supreme Court denied the motion, and CCB appeals. We affirm.

In order to state a cause of action for defamation, "a plaintiff must 'set forth in the complaint the particular words complained of, as required by CPLR 3016 (a),' and must 'state the time, place, and manner of the allegedly false statements and to whom such statements were made' " (*Fika Midwifery PLLC v Independent Health Assn., Inc.*, 208 AD3d 1052, 1054 [4th Dept 2022]). "In assessing 'a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction . . . . We accept the facts as alleged in the

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]). 'Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss' (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005])" (*Pottorff v Centra Fin. Group, Inc.*, 192 AD3d 1552, 1553 [4th Dept 2021]; *see Fika Midwifery PLLC*, 208 AD3d at 1053).

Here, the amended complaint "specified the words that were allegedly defamatory and generally identified the time, place, and manner of those statements as well as to whom those statements were made" (*Fika Midwifery PLLC*, 208 AD3d at 1055; *see Emby Hosiery Corp. v Tawil*, 196 AD3d 462, 464 [2d Dept 2021]). CCB contends that the amended complaint should be dismissed because it fails to state the specific identity of the author(s) and disseminator(s) of the anonymous letters. We reject that contention. At the pleading stage, it is sufficient that plaintiff alleges that those actions of authorship and dissemination were taken by either employees of CCB or members of its board (*see M.H.B. v E.C.F.S.*, 177 AD3d 479, 479-480 [1st Dept 2019]; *Matter of Weitzman v Long Beach City Sch. Dist.*, 175 AD3d 504, 505-506 [2d Dept 2019]). CCB additionally contends that its board members are protected by the qualified privilege that exists "where the [allegedly defamatory] communication is made to persons who have some common interest in the subject matter" (*Foster v Churchill*, 87 NY2d 744, 751 [1996]), but we reject that contention too. Plaintiff alleges that the letters were written and disseminated with actual malice, and a "defense of qualified privilege will be defeated by demonstrating a defendant [acted] with malice" (*id.*). We thus conclude that the amended complaint alleges facts sufficient to state causes of action for defamation.

Contrary to CCB's further contention, plaintiff's causes of action for negligence, breach of contract, and breach of CCB's bylaws and constitution are not barred by the four-month statute of limitations for an article 78 proceeding under CPLR 217. In order to determine the appropriate statute of limitations for a cause of action, regardless of how a plaintiff labels or styles the cause of action in a pleading, a court must look to the "the substance of the action and the relief sought" (*Bennett Rd. Sewer Co. v Town Bd. of Town of Camillus*, 243 AD2d 61, 66 [4th Dept 1998]; *see Doe v State Univ. of N.Y., Binghamton Univ.*, 201 AD3d 1075, 1076 [3d Dept 2022]). Here, plaintiff's causes of action for negligence, breach of contract, and breach of CCB's bylaws and constitution seek only monetary damages, not reinstatement to membership or other article 78 relief (*see Daley v County of Erie*, 59 AD3d 1087, 1088 [4th Dept 2009]; *Kerlikowske v City of Buffalo*, 305 AD2d 997, 997 [4th Dept 2003]; *cf. Bango v Gouverneur Volunteer Rescue Squad, Inc.*, 101 AD3d 1556, 1557 [3d Dept 2012]).

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

Entered: March 14, 2025

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 23-01064

PRESENT: CURRAN, J.P., SMITH, OGDEN, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS P. MITCHELL, JR., DEFENDANT-APPELLANT.

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Kristina Karle, J.), rendered May 24, 2023. The appeal was held by this Court by order entered June 14, 2024, decision was reserved and the matter was remitted to Ontario County Court for further proceedings (228 AD3d 1250 [4th Dept 2024]). 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 Ontario County Court for further proceedings in accordance with the following memorandum: In this prosecution arising from allegations that defendant committed a series of physical and sexual acts of domestic violence against complainant over the course of their relationship, including in the presence of their young child, defendant appeals from a judgment convicting him, upon a jury verdict, of unlawful imprisonment in the second degree (Penal Law § 135.05), rape in the third degree (former § 130.25 [3]), sexual abuse in the first degree (§ 130.65 [1]), assault in the second degree (§ 120.05 [6]), two counts of assault in the third degree (§ 120.00 [1]), two counts of endangering the welfare of a child (§ 260.10 [1]), and two counts of harassment in the second degree (§ 240.26 [1]).

When the appeal was previously before us, we considered defendant's contention that County Court had erred in denying his motion to dismiss the indictment (*People v Mitchell*, 228 AD3d 1250 [4th Dept 2024]). We determined, consistent with the content of defendant's moving papers and the characterization thereof by the parties and the court, that defendant had "moved to dismiss the indictment pursuant to CPL 30.30 on the ground that the People initially filed an improper [certificate of compliance (COC)] and were therefore not actually ready for trial within the requisite time period" (*id.* at 1252). Thus, with respect to the legal standard for evaluating the motion, we stated that "[w]here, as here, 'a defendant

bring[s] a CPL 30.30 motion to dismiss on the ground that the People failed to exercise due diligence and therefore improperly filed a COC, the People bear the burden of establishing that they did, in fact, exercise due diligence and ma[k]e reasonable inquiries prior to filing the initial COC despite a belated or missing disclosure' " (*id.* at 1255-1256, quoting *People v Bay*, 41 NY3d 200, 213 [2023]). We further noted that " '[i]f the prosecution fails to make such a showing, the COC should be deemed improper, the readiness statement stricken as illusory, and—so long as the time chargeable to the People exceeds the applicable CPL 30.30 period—the case dismissed' " (*id.* at 1256, quoting *Bay*, 41 NY3d at 213).

On the merits, we agreed with defendant that, contrary to the court's determination in denying his motion to dismiss the indictment pursuant to CPL 30.30, the People failed to show that they had exercised due diligence and made reasonable efforts to identify mandatory discovery prior to filing their initial COC, and therefore the initial COC was not proper when filed and the People's declaration of readiness at that time was illusory (*id.* at 1251). In particular, the record established that the People, in originally representing that the complainant had no criminal history, violated their discovery obligation to obtain and disclose the complainant's criminal history prior to filing the initial COC (*id.* at 1256). Upon our review of the circumstances presented, including the illustrative list of relevant factors set forth in *Bay*, we concluded that the People failed to meet their burden of establishing that they exercised due diligence and made reasonable inquiries prior to filing the initial COC (*id.* at 1256-1257). We further recognized that, inasmuch as the court had determined that the initial COC was proper and thus that the People's statement of readiness at that time was not illusory, the court did not rule on whether the time chargeable to the People exceeded the applicable CPL 30.30 period (*id.* at 1258). Given that the court's failure to rule on that part of defendant's motion could not be deemed a denial thereof, we held the case, reserved decision, and remitted the matter to the court "to determine whether the People were ready within the requisite time period (*see* CPL 30.30 [1] [a]), including the applicability and effect, if any, of defendant's obligation under CPL 245.50 (4) (b)—which became effective during the pendency of the prosecution—to notify or alert the People to the extent he was aware of a potential defect or deficiency related to the COC, which awareness was a disputed issue before the court" (*id.*).

Notwithstanding our directive, the court determined on remittal, at the People's urging, that defendant had never validly moved to dismiss the indictment on the ground that he had been deprived of his statutory right to a speedy trial. The court thus concluded that, upon remittal, it was unable to consider whether defendant was entitled to dismissal of the indictment on that basis.

Defendant now contends on resubmission that the People's assertion that he never made a valid motion to dismiss the indictment on statutory speedy trial grounds was improperly raised for the first time on remittal and that the court's reliance on that assertion exceeded the scope of our remittal. We agree.

We unequivocally determined in our prior decision—and reiterated several times—that defendant had moved to dismiss the indictment pursuant to CPL 30.30 on the ground that the People initially filed an improper COC and were therefore not actually ready for trial within the requisite time period (*id.* at 1251-1252, 1254-1255, 1258). Upon our review of the circumstances presented, we concluded that the People failed to meet their burden of establishing that they exercised due diligence and made reasonable inquiries prior to filing the initial COC (*id.* at 1256-1257). We nonetheless recognized that, inasmuch as the court had determined that the initial COC was proper and thus that the People's statement of readiness at that time was not illusory, the court did not rule on whether the time chargeable to the People exceeded the applicable CPL 30.30 period (*id.* at 1258). Pursuant to *People v Concepcion* (17 NY3d 192, 197-198 [2011]), the court's failure to rule on that part of defendant's motion could not be deemed a denial thereof, and we therefore held the case, reserved decision, and remitted the matter to the court with the aforementioned directive (*see Mitchell*, 228 AD3d at 1258).

In light of those determinations, the People's assertion on remittal that defendant never made a valid motion to dismiss the indictment on statutory speedy trial grounds was improperly raised because that assertion "extends beyond the scope of the remittal and was not raised by [the People] prior to remittal" (*People v Ramos*, 210 AD3d 1453, 1454 [4th Dept 2022], *lv denied* 39 NY3d 1074 [2023]; *see People v Pressley*, 170 AD3d 1645, 1645 [4th Dept 2019], *lv denied* 33 NY3d 1072 [2019]; *People v Butler*, 75 AD3d 1105, 1105 [4th Dept 2010], *lv denied* 15 NY3d 919 [2010]). Similarly, the court's acceptance of the People's characterization of defendant's motion and its concomitant conclusion that it was unable to consider on remittal whether defendant was entitled to dismissal of the indictment on statutory speedy trial grounds were contrary to our prior determination regarding the nature of defendant's motion and "exceeded the scope of the remittal" (*People v Saxton*, 53 AD3d 1045, 1046 [4th Dept 2008]). "[A] trial court, upon a remand or remittitur, is without power to do anything except to obey the mandate of the higher court, and render judgment in conformity therewith" (*People v Weber*, 195 AD3d 1544, 1544 [4th Dept 2021], *affd* 40 NY3d 206 [2023] [internal quotation marks omitted]; *see Saxton*, 53 AD3d at 1046; *see also People v Dennis*, 148 AD3d 927, 928 [2d Dept 2017]; *People v Garcia*, 145 AD3d 1032, 1033-1034 [2d Dept 2016]).

Under the circumstances of this case, we conclude that remittal for a second time is warranted (*see generally People v Wilson*, 187 AD3d 1586, 1586 [4th Dept 2020]; *People v Henderson*, 148 AD3d 1779, 1779-1780 [4th Dept 2017]; *People v Crimm*, 140 AD3d 1672, 1673-1674 [4th Dept 2016]). We therefore again hold the case, reserve decision, and remit the matter to County Court "to determine whether the People were ready within the requisite time period (*see* CPL 30.30 [1] [a]), including the applicability and effect, if any, of defendant's obligation under CPL 245.50 (4) (b)—which became effective during the pendency of the prosecution—to notify or alert the People to the extent he was aware of a potential defect or deficiency related to the

COC, which awareness was a disputed issue before the court" (*Mitchell*, 228 AD3d at 1258).

Entered: March 14, 2025

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 21-01738

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DIQUAN HALL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ELISABETH DANNAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered November 10, 2021. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a firearm.

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

Memorandum: In 2019, defendant pleaded guilty to attempted criminal possession of a controlled substance in the fifth degree and was referred to drug treatment court, where he signed a contract providing that, if he completed the diversion program, he would be sentenced to a conditional discharge, but if he was terminated from the program, he would be sentenced to a term of imprisonment. Defendant was arrested while he was still undergoing the diversion program. In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a firearm (Penal Law § 265.01-b), arising from that arrest. Based on that conviction, defendant was terminated from the diversion program and, in appeal No. 2, appeals from the judgment convicting him, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fifth degree (§§ 110.00, 220.06 [1]). We affirm in each appeal.

Defendant contends in appeal No. 1 that County Court erred in refusing to suppress evidence recovered from the search of the vehicle he was operating inasmuch as the police lacked probable cause to stop the vehicle. We reject that contention. An automobile stop "is lawful when it is based on probable cause [to believe] that a driver has committed a traffic violation" (*People v Rufus*, — NY3d —, 2024 NY Slip Op 06384, *2 [2024]; *see People v Nektalov*, 42 NY3d 363, 367

[2024]). Where, as here, the stop is based on an officer's observation of excessively tinted windows, "[t]he relevant question for a suppression court in determining whether law enforcement had probable cause is whether 'the officer who stopped the car reasonably believed the windows to be over-tinted in violation of' the Vehicle and Traffic Law" (*Nektalov*, 42 NY3d at 367). The test is an objective one, and the officer's subjective belief that there has been a violation of the Vehicle and Traffic Law, whether correct or not, is not determinative (*see People v Estrella*, 48 AD3d 1283, 1285 [4th Dept 2008], *affd* 10 NY3d 945 [2008], *cert denied* 555 US 1032 [2008]; *see generally People v Edwards*, 14 NY3d 741, 742 [2010], *rearg denied* 14 NY3d 794 [2010]). The People "must establish 'the basis for [the] belief' that law enforcement possessed the requisite suspicion in the form of 'facts, not assurances' " (*Nektalov*, 42 NY3d at 367).

Here, the officer who initiated the stop testified at the suppression hearing that he looked directly at the driver's side window of the vehicle defendant was operating, that he did so from a distance of no more than 10 to 15 feet, and that he was "unable to see the driver of the vehicle" through the window. We conclude that the officer's testimony contained sufficient facts to establish that he reasonably believed that the windows were excessively tinted in violation of Vehicle and Traffic Law § 375 (12-a) (b) (2) (*see People v Biggs*, 208 AD3d 1340, 1343 [2d Dept 2022], *lv denied* 39 NY3d 961 [2022]; *People v Brown*, 169 AD3d 1258, 1259 [3d Dept 2019], *lv denied* 33 NY3d 1029 [2019]; *People v Collins*, 105 AD3d 1378, 1379 [4th Dept 2013], *lv denied* 21 NY3d 1003 [2013]).

We reject defendant's further contention in appeal No. 1 that the court erred in concluding that the police were justified in searching his vehicle pursuant to the automobile exception to the search warrant requirement. The automobile exception "permits police officers to 'search a vehicle without a warrant when they have probable cause to believe that evidence or contraband will be found there' " (*People v Johnson*, 159 AD3d 1382, 1383 [4th Dept 2018], *lv denied* 31 NY3d 1083 [2018], quoting *People v Galak*, 81 NY2d 463, 467 [1993]; *see People v Nichols*, 175 AD3d 1117, 1118 [4th Dept 2019], *lv denied* 34 NY3d 1018 [2019]). "The exception requires 'both probable cause to search the automobile generally and a nexus between the probable cause to search and the crime for which the arrest is being made' "(*Johnson*, 159 AD3d at 1383, quoting *People v Langen*, 60 NY2d 170, 181 [1983], *cert denied* 465 US 1028 [1984]). Here, the arresting officers testified at the suppression hearing that, after fleeing the vehicle, defendant attempted to hide a clear plastic bag containing "a white powdery substance," which the officers, based on their experience and training, believed to be illegal narcotics. That testimony was sufficient to establish that there was "both probable cause to search the automobile generally and a nexus between the probable cause to search and the crime for which the arrest is being made" (*Nichols*, 175 AD3d at 1119 [internal quotation marks omitted]; *see People v Burghart*, 177 AD2d 866, 869 [3d Dept 1991], *lv denied* 79 NY2d 998 [1992]; *see generally People v Santiago*, 165 AD3d 417, 418 [1st Dept 2018], *lv denied* 32 NY3d 1128 [2018]). Contrary to defendant's

contention, the fact the officers did not confirm that the white powdery substance was an illegal narcotic before they searched the vehicle does not mean that they lacked probable cause. "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent [people], not legal technicians, act . . . . Probable cause does not require proof beyond a reasonable doubt, but merely requires a reasonable ground for belief" (*Johnson*, 159 AD3d at 1383 [internal quotation marks omitted]; *see Nichols*, 175 AD3d at 1118).

In light of our determination, we do not reach defendant's contention in appeal No. 2.

All concur except WHALEN, P.J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent inasmuch as I agree with defendant that the People failed to meet their burden of establishing that law enforcement had probable cause to stop his vehicle. Specifically, I conclude that the People failed to elicit evidence "to support the [testifying officer]'s conclusory belief that the tinted windows violated the law" (*People v Nektalov*, 42 NY3d 363, 368 [2024]).

The officer who attempted to initiate the stop of defendant's vehicle testified that he believed any level of tint on the front driver's side window or the front passenger window would be illegal and that the actual tint on the vehicle's windows was never tested with a tint meter. He further testified that he initially observed the vehicle when it was dark outside and that he was unable to see the driver inside the vehicle. At no point did the officer testify that it was the window tint, as opposed to the ambient darkness, that prevented him from seeing the driver. The officer's failure to link the allegedly excessive tint with his inability to see into the vehicle distinguishes this case from those cited by the majority, in which the arresting officer "testified at the suppression hearing that he could tell the window tints were too dark because he could not see into the [vehicle]" (*People v Biggs*, 208 AD3d 1340, 1343 [2d Dept 2022], *lv denied* 39 NY3d 961 [2022]), or "specifically testified that the driver's side windows were 'so dark that [he] was unable to actually see the operator of the vehicle as the vehicle was going by' " (*People v Brown*, 169 AD3d 1258, 1259 [3d Dept 2019], *lv denied* 33 NY3d 1029 [2019]). Because the officer's testimony here failed to link his conclusory belief that the windows were excessively tinted with an objective fact in support of that belief, I conclude that the People failed to meet their burden (*see Nektalov*, 42 NY3d at 367-368).

Thus, in appeal No. 1, I would reverse the judgment, vacate the plea, and grant that part of the omnibus motion seeking suppression of the physical evidence (*see People v Williams*, 177 AD3d 1312, 1313 [4th Dept 2019]). Further, because my determination would result in the suppression of all evidence in support of the crimes charged, I would dismiss the indictment in appeal No. 1 (*id.*). Additionally, inasmuch as defendant was terminated from the treatment court program based on the weapons arrest, I would reverse the judgment in appeal No. 2 and

restore defendant to treatment court (*see generally People v Paul*, 229 AD2d 932, 933 [4th Dept 1996]; *People v Reed*, 186 AD2d 159, 160 [2d Dept 1992]).

Entered: March 14, 2025

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 22-00843

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DIQUAN HALL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ELISABETH DANNAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered November 10, 2021. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fifth degree.

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

Same memorandum as in *People v Hall* ([appeal No. 1] — AD3d — [Mar. 14, 2025] [4th Dept 2025]).

All concur except WHALEN, P.J., who dissents and votes to reverse in accordance with the same dissenting memorandum as in *People v Hall* ([appeal No. 1] – AD3d — [Mar. 14, 2025] [4th Dept 2025]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

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TP 24-01100

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF HARRY'S NURSES REGISTRY, INC., PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF MEDICAID INSPECTOR GENERAL (OMIG), NEW YORK STATE DEPARTMENT OF HEALTH, BUREAU OF ADJUDICATION, JOHN HARRIS TEREPKA, BUREAU OF ADJUDICATION ADMINISTRATIVE LAW JUDGE AND NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENTS.

GEORGE A. RUSK, SNYDER, FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Joseph D. Waldorf, J.], entered February 15, 2024) to review a determination of respondents. The determination found that petitioner was liable for Medicaid overpayments.

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, inter alia, to annul the determination of respondent John Harris Terepka, Bureau of Adjudication Administrative Law Judge (ALJ), made after a hearing, insofar as it affirmed in part the determination of respondent New York State Office of Medicaid Inspector General (OMIG) after a final audit of Medicaid claims paid to petitioner during a two-year period. OMIG determined that respondent New York State Department of Health is entitled to recover from petitioner Medicaid overpayments, based, at least in part, on an extrapolation method used by OMIG to calculate the total amount of overpayments. We confirm the determination and dismiss the petition.

Preliminarily, we note that our review of petitioner's contentions in this transfer proceeding is proper, even though petitioner does not raise a substantial evidence issue in its brief before this Court. Supreme Court properly transferred this proceeding to this Court on the basis that petitioner raised a substantial

evidence issue in its amended petition and, under CPLR 7804 (g), we are required to "dispose of *all issues* in the proceeding" (emphasis added; *see generally* David D. Siegel & Patrick M. Connors, New York Practice § 568 at 1090-1091 [6th ed 2018]). Even assuming, arguendo, that transfer of the proceeding was improper due to petitioner's failure to raise a substantial evidence issue, we are nevertheless permitted to review the merits of the petition in the interest of judicial economy (*see Matter of Waterfront Ctr. for Rehabilitation & Healthcare v New York State Dept. of Health*, 162 AD3d 1717, 1718 [4th Dept 2018]; *Matter of Zickl v Daines*, 83 AD3d 1582, 1583 [4th Dept 2011]; *see generally Matter of 125 Bar Corp. v State Liq. Auth. of State of N.Y.*, 24 NY2d 174, 180 [1969]).

Petitioner contends that the ALJ's determination should be annulled because the actual electronic audit report was not admitted in evidence during the hearing; that, to the extent that certain hearing exhibits are purported to constitute the electronic audit report, they were not properly entered in evidence; that the determination was arbitrary and capricious because OMIG's extrapolation method did not meet the standard for determining the validity of scientific methodologies; and that OMIG did not provide the requisite notice under 18 NYCRR 518.7 (b) and (c), 521-3.5 (a), and 516.3 (b) (2) before collecting the challenged overpayments and charging interest. Because petitioner did not advance those contentions at the administrative hearing, however, it failed to preserve them for our review (*see Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]; *Matter of Lisowski v New York State Dept. of Motor Vehs.*, 227 AD3d 1438, 1439 [4th Dept 2024]; *see also Matter of Cornell v Annucci*, 173 AD3d 1760, 1761 [4th Dept 2019]), and we have no discretionary authority to review those contentions in this CPLR article 78 proceeding (*see Khan*, 96 NY2d at 880; *Lisowski*, 227 AD3d at 1439).

Petitioner contends that OMIG's reliance on an extrapolation method to, at least in part, determine the amount of Medicaid overpayments was not authorized by law or regulation inasmuch as the reference to extrapolation in 18 NYCRR 519.18 (g) is not a clear and explicit grant of such authority. We reject that contention inasmuch as the Court of Appeals has expressly concluded "that the authority for [OMIG] to conduct Medicaid audits based upon statistical sampling is implicit in the general grant of authority to supervise the administration of the Medicaid program in this State" (*Matter of Mercy Hosp. of Watertown v New York State Dept. of Social Servs.*, 79 NY2d 197, 207 [1992]; *see generally West Midtown Mgt. Group, Inc. v State of N.Y., Dept. of Health, Off. of the Medicaid Inspector Gen.*, 31 NY3d 533, 535-536 [2018]). Indeed, the Court noted that "it is not unreasonable for a supervising agency, such as [OMIG], to use statistical samples to establish that overpayments have been made and to estimate their total," as long as the provider—i.e., petitioner here—is given "a fair opportunity to challenge the accuracy of the estimate by attacking the reliability of the methods or standards employed" (*id.* at 204), and petitioner availed itself of that opportunity in this case.

We also reject petitioner's contention that the grant of authority to extrapolate the amount of the overpayment under 18 NYCRR 519.18 (g) conflicts with Social Services Law § 145-b, which grants OMIG the authority to collect a monetary penalty under the appropriate circumstances. The statute and the regulation govern entirely separate forms of relief that OMIG may pursue simultaneously where there have been violations of Medicaid regulations. Indeed, we note that "[t]he imposition of a penalty . . . does not preclude the recovery of an overpayment" (18 NYCRR 516.3 [a] [1]). A petitioner's "reimbursement of the unauthorized payments is not a sanction or a penalty, but merely a remedy in the nature of recoupment" (*Matter of A.R.E.B.A. Casriel v Novello*, 298 AD2d 134, 135 [1st Dept 2002], *lv denied* 100 NY2d 56 [2003]). For the same reasons, we reject petitioner's contention that OMIG's election to seek a recoupment of the overpayment, rather than the imposition of monetary penalties, was arbitrary and capricious.

Petitioner also contends that the ALJ's determination should be annulled because the ALJ's refusal to consider certain documentation pertaining to several sample claims that were ultimately disallowed was based on an irrational interpretation of the relevant regulations. We reject that contention. A provider must file any objections "within 30 days" of receiving notice of the draft audit report (18 NYCRR 517.5 [c]; *see also* 18 NYCRR 517.5 [b]) and " 'may not . . . raise any new matter' at a hearing 'not considered by the department upon submission of objections to a draft audit' " (*Matter of Beth Israel Med. Ctr. v New York State Off. of Medicaid Inspector Gen.*, 221 AD3d 446, 447 [1st Dept 2023], quoting 18 NYCRR 519.18 [a]; *see also* 18 NYCRR 517.5 [b]). Here, petitioner submitted the relevant documentation to OMIG well after the issuance of the final audit report, and the ALJ's refusal to consider that documentation was rational and reasonable (*see generally Matter of Marzec v DeBuono*, 95 NY2d 262, 266 [2000], *rearg denied* 96 NY2d 731 [2001]).

We reject petitioner's contention that declaratory relief is appropriate and authorized in this proceeding (*see generally Schachtler Stone Prods., LLC v Town of Marshall*, 209 AD3d 1316, 1319 [4th Dept 2022]).

Finally, we have reviewed petitioner's remaining contentions and conclude that none warrants annulment of the determination.

Entered: March 14, 2025

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 24-00766

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF 3750 MONROE AVENUE ASSOCIATES, LLC, PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, RESPONDENT-DEFENDANT-RESPONDENT.

WOODS OVIATT GILMAN LLP, ROCHESTER (DONALD W. O'BRIEN, JR., OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN LUSIGNAN OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Vincent M. Dinolfo, J.), entered December 20, 2023. The order and judgment denied the petition, and granted the motion of respondent-defendant to dismiss the petition-complaint.

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

Memorandum: In this hybrid CPLR article 78 proceeding and declaratory judgment action, petitioner-plaintiff (petitioner) appeals from an order and judgment granting the motion of respondent-defendant New York State Department of Environmental Conservation (DEC) to dismiss the petition-complaint on the ground that petitioner failed to exhaust its administrative remedies. We affirm.

An applicant accepted into the Brownfield Cleanup Program "must enter into [a Brownfield Cleanup Agreement (BCA)] with [the] DEC to conduct an investigation to assess the nature and extent of contamination at the brownfield site . . . , and must devise and carry out a remedial program that [the] DEC judges to be protective of public health and the environment" (*Matter of Lighthouse Pointe Prop. Assoc. LLC v New York State Dept. of Envtl. Conservation*, 14 NY3d 161, 166 [2010] [internal quotation marks omitted]; *see* ECL 27-1409, 27-1411, 27-1415 [1], [2]). The BCA must include a provision "authorizing the [DEC] to terminate [the BCA] at any time during the implementation of such agreement if the applicant implementing such agreement fails to substantially comply with such agreement's terms and conditions" (*Campus Sq., LLC v North-Ellicott Mgt., Inc.*, 229 AD3d 1332, 1337 [4th Dept 2024] [internal quotation marks omitted]; *see* ECL 27-1409 [5], [12]). The BCA will terminate 31 days after the

effective date of the DEC's written notice of its intent to terminate "unless the remedial party: (i) seeks dispute resolution within 15 days of the effective date of the notice; or (ii) cures the deficiency within the 30-day period after the effective date of the notice" (6 NYCRR 375-3.5 [c] [2]).

Here, petitioner was accepted into the DEC's Brownfield Cleanup Program and entered into a BCA with respect to the site. Subsequently, the DEC sent petitioner notice of its intent to terminate the BCA based on petitioner's failure to comply with the DEC's requirement that petitioner provide financial assurance for the anticipated future removal of contaminants from underneath the building on the site. Petitioner failed to initiate a dispute resolution proceeding in response to the DEC's termination notice and, instead, commenced this proceeding seeking, inter alia, reinstatement of the BCA. Inasmuch as petitioner failed to exhaust its administrative remedies, Supreme Court properly granted the DEC's motion (*see Matter of Town of Cambria v New York Off. of Renewable Energy Siting*, 228 AD3d 1336, 1341 [4th Dept 2024], *lv denied* 42 NY3d 912 [2025]; *PLP, II LP v New York State Dept. of Envtl. Conservation*, 68 AD3d 1709, 1710 [4th Dept 2009], *lv denied* 14 NY3d 707 [2010]; *see generally Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]).

Entered: March 14, 2025

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 24-00391

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, DELCONTE, AND KEANE, JJ.

DIMARCO CONSTRUCTORS, LLC, PLAINTIFF-RESPONDENT,
ET AL., PLAINTIFFS,

V MEMORANDUM AND ORDER

TOP CAPITAL OF NEW YORK BROCKPORT, LLC,
ZHENG ZHOU, TIMOTHY COOPER, QUAD SEAS, LLC,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

BOYLAN CODE LLP, ROCHESTER (MICHAEL J. WEGMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ADAMS LECLAIR LLP, ROCHESTER (RICHARD T. BELL, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered September 7, 2023. The judgment, inter alia, granted plaintiff DiMarco Constructors, LLC, money damages against defendants Top Capital of New York Brockport, LLC, Zheng Zhou, Timothy Cooper and Quad Seas, LLC.

It is hereby ORDERED that said appeal insofar as taken by defendant Timothy Cooper is unanimously dismissed and the judgment is affirmed without costs.

Memorandum: DiMarco Constructors, LLC (plaintiff) commenced this action seeking, inter alia, to recover the balance allegedly due under its construction contract with defendant Top Capital of New York Brockport, LLC (Top Capital). Plaintiff asserted causes of action for, among other things, breach of contract and diversion of trust funds. Top Capital and defendants Zheng Zhou, Timothy Cooper, and Quad Seas, LLC (Quad Seas), a company owned by Cooper, now appeal from a judgment entered after a nonjury trial finding, in relevant part, that Top Capital breached the contract and that Zhou, Cooper, and Quad Seas were personally liable for trust fund diversion in violation of article 3-A of the Lien Law.

Initially, we dismiss the appeal insofar as taken by Cooper inasmuch as he is deceased and no substitution for him has been made or sought (*see* CPLR 1015, 5016 [d]; *Kelly v St. Francis Hosp.*, 100 AD3d 707, 707-708 [2d Dept 2012]).

On an appeal from a nonjury trial, this Court "has authority

. . . as broad as that of the trial court . . . and . . . may render the judgment it finds warranted by the facts" (*Village Green E. Holdings LLC v Blaakman*, 220 AD3d 1214, 1215 [4th Dept 2023] [internal quotation marks omitted]). "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" (*Unger v Ganci* [appeal No. 2], 200 AD3d 1604, 1605 [4th Dept 2021] [internal quotation marks omitted]; *see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993]; *Dennis v Cerrone*, 229 AD3d 1116, 1118 [4th Dept 2024]).

We reject the contention of Top Capital, Zhou, and Quad Seas (defendants) that DiMarco's total compensation should be limited under the doctrine of in pari delicto. Even assuming, arguendo, that defendants raised that defense below, Supreme Court's rejection of that defense is based on a fair interpretation of the evidence. The doctrine of in pari delicto "mandates that the courts will not intercede to resolve a dispute between two wrongdoers" (*Kirschner v KPMG LLP*, 15 NY3d 446, 464 [2010]). It "requires immoral or unconscionable conduct that makes the wrongdoing of the party against which it is asserted at least equal to that of the party asserting it" (*Romanoff v Romanoff*, 148 AD3d 614, 615 [1st Dept 2017] [internal quotation marks omitted]). Here, any wrongdoing by plaintiff was minor and not equal to that of defendants (*see generally McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 471 [1960]).

Defendants' remaining contention was raised and decided by this Court on the prior appeal (*DiMarco Constructors, LLC v Top Capital of N.Y. Brockport, LLC*, 193 AD3d 1375 [4th Dept 2021]), and further review is therefore foreclosed (*see Matter of Foreclosure of Tax Liens [Neal—Fedder Lofts, LLC]*, 211 AD3d 1508, 1509 [4th Dept 2022]; *Snuszki v Wright*, 34 AD3d 1235, 1236 [4th Dept 2006], *appeal dismissed* 8 NY3d 980 [2007]).

Entered: March 14, 2025 Ann Dillon Flynn
Clerk of the Court

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

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TP 24-00161

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF JOSEPH D. KOLASH, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS
AND UNIVERSITY OF ROCHESTER, RESPONDENTS.

EISENBERG & BAUM, LLP, NEW YORK CITY (ANDREW ROZYNSKI OF COUNSEL), FOR PETITIONER.

OSBORN, REED & BURKE, LLP, ROCHESTER (AIMEE LAFEVER KOCH OF COUNSEL), FOR RESPONDENT UNIVERSITY OF ROCHESTER.

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, Monroe County [Kevin M. Nasca, J.], entered January 22, 2024) to review a determination of respondent New York State Division of Human Rights. The determination dismissed the complaint.

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

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination of respondent New York State Division of Human Rights (DHR) dismissing his complaint against respondent University of Rochester (University). Petitioner, who was born deaf, alleges that the University unlawfully discriminated against him in violation of Executive Law § 296 by treating him differently because of his hearing disability at its medical center, a place of public accommodation, and denying him an accommodation for his disability. DHR's determination, which adopted the recommendation of the Administrative Law Judge [ALJ], dismissed petitioner's complaint on the ground that he failed to establish that he was excluded from or denied access to services of a place of public accommodation because of his disability.

The New York State Human Rights Law protects individuals with disabilities from "discrimination in the form of denial of services, or unequal access to service, advantages or privileges by a place of public accommodation" (*Matter of Staten Is. Alliance for Mentally Ill v Tolbert*, 306 AD2d 31, 32 [1st Dept 2003]; *see* Executive Law §§ 292 [9]; 296 [2]). A discriminatory practice includes a refusal "to make reasonable modifications in policies, practices, or procedures, when

such modifications are necessary to afford facilities, privileges, advantages or accommodations to individuals with disabilities" (§ 296 [2] [c] [i]), or "to take such steps as may be necessary to ensure that no individual with a disability is excluded or denied services because of the absence of auxiliary aids and services" (§ 296 [2] [c] [ii]).

Our review of a DHR determination made after a hearing "is limited to the issue whether it is supported by substantial evidence" (*Matter of Hirsch v New York State Div. of Human Rights,* 232 AD3d 1248, 1249 [4th Dept 2024]; *see Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 331 [2003]). "It is peculiarly within the domain of the [DHR] Commissioner, who is presumed to have special expertise in the matter, to assess whether the facts and the law support a finding of unlawful discrimination" (*Hirsch*, 232 AD3d at 1249 [internal quotation marks omitted]; *see Matter of Garvey Nursing Home v New York State Div. of Human Rights*, 209 AD2d 619, 619 [2d Dept 1994]). Thus, we are not permitted to "weigh the evidence or reject DHR's choice where the evidence is conflicting and room for a choice exists" (*Hirsch*, 232 AD3d at 1249 [internal quotation marks omitted]; *see Matter of Clifton Park Apts., LLC v New York State Div. of Human Rights*, 41 NY3d 326, 333 [2024]; *Matter of Jones v New York State Div. of Human Rights*, 122 AD3d 1387, 1387 [4th Dept 2014]).

Here, we conclude that substantial evidence in the record supports the determination that petitioner failed to establish that he was excluded from or denied access to services of a place of public accommodation because of his disability. Petitioner asserted in his complaint that he arrived at the University's medical center to pick up his friend following completion of her medical procedure and that he had to wait in the lobby for 15 minutes because the reception desk was unstaffed and there were no auxiliary services available to him, but he failed to introduce evidence at the hearing demonstrating that a non-disabled individual would not have had to wait for the same length of time.

We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: March 14, 2025

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 23-02080

PRESENT: BANNISTER, J.P., SMITH, OGDEN, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DIANE E. CLARK, DEFENDANT-APPELLANT.

CAITLIN M. CONNELLY, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered June 20, 2023. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Steuben County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting her, upon her plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [7]), defendant contends that County Court erred in denying her motion to dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30).

Defendant was initially charged with the abovementioned crime by felony complaint on February 18, 2021, at which time grand jury proceedings in Steuben County were suspended due to the COVID-19 pandemic. On August 24, 2021, the matter was presented to a grand jury, and defendant was ultimately indicted. On August 31, 2021, the District Attorney's Office announced trial readiness via letter. Thereafter, defendant filed a CPL 30.30 motion to dismiss the indictment, contending that, although the initial accusatory instrument was filed on February 18, 2021, grand jury proceedings resumed in Steuben County on February 23, 2021. Defendant argued that, while no time was chargeable to the People between February 18, 2021 and February 22, 2021, given the suspension of grand jury presentations, 189 days were chargeable to the People, i.e., from February 23, 2021 until the People announced readiness via letter on August 31, 2021. Defendant claimed that, during that period of time, no warrants were issued for her arrest and she did not request any pre-indictment adjournments.

The People opposed defendant's motion with a two-page attorney

affirmation. The People argued that they had extended a plea offer to defendant on July 16, 2021, and insofar as defendant "was considering that offer" from July 16, 2021 until the case was handed up by the grand jury on August 31, 2021, the People are not chargeable with that period of time. The People further argued, in the alternative, that defendant missed a pretrial appearance on August 6, 2021, and thus the time from August 6, 2021 to August 31, 2021 was not chargeable to them pursuant to CPL 30.30 (4) (c) (i).

The court denied defendant's motion in a written decision and order, without holding a hearing or entertaining oral argument on the motion. The court determined that the People should be charged with the time between July 16, 2021 and August 31, 2021. In so doing, the court rejected the People's contention that such period of time was not chargeable to the People because defendant was considering the plea offer, but did not address the People's alternative argument that the time period between August 6, 2021 and August 31, 2021 should be excluded based upon defendant's non-appearance. Nevertheless, the court conducted its own investigation and reviewed documents not submitted by either party and determined, sua sponte, that defendant had requested an adjournment of 13 days, from February 18, 2021 to March 3, 2021 to obtain counsel, and another adjournment of 28 days, from April 21, 2021 to May 19, 2021 due to transportation issues. The court concluded that such time was not chargeable to the People, that 41 days were thus excludable, and that, inasmuch as 194 days had elapsed between the date the felony complaint was filed on February 18, 2021 and the date the People announced their readiness on August 31, 2021, only 153 days were chargeable to the People. None of the documents the court purported to rely upon in making its sua sponte determination are contained in the record on appeal.

We agree with defendant that the court erred in failing to hold a hearing, in conducting its own sua sponte investigation, and in excluding time not advocated for by the People in opposition to defendant's CPL 30.30 motion. "Where, as here, a felony is included in [the accusatory instrument], the People must be ready for trial within six months, after subtracting excludable time" (*People v Barden*, 27 NY3d 550, 553 [2016]; *see* CPL 30.30 [1] [a]). "The statutory period is calculated by 'computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for an exclusion' " (*People v Barnett*, 158 AD3d 1279, 1280 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018], quoting *People v Cortes*, 80 NY2d 201, 208 [1992], *rearg denied* 81 NY2d 1068 [1993]).

On a CPL 30.30 motion, it is well settled that, "once a defendant [accused of a felony] has shown the existence of an unexcused delay greater than . . . six months, the burden of showing that time should be excluded falls upon the People" (*People v Santos*, 68 NY2d 859, 861 [1986]; *see* CPL 30.30 [1] [a]; *Barden*, 27 NY3d at 553). "Where the papers submitted by the prosecutor show that there is a factual

dispute, there must be a hearing" (*Santos*, 68 NY2d at 861, citing *People v Gruden*, 42 NY2d 214, 217 [1977]). The determination whether time is excludable "is one which must be made following an adversarial proceeding at which the defendant has an adequate opportunity to contend that the time is not excludable. *It may not be made by the court acting sua sponte and in the absence of the parties*" (*People v Berkowitz*, 50 NY2d 333, 349 [1980] [emphasis added]).

Here, defendant correctly contends, and the People do not dispute, that defendant met her initial burden on her motion by providing sworn allegations that there was an unexcused delay of 189 days, in excess of the statutory maximum. Thus, the burden shifted to the People to show that time should be excluded (*see Santos*, 68 NY2d at 861). As noted above, the People raised two arguments in response, i.e., that the entire period from July 16, 2021 to August 31, 2021 was not chargeable to the People because defendant was "considering" the People's plea offer, and that, in the alternative, the time from August 6, 2021 to August 31, 2021 was also not chargeable to the People pursuant to CPL 30.30 (4) (c) (i) because defendant missed a pretrial appearance on August 6, 2021. Inasmuch as the People raised a factual dispute in its opposition papers, the court erred in failing to hold an adversarial hearing with respect thereto (*see* CPL 210.45 [6]; *Gruden*, 42 NY2d at 217). We therefore hold the case, reserve decision, and remit the matter to County Court for a hearing on the disputed time periods raised by the People in their opposition papers, i.e., July 16, 2021 to August 31, 2021 and August 6, 2021 to August 31, 2021 (*see Gruden*, 42 NY2d at 217).

We note that, on remittal, the hearing should not include argument regarding the time periods that were not advanced by the People in their opposition papers but were sua sponte excluded by the court, i.e., the period from February 18, 2021 to March 3, 2021 and the period from April 21, 2021 to May 19, 2021. As set forth above, once defendant met her initial burden on her motion, "the burden of showing that time should be excluded f[ell] upon the People" (*Santos*, 68 NY2d at 861), and we conclude that the hearing should therefore be limited to the "factual dispute [raised in the People's] opposition papers" (*Gruden*, 42 NY2d at 217; *see Berkowitz*, 50 NY2d at 349).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

73

KA 22-01416

PRESENT: BANNISTER, J.P., SMITH, OGDEN, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMONE WILLIAMS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN A. TRESMOND OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered July 21, 2022. The judgment convicted defendant upon his plea of guilty of attempted robbery in the second degree (two counts) and robbery in the second 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 two counts of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [b]) and three counts of robbery in the second degree (§ 160.10 [2] [b]), defendant contends that his waiver of the right to appeal is invalid and that the sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal was not knowingly, voluntarily, and intelligently entered (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v McKnight*, 230 AD3d 1544, 1544 [4th Dept 2024], *lv denied* 42 NY3d 1053 [2024]; *People v Dumas*, 227 AD3d 1509, 1509 [4th Dept 2024]) or otherwise does not encompass his challenge to the severity of the sentence (*see People v Loomis*, 227 AD3d 1461, 1461 [4th Dept 2024]; *People v Tennant*, 217 AD3d 1564, 1564 [4th Dept 2023]), we conclude that the sentence is not unduly harsh or severe.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

79

CAF 24-00005

PRESENT: BANNISTER, J.P., SMITH, OGDEN, NOWAK, AND HANNAH, JJ.

IN THE MATTER OF BRODY B. KOLASSA,
PETITIONER-RESPONDENT,

V ORDER

BROOKE L. KOLASSA, RESPONDENT-APPELLANT.

IN THE MATTER OF BROOKE L. KOLASSA,
PETITIONER-APPELLANT,

V

BRODY B. KOLASSA, RESPONDENT-RESPONDENT.

GERALD J. VELLA, SPRINGVILLE, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

MARY S. HAJDU, LAKEWOOD, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

LYDIA V. EVANS, FREDONIA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Chautauqua County (Michael J. Sullivan, J.), entered December 15, 2023, in proceedings pursuant to Family Court Act article 6. The order, among other things, adjudged that primary placement of the subject child shall be with Brody B. Kolassa during the school year.

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

83

CA 24-00164

PRESENT: BANNISTER, J.P., SMITH, OGDEN, NOWAK, AND HANNAH, JJ.

IN THE MATTER OF DANIELLE DILL, PSY.D.,
EXECUTIVE DIRECTOR OF CENTRAL NEW YORK
PSYCHIATRIC CENTER, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

FRANTZ C., RESPONDENT-APPELLANT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN LUSIGNAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Charles C. Merrell, J.), entered January 4, 2024, pursuant to Mental Hygiene Law § 33.03. The order, inter alia, granted petitioner's application for authorization to administer medication to respondent over his objection.

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

Memorandum: Respondent appeals from an order granting petitioner's application for authorization to administer medication to respondent over his objection. The order has since expired, rendering this appeal moot (*see Matter of McCulloch v Melvin H.*, 156 AD3d 1480, 1481 [4th Dept 2017], *appeal dismissed* 31 NY3d 927 [2018], *lv denied* 32 NY3d 902 [2018]; *Matter of Russell v Tripp*, 144 AD3d 1593, 1594 [4th Dept 2016]), and this case does not fall within the exception to the mootness doctrine (*see Matter of McGrath*, 245 AD2d 1081, 1082 [4th Dept 1997]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

92

KA 16-01444

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVE FULCOTT, ALSO KNOWN AS TOMMY G,
DEFENDANT-APPELLANT.

STEVEN A. FELDMAN, MANHASSET, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMY N. WALENDZIAK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered March 10, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of marihuana in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of criminal possession of marihuana in the first degree (former Penal Law § 221.30). Inasmuch as defendant has completed serving the sentence imposed, his contention that, in imposing the sentence, County Court considered improper factors that resulted in a sentence that was unduly harsh and severe has been rendered moot (*see generally People v Ismael*, 210 AD3d 1528, 1529-1530 [4th Dept 2022]; *People v Dennis*, 179 AD3d 1451, 1451 [4th Dept 2020]; *People v Anderson*, 66 AD3d 1431, 1431 [4th Dept 2009], *lv denied* 13 NY3d 905 [2009]), and we conclude that the exception to the mootness doctrine does not apply (*see generally People v Parente*, 4 AD3d 793, 794 [4th Dept 2004]).

Defendant further contends that the court failed to rule on his motion to strike from the presentence report any references to the conduct underlying charges of which he was acquitted. There is no indication in the record that the court ruled on defendant's motion, and the failure to rule on the motion cannot be deemed a denial thereof (*see People v Wallace*, 214 AD3d 1448, 1449 [4th Dept 2023]; *see generally People v Desius*, 178 AD3d 1422, 1422-1423 [4th Dept

2019]). We therefore hold the case, reserve decision, and remit the matter to County Court to determine defendant's motion.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

94

KA 22-01938

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAKWAN CURRY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered October 18, 2021. 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: In appeal No. 1, defendant appeals from a judgment that convicted him, following his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). In appeal No. 2, defendant appeals from a separate judgment that convicted him, following his plea of guilty, of criminal possession of a weapon in the second degree (*id.*).

Defendant's sole contention in each appeal—that Penal Law § 265.03 (3) is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022])—is unpreserved for our review (*see People v Bell*, 229 AD3d 1178, 1179 [4th Dept 2024], *lv denied* 42 NY3d 1018 [2024]; *People v Sapp*, 225 AD3d 1280, 1280 [4th Dept 2024], *lv denied* 41 NY3d 1020 [2024]; *People v Williams*, 224 AD3d 1355, 1355 [4th Dept 2024], *lv denied* 42 NY3d 941 [2024]; *see generally People v Cabrera*, 41 NY3d 35, 39, 42-47 [2023]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

95

KA 23-02054

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAKWAN CURRY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered October 18, 2021. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Same memorandum as in *People v Curry* ([appeal No. 1] — AD3d — [Mar. 14, 2025] [4th Dept 2025]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

100

CAF 23-01642

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, NOWAK, AND KEANE, JJ.

IN THE MATTER OF ERICA NICOLE SMITH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BENJAMIN V. BUTLER, RESPONDENT,
AND PAMELA A. LITZSEY-THOMAS, RESPONDENT-APPELLANT.

THE LAW OFFICE OF PARKER R. MACKAY, KENMORE (PARKER R. MACKAY OF COUNSEL), FOR RESPONDENT-APPELLANT.

MICHAEL CAPUTO, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Niagara County (Kathleen Wojtaszek-Gariano, J.), entered September 13, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the subject child to petitioner.

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 Pamela A. Litzsey-Thomas, the cousin of the subject child's deceased mother (cousin), appeals from an order that, inter alia, granted petitioner, the child's maternal aunt (aunt), sole custody of the child.

At the outset we note that it is undisputed that extraordinary circumstances exist to warrant placing the child in the custody of a nonparent inasmuch as the mother is deceased and the child's father, respondent Benjamin V. Butler, defaulted in this proceeding (*see Matter of Dinoff v Knechtel*, 224 AD3d 1288, 1289-1290 [4th Dept 2024]). Although the cousin correctly contends that Family Court failed to set forth the factors it relied upon in conducting its best interest analysis (*see Manioci v Schreiber*, 210 AD3d 1523, 1523 [4th Dept 2022], *lv denied* 39 NY3d 907 [2023]), " '[o]ur authority in determinations of custody is as broad as that of Family Court . . . and where, as here, the record is sufficient for this Court to make a best interests determination . . . , we will do so in the interests of judicial economy and the well-being of the child' " (*Matter of Howell v Lovell*, 103 AD3d 1229, 1231 [4th Dept 2013]).

Here, reviewing the relevant factors (*see generally Dinoff*, 224 AD3d at 1290; *Matter of Chilbert v Soler*, 77 AD3d 1405, 1406 [4th Dept

2010], *lv denied* 16 NY3d 701 [2011]), we conclude that the totality of the circumstances supports the determination that the child's best interests are served by awarding the aunt sole custody of the child. The record establishes that the aunt has a more stable home environment, is better able to guide and provide for the child's overall well-being, and displays the willingness to foster a relationship with other family members that the cousin did not. The cousin repeatedly alienated the child from the aunt and other family members, was involved in frequent verbal and physical altercations in the presence of the child, and attempted—while in the presence of the child—to smuggle synthetic marihuana into prison for her ex-husband. Thus, we conclude that it is in the best interests of the child to be placed in the aunt's care (*see generally Sheridan v Sheridan*, 129 AD3d 1567, 1568 [4th Dept 2015]).

We have reviewed the cousin's remaining contentions and conclude that they are either unpreserved or lacking in merit.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

101

CAF 22-02012

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, NOWAK, AND KEANE, JJ.

IN THE MATTER OF MALIAH B. AND MARCUS B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ANGEL B., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

JULIE VILJOEN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROXANNA Q. HERREID OF COUNSEL), ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 11, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject children.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, in appeal Nos. 1 through 3, respondent mother appeals from orders that, inter alia, determined that she neglected the respective subject children.

Contrary to the mother's contentions in all three appeals, petitioner met its respective burdens of establishing by a preponderance of the evidence that the children were neglected (*see* Family Ct Act § 1046 [b] [i]). A neglected child is a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the child's] parent or other person legally responsible for [the child's] care to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship" (§ 1012 [f] [i] [B]). "It is well established that 'a finding of neglect may be appropriate even when a child has not been actually impaired, in order to protect that child and prevent impairment' " (*Matter of Lavountae A.*, 57 AD3d 1382, 1382 [4th Dept 2008], *affd* 12 NY3d 832 [2009], quoting *Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]), and that "[a] single incident 'where the parent's judgment was strongly impaired and

the child exposed to a risk of substantial harm' can sustain a finding of neglect" (*Matter of Kayla W.*, 47 AD3d 571, 572 [1st Dept 2008]; *see Matter of Ashanti R.*, 66 AD3d 1031, 1031 [2d Dept 2009]). Here, petitioner established that the four children, then aged eight, seven, four and three years old, were in imminent danger of becoming impaired when the mother left them unattended at home for at least one hour, only partially clothed and in a dirty and disheveled state, in a dirty house (*see generally Matter of Mollie W. [Corinne W.]*, 214 AD3d 1463, 1463-1464 [4th Dept 2023]; *Matter of Samuel D.-C.*, 40 AD3d 853, 853-854 [2d Dept 2007]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

102

CAF 22-02013

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, NOWAK, AND KEANE, JJ.

IN THE MATTER OF MODESTY B., ALSO KNOWN AS MAKAYLA B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ANGEL B., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

JULIE VILJOEN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROXANNA Q. HERREID OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 11, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Same memorandum as in *Matter of Maliah B. (Angel B.)* ([appeal No. 1] — AD3d — [Mar. 14, 2025] [4th Dept 2025]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

103

CAF 22-02015

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, NOWAK, AND KEANE, JJ.

IN THE MATTER OF MCKELL K., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ANGEL B., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

JULIE VILJOEN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROXANNA Q. HERREID OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 11, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Same memorandum as in *Matter of Maliah B. (Angel B.)* ([appeal No. 1] — AD3d — [Mar. 14, 2025] [4th Dept 2025]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

115

KA 22-01773

PRESENT: CURRAN, J.P., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARTHUR E. MASON, DEFENDANT-APPELLANT.

BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

SHAUN M. CHASE, SPECIAL PROSECUTOR, SYRACUSE, FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Armen J. Nazarian, J.), rendered July 27, 2022. The judgment convicted defendant, upon his plea of guilty, of unlawful manufacture of methamphetamine 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 unlawful manufacture of methamphetamine in the third degree (Penal Law § 220.73 [1]). We affirm.

Preliminarily, we agree with defendant that, contrary to the People's assertion, the waiver of the right to appeal is invalid. Defendant orally waived his right to appeal and executed a written waiver thereof. The language in the written waiver, however, is "inaccurate and misleading insofar as it purports to impose 'an absolute bar to the taking of a direct appeal' and to deprive defendant of his 'attendant rights to counsel and poor person relief, [as well as] all postconviction relief separate from the direct appeal' " (*People v Fernandez*, 218 AD3d 1257, 1258 [4th Dept 2023], *lv denied* 40 NY3d 1012 [2023], quoting *People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Rumph*, 207 AD3d 1209, 1210 [4th Dept 2022], *lv denied* 39 NY3d 1075 [2023]; *People v Hunter*, 203 AD3d 1686, 1686 [4th Dept 2022], *lv denied* 38 NY3d 1033 [2022]; *People v Hughes*, 199 AD3d 1332, 1333 [4th Dept 2021]). Although County Court's colloquy "remedied the mischaracterization of the waiver as an absolute bar to the right to appeal," the court's verbal statements "did nothing to counter the other inaccuracies set forth in the written appeal waiver" (*Hughes*, 199 AD3d at 1333; *see Fernandez*, 218 AD3d at 1258; *Rumph*, 207 AD3d at 1210; *Hunter*, 203 AD3d at 1686). We thus conclude that defendant's purported waiver of the right to appeal is not enforceable inasmuch as

the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" (*Thomas*, 34 NY3d at 559).

We nevertheless reject defendant's contention that the bargained-for sentence is unduly harsh and severe. Finally, we note that the uniform sentence and commitment form incorrectly states that defendant was sentenced as a second felony offender, and therefore it must be amended to reflect that he was actually sentenced as a second felony drug offender (*see People v Jones*, 224 AD3d 1348, 1353 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

116

KA 23-00939

PRESENT: CURRAN, J.P., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOMINIC MAINELLA, DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR DEFENDANT-APPELLANT.

VINCENT A. HEMMING, ACTING DISTRICT ATTORNEY, WARSAW, FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered April 27, 2023. The judgment convicted defendant after a nonjury trial of burglary in the second degree, criminal mischief in the third degree, and petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of burglary in the second degree (Penal Law § 140.25 [2]), criminal mischief in the third degree (§ 145.05 [2]), and petit larceny (§ 155.25). Contrary to defendant's contention, we conclude, with respect to each crime, that the evidence, viewed in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to establish defendant's guilt (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We reject defendant's further contention that the verdict is against the weight of the evidence. 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 conclude that, although an acquittal would not have been unreasonable, it cannot be said that County Court failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends that he was denied effective assistance of counsel based on defense counsel's failure to request a missing witness charge with respect to one of the police officers who responded to the scene of the burglary. We reject that contention inasmuch as there was no indication that the officer would have provided noncumulative testimony favorable to the People (*see People v Gonzales*, 145 AD3d 1432, 1433 [4th Dept 2016], *lv denied* 29 NY3d 1079 [2017]; *People v Smith*, 118 AD3d 1492, 1493 [4th Dept 2014], *lv denied*

25 NY3d 953 [2015]; *see generally People v Smith*, 33 NY3d 454, 458-459 [2019]). Finally, the sentence is not unduly harsh or severe.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

117

KA 24-00634

PRESENT: CURRAN, J.P., GREENWOOD, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND HOLMAN, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (CLEA WEISS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Victoria M. Argento, J.), dated January 2, 2024. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that Supreme Court erred in refusing to grant him a downward departure from risk level three to risk level two. Initially, we agree with the People that, "although the court failed to set forth its findings of fact and conclusions of law in denying defendant's request for a downward departure, the record is sufficient for us to make our own findings of fact and conclusions of law, thereby obviating the need for remittal" (*People v Allis*, 229 AD3d 1375, 1376 [4th Dept 2023] [internal quotation marks omitted]; *see People v Snyder*, 218 AD3d 1356, 1356-1357 [4th Dept 2023], *lv denied* 41 NY3d 902 [2024]). With respect to the merits, even assuming, arguendo, that defendant adequately identified mitigating circumstances that are, as a matter of law, of a kind or to a degree not adequately taken into account by the risk assessment guidelines and proved their existence by a preponderance of the evidence (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]), we conclude, based upon the totality of the circumstances, that a downward departure is not warranted (*see Allis*, 229 AD3d at

1376; *People v Burgess*, 191 AD3d 1256, 1257 [4th Dept 2021]; *see generally Gillotti*, 23 NY3d at 861).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

119

KA 21-01026

PRESENT: CURRAN, J.P., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDDIE THOMAS, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (FABIENNE N. SANTACROCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered June 23, 2021. The judgment convicted defendant upon his plea of guilty of attempted robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]). We affirm. Assuming, arguendo, that defendant's waiver of the right to appeal is invalid or otherwise does not encompass his challenge to the severity of the sentence (*see People v Odle*, 233 AD3d 1502, 1502 [4th Dept 2024]; *People v Ramos-Perez*, 188 AD3d 1741, 1742 [4th Dept 2020], *lv denied* 36 NY3d 1099 [2021]; *People v Nicpon*, 170 AD3d 1501, 1501 [4th Dept 2019]), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

120

KA 23-00464

PRESENT: CURRAN, J.P., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE V. SHORTER, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Cayuga County Court (Thomas G. Leone, J.), rendered October 14, 2022. Defendant was resentenced upon his conviction of driving while intoxicated, a class D felony, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: Defendant was convicted, upon his plea of guilty, of driving while intoxicated (DWI) as a class D felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]). County Court initially imposed an enhanced sentence upon determining that defendant had violated a condition of the plea agreement, but the court subsequently granted defendant's motion pursuant to CPL 440.20 to vacate the sentence on the ground that defendant was entitled to a hearing pursuant to *People v Outley* (80 NY2d 702 [1993]). Following the hearing, the court again imposed an enhanced sentence. Defendant now appeals from the resentence.

We note at the outset that, inasmuch as "the resentence occurred more than 30 days after the original sentence and the only notice of appeal is from the resentence, defendant's appeal is from the resentence only" (*People v Coble*, 17 AD3d 1165, 1165 [4th Dept 2005], *lv denied* 5 NY3d 787 [2005]; *see* CPL 450.30 [3]; *People v Lett*, 42 AD3d 970, 970 [4th Dept 2007], *lv denied* 9 NY3d 962 [2007]). Defendant's contention that his plea was not knowingly, voluntarily, or intelligently entered is not reviewable on appeal from the resentence (*see* CPL 450.30 [3]; *Lett*, 42 AD3d at 970; *People v Luddington*, 5 AD3d 1042, 1042 [4th Dept 2004], *lv denied* 3 NY3d 643 [2004]; *see generally People v Jordan*, 16 NY3d 845, 846 [2011]).

Contrary to defendant's further contention, we conclude that the court did not err in resentencing him to an enhanced sentence. "[A] court may impose an enhanced sentence on a defendant if the court informs the defendant that the promised sentence is conditioned on being truthful in any subsequent presentence interview and the defendant then is not truthful in that interview" (*People v Terry*, 217 AD3d 1582, 1582 [4th Dept 2023], *lv denied* 40 NY3d 1041 [2023]; *see People v Hicks*, 98 NY2d 185, 187-188 [2002]). Indeed, " 'the violation of an explicit and objective plea condition that was accepted by the defendant can result in the imposition of an enhanced sentence' " (*Terry*, 217 AD3d at 1582; *see generally Hicks*, 98 NY2d at 188).

Here, defendant admitted during the plea colloquy, among other things, that his driver's license had been revoked due to a prior DWI conviction and he thus knew that he was not supposed to be driving. The court informed defendant during the plea proceeding that it would not be bound by the sentencing promise if defendant did not "cooperate with probation" during the presentence investigation interview. The court explained that, as part of such cooperation, defendant could not "step back" from his admissions by claiming, for example, that he lacked knowledge that his driver's license was revoked. According to the presentence report, however, defendant told the probation officer that he was "unaware that he did not have a driver[']s license." Contrary to defendant's assertion, the probation officer's testimony at the *Outley* hearing, considered in its entirety, was consistent with the report inasmuch as the probation officer specifically clarified that defendant denied that he knew at the time of his arrest that his driver's license was revoked (*see Terry*, 217 AD3d at 1583). Inasmuch as the record therefore establishes that defendant violated an explicit and objective plea condition that he accepted, we conclude that the court did not err in imposing an enhanced sentence (*see Hicks*, 98 NY2d at 189; *Terry*, 217 AD3d at 1582-1583).

We reject defendant's contention that the enhanced sentence imposed upon resentencing is unduly harsh and severe. Finally, as defendant contends and the People correctly concede, the certificate of disposition and the uniform sentence and commitment form should be amended to correct clerical errors by reflecting that defendant was convicted of DWI as a class D felony under Vehicle and Traffic Law §§ 1192 (3) and 1193 (1) (c) (ii) (*see People v Brown*, 221 AD3d 1565, 1566 [4th Dept 2023]; *People v Vivenzio*, 124 AD3d 1352, 1353 [4th Dept 2015], *lv denied* 25 NY3d 993 [2015]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

121

CAF 22-01138

PRESENT: CURRAN, J.P., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF LEONARD P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KRISTOPHER P., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

MELISSA HORVATITS, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), dated June 14, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, found that respondent had abused the subject child.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent father appeals from orders determining that he abused the child who is the subject of appeal No. 1 (child) and derivatively abused the children who are the subject of appeal Nos. 2 and 3, i.e., the child's siblings. The orders were entered after a fact-finding hearing on abuse petitions filed against the father and the children's mother. We affirm.

We reject the father's contention in appeal No. 1 that petitioner failed to establish by a preponderance of the evidence that he abused the child and his contentions in appeal Nos. 2 and 3 that petitioner failed to establish by a preponderance of the evidence that he derivatively abused the child's siblings. As we concluded in the mother's appeals, those contentions are without merit (*Matter of Leonard P. [Patricia M.]*, 222 AD3d 1443, 1443-1444 [4th Dept 2023], *lv denied* 41 NY3d 905 [2024]). We reject the father's further contention in all three appeals that he was denied meaningful representation by his attorney's failure to call the child's pediatrician and the mother's obstetrician to testify. The father's contention that those witnesses would have provided testimony favorable to his case is based

on speculation and is insufficient to establish deficient representation (*see id.* at 1444-1445).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

122

CAF 22-01139

PRESENT: CURRAN, J.P., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF KEVIN P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KRISTOPHER P., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

MELISSA HORVATITS, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), dated June 14, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, found that respondent had derivatively abused the subject child.

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

Same memorandum as in *Matter of Leonard P. (Kristopher P.)* ([appeal No. 1] — AD3d — [Mar. 14, 2025] [4th Dept 2025]).

Entered: March 14, 2025

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 22-01140

PRESENT: CURRAN, J.P., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF MICHAEL M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KRISTOPHER P., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

MELISSA HORVATITS, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), dated June 14, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, found that respondent had derivatively abused the subject child.

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

Same memorandum as in *Matter of Leonard P. (Kristopher P.)* ([appeal No. 1] — AD3d — [Mar. 14, 2025] [4th Dept 2025]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

124

CAF 24-00112

PRESENT: CURRAN, J.P., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF JONATHAN M.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JESSICA N. AND THOMAS M.,
RESPONDENTS-RESPONDENTS.

KAMAN BERLOVE LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR PETITIONER-APPELLANT.

KIRWAN LAW FIRM, P.C., SYRACUSE (R. ANDREW FEINBERG OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered October 10, 2023, in a proceeding pursuant to Family Court Act article 5. The order dismissed the amended petition.

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 5, petitioner appeals from an order that, following a hearing, dismissed his amended paternity petition based on the doctrine of equitable estoppel. We affirm.

In April 2018, respondent mother was in a sexual relationship with Thomas M. (respondent) and also engaged in sexual relations with petitioner. Upon subsequently discovering that she was pregnant, the mother advised petitioner on multiple occasions, both before and after the birth of the subject child, that the child was not his. The mother continued her relationship with respondent, who signed an acknowledgment of paternity upon the child's birth and was listed as the child's father on the child's birth certificate. With the mother, respondent thereafter raised the child, as her father, of which petitioner was aware. Approximately three and one-half years after the child was born, a third party told petitioner of suspicions that petitioner was the child's biological father. Upon petitioner's request, the mother agreed to allow a DNA paternity test and, after the results indicated a strong likelihood that he was the child's biological father, petitioner commenced the instant proceeding. The mother and respondent raised the defense of equitable estoppel.

We reject petitioner's contention that Family Court erred in applying equitable estoppel. Equitable estoppel "preclude[s] a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted" (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]). "Estoppel may also preclude a man who claims to be a child's biological father from asserting his paternity when he acquiesced in the establishment of a strong parent-child bond between the child and another man" (*id.* at 327). In determining whether equitable estoppel applies in the context of a paternity proceeding, "the paramount concern . . . has been and continues to be the best interests of the child" (*Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1, 5 [2010] [internal quotation marks omitted]; *see also* Family Ct Act § 532 [a]). Thus, "the doctrine [may be] used to prevent a biological father from asserting paternity rights when it would be detrimental to the child's interests to disrupt the child's close relationship with another father figure" (*Juanita A.*, 15 NY3d at 6; *see Matter of Fidel A. v Sharon N.*, 71 AD3d 437, 437 [1st Dept 2010]; *Matter of Richard W. v Roberta Y.*, 240 AD2d 812, 814-815 [3d Dept 1997], *lv denied* 90 NY2d 809 [1997]).

On appellate review, "we afford great deference to [a] court's determination of [a child]'s best interests, particularly following a hearing," so long as the determination has a "sound and substantial basis in the record" (*Matter of J.B. [Lakoia W.-Paul B.]*, 188 AD3d 1683, 1683 [4th Dept 2020]; *see Kaleta v Kaleta*, 225 AD3d 1293, 1294 [4th Dept 2024]). Here, the evidence at the hearing established that petitioner was aware of the possibility that he could be the child's father because of his sexual relations with the mother but nonetheless waited nearly four years after the child's birth before commencing this proceeding, during which time a strong, positive father-daughter relationship between the child and respondent developed of which petitioner was also aware. Thus, there is a sound and substantial basis in the record for the court's determination that petitioner acquiesced in the development of that father-daughter bond, and it is in the best interests of the child that he be equitably estopped from now seeking paternity (*see Matter of Onorina C.T. v Ricardo R.E.*, 172 AD3d 726, 730 [2d Dept 2019]; *Matter of Richard A.M. v Alejandra H.*, 123 AD3d 1129, 1129 [2d Dept 2014]; *Matter of Ellis v Griffin*, 308 AD2d 449, 450 [2d Dept 2003], *lv denied* 2 NY3d 704 [2004]). Further, "[a]lthough a child has an interest in finding out the identity of [the] biological father, 'in many instances a child also has an interest—no less powerful—in maintaining [the] relationship with the man who led [the child] to believe that he is [the] father' " (*Matter of Jennifer L. v Gerald S.*, 145 AD3d 1581, 1583 [4th Dept 2016], *lv dismissed* 29 NY3d 942 [2017], quoting *Shondel J.*, 7 NY3d at 329).

Contrary to petitioner's contention, the mother's deception with respect to the child's paternity does not bar application of the doctrine of equitable estoppel. Indeed, the parties' "motivation and honesty are irrelevant" (*Shondel J.*, 7 NY3d at 331) because the determination whether equitable estoppel should be applied "depends entirely on the best interests of the child and not the equities

between the adults" (*Jennifer L.*, 145 AD3d at 1582).

We have reviewed petitioner's remaining contention and conclude that, because it was raised for the first time on appeal, it is not properly before us (*see Leroy v Leroy*, 298 AD2d 923, 924 [4th Dept 2002]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: March 14, 2025

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 24-00382

PRESENT: CURRAN, J.P., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

MARIA GUZMAN-MARTINEZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LOUIS ROSADO, DEFENDANT-APPELLANT.

TIMOTHY R. LOVALLO, BUFFALO, FOR DEFENDANT-APPELLANT.

ANDREWS, BERNSTEIN & MARANTO, PLLC, BUFFALO (THOMAS P. KOTRYS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered February 23, 2023. The order, inter alia, denied the motion of defendant to dismiss the complaint, granted the cross-motion of plaintiff to enforce a purported settlement agreement and awarded plaintiff costs.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross-motion, vacating the award of costs to plaintiff, and granting the motion in part and dismissing the second cause of action, and as modified the order is affirmed without costs.

Memorandum: In this legal malpractice action, plaintiff seeks damages for the alleged negligence of defendant with respect to his representation of plaintiff in connection with a personal injury action stemming from an incident where she fell inside a Niagara Frontier Transit Authority bus. Plaintiff alleges, inter alia, that defendant negligently informed her about the duration of the statute of limitations applicable to her personal injury claim and that he, concomitantly, failed to diligently and skillfully prosecute and protect her rights arising out of the accident. Defendant moved, inter alia, to dismiss the complaint for, in effect, failure to state a cause of action (*see* CPLR 3211 [a] [7]), and plaintiff cross-moved to enforce the parties' purported stipulation in open court settling the action (*see* CPLR 2104). Defendant appeals from an order that, inter alia, denied the motion, granted the cross-motion, and awarded plaintiff costs.

Initially, we agree with defendant that Supreme Court erred in granting the cross-motion to enforce the purported settlement agreement and we modify the order accordingly. It is well settled that " '[a]n oral stipulation of settlement that is made in *open court and stenographically recorded* is enforceable as a contract and is

governed by general contract principles for its interpretation and effect' " (*Gay v Gay*, 118 AD3d 1331, 1332 [4th Dept 2014], *lv dismissed* 25 NY3d 1015 [2015] [emphasis added]; *see generally* CPLR 2104). Here, however, in support of her cross-motion, plaintiff failed to attach any transcripts or other evidence substantiating the purported settlement agreement. Indeed, we conclude that "[t]he record provides no basis for concluding that an enforceable stipulation was entered into between the parties" inasmuch as "[p]ertinent discussions took place off the record" (*Matter of Hicks v Schoetz*, 261 AD2d 944, 944 [4th Dept 1999]). Plaintiff also failed to establish that the terms of the settlement agreement were ever filed with the county clerk (*see* CPLR 2104; *Velazquez v St. Barnabas Hosp.*, 13 NY3d 894, 895 [2009]; *cf. Harrison v NYU Downtown Hosp.*, 117 AD3d 479, 479 [1st Dept 2014]).

Even if plaintiff had submitted written evidence of the parties' purported stipulation of settlement, we conclude that said stipulation was not entered in "open court" inasmuch as there is no dispute that the alleged settlement was reached during a pretrial conference with the court's law clerk (*see Diarassouba v Urban*, 71 AD3d 51, 55 [2d Dept 2009], *lv dismissed* 15 NY3d 741 [2010]; *see generally Matter of Dolgin Eldert Corp.*, 31 NY2d 1, 4-5 [1972]). Indeed, the "open court requirement . . . is not satisfied in locations *without a Justice* presiding . . . , and it is not satisfied during less formal stages of litigation, such as a pretrial conference" (*Diarassouba*, 71 AD3d at 55 [emphasis added]; *see Andre-Long v Verizon Corp.*, 31 AD3d 353, 354 [2d Dept 2006]; *Johnson v Four G's Truck Rental*, 244 AD2d 319, 319 [2d Dept 1997]). As a consequence of our conclusion that the court erred in granting the cross-motion, we vacate that part of the order awarding plaintiff costs inasmuch as she is no longer a prevailing party (*see Emerald Enters. of Rochester v Chili Plaza Assoc.*, 237 AD2d 912, 913 [4th Dept 1997]; *see generally* CPLR 8101).

Defendant also contends that the court erred in denying the motion insofar as it sought to dismiss the complaint for failure to state a cause of action. We reject that contention with respect to the first cause of action, for legal malpractice. It is well settled that "[t]o establish a cause of action for legal malpractice, a plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care" (*Harvey v Handelman, Witkowicz & Levitsky, LLP*, 130 AD3d 1439, 1441 [4th Dept 2015] [internal quotation marks omitted]; *see Leder v Spiegel*, 9 NY3d 836, 837 [2007], *cert denied* 552 US 1257 [2008]; *Santaro v Finocchio* [appeal No. 2], 221 AD3d 1489, 1490 [4th Dept 2023]). On a motion pursuant to CPLR 3211 (a) (7), a cause of action for legal malpractice is properly dismissed where the conduct alleged in the complaint, "even if accepted as true[,] does not establish negligence" (*Leder*, 9 NY3d at 837; *see generally Bua v Purcell & Ingrao, P.C.*, 99 AD3d 843, 847 [2d Dept 2012], *lv denied* 20 NY3d 857 [2013]).

Here, we conclude that, giving the complaint "a liberal construction, accept[ing] the allegations as true and accord[ing] . . . plaintiff every possible favorable inference" (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]), plaintiff stated a cause of action for legal malpractice by alleging that defendant made erroneous statements about the applicable statute of limitations with respect to her personal injury case, which resulted in her failing to timely commence that action. We reject defendant's argument that he could not be negligent, as a matter of law, because when plaintiff retained him as her attorney, the time to file the requisite notice of claim had expired (*see* Public Authorities Law § 1299-p; *see also* General Municipal Law § 50-e). Indeed, we reject defendant's assertion that any failure on his part to file a motion for leave to file a late notice of claim was not negligent, as a matter of law, on the basis that there was no guarantee of success on such a motion. To the contrary, we conclude that at the time he was retained by plaintiff, defendant "had an opportunity to protect plaintiff's rights by seeking discretionary leave, pursuant to General Municipal Law § 50-e (5), to serve a late notice of claim" (*Liporace v Neimark & Neimark, LLP*, 162 AD3d 570, 570 [1st Dept 2018]; *see Phillips v Moran & Kufta, P.C.*, 53 AD3d 1044, 1045 [4th Dept 2008]). Whether defendant "would have prevailed on such motion will have to be determined by the trier of fact" (*Liporace*, 162 AD3d at 570), and should not be resolved on this motion to dismiss where plaintiff has alleged that defendant was negligent in failing to "diligently and skillfully . . . protect[ ] the rights of plaintiff[ ] arising out of the accident." We therefore conclude that the allegations in the complaint sufficiently state a cause of action for legal malpractice based on defendant's alleged errors with respect to the statute of limitations.

Nevertheless, we note that the second cause of action, for breach of contract, is duplicative of the cause of action for legal malpractice and we therefore grant the motion with respect to the second cause of action (*see generally Mahran v Berger*, 137 AD3d 1643, 1644 [4th Dept 2016]; *Rich Prods. Corp. v Kenyon & Kenyon, LLP*, 128 AD3d 1532, 1534 [4th Dept 2015]; *Board of Trustees of IBEW Local 43 Elec. Contrs. Health & Welfare, Annuity & Pension Funds v D'Arcangelo & Co., LLP*, 124 AD3d 1358, 1360 [4th Dept 2015]). We further modify the order accordingly.

We have considered defendant's remaining contentions and conclude that none warrant further modification or reversal of the order.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

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TP 24-01142

PRESENT: CURRAN, J.P., SMITH, GREENWOOD, AND HANNAH, JJ.

IN THE MATTER OF BRANDON MARTIN, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, BASIL SEGGOS, AS COMMISSIONER OF NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND LOUIS ALEXANDER, AS DEPUTY COMMISSIONER OF NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, RESPONDENTS.

HARTER SECREST & EMERY LLP, ROCHESTER (MELISSA M. VALLE OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (PATRICK B. OMILIAN OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wayne County [Richard M. Healy, A.J.], entered January 9, 2024) to review a determination of respondents. The determination, inter alia, found that petitioner had committed a number of violations of the Environmental Conservation Law.

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

Memorandum: Petitioner is the owner of property that includes a freshwater wetland as designated on a map of respondent New York State Department of Environmental Conservation (DEC). Petitioner constructed a horse barn and a pole barn on the property before starting to construct a pole barn extension (extension). When petitioner applied to the Town of Arcadia (Town) for a building permit for the extension, the Town issued a stop work order and advised petitioner that there might be wetlands in the area where he began construction of the extension. The Town notified the DEC of petitioner's activities, and an investigation began. A biologist with the DEC inspected the property and determined that petitioner had constructed the horse barn, pole barn, and extension in the wetland and adjacent area. At that time, only the framing of the extension had been built, and the biologist advised petitioner that he would likely have to take it down. Despite the warning, petitioner completed construction of the extension. The DEC served petitioner

with a complaint alleging that he violated the Environmental Conservation Law by filling, grading, dredging, and constructing in the wetland and adjacent area without a permit.

After a hearing before an administrative law judge (ALJ), the ALJ found that the DEC had met its burden and recommended a penalty of $44,000 and a remedial order requiring petitioner to, inter alia, remove the extension. Louis Alexander, as Deputy Commissioner of the DEC (respondent), adopted the ALJ's hearing report with modifications. Petitioner commenced this CPLR article 78 proceeding seeking to annul respondent's determination, and Supreme Court transferred the proceeding to this Court.

Petitioner contends that the DEC did not meet its burden inasmuch as the maps it used were unreliable and incorrect, and the DEC failed to establish that the property was ever filled, dredged, or graded. We reject that contention. It is well settled that "[j]udicial review of an administrative determination made after a hearing required by law, and at which evidence was taken, is limited to whether that determination is supported by substantial evidence" (*Matter of Call-A-Head Portable Toilets, Inc. v New York State Dept. of Envtl. Conservation*, 213 AD3d 842, 844 [2d Dept 2023], *appeal dismissed* 39 NY3d 1116 [2023], *lv denied* 40 NY3d 907 [2023], *cert denied* — US —, 144 S Ct 2580 [2024] [internal quotation marks omitted]; *see Matter of Rochester Redevelopment, LLC v New York State Dept. of Envtl. Conservation*, 186 AD3d 1099, 1099-1100 [4th Dept 2020]). "[T]he substantial evidence standard is a minimal standard" and refers to "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1045-1046 [2018] [internal quotation marks omitted]; *see Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

A permit is required to conduct "regulated activities" on freshwater wetlands, as designated on "the official freshwater wetlands map of the state" (ECL 24-0701 [former (1)]). The "regulated activities" include "any form of . . . dredging, excavation, removal of soil . . . ; and any form of dumping, filling, or depositing of . . . fill of any kind; erecting any structures . . . ; and any other activity which substantially impairs any of the several functions served by freshwater wetlands or the benefits derived therefrom" (ECL 24-0701 [2]). These activities "are subject to regulation whether or not they occur upon the wetland itself, if they impinge or otherwise substantially affect the wetlands and are located not more than [100] feet from the boundary of such wetland" (*id.*).

The freshwater wetlands map shows that the horse barn, pole barn, and extension were all built in the wetland itself. The DEC biologist who inspected the property testified that he could see where the wetland was and that in the wetland petitioner had removed trees and vegetation, added fill and graded it, burned debris and dredged to remove the burn piles, and constructed the structures. Petitioner admitted that he added fill and graded the area before constructing the structures. Although petitioner's expert gave a different opinion

about the wetland boundary, he admitted that the horse barn, pole barn, and extension were built on the adjacent area of the wetland. We conclude that respondent's determination that petitioner violated the Environmental Conservation Law and applicable regulations by filling, grading, dredging, and constructing in the wetland and adjacent area without a permit is supported by substantial evidence (*see Call-A-Head Portable Toilets, Inc.*, 213 AD3d at 845; *Matter of Valiotis v State of New York*, 95 AD3d 1026, 1027 [2d Dept 2012], *lv dismissed* 19 NY3d 1008 [2012]).

We reject petitioner's contention that his activities were exempted from the permit requirement based on agricultural productivity. An exemption to the permitting requirement exists for certain agricultural activities, but "structures not required for enhancement or maintenance of the agricultural productivity of the land and any filling activities shall not be excluded" (ECL 24-0701 [former (4)]). Inasmuch as petitioner engaged in filling, respondent's determination that the agricultural exemption does not apply is supported by substantial evidence (*see Matter of Russo v Jorling*, 214 AD2d 863, 865 [3d Dept 1995], *lv denied* 86 NY2d 705 [1995]).

We reject petitioner's further contention that the harm was de minimis and that the penalties were excessive. Petitioner testified that the area had been a "farm dump" for years. The DEC's expert testified that a wetland could still perform some of its functions even with trash or foreign materials added, whereas petitioner's activities in filling the wetland can destroy it by reducing its size, function, and benefit. The penalty does not "shock one's sense of fairness" (*Matter of Scott v Department of Envtl. Conservation of State of N.Y.*, 112 AD2d 726, 726 [4th Dept 1985], *lv denied* 66 NY2d 606 [1985]; *see Call-A-Head Portable Toilets, Inc.*, 213 AD3d at 846; *see generally Matter of Bolt v New York City Dept. of Educ.*, 30 NY3d 1065, 1068 [2018]).

We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

129

CA 23-01751

PRESENT: CURRAN, J.P., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

EUGENE MUSIAL AND LORRAINE MUSIAL,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DAVID C. DONOHUE, ESQ., BARRY J. DONOHUE, ESQ.,
JOHN F. DONOHUE, ESQ., DONOHUE LAW OFFICES,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

KEVIN T. STOCKER, TONAWANDA, FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered October 13, 2023. The order, inter alia, granted the motion of defendants David C. Donohue, Esq., Barry J. Donohue, Esq., John F. Donohue, Esq., and Donohue Law Offices for summary judgment.

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

Memorandum: Plaintiffs commenced this breach of contract and legal malpractice action against Texas attorney Russell Button, Esq., and his law firm, the Button Law Firm, PLLC (collectively, Button defendants), and New York attorneys David C. Donohue, Esq., Barry J. Donohue, Esq., and John F. Donohue, Esq., and their law firm, Donohue Law Offices (collectively, Donohue defendants), alleging that defendants failed to provide them with adequate legal representation with respect to claims arising from a motor vehicle accident that occurred in Texas. On a prior appeal, we affirmed an order granting the motion of the Button defendants to dismiss the complaint against them for lack of personal jurisdiction (*Musial v Donohue*, 225 AD3d 1164, 1164 [4th Dept 2024]). Following discovery, the Donohue defendants moved for summary judgment dismissing the complaint against them on the ground that, inter alia, the settlement of plaintiffs' motor vehicle accident claims was not compelled by any mistake of counsel. Supreme Court granted the motion, and we now affirm.

Generally, to recover damages for legal malpractice, a client must prove: "(1) that the [law firm] failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the

legal community, (2) proximate cause, (3) damages, and (4) that the [client] would have been successful in the underlying action had the [law firm] exercised due care" (*Chamberlain, D'Amanda, Oppenheimer & Greenfield, LLP v Wilson*, 136 AD3d 1326, 1327 [4th Dept 2016], *lv dismissed* 28 NY3d 942 [2016] [internal quotation marks omitted]; *see Schiller v Bender, Burrows & Rosenthal, LLP*, 116 AD3d 756, 757 [2d Dept 2014]). Settlement of the underlying claim "does not, per se, preclude a legal malpractice action" (*Chamberlain, D'Amanda, Oppenheimer & Greenfield, LLP*, 136 AD3d at 1328; *see Schiff v Sallah Law Firm, P.C.*, 128 AD3d 668, 669 [2d Dept 2015]), but requires that the plaintiff further establish that the "settlement . . . was effectively compelled by the mistakes of counsel" (*Chamberlain, D'Amanda, Oppenheimer & Greenfield, LLP*, 136 AD3d at 1328 [internal quotation marks omitted]; *see Schiller*, 116 AD3d at 757). "[M]ere speculation about a loss resulting from an attorney's [alleged] poor performance is insufficient" to establish that a settlement was compelled due to the mistake of counsel, and "[c]onclusory allegations that merely reflect a subsequent dissatisfaction with the settlement, or that the client would be in a better position but for the settlement, without more, do not make out a claim of legal malpractice" (*Chamberlain, D'Amanda, Oppenheimer & Greenfield, LLP*, 136 AD3d at 1328 [internal quotation marks omitted]; *see Boone v Bender*, 74 AD3d 1111, 1113 [2d Dept 2010], *lv denied* 16 NY3d 710 [2011]; *Antokol & Coffin v Myers*, 30 AD3d 843, 845 [3d Dept 2006]). "[T]he fact that the plaintiff[s] subsequently w[ere] unhappy with the settlement . . . does not rise to the level of legal malpractice" (*Givens v De Moya*, 193 AD3d 691, 692 [2d Dept 2021] [internal quotation marks omitted]).

Here, we conclude that the Donohue defendants met their initial burden on their motion by establishing that they did not fail to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and that the settlement of plaintiffs' underlying motor vehicle accident claims was not effectively compelled by any mistake on their part (*see Chamberlain, D'Amanda, Oppenheimer & Greenfield, LLP*, 136 AD3d at 1328; *Schiff*, 128 AD3d at 669). The Donohue defendants submitted, inter alia, the deposition testimony of each plaintiff, which established that plaintiffs were aware that the settlement would resolve all of their claims, that they had read and understood the terms of the settlement before signing it, and that they chose to settle their claims because they did not want to go to Texas for trial and desired to put the case behind them and move on with their lives.

Plaintiffs, in opposition, failed to raise a triable issue of fact (*see Chamberlain, D'Amanda, Oppenheimer & Greenfield, LLP*, 136 AD3d at 1328-1329; *Schiff*, 128 AD3d at 669). The affidavit of plaintiffs' expert, in which that expert averred that plaintiffs were "coerced . . . into settling" and that a more favorable settlement "could have [been] produced," does not "contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in

[plaintiffs'] favor" (*Bush v Independent Food Equip., Inc.*, 158 AD3d 1129, 1130 [4th Dept 2018] [internal quotation marks omitted]).

Entered: March 14, 2025

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 23-01924

PRESENT: CURRAN, J.P., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

MARK D. MIDDAUGH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

OLEAN GENERAL HOSPITAL, ET AL., DEFENDANTS,
AND VINOD GARG, M.D., DEFENDANT-APPELLANT.

RICOTTA MATTREY CALLOCCHIA MARKEL & CASSERT, BUFFALO (KATHERINE V. MARKEL OF COUNSEL), FOR DEFENDANT-APPELLANT.

BLACK, LYLE & HABBERFIELD, LLP, OLEAN (KEVIN M. HABBERFIELD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Terrence M. Parker, A.J.), entered November 3, 2023. The order denied the motion of defendant Vinod Garg, M.D., for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as a result of, inter alia, the failure of defendant Vinod Garg, M.D. to determine that plaintiff was a candidate for tissue plasminogen activator (tPA), a medicine that can be given to treat strokes *if* administered within a certain period of time after the patient's last known well time. He alleges that, at the time he presented to defendant Olean General Hospital's emergency department with symptoms of a stroke, Garg failed to administer tPA because he negligently determined that plaintiff's last known well time could not be confidently or reliably established. Garg appeals from an order that denied his motion for summary judgment dismissing the amended complaint against him. We affirm.

Even assuming, arguendo, that Garg met his initial burden on the motion with respect to both the alleged deviation from the accepted standard of medical care and proximate causation through the submission of Garg's deposition testimony and the affirmation and affidavit, respectively, of two expert physicians (*see generally Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]), we conclude that plaintiff raised triable issues of fact with respect to both elements sufficient to defeat the motion by submitting, inter alia, the affidavit of his medical expert, which "squarely oppose[d]" the affirmation and affidavit of Garg's experts, and resulted in "a classic battle of the experts that [was] properly left to a jury for

resolution" (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1258 [4th Dept 2019] [internal quotation marks omitted]; *see Cully v Ricottone*, 228 AD3d 1240, 1240-1241 [4th Dept 2024]; *Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

134

CA 23-01921

PRESENT: CURRAN, J.P., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

CHRISTOPHER M. FREAS, ET AL., PLAINTIFFS,

V MEMORANDUM AND ORDER

JOHN W. DANFORTH COMPANY, ET AL., DEFENDANTS.

JOHN W. DANFORTH COMPANY, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

ROCHESTER DAVIS-FETCH CORP., THIRD-PARTY
DEFENDANT-APPELLANT.

THE LAW OFFICES OF GERARD E. O'CONNOR, BUFFALO (GERARD E. O'CONNOR OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

LIPPES MATHIAS LLP, BUFFALO (THOMAS J. GAFFNEY OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Diane Y. Devlin, J.), entered November 14, 2023. The order granted the motion of defendant-third-party plaintiff for partial summary judgment and denied the cross-motion of third-party defendant for summary judgment.

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

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries Christopher M. Freas (plaintiff) sustained when he slipped and fell at a construction site on September 2, 2016. Defendant-third-party plaintiff, John W. Danforth Company (Danforth), was the general contractor on the construction project and hired as a subcontractor third-party defendant, Rochester Davis-Fetch Corp. (Davis-Fetch), who was plaintiff's employer. After plaintiffs commenced this action against Danforth, among others, Danforth commenced a third-party action against Davis-Fetch, stating causes of action for contractual indemnification and failure to procure insurance. Danforth moved for partial summary judgment against Davis-Fetch, seeking an order of contractual indemnification. Davis-Fetch cross-moved for summary judgment dismissing the third-party complaint. Supreme Court granted

the motion and denied the cross-motion, and Davis-Fetch now appeals.

Davis-Fetch contends that the court erred in granting Danforth's motion and in denying its cross-motion because there was no agreement prior to plaintiff's accident for Davis-Fetch to indemnify Danforth or to procure insurance for Danforth's benefit. We agree with Davis-Fetch that the court erred in granting Danforth's motion, and we therefore modify the order by denying the motion, but we reject Davis-Fetch's contention with respect to its cross-motion.

The subcontract included both an indemnification provision and a provision requiring Davis-Fetch to procure insurance coverage and add Danforth as an additional insured. The subcontract was dated July 19, 2016, but it was not signed by Davis-Fetch and Danforth until September 13, 2016, and September 21, 2016, respectively. "An indemnification agreement that is executed after a plaintiff's accident . . . may only be applied retroactively where it is established that (1) the agreement was made as of a date prior to the accident and (2) the parties intended the agreement to apply as of that prior date" (*Carpentieri v 1438 S. Park Ave. Co., LLC*, 215 AD3d 1236, 1238 [4th Dept 2023] [internal quotation marks omitted]; *see Tanksley v LCO Bldg. LLC*, 196 AD3d 1037, 1039 [4th Dept 2021]; *Lorica v Krug*, 195 AD3d 1194, 1195 [3d Dept 2021]). Here, the subcontract was made as of a date prior to the accident, but there is a triable issue of fact whether the parties intended the indemnification provision of the subcontract to apply retroactively (*see Carpentieri*, 215 AD3d at 1238; *Guthorn v Village of Saranac Lake*, 169 AD3d 1298, 1300-1301 [3d Dept 2019]). Two of Davis-Fetch's executives averred that, prior to signing the subcontract, there was no discussion between Danforth's representatives and Davis-Fetch's representatives concerning the terms of the subcontract, including any indemnification provision. There was evidence, however, that the parties had worked together before on a project that included a subcontract with an indemnification provision, and that subcontract, like the one at issue here, was also signed after its effective date (*see Tanksley*, 196 AD3d at 1039). On this record, we conclude that neither party is entitled to summary judgment on the contractual indemnification claim (*see Zalewski v MH Residential 1, LLC*, 163 AD3d 900, 902 [2d Dept 2018]). For the same reasons, Davis-Fetch is not entitled to summary judgment dismissing the second cause of action, for failure to procure insurance (*see Contreras v Mall 1-Bay Plaza, LLC*, 213 AD3d 601, 601 [1st Dept 2023]; *Regno v City of New York*, 88 AD3d 610, 610 [1st Dept 2011]).

In light of our determination, there is no need to address Davis-Fetch's remaining contention.

Entered: March 14, 2025 Ann Dillon Flynn
Clerk of the Court

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

135

CA 23-02112

PRESENT: CURRAN, J.P., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

NEWREZ LLC, DOING BUSINESS AS
SHELLPOINT MORTGAGE SERVICING,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JEBCO OGM RESOURCES, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

ARTHUR N. BAILEY & ASSOCIATES, JAMESTOWN, RUPP PFALZGRAF LLC, BUFFALO (KYLE C. DIDONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

AKERMAN LLP, NEW YORK CITY (ALIZA B. MALOUF OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered June 26, 2023. The order, inter alia, granted the motion of plaintiff's predecessor-in-interest seeking, inter alia, a default judgment.

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

Memorandum: In this mortgage foreclosure action, JEBCO OGM Resources (defendant) appeals from an order that granted the motion of plaintiff's predecessor-in-interest seeking, inter alia, a default judgment and the appointment of a referee to compute. Defendant opposed the motion on several grounds but did not deny that it had failed to serve an answer, did not offer an excuse for failing to serve an answer, and did not request leave to serve a late answer. We affirm.

Where a plaintiff moving for a default judgment and order of reference in a foreclosure action has met its initial burden of showing that "a defendant is in default because he or she 'failed to appear' within the meaning of CPLR 3215 (a)" (*Aurora Loan Servs., LLC v Jemal*, 205 AD3d 661, 663 [2d Dept 2022]), the defendant is precluded from raising "nonjurisdictional argument[s]" in opposition (*Bank of N.Y. Mellon Trust Co., N.A. v Lagasse*, 224 AD3d 800, 801 [2d Dept 2024]) until it first "show[s] either that there was no default, or that it has a reasonable excuse for its delay and a potentially meritorious defense" (*HSBC Bank USA, N.A. v Clayton*, 146 AD3d 942, 944 [2d Dept 2017], *lv denied* 29 NY3d 1073 [2017]; *see HSBC Bank USA, N.A. v Scivoletti*, 212 AD3d 600, 602 [2d Dept 2023]).

Here, in response to the motion papers establishing that defendant did not serve an answer and was therefore in default, defendant failed to establish either that it was not in default or that it had a reasonable excuse for its delay in serving an answer. Thus, the nonjurisdictional arguments raised by defendant in opposition to the motion—standing (*see Aurora Loan Servs., LLC*, 205 AD3d at 663), statute of limitations (*see Mendez v Steen Trucking*, 254 AD2d 715, 716 [4th Dept 1998]), collateral estoppel (*see Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1011 [2d Dept 2020]), the need for additional discovery and the existence of issues of fact (*see Indus PVR LLC v MAA-Sharda, Inc.*, 140 AD3d 1666, 1667 [4th Dept 2016], *lv dismissed in part & denied in part* 28 NY3d 1059 [2016]), and the application of FAPA (*see generally FLA Mtge. Capital I, LLC v Unknown Heirs at Law of Estate of Paul*, 233 AD3d 1452, 1453 [4th Dept 2024])—were not before Supreme Court, and the motion was properly granted.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

140

KA 23-02012

PRESENT: WHALEN, P.J., BANNISTER, OGDEN, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER M. LAFRAMBOISE, DEFENDANT-APPELLANT.

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

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered November 16, 2023. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree and assault in the first degree.

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

141

KA 23-02006

PRESENT: WHALEN, P.J., BANNISTER, OGDEN, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JASON MCDEID, DEFENDANT-APPELLANT.

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

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 26, 2023. 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.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

142

KA 23-01020

PRESENT: WHALEN, P.J., BANNISTER, OGDEN, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYANT WHEELER, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JONATHAN GARVIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Stephen T. Miller, A.J.), rendered May 11, 2023. The judgment convicted defendant, upon his plea of guilty, of attempted arson 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 attempted arson in the second degree (Penal Law §§ 110.00, 150.15), defendant contends that the waiver of the right to appeal is invalid and that his 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 his challenge to the severity of the sentence (*see People v Albanese*, 218 AD3d 1366, 1366-1367 [4th Dept 2023], *lv denied* 40 NY3d 995 [2023]; *see generally People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

146

KA 18-01860

PRESENT: WHALEN, P.J., BANNISTER, OGDEN, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOMINICK MOORE, DEFENDANT-APPELLANT.

TODD G. MONAHAN, LITTLE FALLS, FOR DEFENDANT-APPELLANT.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (DAWN CATERA LUPI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered November 9, 2017. 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]). As defendant contends and the People correctly concede, defendant's purported waiver of the right to appeal is invalid inasmuch as both the signed written waiver of the right to appeal and the oral waiver colloquy mischaracterized the nature of the right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Irwin*, 232 AD3d 1251, 1251 [4th Dept 2024]; *People v Cossette*, 199 AD3d 1397, 1398 [4th Dept 2021], *lv denied* 37 NY3d 1160 [2022]). Contrary to defendant's further contention, however, the invalidity of the waiver of the right to appeal does not undermine the voluntariness of his guilty plea (*see People v Blackwell*, 129 AD3d 1690, 1690 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

148

CAF 23-01149

PRESENT: WHALEN, P.J., BANNISTER, OGDEN, NOWAK, AND KEANE, JJ.

IN THE MATTER OF AMIYAH G.G. AND HUNTER G.G.

ALLEGANY COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ARIEL E.G., RESPONDENT-APPELLANT,
AND JOHN E.G., RESPONDENT.

IN THE MATTER OF DORIS A.E. AND TIMOTHY D.C.,
PETITIONERS-RESPONDENTS,

V

ARIEL E.G., RESPONDENT-APPELLANT,
JOHN E.G. AND ALLEGANY COUNTY DEPARTMENT OF
SOCIAL SERVICES, RESPONDENTS-RESPONDENTS.

IN THE MATTER OF DORIS A.E. AND TIMOTHY D.C.,
PETITIONERS-RESPONDENTS,

V

ARIEL E.G., RESPONDENT-APPELLANT,
AND JOHN E.G., RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

THOMAS L. PELYCH, HORNELL, FOR RESPONDENT-APPELLANT.

ALLISON B. CARROW, COUNTY ATTORNEY, BELMONT, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT ALLEGANY COUNTY DEPARTMENT OF SOCIAL SERVICES.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Allegany County (Thomas P. Brown, J.), dated May 24, 2023, in proceedings pursuant to Family Court Act articles 6 and 10. The order continued the placement of the subject children in foster care and denied the petition of petitioners Doris A.E. and Timothy D.C. seeking custody of the subject children.

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

Memorandum: In appeal No. 1, respondent mother appeals from a

dispositional order that, among other things, denied the petition of the paternal grandparents seeking custody of the subject children. In appeal No. 2., the mother and respondent father appeal from a dispositional order that, inter alia, continued the children's placement with their foster parents. Because the parents subsequently judicially surrendered the subject children and those children were thereafter adopted by their foster parents, we dismiss these appeals as moot (*see Matter of Mirely M. v Wilbert L.*, 221 AD3d 1227, 1228-1229 [3d Dept 2023]; *see generally Matter of Michael B.*, 80 NY2d 299, 317 [1992]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

150

CAF 24-01015

PRESENT: WHALEN, P.J., BANNISTER, OGDEN, NOWAK, AND KEANE, JJ.

IN THE MATTER OF JACQUELYN GRABOWSKI,
PETITIONER-RESPONDENT,

V ORDER

JAY SMITH, JR., RESPONDENT-APPELLANT.

LOCKHART LAW OFFICE, P.C., NORTH SYRACUSE (BETH A. LOCKHART OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered January 6, 2023, in a proceeding pursuant to Family Court Act article 4. The order denied and dismissed the objections of respondent to an order of the Support Magistrate.

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

153

CAF 23-01150

PRESENT: WHALEN, P.J., BANNISTER, OGDEN, NOWAK, AND KEANE, JJ.

IN THE MATTER OF AMIYAH B.G. AND HUNTER S.

ALLEGANY COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ARIEL E.G. AND JOHN E.G.,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

THOMAS L. PELYCH, HORNELL, FOR RESPONDENT-APPELLANT ARIEL E.G.

ANDREW J. DIPASQUALE, ROCHESTER, FOR RESPONDENT-APPELLANT JOHN E.G.

ALLISON B. CARROW, COUNTY ATTORNEY, BELMONT, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeals from an order of the Family Court, Allegany County (Thomas P. Brown, J.), entered June 9, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, continued the placement of the subject children in foster care.

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

Same memorandum as in *Matter of Amiyah G.G. (Ariel E.G.)* ([appeal No. 1] — AD3d — [Mar. 14, 2025] [4th Dept 2025]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

156

CA 24-00338

PRESENT: WHALEN, P.J., BANNISTER, OGDEN, NOWAK, AND KEANE, JJ.

ROUTE 90, LLC, UBIF NEW YORK, LLC,
AND NATHAN BAUTZ, PLAINTIFFS-APPELLANTS,

V ORDER

ASURION UBIF FRANCHISE, LLC, AND ASURION, LLC,
DEFENDANTS-RESPONDENTS.

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (MATTHEW J. BIRD OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HURWITZ FINE P.C., BUFFALO (ANDREA SCHILLACI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Deborah A. Chimes, J.), entered January 23, 2024. The order granted the motion of defendants to dismiss the 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: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

158

CA 24-00495

PRESENT: WHALEN, P.J., BANNISTER, OGDEN, NOWAK, AND KEANE, JJ.

CHRISTOPHER COPLAND AND RACHEL HEIKOOPS,
PLAINTIFFS-APPELLANTS,

V ORDER

STATE FARM FIRE AND CASUALTY COMPANY,
DEFENDANT-RESPONDENT.

KEVIN T. STOCKER, TONAWANDA, FOR PLAINTIFFS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (SCOTT D. STORM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered March 11, 2024. The order, inter alia, granted the motion of defendant for partial summary judgment and denied the motion of plaintiffs to extend the scheduling order.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 19, 2024,

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

176

CA 23-01867

PRESENT: CURRAN, J.P., MONTOUR, SMITH, DELCONTE, AND HANNAH, JJ.

NEWCO CAPITAL GROUP VI LLC, PLAINTIFF-APPELLANT,

V ORDER

MD POWER INC., DOING BUSINESS AS MD POWER,
MD POWER INC., INFINITUM INC., DISPOZIBUM CO.,
AND MIRJANA RACIC, DEFENDANTS-RESPONDENTS.

BERKOVITCH & BOUSKILA, PLLC, POMONA (ARIEL BOUSKILA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LEBEDIN KOFMAN, LLP, NEW YORK CITY (MICHAEL S. LEINOFF OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Daniel J. Doyle, J.), entered October 26, 2023. The order granted the motion of defendants to vacate a default judgment, vacated the default judgment and dismissed the 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: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

177

CA 24-00785

PRESENT: CURRAN, J.P., MONTOUR, SMITH, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF DANIELLE DILL, PSY.D.,
EXECUTIVE DIRECTOR, CENTRAL NEW YORK
PSYCHIATRIC CENTER, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOSE P., RESPONDENT-APPELLANT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (RACHEL RAIMONDI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Charles C. Merrell, J.), entered April 1, 2024. The order, inter alia, authorized petitioner to administer medication to respondent over his objection.

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

Memorandum: Petitioner commenced this proceeding seeking authorization to administer a course of treatment to respondent over his objection pursuant to the parens patriae power of the State of New York (*see Matter of Sawyer [R.G.]*, 68 AD3d 1734, 1734-1735 [4th Dept 2009]; *see generally Rivers v Katz*, 67 NY2d 485, 496-498 [1986], *rearg denied* 68 NY2d 808 [1986]). Respondent is an incarcerated individual serving a 20-year sentence of imprisonment for his conviction of attempted murder in the second degree (Penal Law §§ 110.00, 125.25) who was subsequently indicted for promoting prison contraband in the first degree (§ 205.25) and then admitted to the Central New York Psychiatric Center pursuant to CPL 730.50 for competency restoration and treatment services. Following a hearing, Supreme Court issued an order that, inter alia, authorized the administration, over respondent's objection, of a regimen of Risperdal, as well as certain alternative medication regimens in the event of refusal, for a period of up to 12 months from the date of the treatment order. Respondent appeals, and we affirm.

"[T]he State may administer a course of medical treatment against a patient's will if it establishes, by clear and convincing evidence, that the patient lacks the capacity to make a reasoned decision with respect to proposed treatment . . . , and that the proposed treatment

is narrowly tailored to give substantive effect to the patient's liberty interest, taking into consideration all relevant circumstances, including the patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive alternative treatments" (*Matter of Harper v Louis M.*, 196 AD3d 1086, 1087 [4th Dept 2021] [internal quotation marks omitted]; *see Rivers*, 67 NY2d at 497-498; *Matter of Samuel D. [Mid-Hudson Forensic Psychiatric Ctr.]*, 171 AD3d 1172, 1173 [2d Dept 2019], *appeal dismissed* 33 NY3d 1117 [2019]). "Whether a mentally ill patient has the capacity to make a reasoned decision with respect to treatment is a question of fact for the hearing court, the credibility findings of which are entitled to due deference" (*Matter of Beverly F. [Creedmoor Psychiatric Ctr.]*, 150 AD3d 998, 998 [2d Dept 2017]; *see Matter of Guttmacher [James M.]*, 181 AD3d 1313, 1313 [4th Dept 2020]).

Here, petitioner met her burden through, inter alia, the uncontroverted expert testimony of respondent's treating psychiatrist, who testified that respondent exhibited psychosis, disorganized speech and thinking, and delusional thoughts; diagnosed him with schizophrenia; and opined that, as a result of his mental illness, respondent lacked the capacity to make a reasoned decision with respect to the proposed treatment (*see Matter of Schlee [Clarence E.]*, 194 AD3d 1365, 1366 [4th Dept 2021]; *Guttmacher*, 181 AD3d at 1313). Petitioner further established, through the uncontroverted expert testimony, that the proposed treatment was "narrowly tailored to give substantive effect to [respondent's] liberty interest, taking into consideration all relevant circumstances, including the patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive alternative treatments" (*Rivers*, 67 NY2d at 497-498; *see Schlee*, 194 AD3d at 1366).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

181

KA 23-00987

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHAD P. JENNINGS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered February 16, 2023. The judgment convicted defendant, upon his plea of guilty, of aggravated criminal contempt.

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

182

KA 23-00988

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

ORDER

CHAD P. JENNINGS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered February 16, 2023. The judgment convicted defendant, upon his plea of guilty, of aggravated family offense and criminal contempt in the second degree.

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

185

KA 21-01078

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL T. NILES, DEFENDANT-APPELLANT.

TINA L. HARTWELL, PUBLIC DEFENDER, UTICA (JAMES P. GODEMANN OF COUNSEL), FOR DEFENDANT-APPELLANT.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (DAWN CATERA LUPI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered June 9, 2021. The judgment convicted defendant upon a jury verdict of assault in the second degree and assault in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of assault in the third degree and dismissing count 2 of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [7]) and assault in the third degree (§ 120.00 [1]). As defendant contends and the People correctly concede, assault in the third degree is an inclusory concurrent count of assault in the second degree (*see generally People v Skinner*, 94 AD3d 1516, 1520 [4th Dept 2012]). Thus, that part of the judgment convicting defendant of assault in the third degree must be reversed and count 2 of the indictment dismissed (*see generally People v Hickey*, 171 AD3d 1465, 1466-1467 [4th Dept 2019], *lv denied* 33 NY3d 1105 [2019]; *People v Mastowski*, 155 AD3d 1624, 1625 [4th Dept 2017], *lv denied* 30 NY3d 1117 [2018]), and we therefore modify the judgment accordingly. Contrary to the People's contention, preservation of this issue is not required (*see Mastowski*, 155 AD3d at 1625-1626).

Defendant failed to preserve for our review his contention that he was penalized for exercising his right to a jury trial on the ground that he received a harsher sentence than that proposed as part of a plea agreement (*see People v McCullough*, 128 AD3d 1510, 1512 [4th Dept 2015], *lv denied* 26 NY3d 1010 [2015]). In any event, his contention is without merit. "[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea

negotiations is not proof that defendant was punished for asserting his right to trial . . . , and there is no evidence in the record that [County Court] was vindictive" (*People v Lombardi*, 68 AD3d 1765, 1765-1766 [4th Dept 2009], *lv denied* 14 NY3d 802 [2010] [internal quotation marks omitted]; *see generally People v Pena*, 50 NY2d 400, 411-412 [1980], *rearg denied* 51 NY2d 770 [1980], *cert denied* 449 US 1087 [1981]). The sentence is not unduly harsh or severe.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

185

KA 21-01078

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL T. NILES, DEFENDANT-APPELLANT.

TINA L. HARTWELL, PUBLIC DEFENDER, UTICA (JAMES P. GODEMANN OF COUNSEL), FOR DEFENDANT-APPELLANT.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (DAWN CATERA LUPI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered June 9, 2021. The judgment convicted defendant upon a jury verdict of assault in the second degree and assault in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of assault in the third degree and dismissing count 2 of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [7]) and assault in the third degree (§ 120.00 [1]). As defendant contends and the People correctly concede, assault in the third degree is an inclusory concurrent count of assault in the second degree (*see generally People v Skinner*, 94 AD3d 1516, 1520 [4th Dept 2012]). Thus, that part of the judgment convicting defendant of assault in the third degree must be reversed and count 2 of the indictment dismissed (*see generally People v Hickey*, 171 AD3d 1465, 1466-1467 [4th Dept 2019], *lv denied* 33 NY3d 1105 [2019]; *People v Mastowski*, 155 AD3d 1624, 1625 [4th Dept 2017], *lv denied* 30 NY3d 1117 [2018]), and we therefore modify the judgment accordingly. Contrary to the People's contention, preservation of this issue is not required (*see Mastowski*, 155 AD3d at 1625-1626).

Defendant failed to preserve for our review his contention that he was penalized for exercising his right to a jury trial on the ground that he received a harsher sentence than that proposed as part of a plea agreement (*see People v McCullough*, 128 AD3d 1510, 1512 [4th Dept 2015], *lv denied* 26 NY3d 1010 [2015]). In any event, his contention is without merit. "[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea

negotiations is not proof that defendant was punished for asserting his right to trial . . . , and there is no evidence in the record that [County Court] was vindictive" (*People v Lombardi*, 68 AD3d 1765, 1765-1766 [4th Dept 2009], *lv denied* 14 NY3d 802 [2010] [internal quotation marks omitted]; *see generally People v Pena*, 50 NY2d 400, 411-412 [1980], *rearg denied* 51 NY2d 770 [1980], *cert denied* 449 US 1087 [1981]). The sentence is not unduly harsh or severe.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

199

KA 21-01024

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LEROY WILLIAMS, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (CLEA WEISS 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 (Charles A. Schiano, Jr., J.), rendered June 28, 2021. The appeal was held by this Court by order entered June 14, 2024, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (228 AD3d 1314 [4th Dept 2024]). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed for reasons stated in the decision at Supreme Court.

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

214

CA 24-00107

PRESENT: LINDLEY, J.P., CURRAN, GREENWOOD, AND HANNAH, JJ.

EDWARD P. SANDELL AND ROSANNA DIMILLO SANDELL,
PLAINTIFFS-RESPONDENTS,

V ORDER

SEVERYN DEVELOPMENT, INC., DEFENDANT-APPELLANT.

TIVERON LAW PLLC, AMHERST (DIANE R. TIVERON OF COUNSEL), FOR DEFENDANT-APPELLANT.

A. ANGELO DIMILLO, LOCKPORT, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered January 10, 2024. The order, among other things, granted plaintiffs' motion seeking a default judgment against defendant and denied defendant's cross-motion to, inter alia, dismiss plaintiffs' complaint.

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

220

CAF 24-00179

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF MAGDALENA KOHLER,
PETITIONER-APPELLANT,

V ORDER

RANDOLPH BARDEN, JR., RESPONDENT-RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS R. BABILON OF COUNSEL), FOR PETITIONER-APPELLANT.

CHARLES E. LUPIA, SYRACUSE, FOR RESPONDENT-RESPONDENT.

MICHAEL J. KERWIN, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered January 3, 2024, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 10, 2025,

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

246

CA 24-00566

PRESENT: WHALEN, P.J., CURRAN, OGDEN, AND GREENWOOD, JJ.

HSBC BANK USA, NATIONAL ASSOCIATION,
AS TRUSTEE FOR DEUTSCHE ALT-B SECURITIES
INC. MORTGAGE LOAN TRUST, MORTGAGE PASS-THROUGH
CERTIFICATES SERIES 2006-AB4,
PLAINTIFF-APPELLANT,

V ORDER

DAVID CASS, ALSO KNOWN AS DAVID A. CASS,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

HINSHAW & CULBERTSON LLP, NEW YORK CITY (EVAN N. SOYER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ARTHUR N. BAILEY & ASSOCIATES, JAMESTOWN (ARTHUR N. BAILEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered October 11, 2023. The order granted the motion of defendant David Cass to vacate a default judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 17, 2025,

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

252.2

KAH 25-00059

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK
EX REL. MARTHA RAYNER, ESQ., ON BEHALF
OF STEVE COLEMAN, PETITIONER-APPELLANT,

V ORDER

DANIEL F. MARTUSCELLO, III, COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION,
RESPONDENT-RESPONDENT.

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, NEW YORK CITY (DANIEL R. LAMBRIGHT OF COUNSEL), AND PAROLE PREPARATION PROJECT, FOR PETITIONER-APPELLANT.

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

LOWENSTEIN SANDLER LLP, NEW YORK CITY (NATALIE J. KRANER OF COUNSEL), FOR BIOMEDICAL ETHICISTS, AMICUS CURIAE.

MILBANK LLP, NEW YORK CITY (DANIEL M. PERRY OF COUNSEL), FOR DISABILITY RIGHTS NEW YORK, AMICUS CURIAE.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Debra L. Givens, A.J.), entered October 9, 2024, in a habeas corpus proceeding. The judgment denied and dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see People ex rel. Billinger v Harper*, 198 AD3d 1295, 1295 [4th Dept 2021]).

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

252

CA 24-00214

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, AND KEANE, JJ.

WATERTOWN SAVINGS BANK, PLAINTIFF-RESPONDENT,

V ORDER

TRESEA L. DULMAGE, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

LEGAL AID SOCIETY OF MID-NEW YORK, INC., UTICA (CINDY DOMINGUE-HENDRICKSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCHWERZMANN & WISE, P.C., WATERTOWN (KEITH B. CAUGHLIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (William F. Ramseier, J.), entered December 6, 2023. The order denied the motion of defendant Tresea L. Dulmage to vacate a judgment of foreclosure.

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

263

CAF 23-01217

PRESENT: LINDLEY, J.P., MONTOUR, SMITH, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF TRISTAN F.-S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

CANDICE F., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

MINDY L. MARRANCA, BUFFALO, FOR RESPONDENT-APPELLANT.

SHELBY S. MAROSELLI, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CLAIRE H. FORTIN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered July 11, 2023, in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had abused the subject child.

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court

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

264

CAF 23-01218

PRESENT: LINDLEY, J.P., MONTOUR, SMITH, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF SUMMER F.-R. AND ETHAN F.-R.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

CANDICE F., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

MINDY L. MARRANCA, BUFFALO, FOR RESPONDENT-APPELLANT.

SHELBY S. MAROSELLI, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CLAIRE H. FORTIN OF COUNSEL), ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered July 11, 2023, in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had derivatively abused the subject children.

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

Entered: March 14, 2025

Ann Dillon Flynn
Clerk of the Court