SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 1, 2026

HON. GERALD J. WHALEN, PRESIDING JUSTICE

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. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED MAY 1, 2026

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_____	90	CA 25 00138	CHRISTOPHER MONFORT V ALDEN CENTRAL SCHOOL DISTRIC
_____	91	CA 25 00596	JANE DOE V THOMAS MORAN
_____	92	CA 24 02025	KIM SUE BROWN V STATE OF NEW YORK
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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1005

KA 22-01411

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEROME LINDSEY, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (CLEA WEISS 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 (Charles A. Schiano, Jr., J.), rendered July 26, 2022. The judgment convicted defendant upon a nonjury verdict of attempted criminal possession of a weapon in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of two counts of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [1] [b]; [3]), defendant contends that Penal Law § 265.03 is unconstitutional in light of *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). We have rejected identical contentions in prior cases, holding that *Bruen* "had no impact on the constitutionality of New York State's criminal possession of a weapon statutes" (*People v Mancuso*, 225 AD3d 1151, 1153 [4th Dept 2024], *lv denied* 43 NY3d 964 [2025], *cert denied* — US — [2026] [internal quotation marks omitted]; *see People v Richardson*, 246 AD3d 1396, 1396 [4th Dept 2026]; *People v Brinson*, 240 AD3d 1376, 1378 [4th Dept 2025], *lv denied* 44 NY3d 1064 [2026]), and we perceive no reason to reach a different conclusion here.

Defendant failed to preserve for our review his contention that the sentencing procedure pursuant to which he was adjudicated a persistent violent felony offender (PVFO) is unconstitutional in light of *Erlinger v United States* (602 US 821 [2024]), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Nesmith*, 242 AD3d 1564, 1566 [4th Dept 2025], *lv denied* 44 NY3d 1067 [2026]; *People v Emanuel*, 240 AD3d 1324, 1327 [4th Dept 2025], *lv denied* 44 NY3d 993 [2025]; *People v Daniels*, 239 AD3d 1442, 1442-1443

[4th Dept 2025], *lv denied* 44 NY3d 982 [2025]).

Defendant next contends that his sentence should be vacated and the matter remitted for resentencing because the People failed to file a predicate statement before the PVFO hearing (*see* CPL 400.15 [2], [6]; 400.16 [2]). Although the People failed to file a predicate statement prior to the hearing, we conclude that strict compliance with CPL 400.15 was not required inasmuch as defendant was informed well before the hearing of the prior violent felony convictions upon which the People would be relying to have him adjudicated a persistent violent felony offender, and defendant "was provided an opportunity to be heard with respect to those accusations during the [PVFO] proceeding" (*People v Williams*, 163 AD3d 1422, 1424 [4th Dept 2018] [internal quotation marks omitted]; *see generally People v Bouyea*, 64 NY2d 1140, 1142 [1985]).

Finally, defendant contends that the evidence at the PVFO hearing was insufficient to establish sufficient tolling periods because the People relied exclusively on his NYSID criminal history obtained from the New York State Division of Criminal Justice Services (*see People v Soto*, 138 AD3d 533, 534 [1st Dept 2016], *lv denied* 28 NY3d 937 [2016]; *People v Ortiz*, 23 AD3d 499, 500 [2d Dept 2005], *lv denied* 6 NY3d 757 [2005]). At the hearing, however, defendant did not object to the NYSID history proffered by the People and did not contend that it was insufficient to establish the necessary tolling periods. In fact, defendant did not dispute any of the tolling periods alleged by the People. Under the circumstances, defendant's contention is unpreserved for our review, and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: May 1, 2026

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 25-00138

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

CHRISTOPHER MONFORT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

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

WEITZ & LUXENBERG, P.C., NEW YORK CITY (JASON P. WEINSTEIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (HUGH M. RUSS, III, OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a "decision and order" of the Supreme Court, Erie County (Daniel Furlong, J.), entered January 14, 2025. The "decision and order" granted in part the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: In this action pursuant to the Child Victims Act (*see* CPLR 214-g), plaintiff purports to appeal from the "Decision and Order," as limited by his brief, to the extent that it granted that part of defendants' motion seeking summary judgment dismissing his second cause of action, for negligent supervision of plaintiff while acting in loco parentis. We dismiss the appeal. " '[N]o appeal lies from a [mere] decision,' " and a document does not become an order simply because it has been denominated as such (*Garcia v Town of Tonawanda*, 194 AD3d 1479, 1479 [4th Dept 2021]; *see Allen v Grimm*, 208 AD3d 1589, 1589-1590 [4th Dept 2022]; *Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]). Although the paper contains the words "Decision and Order," it does not meet the essential elements of an order inasmuch as it does not "recite the papers used on the motion" (CPLR 2219 [a]), and furthermore "that document did not actually order anything" (*Pecora v Lawrence*, 28 AD3d 1136, 1137 [4th Dept 2006]; *see Prevost v Associated Materials, LLC*, 239 AD3d 1235, 1236 [4th Dept 2025]).

Entered: May 1, 2026

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 25-00596

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

JANE DOE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THOMAS E. MORAN, COUNTY OF LIVINGSTON,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

THE LAW OFFICE OF JOHN MANNING REGAN, JR., ROCHESTER (JOHN M. REGAN, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GROSS SHUMAN P.C., BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Danielle M. Fogel, J.), entered September 19, 2024. The order granted that part of the motion of defendants Thomas E. Moran and County of Livingston to dismiss the complaint against them and denied the cross-motion of plaintiff to amend the complaint.

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

Memorandum: Plaintiff commenced this action pursuant to the Adult Survivors Act (ASA) (*see* CPLR 214-j) against defendant Thomas E. Moran, who was at all relevant times the District Attorney of Livingston County; Moran's employer, defendant County of Livingston (County); and defendant Eric Harder, among others. We conclude that Supreme Court properly granted that part of the motion of Moran and the County (defendants) seeking to dismiss the complaint against them on statute of limitations grounds (*see* CPLR 3211 [a] [5]).

By way of background, plaintiff was arrested in January 2004 for her alleged participation in a gunpoint robbery that occurred in December 2003. The police arrested three other people for the crime, including Harder. According to the police, plaintiff, using her own car, drove two of her codefendants in the robbery to and from the scene of the crime. Plaintiff's codefendants in the robbery pleaded guilty and implicated her during their factual colloquies. Plaintiff later pleaded guilty as well, albeit without admitting culpability, pursuant to *North Carolina v Alford* (400 US 25 [1970]; *see generally Matter of Silmon v Travis*, 95 NY2d 470, 475 [2000]).

In November 2023, plaintiff commenced this action pursuant to the

ASA. The complaint asserts a single cause of action that includes a claim for malicious prosecution against Moran, the former District Attorney who prosecuted plaintiff for the robbery approximately 20 years earlier, and the County, based on principles of vicarious liability. The cause of action is based on allegations that Harder raped plaintiff at knifepoint late in the afternoon on December 8, 2003, six or seven hours before the robbery took place. Although the complaint does not allege that Moran had anything to do with the sexual assault, plaintiff asserts in her pleading that Moran "aggravated the injury and trauma" arising from the violent rape by working with Harder and other witnesses to "bring false criminal charges" against her. According to the complaint, Moran persuaded plaintiff's codefendants in the criminal action, including Harder, to falsely implicate plaintiff in the robbery, resulting in her wrongful conviction.

In lieu of an answer, defendants moved to dismiss the complaint against them on various grounds, including that it was barred by the statute of limitations. Defendants argued that the claim asserted against them, sounding in malicious prosecution, is not revived by the ASA because it is not based on conduct constituting a sex crime under article 130 of the Penal Law. Plaintiff opposed the motion and cross-moved to amend the complaint to specifically assert a cause of action against all defendants for intentional infliction of emotional distress based upon the same facts alleged in the complaint. Supreme Court granted the motion insofar as it sought dismissal of the complaint against defendants and denied the cross-motion, concluding that the tort claim against defendants is time-barred. We now affirm.

Modeled after the Child Victims Act (*see* CPLR 214-g), the ASA opened a one-year window for adult survivors of sexual abuse to revive otherwise time-barred civil claims based on, inter alia, conduct that "would constitute a sexual offense as defined in [Penal Law article 130]" (CPLR 214-j). Here, as the court determined, the tort claim asserted against defendants is not based on conduct by Moran that would constitute a sexual offense. Instead, the claim is based on conduct by Moran that would constitute fabrication of evidence and malicious prosecution. Although it may be true that Moran's alleged conduct—resulting in plaintiff's conviction—aggravated the psychological trauma to plaintiff arising from the sexual assault committed by Harder, such conduct did not in any way cause the sexual assault or allow it to happen. Indeed, as the record makes plain, Moran did not even know plaintiff or Harder when the rape allegedly occurred, and his alleged tortious acts took place weeks and months later, before plaintiff told anyone that she had been raped.

It is true, as plaintiff contends, that the ASA is not limited to claims asserted against sexual abusers. As stated in the Senate Introducer's Memorandum in Support of the ASA, the statute is intended to allow sexual abuse victims to "seek civil redress against their abuser *or their abuser's enablers* in a court of law" (Senate Introducer's Mem in Support, Bill Jacket, L 2022, ch 203 at 7 [emphasis added]; *see generally Matter of All Plaintiffs in Child Victims Act NYC Litig. v All Defendants in Child Victims Act NYC*

Litig., 200 AD3d 476, 477-478 [1st Dept 2021]). Here, however, the complaint, even liberally construed (*see generally Richardson v Tops Mkts., LLC*, 243 AD3d 1215, 1217 [4th Dept 2025]), does not allege any facts that, if true, would establish that Moran enabled the rape of plaintiff by Harder, neither of whom Moran knew when the assault was committed. The mere fact that Moran's alleged tortious conduct may have aggravated injuries previously caused to plaintiff by Harder's sexual assault does not bring his conduct within the ambit of CPLR 214-j. We therefore conclude that the court properly granted the motion insofar as it seeks to dismiss the complaint as against defendants on statute of limitations grounds.

Entered: May 1, 2026

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 24-02025

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

KIM SUE BROWN, FORMERLY KNOWN AS KIM DADOU,
CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 141447.)

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BEEZLY J. KIERNAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered November 8, 2024. The order denied the motion of claimant for leave to renew and reargue, inter alia, her opposition to defendant's motion to dismiss the claim.

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

Memorandum: Claimant commenced this action pursuant to the Adult Survivors Act (ASA) (*see* CPLR 214-j) seeking damages for alleged rape and sexual assault inflicted upon her while she was incarcerated at Albion Correctional Facility between 1995 and 2008. The verified claim was filed on November 21, 2023, and served on the Office of the Attorney General (OAG) on November 27, 2023. The Court of Claims granted the motion of defendant, State of New York (State), to dismiss the claim for lack of jurisdiction on the ground that the State was not timely served with the claim, and denied claimant's cross-motion for leave pursuant to Court of Claims Act § 10 (6) to file a late claim. Claimant now appeals from an order denying claimant's motion for leave to renew and reargue the State's motion and claimant's cross-motion.

At the outset, we note that the appeal from the order insofar as it denied that part of claimant's motion seeking leave to reargue must be dismissed because no appeal lies therefrom (*see McGirr v Zurbrick* [appeal No. 2], 217 AD3d 1462, 1463 [4th Dept 2023], *lv denied* 41 NY3d 902 [2024]; *MidFirst Bank v Storto*, 121 AD3d 1575, 1575 [4th Dept 2014]; *Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]).

Of course, claimant may appeal as of right from that part of the order that denied her motion insofar is it seeks leave to renew (*see* CPLR 5701 [a] [2] [viii]). Nonetheless, we conclude that the court did not abuse its discretion in denying claimant's motion insofar as it seeks leave to renew. "[A] motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion" (*2006905 Ontario Inc. v Goodrich Aerospace Can., Ltd.*, 206 AD3d 1607, 1607-1608 [4th Dept 2022] [internal quotation marks omitted]; *see* CPLR 2221 [e] [2]-[3]). As the moving party, claimant "bore the burden of proving that the new evidence [she] sought to present could not have been discovered earlier with due diligence and would have led to a different result" (*Fusion Funding v Loftti Inc.*, 216 AD3d 1416, 1417 [4th Dept 2023] [internal quotation marks omitted]; *see Centerline/Fleet Hous. Partnership, L.P.—Series B v Hopkins Ct. Apts., LLC*, 176 AD3d 1596, 1598 [4th Dept 2019]).

Here, we conclude that the part of claimant's motion for leave to renew was not based upon new facts not offered on the prior motion and cross-motion, but rather on evidence corroborating the facts alleged in opposition to the prior motion. Specifically, in connection with the prior motion and cross-motion, claimant sought to show that she had timely served OAG on November 24, 2023, albeit after normal business hours, under Court of Claims Act § 11 (a) (i), inasmuch as the verified claim had been mailed to OAG and was available for pickup by November 24, 2023, but that OAG did not pick up mail that day. The court rejected that argument on the original motion and cross-motion, noting that claimant had not properly substantiated her assertions with respect to the mailing of the claim to OAG. In support of her request for leave to renew, claimant submitted affidavits from employees of her prior counsel, who attempted to substantiate claimant's assertions about the mailing of the claim by repeating hearsay statements of postal employees. We conclude that the court did not err in denying leave to renew inasmuch as the purportedly new evidence was mere hearsay (*see Wells Fargo Bank, N.A. v Mone*, 185 AD3d 626, 630 [2d Dept 2020]; *Taub v Art Students League of N.Y.*, 63 AD3d 630, 631 [1st Dept 2009]; *Marine Midland Bank v Hall*, 74 AD2d 729, 729 [4th Dept 1980]). Further, even assuming, arguendo, that claimant's submissions constituted new facts, she provided no reasonable justification for her failure to provide such evidence at the time of the first motion and cross-motion. "[A] motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Heltz v Barratt*, 115 AD3d 1298, 1300 [4th Dept 2014], *affd* 24 NY3d 1185 [2014] [internal quotation marks omitted]; *see Welch Foods v Wilson*, 247 AD2d 830, 831 [4th Dept 1998]). Consequently, in the absence of a reasonable justification for the failure to offer the "new facts" on the prior motion and cross-motion, the court could not exercise its discretion to grant claimant's motion to renew (*see Fusion Funding*, 216 AD3d at 1417; *Mura v Mura*, 133 AD3d 1324, 1325-1326 [4th Dept 2015]).

Claimant further contends that the court erred in denying leave

to renew with respect to her cross-motion for leave to file a late claim inasmuch as a recent amendment to the Court of Claims Act obviated the requirement that she move for leave to file a late claim prior to the expiration of the relevant limitations period (*see* Court of Claims Act § 10 [10] [ii], as amended by L 2024, ch 153 [eff. June 28, 2024]; *see generally* CPLR 2221 [e] [2]; Court of Claims Act § 10 [6]; *Carey v State of New York*, 207 AD3d 1194, 1195 [4th Dept 2022]). We reject that contention. We note that the recent amendment to the Court of Claims Act provides, as relevant here, that section 10 "shall not apply to . . . any civil claim or cause of action revived pursuant to [the ASA]" (§ 10 [10] [ii]). Here, however, the claim and claimant's cross-motion to file a late claim were not precluded as a result of Court of Claims Act § 10, but rather due to claimant's failure to properly file and serve the claim pursuant to Court of Claims Act § 11, within the relevant limitations period of CPLR 214-j, and those provisions are unaffected by the recent amendment. Consequently, we conclude that the court properly denied leave to renew here inasmuch as claimant did not "demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]).

Entered: May 1, 2026

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 25-00109

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

APRIL I.O., AND M.H., AN INFANT
BY HIS MOTHER AND NATURAL GUARDIAN,
APRIL I.O., AND APRIL I.O.,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MICHAEL A. TAYLOR, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

HARMON, LINDER & ROGOWSKY, ESQS., NEW YORK CITY (MITCHELL DRANOW OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BURGIO, CURVIN & BANKER, BUFFALO (NICHOLAS MICHAEL ROSSI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Yates County (Jason L. Cook, J.), entered December 11, 2024. The order denied the motion of plaintiffs to vacate an order granting the motion of defendant Michael A. Taylor for summary judgment.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, plaintiffs' motion is granted, the order entered September 24, 2024 is vacated insofar as it granted that part of the motion of defendant Michael A. Taylor seeking to dismiss the complaint against him, and the complaint against that defendant is reinstated.

Memorandum: Plaintiffs commenced this action seeking damages for injuries they sustained when the motor vehicle in which they were passengers collided with a vehicle operated by Michael A. Taylor (defendant). Defendant moved for, inter alia, summary judgment dismissing the complaint and all cross-claims against him. Plaintiffs failed to submit timely opposition papers or appear for oral argument on the return date of the motion, and Supreme Court granted the motion insofar as it sought summary judgment dismissing the complaint and cross-claim. Approximately two weeks later, plaintiffs moved to vacate the order pursuant to CPLR 5015 (a) (1), and the court denied plaintiffs' motion. We agree with plaintiffs that the court abused its discretion in denying their motion to vacate.

On their CPLR 5015 (a) (1) motion to vacate their default in opposing defendant's motion, plaintiffs " 'were required to demonstrate both a reasonable excuse for the default and a potentially

meritorious opposition to the motion' " (*Fremming v Niedzialowski*, 93 AD3d 1336, 1336 [4th Dept 2012]; *see Gounder v Melrose Credit Union*, 241 AD3d 882, 884 [2d Dept 2025]; *see generally Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). "[T]he determination of whether . . . to vacate a default . . . is generally left to the sound discretion of the court" (*Peroni v Peroni*, 189 AD3d 2058, 2060 [4th Dept 2020] [internal quotation marks omitted]; *see Clearfund Solutions LLC v Tomassetti*, 224 AD3d 1387, 1387 [4th Dept 2024]). In determining whether to vacate an order entered on default, "the court should consider relevant factors, such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*Moore v Day*, 55 AD3d 803, 804 [2d Dept 2008]; *see Calaci v Allied Interstate, Inc.* [appeal No. 2], 108 AD3d 1127, 1128 [4th Dept 2013]).

Here, contrary to the conclusion of the court, plaintiffs proffered a reasonable excuse of law office failure for the brief delay in serving their opposition papers to defendant's motion (*see* CPLR 2005; *Calaci*, 108 AD3d at 1128-1129). Although plaintiffs' counsel admittedly failed to properly calendar the motion opposition date, counsel did attempt to seek defendant's consent for an adjournment prior to the return date of the motion, which plaintiffs' counsel apparently believed to be the due date for the opposition to defendant's motion. Further, plaintiffs' counsel submitted opposition papers on the return date, albeit after business hours, upon the mistaken belief that the motion was to be taken on submission. There is no evidence of a willful default and the negligible delay cannot be said to have prejudiced defendant (*see Calaci*, 108 AD3d at 1128-1129; *Moore*, 55 AD3d at 805).

We further conclude that plaintiffs established a meritorious opposition sufficient for the purpose of this motion (*see Moore*, 55 AD3d at 804-805). Although "[a] driver who has the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield to the driver with the right-of-way," the driver with the right-of-way nonetheless "has a duty to use reasonable care to avoid a collision" (*Penda v Duvall*, 141 AD3d 1156, 1157 [4th Dept 2016] [internal quotation marks omitted]). Here, although there is no dispute that defendant had the right-of-way at the time of the accident, there are issues of fact whether defendant's speed was reasonable under the circumstances, including defendant's knowledge that his view of the intersection where the accident occurred was limited by the terrain (*see Gates v Simpson* [appeal No. 2], 240 AD3d 1204, 1205-1206 [4th Dept 2025]; *Brooks v Davis*, 185 AD3d 1392, 1393 [4th Dept 2020]).

Under the circumstances of this case, including the expediently filed motion to vacate, and in light of the public policy favoring the resolution of cases on the merits, we conclude that the court abused its discretion in denying plaintiffs' motion (*see Moore*, 55 AD3d at 805). We therefore reverse the order, grant plaintiffs' motion, vacate the order entered September 24, 2024 insofar as it granted that part of defendant's motion seeking to dismiss the complaint against

him, and reinstate the complaint against him.

All concur except OGDEN and GREENWOOD, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent and would affirm the order inasmuch as we conclude that Supreme Court did not abuse its discretion in denying plaintiffs' motion to vacate an order granting the motion of Michael A. Taylor (defendant), insofar as it sought summary judgment dismissing the complaint and all cross-claims against him, upon plaintiffs' failure to submit timely opposition papers or appear for oral argument on the return date of the motion. Although we agree with the majority's recitation of the law governing the CPLR 5015 (a) (1) motion to vacate, in our view, the court did not err in determining that plaintiffs failed to establish a reasonable excuse for the default (*see Fremming v Niedzialowski*, 93 AD3d 1336, 1336 [4th Dept 2012]; *see generally Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]).

In their motion, plaintiffs set forth law office failure as the reason for the default (*see* CPLR 2005). " '[W]hile CPLR 2005 allows courts to excuse a default due to law office failure, it was not the Legislature's intent to routinely excuse such defaults, and mere neglect will not be accepted as a reasonable excuse' " (*Stonewell Bodies & Mach., Inc. v All Area Fire & Rescue Apparatus Sales, LLC*, 213 AD3d 1237, 1238 [4th Dept 2023]; *see Wells Fargo Bank, N.A. v Eliacin*, 206 AD3d 950, 952 [2d Dept 2022]). A claim of law office failure must be supported by a detailed and credible explanation of the default; conclusory and unsubstantiated allegations of law office failure are insufficient (*see Bank of N.Y. Mellon Trust Co. N.A. v Hsu*, 204 AD3d 874, 876 [2d Dept 2022]; *Brehm v Patton*, 55 AD3d 1362, 1363 [4th Dept 2008]).

Plaintiffs' counsel asserted that they believed that defendant's motion was on submission, but, as the court noted, that would not explain their failure to submit timely opposition papers. To the extent that plaintiffs' counsel had a new explanation for the default during oral argument of their motion, i.e., "a breakdown of communication between . . . three separate aspects of our office," that again addressed only the failure to appear at oral argument of defendant's motion, not the failure to submit timely opposing papers. In any event, the reason constituted only a "vague claim[ ]" and insufficient evidence of the events leading to the default and therefore does not establish a reasonable excuse (*Stonewell Bodies & Mach., Inc.*, 213 AD3d at 1239; *see Brehm*, 55 AD3d at 1363).

Entered: May 1, 2026

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 24-01033

PRESENT: BANNISTER, J.P., MONTOUR, GREENWOOD, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANNISA N. DOUSE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

KELLY C. WOLFORD, ACTING DISTRICT ATTORNEY, CANANDAIGUA (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered April 11, 2024. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting her, upon a jury verdict, of assault in the second degree (Penal Law § 120.05 [2]). In appeal No. 2, defendant appeals from a judgment convicting her, upon the same jury verdict, of endangering the welfare of a child (§ 260.10 [1]). Defendant's conviction stems from a physical altercation she had with her 11-year-old son. We affirm in both appeals.

We reject defendant's contention that County Court erred in denying her request for a missing witness charge with respect to the medical personnel who treated the victim at the hospital on the date of the altercation. A missing witness charge instructs a jury that it may "draw an unfavorable inference based on a party's failure to call a witness who would normally be expected to support that party's version of events" (*People v Savinon*, 100 NY2d 192, 196 [2003]), and is appropriate where: "[1] the uncalled witness is knowledgeable about a material issue upon which evidence is already in the case; . . . [2] the witness would naturally be expected to provide noncumulative testimony favorable to the party who has not called [them], and . . . [3] the witness is available to such party" (*People v Gonzalez*, 68 NY2d 424, 427 [1986]; *see People v Smith*, 33 NY3d 454, 458 [2019]; *Savinon*, 100 NY2d at 197). "[T]estimony is cumulative when it would not have contradicted or added to the existing testimony" (*People v Garcia*, 192 AD3d 1463, 1465 [4th Dept 2021]

[internal quotation marks omitted]; *see also Smith*, 33 NY3d at 461). Although defendant met her initial burden with respect to her request (*see Smith*, 33 NY3d at 460; *see generally People v Kitching*, 78 NY2d 532, 536-537 [1991]; *People v Elmore*, 211 AD3d 1536, 1539 [4th Dept 2022], *lv denied* 42 NY3d 938 [2024]), we conclude that the prosecution established that the testimony of the witnesses in question would have been cumulative (*see People v Carr*, 59 AD3d 945, 946 [4th Dept 2009], *affd* 14 NY3d 808 [2010]; *Elmore*, 211 AD3d at 1539; *cf. Garcia*, 192 AD3d at 1465-1466). Further, we conclude that, the People having met their burden with respect to cumulativeness, defendant did not meet her "ultimate burden to show that the [missing witness] charge would be appropriate" (*Smith*, 33 NY3d at 459)—i.e., "by demonstrating that the witness's testimony would, in fact, be noncumulative" (*People v Khiamdavanh*, 234 AD3d 1353, 1354 [4th Dept 2025], *lv granted* 43 NY3d 1046 [2025]).

Defendant contends that she was deprived of a fair trial by the court permitting the pediatric emergency department doctor and child abuse pediatrician to testify with respect to the cause of the victim's injuries inasmuch as that testimony usurped the function of the jury. We reject that contention. "The admissibility of expert testimony, even when it concerns an ultimate issue to be determined by the jury, is within the sound discretion of the trial court" (*People v Mason*, 281 AD2d 893, 893 [4th Dept 2001], *lv denied* 96 NY2d 785 [2001]; *see People v Cronin*, 60 NY2d 430, 433 [1983]). Expert opinion is proper when it would "help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror" (*People v Nicholson*, 26 NY3d 813, 828 [2016] [internal quotation marks omitted]). Here, the People's expert testified that based upon her training, experience, and education, her evaluation of the victim, and her review of photographs of the victim's injuries, such injuries were consistent with physical abuse and were not consistent with being caused by routine childhood activity. Under these circumstances, we conclude that the court properly determined that the medical expert's testimony regarding her findings was "not within the range of ordinary training or intelligence" (*People v Beckwith*, 289 AD2d 956, 958 [4th Dept 2001] [internal quotation marks omitted]; *see generally People v Valentine*, 48 AD3d 1268, 1270 [4th Dept 2008], *lv denied* 10 NY3d 871 [2008]) and was, in other words, beyond the ken of the average juror (*see People v Seignious*, 114 AD3d 883, 884 [2d Dept 2014], *lv denied* 23 NY3d 967 [2014]).

At sentencing, defendant admitted her prior conviction and did not dispute the relevant period of incarceration listed in the second violent felony offender statement, and thus her contention that she should be resentenced as a first-time felony offender based on the recent Supreme Court decision in *Erlinger v United States* (602 US 821 [2024]) is not preserved for our review (*see People v Hernandez*, 43 NY3d 591, 597 [2025]; *People v Emanuel*, 240 AD3d 1324, 1327 [4th Dept 2025], *lv denied* 44 NY3d 993 [2025]; *People v Lopez-Nunez*, 239 AD3d 1327, 1327-1328 [4th Dept 2025], *lv denied* 44 NY3d 983 [2025]). 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 conclude that the sentences are not unduly harsh or severe.

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

160

KA 24-01034

PRESENT: BANNISTER, J.P., MONTOUR, GREENWOOD, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANNISA N. DOUSE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

KELLY C. WOLFORD, ACTING DISTRICT ATTORNEY, CANANDAIGUA (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered April 18, 2024. The judgment convicted defendant, upon a jury verdict, of endangering the welfare of a child.

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

Same memorandum as in *People v Douse* ([appeal No. 1] — AD3d — [May 1, 2026] [4th Dept 2026]).

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

164

CAF 25-00482

PRESENT: BANNISTER, J.P., MONTOUR, GREENWOOD, NOWAK, AND HANNAH, JJ.

IN THE MATTER OF TRACY L. MOSES,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

INDIA S. MCFARLAND, RESPONDENT-APPELLANT,
AND RODNEY A. RICHARDS, RESPONDENT.

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

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered September 26, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner sole custody and primary residence with respect to the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent-appellant challenges the finding of extraordinary circumstances and the order is affirmed without costs.

Memorandum: On appeal from an order that, inter alia, awarded petitioner, a nonrelative, sole custody and primary residence of the child who is the subject of this proceeding, respondent mother contends that petitioner failed to establish that extraordinary circumstances existed and that it was in the child's best interests for the mother to have sole custody. The Attorney for the Child, however, submitted new information to this Court before oral argument of the appeal indicating that the child no longer resides with petitioner. After oral argument of this appeal, an order was entered upon agreement of the mother and a maternal aunt of the child of joint custody and shared residency of the child. The order on consent "renders moot the [mother's] challenge to [Family C]ourt's finding regarding the child's best interests . . . , but not [her] challenge to the court's finding of extraordinary circumstances" (*Matter of Gorski v Phalen*, 187 AD3d 1670, 1671 [4th Dept 2020]; *see Matter of Turner v Estate of Turner*, 223 AD3d 744, 745 [2d Dept 2024]; *Matter of Durgala v Batrony*, 154 AD3d 1115, 1116-1117 [3d Dept 2017]). We therefore dismiss the appeal except insofar as the mother challenges the finding of extraordinary circumstances (*see Gorski*, 187 AD3d at

1671). For the reasons stated in the decision at Family Court, we conclude that petitioner established that extraordinary circumstances existed in this case.

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

166

CA 25-00073

PRESENT: BANNISTER, J.P., MONTOUR, GREENWOOD, NOWAK, AND HANNAH, JJ.

JARROD W.S. AND MICHELLE A.S., AND
JARROD W.S. AND MICHELLE A.S.,
ON BEHALF OF THEIR INFANT CHILDREN, J.S.
AND O.S., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JORDAN-ELBRIDGE CENTRAL SCHOOL DISTRICT,
ET AL., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

SMITH PARRY, P.L.L.C., JORDAN (JARROD W. SMITH OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (RICHARD L. WEBER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered September 26, 2024. The order, inter alia, granted the motion of defendants to dismiss the amended complaint and dismissed the amended complaint.

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

Memorandum: Plaintiffs, individually and on behalf of their infant children, J.S. and O.S. (infant plaintiffs), commenced this action against defendants Jordan-Elbridge Central School District (School District), the Board of Education of the School District, and numerous employees of the School District, asserting causes of action for, inter alia, negligence stemming from the alleged bullying of J.S. while at the School District. In appeal No. 1, plaintiffs appeal from an order that, inter alia, granted defendants' motion to dismiss the amended complaint for failure to serve a timely notice of claim. In appeal No. 2, plaintiffs appeal from an order denying their motion for leave to reargue their opposition to defendants' motion, for leave to serve a late notice of claim, and for Supreme Court's recusal.

With respect to appeal No. 1, we reject plaintiffs' contention that the court erred in dismissing the amended complaint on the ground that plaintiffs failed to serve a notice of claim within 90 days after the claim arose (*see* Education Law § 3813 [2]; General Municipal Law § 50-e [1] [a]; *see generally Matter of Ficek v Akron Cent. Sch. Dist.*, 144 AD3d 1601, 1601 [4th Dept 2016]). The alleged instances of

bullying occurred from September 2019 until June 2021, but plaintiffs did not serve a notice of claim until April 2023. Contrary to plaintiffs' contention, the letters and emails they sent to the School District did not constitute notices of claim (*see* General Municipal Law § 50-e [2]; *Rosenbaum v City of New York*, 8 NY3d 1, 11-12 [2006]; *Clune v Garden City Union Free School Dist.*, 34 AD3d 618, 619 [2d Dept 2006]).

With respect to appeal No. 2, no appeal lies from an order denying a motion seeking leave to reargue, and thus plaintiffs' appeal from that part of the order denying their motion to that extent must be dismissed (*see Matter of Rochester Genesee Regional Transp. Auth. v Stensrud*, 162 AD3d 1495, 1495 [4th Dept 2018], *lv dismissed* 35 NY3d 950 [2020]; *Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]). Plaintiffs contend in appeal No. 2 that the court abused its discretion in denying their motion to the extent it sought leave to serve a late notice of claim. We agree in part.

In determining whether to grant leave to serve a late notice of claim, " 'the court must consider, inter alia, whether [plaintiffs have] shown a reasonable excuse for the delay, whether [defendants] had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to [defendants]' " (*Diez v Lewiston-Porter Cent. Sch. Dist.*, 140 AD3d 1665, 1665 [4th Dept 2016]; *see Brown v City of Buffalo*, 100 AD3d 1439, 1440 [4th Dept 2012]; *see generally Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 461 [2016], *rearg denied* 29 NY3d 963 [2017]). Although "the presence or absence of any single factor is not determinative, one factor that should be accorded great weight is whether [defendants] received actual knowledge of the facts constituting the claim in a timely manner" (*Matter of Szymkowiak v New York Power Auth.*, 162 AD3d 1652, 1654 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016]). "[A] court's decision to grant or deny a motion to serve a late notice of claim is purely a discretionary one" (*Newcomb*, 28 NY3d at 465 [internal quotation marks omitted]) and, "[w]hile the discretion of Supreme Court [in considering the application] will generally be upheld absent demonstrated abuse[,] . . . such discretion is ultimately reposed in [the Appellate Division]" (*Matter of Dusch v Erie County Med. Ctr.*, 184 AD3d 1168, 1169 [4th Dept 2020] [internal quotation marks omitted]; *see Arnold v Town of Camillus*, 222 AD3d 1372, 1377 [4th Dept 2023]).

Preliminarily, contrary to defendants' assertion, that part of plaintiffs' motion for leave to serve a late notice of claim was not untimely with respect to the infant plaintiffs. A plaintiff seeking to commence a tort action against a school district must do so within one year and 90 days (*see* General Municipal Law § 50-i [1] [c]). A motion seeking leave to serve a late notice of claim "may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled" (*Pierson v City of New York*, 56 NY2d 950, 954

[1982]). "[W[here the time for commencing an action on the claim is tolled under CPLR 208, there will be a concomitant tolling of the time during which late notice of claim may be served" (*Cohen v Pearl Riv. Union Free School Dist.*, 51 NY2d 256, 263 [1980]). Here, plaintiffs sought leave to serve a late notice of claim within one year and 90 days of the infant plaintiffs' 18th birthdays, and thus that part of the motion seeking leave to serve a late notice of claim with respect to infant plaintiffs was not untimely (*see generally Quinn v Wallkill Sch. Dist.*, 215 AD3d 1113, 1115 [3d Dept 2023]).

Although plaintiffs failed to demonstrate a reasonable excuse for failing to serve a timely notice of claim, such failure "is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [defendants]" (*Shaul v Hamburg Cent. Sch. Dist.*, 128 AD3d 1389, 1389 [4th Dept 2015] [internal quotation marks omitted]; *see Matter of Mary Beth B. v West Genesee Cent. Sch. Dist.*, 186 AD3d 979, 980 [4th Dept 2020]; *Matter of Lindstrom v Board of Educ. of Jamestown City School Dist.*, 24 AD3d 1303, 1304 [4th Dept 2005]). Again, it is well settled that actual knowledge of the essential facts constituting the claim is the factor that is accorded "great weight" in determining whether to grant leave to serve a late notice of claim (*Santana v Western Regional Off-Track Betting Corp.*, 2 AD3d 1304, 1304 [4th Dept 2003], *lv denied* 2 NY3d 704 [2004]; *see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 535 [2006]; *Turlington*, 143 AD3d at 1248).

We conclude that the record establishes that defendants "acquired actual knowledge of the essential facts constituting the claim" with respect to J.S. within the 90-day period in which the notice of claim was required to be served (General Municipal Law § 50-e [5]; Education Law § 3813 [2-a]; *see Matter of Polito v North Babylon Sch. Dist.*, 246 AD3d 1098, 1099 [2d Dept 2026]; *Matter of Christopher M. v Boquet Val. Cent. Sch. Dist.*, 200 AD3d 1176, 1177 [3d Dept 2021]; *Ficek*, 144 AD3d at 1602-1603), and defendants do not contend otherwise. Indeed, this is not a situation where defendants were unaware of "the facts underlying the claim" (*Williams*, 6 NY3d at 536; *see Matter of C.B. v Carmel Cent. Sch. Dist.*, 164 AD3d 670, 671 [2d Dept 2018]; *cf. Diez*, 140 AD3d at 1666). Plaintiffs made numerous complaints to the School District through their letters and emails regarding incidents of bullying of J.S. that occurred from 2019 through June 2021. With respect to O.S., however, the record does not establish that she was ever bullied or that defendants were on notice of any alleged incidents involving O.S.

We further conclude that defendants would not be prejudiced by the late notice of claim with respect to J.S. (*see Polito*, 246 AD3d at 1100; *Ficek*, 144 AD3d at 1603; *Matter of Mahan v Board of Educ. of Syracuse City School Dist.*, 269 AD2d 834, 834-835 [4th Dept 2000]) and again, defendants do not make any argument to the contrary.

Based on the foregoing, we modify the order in appeal No. 2 in the exercise of our discretion by granting in part plaintiffs' motion insofar as it sought leave to serve a late notice of claim with

respect to the claims asserted on behalf of J.S. (*see e.g. Arnold*, 222 AD3d at 1380; *Matter of Battaglia v Medina Cent. School Dist.*, 204 AD2d 997, 997-998 [4th Dept 1994]), deeming the notice of claim with respect to those claims timely served nunc pro tunc (*see Terrigino v Village of Brockport*, 88 AD3d 1288, 1288 [4th Dept 2011]), and reinstating the amended complaint with respect to those claims (*see generally Bri-Den Constr. Co. v Board of Educ., Hempstead School Dist.*, 200 AD2d 605, 605 [2d Dept 1994]).

Finally, we reject plaintiffs' contention in appeal No. 2 that the court abused its discretion in denying the motion insofar as it sought recusal (*see Matter of Cellino Law, LLP v Looney Injury Law PLLC*, 219 AD3d 1669, 1669 [4th Dept 2023], *lv denied* 41 NY3d 902 [2024]; *Matter of Allison v Seeley-Sick*, 199 AD3d 1490, 1491 [4th Dept 2021]).

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

167

CA 25-00074

PRESENT: BANNISTER, J.P., MONTOUR, GREENWOOD, NOWAK, AND HANNAH, JJ.

JARROD W.S. AND MICHELLE A.S., AND
JARROD W.S. AND MICHELLE A.S.,
ON BEHALF OF THEIR INFANT CHILDREN, J.S.
AND O.S., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JORDAN-ELBRIDGE CENTRAL SCHOOL DISTRICT,
ET AL., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

SMITH PARRY, P.L.L.C., JORDAN (JARROD W. SMITH OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (RICHARD L. WEBER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered January 8, 2025. The order denied the motion of plaintiffs for leave to reargue, for leave to serve a late notice of claim, and for recusal.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is modified in the exercise of discretion by granting the motion in part insofar as it sought leave to serve a late notice of claim with respect to the claims asserted on behalf of J.S., deeming the notice of claim with respect to those claims timely served nunc pro tunc, and reinstating the amended complaint with respect to those claims, and as modified the order is affirmed without costs.

Same memorandum as in *Jarrod W.S. v Jordan-Elbridge Cent. Sch. Dist.* ([appeal No. 1] — AD3d — [May 1, 2026] [4th Dept 2026]).

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

168

CA 24-01818

PRESENT: BANNISTER, J.P., MONTOUR, GREENWOOD, NOWAK, AND HANNAH, JJ.

LESSIE VILLALBA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF AUBURN, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

GROSS SHUMAN P.C., BUFFALO (D. CHARLES ROBERTS OF COUNSEL), FOR DEFENDANT-APPELLANT.

HUFFMAN LAW FIRM, P.C., AUBURN (JUSTIN T. HUFFMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered October 4, 2024. The order and judgment, inter alia, reserved decision on that part of defendants' motion seeking to dismiss the complaint against defendant City of Auburn on the ground that plaintiff failed to properly serve that defendant.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Supreme Court, Cayuga County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action sounding in negligence, negligent training, and excessive force against, among others, defendant City of Auburn (City). According to plaintiff, during a traffic stop, City police officers dragged plaintiff to the hood of her vehicle and slammed her head into the hood. Plaintiff alleges that she was denied medical treatment at the police station. In lieu of answering, defendants moved to dismiss the complaint. Supreme Court, inter alia, reserved decision on the motion insofar as it was based on the ground that plaintiff failed to properly serve the City and held that a traverse hearing was required, but otherwise denied the motion on the other grounds raised. The City appeals from the order and judgment to the extent that it denied the motion on those other grounds.

The court should have first conducted the traverse hearing and determined the jurisdictional issue before making a determination on the other grounds raised on the motion (*see Elm Mgt. Corp. v Sprung*, 33 AD3d 753, 755 [2d Dept 2006]; *77 Commercial Holding, LLC v Central Plastic, Inc.*, 46 Misc 3d 80, 83 [App Term, 2d Dept, 11th & 13th Jud Dists 2014]). We therefore hold the case, reserve decision, and remit

the matter to Supreme Court to conduct a traverse hearing and thereafter make a determination on the motion.

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

170

CA 24-00242

PRESENT: BANNISTER, J.P., MONTOUR, GREENWOOD, NOWAK, AND HANNAH, JJ.

PETER R. MORGAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF MOHAWK, MOHAWK, NEW YORK
DEFENDANT-RESPONDENT.

PETER R. MORGAN, PLAINTIFF-APPELLANT PRO SE.

BAILEY, JOHNSON & PECK, P.C., ALBANY (RYAN P. BAILEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Mark R. Rose, J.), entered September 28, 2023. The order granted defendant's motion for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action alleging, inter alia, a claim for false arrest after he was arrested for harassment in the second degree. Supreme Court granted defendant's motion for summary judgment dismissing the complaint, and plaintiff appeals. We affirm.

To prevail on a cause of action for false arrest, a "plaintiff must show that: (1) the defendant intended to confine [them], (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged" (*Broughton v State of New York*, 37 NY2d 451, 456 [1975], *cert denied* 423 US 929 [1975]; *see De Lourdes Torres v Jones*, 26 NY3d 742, 759 [2016]; *Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]). The burden is on the defendant to prove legal justification as an affirmative defense (*see Broughton*, 37 NY2d at 458). "The existence of probable cause serves as a legal justification for the arrest and an affirmative defense to the claim" of false arrest (*Martinez*, 97 NY2d at 85; *see Broughton*, 37 NY2d at 458; *Taylor v City of Buffalo*, 229 AD3d 1125, 1127 [4th Dept 2024]; *Hernandez v Denny's Corp.*, 177 AD3d 1372, 1374 [4th Dept 2019]). "[A] conviction [that] survives appeal [is] conclusive evidence of probable cause" (*Broughton*, 37 NY2d at 458).

Plaintiff was convicted of harassment in the second degree (Penal Law § 240.26 [3]), and he did not appeal from the judgment of

conviction. The conviction is conclusive evidence that probable cause existed for the arrest (*see Broughton*, 37 NY2d at 458), and thus the claim for false arrest was properly dismissed (*see Bennett v New York City Hous. Auth.*, 245 AD2d 254, 254 [2d Dept 1997]; *see also Kandekore v Town of Greenburgh*, 243 AD2d 610, 610 [2d Dept 1997], *lv denied* 91 NY2d 810 [1998]; *Hugar v Nigro*, 207 AD2d 954, 955 [4th Dept 1994]).

We have considered plaintiff's remaining contentions and conclude that they do not warrant modification or reversal of the order.

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

199

KA 24-01666

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE SESSION, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, 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 January 26, 2023. The judgment convicted defendant, upon a plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39), defendant contends that he was denied effective assistance of counsel based on his attorney's failure to file an application requesting judicial diversion to a substance abuse treatment program pursuant to CPL 216.05. Even assuming, arguendo, that defendant's contention survives his guilty plea (*see People v Clark*, 191 AD3d 1485, 1486 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]; *People v Glowacki*, 159 AD3d 1585, 1586 [4th Dept 2018], *lv denied* 31 NY3d 1117 [2018]), we reject that contention inasmuch as "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]).

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

209

CA 25-00060

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

IN THE MATTER OF HSBC BANK USA, N.A., FORMERLY KNOWN AS THE MARINE TRUST COMPANY OF BUFFALO, AS TRUSTEE OF THE TRUST UNDER ARTICLE FIRST OF THE TRUST AGREEMENT DATED DECEMBER 29, 1934, TRUSTEE, PETITIONER-RESPONDENT, FOR THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE AND FINAL ACCOUNTS AS TRUSTEE OF TRUST BY MARJORIE KNOX CAMPBELL, GRANTOR.

MEMORANDUM AND ORDER

GRACIA E. CAMPBELL, CLARISSA L. VAIDA AND HEATHER B. BYRNE, RESPONDENTS-APPELLANTS;

BENJAMIN K. CAMPBELL, MELISSA C. ENGLAND, ALEXANDRA F. SECOR, PETER C. FLICKINGER, SHARON KNOX DOUGLAS AND MARJORIE K. DILLON, RESPONDENTS-RESPONDENTS.

LAWRENCE J. KONCELIK, EAST HAMPTON, FOR RESPONDENTS-APPELLANTS.

LIPPES MATHIAS LLP, BUFFALO (COURTNEY DONAHUE TASNER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS BENJAMIN K. CAMPBELL AND MELISSA C. ENGLAND.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS SHARON KNOX DOUGLAS AND MARJORIE K. DILLON.

Appeal from an order and decree (one paper) of the Surrogate's Court, Erie County (Acea M. Mosey, S.), entered November 26, 2024. The order and decree made a final disposition of trust assets.

It is hereby ORDERED that the order and decree so appealed from is unanimously reversed on the law without costs and the matter is remitted to Surrogate's Court, Erie County, for further proceedings in accordance with the following memorandum: Petitioner, HSBC Bank USA, N.A., formerly known as the Marine Trust Company of Buffalo, trustee of the trust of Marjorie Knox Campbell (grantor), commenced this proceeding for the final judicial settlement of the trust account and for construction of the trust to determine how to distribute the remainder of the trust fund to the grantor's 10 grandchildren. The grantor created the trust in December 1934, when she had three children. The trust provides that it is to terminate upon the death of the grantor's first- and third-born children, and its proceeds distributed. The grantor's second-born child was not a measuring life for the termination of the trust. The grantor died in 1971. The

trust terminated in April 2023 when the grantor's first-born child, the final trust-measuring life, died. At that time, all three of the grantor's children were deceased. The grantor's children were survived, collectively, by 10 children, i.e., the grantor's grandchildren. Construing the distribution provision of the trust, Surrogate's Court determined that because the grantor had three children, the trust remainder must be divided into three equal shares, with the children of each pre-deceased child of the grantor taking equal shares of their predeceased parent's one-third share. Three of the grantor's grandchildren, i.e., respondents-appellants (respondents), appeal, and we reverse.

"It is well settled that 'the trust instrument is to be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself' " (*Matter of Chase Manhattan Bank*, 6 NY3d 456, 460 [2006]; *see Golden Gate Yacht Club v Société Nautique de Genève*, 12 NY3d 248, 255 [2009]; *Massey-Hughes v Massey*, 200 AD3d 1684, 1686 [4th Dept 2021]; *Matter of HSBC Bank USA, N.A. [Knox]*, 98 AD3d 300, 314 [4th Dept 2012], *lv dismissed* 20 NY3d 1056 [2013]). If the language of the instrument is ambiguous, a court may resort to extrinsic evidence (*see Massey-Hughes*, 200 AD3d at 1686); otherwise, "the governing instrument reigns supreme" (*HSBC Bank USA, N.A.*, 98 AD3d at 314 [internal quotation marks omitted]).

We agree with respondents that the Surrogate erred in her construction of the operative distribution provision in the trust. That provision states that, upon the death of the final measuring life, "the trust hereby created shall cease and terminate, and the Trustee[ ] shall thereupon transfer and deliver the property then constituting the trust fund unto the then surviving child or children of the Grantor and *the lawful issue then surviving of any deceased child or children of hers*, *in equal shares*, *per stirpes and not per capita*, and if there shall be no such surviving child or children or issue, the said property shall be transferred and delivered to the persons entitled to take as distributees of the Grantor as then determined by the intestate laws of the State of New York, such determination to be made as if the Grantor had died on the date of the termination of the trust" (emphasis added). Inasmuch as the children of the grantor are all deceased, the governing language of that provision is that the trustee shall transfer the remainder of the trust unto "the lawful issue then surviving of any deceased child or children of hers, in equal shares, per stirpes and not per capita." The language of the provision is unambiguous inasmuch as it is clear that only surviving persons can be distributees of the trust proceeds. Inasmuch as the grantor's children are all deceased, the grandchildren are the first generation of surviving members from which the branches of the per stirpes distribution flow (*see* EPTL 1-2.14; *Matter of Fussell*, 34 AD3d 164, 168 [4th Dept 2006]). Thus, the trust proceeds should be distributed to the grantor's grandchildren per stirpes, or one-tenth share, each. We therefore reverse the order and decree and

remit the matter to Surrogate's Court for further proceedings consistent with this decision.

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

210

CA 24-01675

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

IN RE: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION

HEDMAN RESOURCES LIMITED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

OCCIDENTAL CHEMICAL CORPORATION,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

CLYDE & CO US LLP, NEW YORK CITY (PETER J. DINUNZIO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (JOSHUA GLASGOW OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Raymond W. Walter, J.), entered September 12, 2024. The order granted the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action seeking indemnification, contribution, and declaratory relief after it was found liable in an underlying action brought by a former employee of defendant's predecessor in interest. In appeal No. 1, Supreme Court granted defendant's motion to dismiss the complaint and, in appeal No. 2, the court denied plaintiff's motion seeking leave to reargue or renew with respect to the court's order dismissing the complaint.

With respect to appeal No. 1, plaintiff has abandoned the first and second causes of action, seeking indemnification, by not raising any contentions in its brief regarding them (*see Claude Mayo Constr. Co., Inc. v Barclay Damon LLP*, 239 AD3d 1430, 1430 [4th Dept 2025]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). In addition, "there is no necessity for resorting to [a] declaratory judgment" in this action (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931], *rearg denied* 256 NY 681 [1931]). The fourth, fifth, and sixth causes of action were therefore properly dismissed (*see generally Applied Healthcare Research Mgt. v Ibrahim*, 232 AD3d 1312, 1315 [4th Dept 2024]).

When considering a motion to dismiss the complaint pursuant to

CPLR 3211, "the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994], citing CPLR 3026). The court must give "every possible favorable inference" to a plaintiff and accept the allegations contained in the complaint as true (*id.*). In evaluating whether a complaint should be dismissed pursuant to CPLR 3211 (a) (7) in a case where the court has considered evidentiary material in support of or in opposition to the motion, "the criterion is whether the proponent of the pleading has a cause of action, not whether [the proponent] has stated one" (*Leon*, 84 NY2d at 88 [internal quotation marks omitted]). "[B]are legal conclusions and factual claims [that] are flatly contradicted by the evidence [proffered by the moving party] are not presumed to be true on a motion to dismiss for failure to state a cause of action" (*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] [internal quotation marks omitted]; *see also Naegele v Fox*, 206 AD3d 1558, 1559 [4th Dept 2022]; *see generally Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). "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, 142 [2017]).

The court properly dismissed the third cause of action, seeking contribution, pursuant to General Obligations Law § 15-108 (b). A "release given in good faith by the injured person to one tortfeasor . . . relieves [them] from liability to any other person for contribution" (*id.*). Here, the plaintiff in the underlying action gave a release to defendant, which relieved it from liability to plaintiff for contribution (*see id.*; *see generally Rosado v Proctor & Schwartz*, 66 NY2d 21, 24 [1985]). We reject plaintiff's contention that General Obligations Law § 15-108 is inapplicable to the settlement between the plaintiff in the underlying action and defendant, the successor in interest to his former employer (*see Trzaska v Cincinnati, Inc.*, 277 AD2d 1048, 1048-1049 [4th Dept 2000]).

We also reject plaintiff's contention that the settlement was not made in "good faith" (General Obligations Law § 15-108 [b]). "The 'good faith' requirement was imposed to assure that an injured party would not collusively release one wrongdoer for a small amount in return for a promise to co-operate improperly in an attempt to extract from the other wrongdoers more than their equitable share of the damages" (*Matter of Torres v State of New York*, 67 AD2d 814, 814 [4th Dept 1979]). Plaintiff's allegations in the complaint do not constitute bad faith (*see Balkheimer v Spanton*, 103 AD3d 603, 603 [2d Dept 2013]; *see also Kingston Check Cashing Corp. v Nussbaum Yates Berg Klein & Wolpow, LLP*, 218 AD3d 760, 762-763 [2d Dept 2023]; *Arbutina v Bahuleyan*, 159 AD2d 973, 975 [4th Dept 1990]; *SSDW Co. v Feldman-Misthopoulos Assoc.*, 151 AD2d 293, 296 [1st Dept 1989]).

With respect to appeal No. 2, no appeal lies from an order denying a motion seeking leave to reargue, and thus that part of plaintiff's appeal must be dismissed (*see Matter of Rochester Genesee*

Regional Transp. Auth. v Stensrud, 162 AD3d 1495, 1495 [4th Dept 2018], *lv dismissed* 35 NY3d 950 [2020]; *Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]). The court properly denied that part of plaintiff's motion seeking leave to renew. "It is well settled that a motion for leave to renew must be 'based upon new facts not offered on the prior motion that would change the prior determination,' and 'shall contain reasonable justification for the failure to present such facts on the prior motion' " (*Heltz v Barratt*, 115 AD3d 1298, 1299 [4th Dept 2014], *affd* 24 NY3d 1185 [2014]; *see* CPLR 2221 [e] [2], [3]; *Blazynski v A. Gareleck & Sons, Inc.*, 48 AD3d 1168, 1170 [4th Dept 2008], *lv denied* 11 NY3d 825 [2008]). The information submitted by plaintiff "would [not have] change[d] the prior determination" to dismiss the complaint (CPLR 2221 [e] [2]; *see Croisdale v Weed*, 139 AD3d 1363, 1365 [4th Dept 2016]; *Fasolo v Scarafile*, 120 AD3d 929, 931 [4th Dept 2014], *lv denied in part & dismissed in part* 24 NY3d 992 [2014]).

We have considered plaintiff's remaining contentions and conclude that they do not warrant modification or reversal of the orders in appeal Nos. 1 and 2.

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

211

CA 25-00982

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

IN RE: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION

HEDMAN RESOURCES LIMITED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

OCCIDENTAL CHEMICAL CORPORATION, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

CLYDE & CO US LLP, NEW YORK CITY (PETER J. DINUNZIO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (JOSHUA GLASGOW OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Raymond W. Walter, J.), entered April 11, 2025. The order denied the motion of plaintiff seeking leave to renew or reargue with respect to a prior order dismissing the complaint.

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

Same memorandum as in *Hedman Resources Ltd. v Occidental Chem. Corp.* ([appeal No. 1] — AD3d — [May 1, 2026] [4th Dept 2026]).

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

219

KA 15-01962

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE T. MCCULLOUGH, ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (AMY N. WALENDZIAK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered November 18, 2015. The judgment convicted defendant, upon a jury verdict, of murder in the first degree and murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of murder in the second 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 murder in the first degree (Penal Law §§ 20.00, 125.27 [1] [a] [v]; [b]) and murder in the second degree (§§ 20.00, 125.25 [1]). The conviction arises out of defendant's participation in the fatal shooting of the victim, who was a witness and the victim in a pending assault case against defendant.

Defendant's contention that County Court erred when it denied a challenge for cause to prospective juror No. 8 is unpreserved inasmuch as defendant did not join in the challenge for cause to that juror made by codefendant (*see* CPL 470.05 [2]; *People v Gonzalez*, 170 AD3d 558, 558 [1st Dept 2019], *lv denied* 33 NY3d 1031 [2019]; *People v Toledo*, 101 AD3d 571, 571 [1st Dept 2012], *lv denied* 21 NY3d 947 [2013]; *see also People v Buckley*, 75 NY2d 843, 846 [1990]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that the court erred in denying his challenge for cause to prospective juror No. 10 due to that prospective juror's implied bias. There are two types of biases that

subject a prospective juror to a challenge for cause: actual bias and implied bias (*see* CPL 270.20 [1] [b], [c]; *People v Carpenter*, 187 AD3d 1556, 1557 [4th Dept 2020], *lv denied* 36 NY3d 970 [2020]). An actual bias arises where the prospective juror exhibits "a state of mind that is likely to preclude [them] from rendering an impartial verdict based upon the evidence adduced at the trial" (CPL 270.20 [1] [b]; *see People v Nicholas*, 98 NY2d 749, 751 [2002]; *People v Johnson*, 94 NY2d 600, 611 [2000]).

The second type of bias "is referred to colloquially as an 'implied bias' . . . [and it] requires automatic exclusion from jury service regardless of whether the prospective juror declares that the relationship will not affect her ability to be fair and impartial" (*People v Furey*, 18 NY3d 284, 287 [2011]). Unlike an actual bias, an implied bias is discernible not from a prospective juror's statements during voir dire, but instead from the prospective juror's experiences. An implied bias exists where a prospective juror is "related within the sixth degree by consanguinity or affinity to the defendant, or to the person allegedly injured by the crime charged, or to a prospective witness at the trial, or to counsel for the people or for the defendant; or . . . is or was a party adverse to any such person in a civil action; or . . . has complained against or been accused by any such person in a criminal action; or . . . bears some other relationship to any such person of such nature that it is likely to preclude [the prospective juror] from rendering an impartial verdict" (CPL 270.20 [1] [c]; *see Furey*, 18 NY3d at 287; *People v Farley*, 164 AD3d 1633, 1634 [4th Dept 2018]).

In determining whether a relationship is sufficiently close to require disqualification, "[t]rial courts are directed to look at myriad factors surrounding the particular relationship in issue, such as the frequency, recency or currency of the contact, whether it was direct contact, and the nature of the relationship as personal and/or professional . . . or merely a nodding acquaintance" (*People v Cross*, 174 AD3d 1311, 1312 [4th Dept 2019], *lv denied* 34 NY3d 950 [2019] [internal quotation marks omitted]; *see Furey*, 18 NY3d at 287-288; *Farley*, 164 AD3d at 1634-1635).

We conclude that the nature of the relationship between prospective juror No. 10 and the prosecutor was not of such a nature that would likely "preclude [prospective juror No. 10] from rendering an impartial verdict" (CPL 270.20 [1] [c]; *see People v Scott*, 16 NY3d 589, 595 [2011]). The prospective juror and the prosecutor were neighbors for only six months, and there is no indication that they ever socialized as neighbors or anytime afterward. Indeed, it appears that the prospective juror did not recognize the prosecutor until the prosecutor raised the issue himself.

Defendant contends, with respect to the count of murder in the first degree, that the evidence is legally insufficient to support the conviction and the verdict is against the weight of the evidence. We reject those contentions. In reviewing the legal sufficiency of the evidence, where, as here, the defendant contends that their conviction is not supported by legally sufficient evidence, we review the

evidence in the 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]). As relevant here, a defendant "is guilty of murder in the first degree when[,] . . . [w]ith intent to cause the death of another person, [the defendant] causes the death of such person or of a third person; and . . . the intended victim was a witness to a crime committed on a prior occasion and the death was caused for the purpose of preventing the intended victim's testimony in any criminal action or proceeding whether or not such action or proceeding had been commenced" (Penal Law § 125.27 [1] [a] [v]). A defendant's motive to eliminate a person as a witness must be a substantial factor in the murder, even though the defendant may have had mixed motives (*see People v Cahill*, 2 NY3d 14, 57 [2003]). Motive may be inferred from a defendant's conduct and the surrounding circumstances of the crime (*see generally People v Covlin*, 205 AD3d 578, 579-580 [1st Dept 2022], *lv denied* 38 NY3d 1149 [2022]; *People v Rose*, 185 AD3d 1228, 1229 [3d Dept 2020], *lv denied* 35 NY3d 1115 [2020]; *People v Ojeda*, 11 AD3d 258, 258-259 [1st Dept 2004], *lv denied* 4 NY3d 747 [2004]).

Here, the evidence at trial established that there was a pending assault case against defendant involving the victim and the victim was cooperating with the prosecution. There was also an upcoming hearing in that case. The intent to kill the victim, as opposed to injure the victim, was established by evidence that five shots were fired at the victim (*see People v Torres*, 149 AD2d 747, 748 [2d Dept 1989], *lv denied* 74 NY2d 748 [1989]). The record presented no evidence of another motive for the killing, such as robbery; no personal effects or valuables were taken from the victim (*see People v Lau*, 11 AD3d 482, 482-483 [2d Dept 2004], *lv denied* 4 NY3d 765 [2005]). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the People established that defendant's motive to hinder his prosecution for the assault was a substantial factor in the murder (*see Cahill*, 2 NY3d at 57), and the evidence is thus legally sufficient to establish defendant's guilt under Penal Law § 125.27 (1) (a) (v), (b).

Viewing the evidence in light of the elements of murder in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

However, we agree with defendant, and the People concede, that count 2 of the indictment, charging intentional murder in the second degree (Penal Law § 125.25 [1]), must be dismissed as a lesser included offense of murder in the first degree (*see* CPL 300.40 [3] [b]; *People v Beard*, 189 AD3d 2097, 2099 [4th Dept 2020], *lv denied* 36 NY3d 1097 [2021]; *People v Clayton*, 175 AD3d 963, 967 [4th Dept 2019]). We therefore modify the judgment accordingly.

Defendant further contends that the court erred in admitting certain alleged hearsay evidence containing information about codefendant found in a pocket of defendant's coat. We reject that contention. The evidence was not hearsay because it was not offered for its truth (*see People v Ballard*, 236 AD3d 1434, 1435 [4th Dept 2025], *lv denied* 44 NY3d 992 [2025]), but rather to establish a connection between defendant and codefendant (*see generally People v Johnson*, 237 AD2d 971, 972 [4th Dept 1997], *lv denied* 89 NY2d 1095 [1997]; *see People v Boswell*, 167 AD2d 928, 928 [4th Dept 1990], *lv denied* 77 NY2d 876 [1991], *lv dismissed* 81 NY2d 785 [1993]). Contrary to defendant's further contention, we conclude on this record that the court's cautionary instruction, which the jury is presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983]), sufficiently informed the jury that the evidence was not being offered for the truth of its content (*see generally People v Griner*, 178 AD3d 1436, 1436 [4th Dept 2019], *lv denied* 35 NY3d 941 [2020]). Defendant abandoned his related contention that a juror's comment demonstrated that the evidence was being considered for its truth contrary to the court's instruction inasmuch as defendant requested that no further inquiry be made and thus did not create a record or ruling subject to appellate review (*see generally People v Mower*, 97 NY2d 239, 246 [2002]).

Contrary to defendant's further contention, the opinion testimony of the expert medical examiner, based upon, inter alia, her review of autopsy materials, was properly admitted at trial and did not violate defendant's Sixth Amendment right to confrontation (*see People v Ortega*, 40 NY3d 463, 475-476 [2023]). "[T]he Confrontation Clause does not entirely preclude the use of information contained in testimonial autopsy reports," and an expert may offer opinions related to the cause and manner of death if the expert has "used their independent analysis on the primary data," including autopsy photographs, video recordings, and anatomical measurements (*id.*; *People v Belstadt*, 243 AD3d 1313, 1315-1316 [4th Dept 2025], *lv denied* 45 NY3d 935 [2026]); *People v Austin*, 237 AD3d 736, 738 [2d Dept 2025]; *People v Taveras*, 228 AD3d 410, 412 [1st Dept 2024], *lv denied* 42 NY3d 1054 [2024]). Here, the record reflects that the testifying expert, who did not perform or observe the autopsy, reached her conclusions based on an independent review of the proper materials rather than the conclusions of the performing medical examiner (*see Austin*, 237 AD3d at 738; *cf. Ortega*, 40 NY3d at 478).

Furthermore, we reject defendant's contention that the court erred in denying his request for a circumstantial evidence charge. A circumstantial evidence instruction need not be given "where there is both direct and circumstantial evidence of the defendant's guilt" (*People v Hardy*, 26 NY3d 245, 249 [2015]; *see People v Exford*, 234 AD3d 1252, 1254 [4th Dept 2025]), and it is well established that "[d]irect evidence . . . include[s] . . . eyewitness testimony" (*People v James*, 147 AD3d 1211, 1212 [3d Dept 2017], *lv denied* 29 NY3d 1128 [2017]). Here, there was direct evidence of at least one of the elements of the crime, including testimony from witnesses establishing that defendant knew that the victim was a witness in the pending

assault case (*see generally People v Francis*, 206 AD3d 1605, 1606 [4th Dept 2022], *lv denied* 38 NY3d 1133 [2022]). The fact that such testimony did not prove every element of the crime charged is irrelevant to defendant's entitlement to a circumstantial evidence instruction (*see Hardy*, 26 NY3d at 251).

We note that the certificate of conviction incorrectly states that defendant was convicted of murder in the first degree pursuant to Penal Law § 125.27 (1) (E), and it must be amended to reflect that he was convicted of murder in the first degree pursuant to section 125.27 (1) (a) (v), (b).

Entered: May 1, 2026

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 24-02028

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

IN THE MATTER OF TAMRA J. WERNER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KRAIG H. KENNEY, RESPONDENT-RESPONDENT.

SCOTT A. OTIS, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.
(APPEAL NO. 1.)

INCLIMA LAW FIRM, PLLC, ROCHESTER (CHARLES P. INCLIMA OF COUNSEL), FOR PETITIONER-APPELLANT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

JOAN DE R. O'BYRNE, ROCHESTER, MICHAEL STEINBERG, FOR RESPONDENT-RESPONDENT.

Appeals from an order of the Family Court, Monroe County (Stacey Romeo, J.), entered November 7, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, denied the petition for sole custody with respect to the subject child, found petitioner in civil contempt, and imposed a sanction.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the finding of contempt and the imposition of a sanction upon the contempt and as modified the order is affirmed without costs.

Memorandum: Petitioner mother and respondent father are the parents of a child born in 2009. Although the parties had initially agreed to joint custody of the child, they both moved to modify the judgment of divorce, which incorporated the custody agreement. Supreme Court (Kocher, A.J.) ultimately awarded the father sole custody of the child, and we affirmed that order (*Werner v Kenney*, 142 AD3d 1351 [4th Dept 2016]). In the years that followed, the mother filed numerous petitions to modify custody, all of which were denied without a hearing. On appeal from one such order of Family Court (Dennis, J.), we again affirmed (*Matter of Werner v Kenney*, 191 AD3d 1256 [4th Dept 2021]).

The instant appeals arise from the mother's latest petition to modify custody of the child. In appeal No. 1, the mother and the

Attorney for the Child (AFC) appeal from an order of Family Court (Romeo, J.) that, inter alia, denied the mother's petition for sole custody and effectively granted the father's cross-claim for civil contempt. In appeal No. 2, the mother appeals from an order of the same court fining the mother $250 and ordering her to pay the father $18,000 in attorneys' fees as a sanction for civil contempt.

In appeal No. 1, although we agree with the mother and the AFC that the court erred in finding the mother in contempt, we conclude that the court did not err with respect to custody. At the hearing on the petition, the mother introduced in evidence a transcript of ex parte testimony that the child had given in a Family Court Act article 8 proceeding brought by the mother against the father that had been dismissed. In that transcript, the child testified about an argument that he had with his father on March 6, 2023 (March 6 incident). We agree with the mother that the court erred in disregarding that evidence. Although the child's testimony at the article 8 hearing constituted inadmissible hearsay inasmuch as it did not meet the requirements of CPLR 4517 and did not fall under any other exception to the hearsay rule, the father's attorney stated that she had "[n]o objection" to its admission. "[I]n civil cases, inadmissible hearsay admitted without objection may be considered and given [such] probative value as, under the circumstances, it may possess" (*Costor v AT&T Servs., Inc.*, 187 AD3d 1135, 1136-1137 [2d Dept 2020] [internal quotation marks omitted]; *see Matter of Emily M. [Joyce G.]*, 245 AD3d 943, 945 [2d Dept 2026]). The court thus erred in refusing to consider the evidence. We nevertheless conclude that the error is harmless.

The child participated in a *Lincoln* hearing, and the father admitted the facts expressly discussed by the child in the earlier ex parte testimony. During the March 6 incident, the father and the child had a heated argument, with both using profanity and the father, who was several feet away from the child, punching a pillow. The father did not touch or threaten the child. Inasmuch as the facts regarding the March 6 incident were not in dispute and the child was afforded the ability to present his testimony to the court in the *Lincoln* hearing, no substantial right of a party was prejudiced by the court's refusal to consider the child's testimony from the article 8 hearing, and, therefore, reversal is not warranted on that ground (*see* CPLR 2002; *Senycia v Vosseler*, 217 AD3d 1520, 1522 [4th Dept 2023]; *Matter of Beth M. v Susan T.*, 81 AD3d 1396, 1396-1397 [4th Dept 2011]).

The mother further contends that the court erred in refusing to admit additional hearsay statements of the child based on her contention that those statements related to neglect or abuse (*see* Family Ct Act § 1012). We reject that contention. It is true that out-of-court statements of a child, "if corroborated, are admissible in custody and visitation proceedings that are 'based in part upon allegations of abuse or neglect' " (*Matter of Montalbano v Babcock*, 155 AD3d 1636, 1637 [4th Dept 2017], *lv denied* 31 NY3d 912 [2018]; *see* Family Ct Act § 1046 [a] [vi]; *Matter of Cobane v Cobane*, 57 AD3d

1320, 1321 [3d Dept 2008], *lv denied* 12 NY3d 706 [2009]). Here, however, there were no allegations or evidence of neglect or abuse, i.e., no allegations or evidence that the father failed "to exercise a minimum degree of care" (§ 1012 [f] [i]) or abused the child (*see* § 1012 [e]).

The father and his teenage son had some disagreements regarding the child quitting certain activities and refusing to go forward with a religious ceremony, and the father used profanities and punched a pillow. Under the circumstances of this case, the evidence of such conduct by the father does not constitute an allegation of failure to exercise a minimum degree of care or of abuse. Notably, Family Court Act § 1012 (e) requires, in order for there to be a finding of abuse, that any emotional harm to a child be caused either by "physical injury" or by "a substantial risk of physical injury" (§ 1012 [e] [i], [ii]).

We also reject the mother's contention that the court's credibility determinations are not supported by the record. The court had a " 'superior ability to evaluate the credibility of the testifying witnesses' " (*Matter of Cross v Cross*, 235 AD3d 1264, 1266 [4th Dept 2025], *lv denied* 44 NY3d 902 [2025]; *see Matter of Torres v Burchell*, 228 AD3d 1303, 1303-1304 [4th Dept 2024], *lv denied* 42 NY3d 908 [2024]), and we see "no basis to disturb the court's credibility assessments and factual findings" (*Matter of Beman v Hand*, 243 AD3d 1293, 1294 [4th Dept 2025]; *see Matter of Wasicki v Wilber*, 239 AD3d 1487, 1488 [4th Dept 2025]).

Contrary to the contentions of the mother and the AFC, the court's determination to deny the mother's petition seeking sole custody is supported by a sound and substantial basis in the record. "The court's determination in a custody matter is entitled to great deference and will not be disturbed where . . . it is based on a careful weighing of appropriate factors . . . Those factors include: (1) the continuity and stability of the existing custodial arrangement, including the relative fitness of the parents and the length of time the present custodial arrangement has continued; (2) the relative quality of each parent's home environment; (3) each parent's ability to provide for the child's emotional and intellectual development; (4) the parents' relative financial status and ability to provide for the child; (5) the child's wishes; and (6) the need of the child to live with siblings" (*Matter of Krier v Krier*, 178 AD3d 1372, 1373 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Torres v Pfeiffer*, 235 AD3d 1261, 1262 [4th Dept 2025]).

Here, almost all of the relevant custody factors weigh in favor of the father. The only factor favoring the mother is the child's express wishes, but that factor should be discounted considering the significant evidence of parental alienation by the mother, as established in earlier litigation (*see Werner*, 142 AD3d at 1352). The evidence at the most recent hearing confirms that the mother has engaged in an unrelenting campaign of alienation against the father. For example, the mother made numerous unfounded allegations of abuse of the child by the father, inflamed the child's fear that the father

was going to take away the child's dog by taking the child to various shelters to look for the dog, even though the dog remained safely in the father's custody, and by other means encouraged the child's disregard for the father. Indeed, inasmuch as the father never assaulted the child or threatened him with violence, the only explanation supported by the record for the child's refusal to see his father is that the mother alienated him against the father.

"Although the express wishes of [a child] are entitled to great weight, the [c]ourt is . . . not required to abide by the wishes of a child to the exclusion of other factors in the best interests analysis" (*Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018] [internal quotation marks omitted]). The evidence in this case establishes that "the child was so profoundly influenced by his mother" that his position on where he would like to reside was "not entitled to great weight" (*Krier*, 178 AD3d at 1373; *see Matter of Brady J.S. v Darla A.B.*, 208 AD3d 1023, 1026 [4th Dept 2022], *lv denied* 39 NY3d 904 [2022]; *Matter of Marino v Marino*, 90 AD3d 1694, 1695-1696 [4th Dept 2011]).

Moreover, it is well settled that "[a] concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent" (*Marino*, 90 AD3d at 1695). As noted, the record is replete with examples of the mother's prolonged and concerted effort to alienate the child from the father. We conclude that the court's order in appeal No. 1, insofar as it concerns issues of custody, "resulted from a careful weighing of [the] appropriate factors" (*Matter of Fowler v Rothman*, 198 AD3d 1374, 1375 [4th Dept 2021], *lv dismissed* 38 NY3d 995 [2022] [internal quotation marks omitted]) and is supported by a sound and substantial basis in the record and should not be disturbed (*see e.g. Wasicki*, 239 AD3d at 1488; *cf. Matter of Memole v Memole*, 63 AD3d 1324, 1327-1328 [3d Dept 2009]). Based on our determination with respect to custody, we also reject as academic the mother's contention concerning child support.

In appeal Nos. 1 and 2, we conclude that the court erred in holding the mother in contempt and in imposing sanctions for such contempt. Section 756 of the Judiciary Law requires certain notices and warnings to be on the face of a contempt application (*see Rennert v Rennert*, 192 AD3d 1513, 1515 [4th Dept 2021]; *Tuchrello v Tuchrello*, 233 AD2d 917, 917-918 [4th Dept 1996]; *Barreca v Barreca*, 77 AD2d 793, 793 [4th Dept 1980]). "It is well settled that the failure to include the notice or the warning language of Judiciary Law § 756 constitutes a jurisdictional defect" (*Rennert*, 192 AD3d at 1515; *see Barreca*, 77 AD2d at 793). Here, the father first sought civil contempt against the mother in a cross-claim, but that cross-claim was not a proper procedural method for such relief (*see* Judiciary Law § 756). In any event, the cross-claim failed to comply with Judiciary Law § 756 inasmuch as it did not contain the required notice and warning (*see Matter of P&N Tiffany Props. v Williams*, 302 AD2d 466, 466-467 [2d Dept 2003], *lv denied* 100 NY2d 512 [2003]; *Barreca*, 77 AD2d at 793).

On the eve of trial, the father filed an order to show cause with the necessary contempt warnings (*see* Family Ct Act § 156; Judiciary Law §§ 753, 756), but the court did not sign the order to show cause, which was therefore never served upon the mother. Despite the procedural failings, the court, at the end of the hearing, asked the attorneys to address the contempt issues in their summations and found the mother in contempt for failing to comply with the order awarding the father sole custody of the child. We conclude that the court lacked jurisdiction to find the mother in contempt (*see Rennert*, 192 AD3d at 1515; *Barreca*, 77 AD2d at 793).

We thus modify the order in appeal No. 1 by vacating the finding of contempt and the imposition of a sanction upon that contempt and reverse the order in appeal No. 2.

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

226

CAF 25-00301

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

IN THE MATTER OF TAMRA J. WERNER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KRAIG H. KENNEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

INCLIMA LAW FIRM, PLLC, ROCHESTER (CHARLES P. INCLIMA OF COUNSEL), FOR PETITIONER-APPELLANT.

JOAN DE R. O'BYRNE, ROCHESTER, MICHAEL STEINBERG, FOR RESPONDENT-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Stacey Romeo, J.), entered December 17, 2024, in a proceeding pursuant to Family Court Act article 6. The order directed petitioner to pay respondent $18,000 for legal fees and expenses, plus a fine of $250.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the fine and award of legal fees and expenses are vacated.

Same memorandum as in *Matter of Werner v Kenney* ([appeal No. 1] — AD3d — [May 1, 2026] [4th Dept 2026]).

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

263

CA 25-00353

PRESENT: MONTOUR, J.P., OGDEN, GREENWOOD, NOWAK, AND HANNAH, JJ.

THERESA CARBONE, PLAINTIFF-RESPONDENT,

V ORDER

A&D TRANSPORT SERVICES, INC., DEFENDANT-APPELLANT.

BURDEN & HANSEN, LLC, BUFFALO (DONNA L. BURDEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. LAUCELLO, CLINTON, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (James P. McClusky, J.), entered February 7, 2025. The order denied the motion of defendant for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 1 and April 3, 2026,

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

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

293

KA 24-01969

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TINOS MCBRIDE, DEFENDANT-APPELLANT.

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (MERIDETH H. SMITH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered September 11, 2024. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We affirm. 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 Thomas*, 236 AD3d 1357, 1357 [4th Dept 2025]; *People v Odle*, 233 AD3d 1502, 1502 [4th Dept 2024], *lv denied* 43 NY3d 965 [2025]), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

321

CAF 24-01700

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

IN THE MATTER OF ETHAN K. SPRAGUE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ELIZABETH A. YOUNES, RESPONDENT-APPELLANT.

IN THE MATTER OF ELIZABETH A. YOUNES,
PETITIONER-APPELLANT,

V

ETHAN K. SPRAGUE, RESPONDENT-RESPONDENT.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Allegany County (Emily Vella, R.), entered September 17, 2024, in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, dismissed the petition of respondent-petitioner seeking permission to relocate to Arkansas with the parties' child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, respondent-petitioner's petition is reinstated, and the matter is remitted to Family Court, Allegany County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondent-petitioner mother appeals from an order insofar as it dismissed her petition seeking permission to relocate to Arkansas with the parties' child. The mother contends that Family Court's determination that relocation is not in the child's best interests lacks a sound and substantial basis in the record. The Attorney for the Child has submitted new information to this Court indicating that the mother married her fiancé, who resides in Arkansas, and that petitioner-respondent father has not exercised any visitation with the child for the past 16 months. This Court may "take notice of . . . new facts and allegations to the extent they indicate that the record before us is no longer sufficient for determining" whether relocation is in the child's best interests (*Matter of Allen v Courtney*, 224 AD3d 1346, 1347 [4th Dept 2024] [internal quotation marks omitted]; *see Matter of Michael B.*, 80 NY2d

299, 318 [1992]; *see also Matter of Morris v Smith*, 244 AD3d 1741, 1744 [4th Dept 2025]). In light of the new information, we reverse the order insofar as appealed from and reinstate the mother's petition, and we remit the matter to Family Court for an expedited hearing and, thereafter, a new determination of whether, considering the best interests of the child, the mother should be permitted to relocate with the child (*see Allen*, 224 AD3d at 1347; *Matter of Kennedy v Kennedy*, 107 AD3d 1625, 1626 [4th Dept 2013]).

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

325

CAF 25-01788

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

IN THE MATTER OF BABY A. AND BABY B.

MARY B.L. AND ROBERT A.L.,
PETITIONERS-RESPONDENTS;

MEMORANDUM AND ORDER

ISABELLA F., RESPONDENT-RESPONDENT.

MARY HOPE BENEDICT, ESQ., ATTORNEY FOR THE CHILDREN, APPELLANT.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR PETITIONER-RESPONDENT MARY B.L.

JON M. STERN, ROCHESTER, FOR PETITIONER-RESPONDENT ROBERT A.L.

KATHARINE F. WOODS, ROCHESTER, FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered October 20, 2025, in a proceeding pursuant to Family Court Act article 5-C. The order and judgment, inter alia, adjudged that petitioners are the only legal parents of the subject children and directed that custody of the subject children be transferred to petitioners.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Steuben County, for further proceedings in accordance with the following memorandum: In February 2023, petitioners Mary B.L. (Mary) and Robert A.L. (Robert) purportedly executed a surrogacy agreement with respondent Isabella F. (Surrogate) to carry to term two embryos, Baby A and Baby B. Baby A and Baby B were expected to be born on or about November 26, 2023. In August 2023, petitioners petitioned for a judgment of parentage pursuant to article 5-C of the Family Court Act (*see* Family Ct Act § 581-203). Family Court (Watches, J.), found that the petition and accompanying documents, including the surrogacy agreement, met the requirements of the statute and granted the petition, issuing an order and judgment of parentage (2023 judgment of parentage) declaring, among other things, that upon the birth of Baby A and Baby B, petitioners would be the only legal parents of the children (*see* § 581-203 [c] [1-4]; [d] [1]).

Shortly thereafter, the attorney representing petitioners learned

that Robert had not signed the surrogacy agreement and that he was altogether unaware of the existence of the surrogacy agreement and the parentage proceeding. Petitioners' attorney notified the court and sought to withdraw from her representation of petitioners in the matter. The court (Roche, J.), acting sua sponte, entered an order (rescission order) that, inter alia, rescinded the 2023 judgment of parentage in its entirety, directed that custody of Baby A and Baby B not be transferred to petitioners upon their birth, added the Steuben County Department of Social Services (DSS) to the matter as an interested party, and assigned an Attorney for the Children (AFC).

Mary, Robert, and the Surrogate executed a new surrogacy agreement. Baby A and Baby B were born shortly thereafter. The children were placed in the care of DSS and then placed with a foster family, with whom they have continued to reside for over two years.

In April 2025, Robert moved to vacate the rescission order, asserting, among other things, that the order was entered sua sponte by the court without a hearing, application, or notice and solely on the basis of an ex parte conversation with petitioners' former attorney. The court (McCarthy, A.J.), granted the motion but noted that vacating the rescission order was not dispositive of all the issues involving the children.

The AFC subsequently moved to vacate the 2023 judgment of parentage—which was effectively revived upon the vacatur of the rescission order—and to dismiss the parentage petition on the ground that the documentary evidence established as a matter of law that the statutory requirements of Family Court Act article 5-C were not met. The court denied that part of the AFC's motion for summary judgment dismissing the parentage petition and reserved decision, pending a hearing, on that part of the motion seeking vacatur of the 2023 judgment of parentage. Prior to the date of the scheduled hearing on the parentage petition, however, the court, over the objection of the AFC, granted the parties' request to submit affidavits in lieu of holding the hearing. Upon its consideration of the issues raised by the parties and the AFC in their affidavits, the court held that, because the intentions of the parties to the surrogacy agreement were not in dispute, the best interests of the children did not need to be considered. As relevant here, the court thus vacated the 2023 judgment of parentage and ordered that a new order and judgment of parentage be issued declaring petitioners to be the legal parents of Baby A and Baby B. The AFC appeals from the ensuing order and judgment of parentage (2025 judgment of parentage), which, inter alia, declared that petitioners are the only legal parents of Baby A and Baby B and ordered the immediate transfer of the children to petitioners' custody. This Court granted a stay of the 2025 judgment of parentage pending this expedited appeal.

Preliminarily, we reject petitioners' assertion that the appeal must be dismissed. Petitioners argue that the AFC cannot maintain the appeal on behalf of the children, under the circumstances of the case, because petitioners and the Surrogate are the only necessary parties to the proceeding and are in agreement that petitioners are entitled

to be the legal parents of Baby A and Baby B. Contrary to petitioners' suggestion, we conclude that a proceeding pursuant to Family Court Act article 5-C is akin to a paternity proceeding, not a custody proceeding, inasmuch as the proceeding is not intended to determine custody between the children's legal parents but is instead the means by which parentage is legally established in the first place (*see* Family Ct Act § 581-101). As in a paternity proceeding, which may be commenced by a child (§ 522) and in which an AFC may appeal on behalf of the child (*see generally Matter of White v Wilcox*, 109 AD3d 1145, 1146 [4th Dept 2013], *lv dismissed in part & denied in part* 22 NY3d 1085, 1086 [2014]), a child or the child's representative may commence a parentage proceeding pursuant to a surrogacy agreement (*see* § 581-201 [c] [1], [6]). Moreover, although the AFC is not among the statutorily defined "necessary parties" to a proceeding for a judgment of parentage of a child conceived pursuant to a surrogacy agreement (§ 581-203 [b]), we note that the appointment of an AFC will be unnecessary in most proceedings inasmuch as the surrogacy agreement, if done properly, will meet the statutory requirements and will be enforceable, permitting the court to issue a judgment of parentage (*see generally* §§ 581-203 [c], [d]; 581-403). However, where, as here, the surrogacy agreement does not meet the statutory requirements to be enforceable, the best interests of the child become relevant to the parentage determination (*see* § 581-407), and the court is empowered to appoint an AFC to help protect the child's interests (*see* § 241). We conclude that the AFC has the authority to bring this appeal as part of that representation.

The AFC contends that the court erred in refusing to hold a hearing and in failing to consider the best interests of the children in making its parentage determination. We agree. Family Court Act § 581-407 provides that if the surrogacy agreement "does not meet the material requirements of [article 5-C], the agreement is not enforceable and the court shall determine parentage based on the intent of the parties, taking into account the best interests of the child."

Here, there is no real dispute that neither surrogacy agreement meets the material requirements of Family Court Act article 5-C. The original surrogacy agreement is unenforceable because it was not signed by Robert (*see* Family Ct Act § 581-403 [a] [1]; [d]; *see also* § 581-402 [b] [3]). The second agreement is unenforceable because it was not executed prior to "the commencement of medical procedures in furtherance of embryo transfer" (§ 581-403 [b]). Thus, the court was required to determine parentage "based on the intent of the parties, taking into account the best interests of the child[ren]" (§ 581-407).

Here, the court considered the intentions of the parties and determined that the intent weighed heavily and exclusively in favor of Mary and Robert. That determination is not contested by the AFC on appeal. Indeed, all three parties to the second surrogacy agreement—Mary, Robert and the Surrogate—agree that their intent was for Mary and Robert to be the children's parents, and none of them contemplated anyone else becoming a parent. We agree with the AFC, however, that on this record the court failed to give due

consideration to the best interests of the children as required by the statute (*see* Family Ct Act § 581-407; *see also* § 581-701; *Matter of Anonymous*, 85 Misc 3d 676, 677 [Sup Ct, NY County 2024]). We therefore reverse the 2025 judgment of parentage, and we remit the matter to Family Court to hold an immediate hearing at which the court, in making its parentage determination, must consider evidence of the intent of the parties, taking into account evidence pertaining to the best interests of the children.

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

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

344

KAH 25-00307

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
MARKEEF ROYAL, PETITIONER-APPELLANT,

V ORDER

K. MCCARTHY, SUPERINTENDENT, ELMIRA CORRECTIONAL
FACILITY, RESPONDENT-RESPONDENT.

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

Appeal from a judgment (denominated order) of the Monroe County Court (Douglas A. Randall, J.), entered November 22, 2024, in a habeas corpus proceeding. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see People v Royal*, — AD3d — [Apr. 24, 2026] [4th Dept 2026]).

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

346

CAF 25-01085

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

IN THE MATTER OF CARL MARTIN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHELSEA MARTIN, RESPONDENT-RESPONDENT.

THOMAS L. PELYCH, HORNELL, FOR PETITIONER-APPELLANT.

VERA A. VENKOVA, WILLIAMSVILLE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Wyoming County (Keith D. Kibler, J.), entered May 23, 2025, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, set out the parenting time for the parties with the children.

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

Memorandum: We conclude that petitioner father's appeal in this Family Court Act article 6 custody modification proceeding must be dismissed. Inasmuch as the father received the substantive relief requested in his petition for modification of a prior custody order, including the equal parenting time he specified, the father is not an aggrieved party (*see* CPLR 5511; *Matter of Jefferson County Dept. of Social Servs. v Mark L.O.*, 12 AD3d 1037, 1038 [4th Dept 2004], *lv dismissed* 4 NY3d 794 [2005]; *see also Matter of Cooper v Cooper*, 74 AD3d 1868, 1869 [4th Dept 2010]).

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court

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

357

KA 23-00084

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON TALLEY, ALSO KNOWN AS SPREADY DEMON, DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (APRIL J. ORLOWSKI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered December 21, 2022. The judgment convicted defendant upon a nonjury verdict of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of assault in the second degree (Penal Law § 120.05 [2]), arising out of an incident where, among other things, he repeatedly hit the victim in the head and lip with an air gun. We affirm.

Defendant contends that the verdict is against the weight of the evidence because the People failed to establish that the victim suffered a physical injury. We reject that contention. Physical injury is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]). On appeal, the People do not contest that the victim did not suffer impairment of physical condition but contend that the evidence established that she experienced substantial pain. We agree. "Of course 'substantial pain' cannot be defined precisely, but it can be said that it is more than slight or trivial pain. Pain need not, however, be severe or intense to be substantial" (*People v Chiddick*, 8 NY3d 445, 447 [2007]; *see People v Westbrooks*, 213 AD3d 1274, 1275 [4th Dept 2023], *lv denied* 39 NY3d 1144 [2023]). "Whether the 'substantial pain' necessary to establish an assault charge has been proved is generally a question for the trier of fact" (*People v Rojas*, 61 NY2d 726, 727 [1984]). "Factors relevant to an assessment of substantial pain include the nature of the injury, viewed objectively, the victim's subjective description of the injury and [their] pain, whether the victim sought medical treatment, and the

motive of the offender" (*People v Haynes*, 104 AD3d 1142, 1143 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]).

Here, the evidence at trial established that defendant hit the victim in the head with a gun multiple times, causing her to sustain "goose eggs" on her head and a lip laceration. The victim's testimony established that her "pain was not trivial" (*Chiddick*, 8 NY3d at 447). She ranked the pain from her lip as being 9.5 out of 10 and the pain from her head as ranging from 7 or 8 to 9 out of 10. Indeed, being hit in the head with a gun is "an experience that would normally be expected to bring with it more than a little pain" (*id.*; *see generally People v Soto*, 242 AD3d 1613, 1614 [4th Dept 2025], *lv denied* 44 NY3d 1068 [2026]). Additionally, the victim sought medical attention after the incident. Medical professionals conducted a CAT scan and recommended that the victim have stitches to repair her lip laceration. The victim's refusal of stitches does not negate a finding that defendant inflicted substantial pain when he repeatedly hit her with the gun (*see generally People v Guidice*, 83 NY2d 630, 636 [1994]; *People v Kraatz*, 147 AD3d 1556, 1557 [4th Dept 2017]). Moreover, that defendant repeatedly hit the victim in the head with a hard metal object like a gun established that defendant's motive was to inflict pain. Thus, viewing the evidence in light of the elements of the crime of assault in the second degree in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to whether the victim sustained a physical injury (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, it cannot be said that the factfinder "failed to give the evidence the weight it should be accorded" (*id.*).

We also reject defendant's contention that defense counsel was ineffective in failing to make a motion for a trial order of dismissal with respect to the count in the indictment charging defendant with assault in the second degree inasmuch as, for the reasons outlined above (*see generally People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]), such a motion would have little or no chance of success (*see People v Hills*, 234 AD3d 1311, 1312 [4th Dept 2025], *lv denied* 43 NY3d 963 [2025]; *People v Lostumbo*, 182 AD3d 1007, 1010 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: May 1, 2026

Ann Dillon Flynn
Clerk of the Court