



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

DECISIONS FILED

JUNE 6, 2025

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. NANCY E. SMITH

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED JUNE 6, 2025

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\_\_\_\_\_ 569 CA 24 00852 RUPERT PAGE V CLARK L. RITTERSBACH, DOING BUSINES  
\_\_\_\_\_ 571 CA 24 00714 ELISE V. HUNT V COUNTY OF ONTARIO

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

**880/23**

**KA 23-00435**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

SAVANNAH D. JACKSON, DEFENDANT-APPELLANT.

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ALEXANDER E. BASINSKI, KENMORE, FOR DEFENDANT-APPELLANT.

LORI P. RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

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Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered July 23, 2018. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, robbery in the second degree, grand larceny in the fourth degree (two counts) and menacing in the second degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant-appellant and the attorneys for the parties on July 30, 2024, and May 2, 2025,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**491/24**

**CA 24-00020**

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

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MARY E. GALANTE, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT G. KARLIS, DEFENDANT,  
COUNTY OF ERIE, ELMA MEADOWS GOLF COURSE  
AND COUNTY OF ERIE PARKS, RECREATION AND FORESTRY,  
DEFENDANTS-APPELLANTS.

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JEREMY C. TOTH, COUNTY ATTORNEY, BUFFALO (ERIN E. MOLISANI OF  
COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

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Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered September 15, 2023. The order, insofar as appealed from, denied in part the cross-motion of defendants-appellants for summary judgment and granted the motion of plaintiff to dismiss two of defendants-appellants' affirmative defenses. The order was reversed insofar as appealed from by order of this Court entered July 26, 2024 (229 AD3d 1311), and the Court of Appeals on April 15, 2025 reversed the order and remitted the case to this Court for consideration of issues raised but not determined on the appeal to this Court (- NY3d -, 2025 NY Slip Op 02178 [2025]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the order so appealed from is unanimously affirmed without costs.

Memorandum: This case is before us upon remittitur from the Court of Appeals (*Katleski v Cazenovia Golf Club, Inc.*, - NY3d -, 2025 NY Slip Op 02178 [2025], *revg Galante v Karlis*, 229 AD3d 1311 [4th Dept 2024]). We previously, inter alia, reversed an order insofar as appealed from, denied in part plaintiff's motion to dismiss certain affirmative defenses asserted by, among others, defendant County of Erie (County), reinstated the 11th affirmative defense, and granted that part of the cross-motion of the County, among others, for summary judgment dismissing the complaint against the County (*Galante*, 229 AD3d at 1311-1312). We determined that the County was entitled to summary judgment dismissing the complaint against it based on its 11th affirmative defense, the doctrine of assumption of the risk (*id.* at

1313-1314). In light of that determination, we did not decide whether the County was also entitled to summary judgment dismissing the complaint against it based on its 15th affirmative defense, sounding in release, or whether the court erred in granting that part of plaintiff's motion seeking summary judgment dismissing that affirmative defense (*id.* at 1314). The Court of Appeals reversed our order, and thus it denied that part of the cross-motion seeking summary judgment dismissing the complaint against the County based on the 11th affirmative defense, reinstated the complaint against the County, and granted that part of plaintiff's motion seeking to dismiss the 11th affirmative defense, and it remitted the matter to this Court "for consideration of the issues raised but not determined" previously (*Katleski*, - NY3d at -, 2025 NY Slip Op 02178, \*3).

Contrary to the County's contention, Supreme Court properly granted that part of the motion seeking to dismiss the County's affirmative defense of release, and denied that part of the cross-motion seeking summary judgment dismissing the complaint against the County based on that affirmative defense (*see Galante*, 229 AD3d at 1315 [Lindley and Ogden, JJ., dissenting]). In the complaint, plaintiff seeks damages resulting from the County's own alleged negligence stemming from, *inter alia*, its design and maintenance of the parking lot in which plaintiff was injured. Although plaintiff signed a release before she used the golf cart in which her injuries occurred, such a release must pass an "exacting standard," *i.e.*, "unless the intention of the parties is expressed in unmistakable language, an exculpatory clause will not be deemed to insulate a party from liability for [its] own negligent acts" (*Gross v Sweet*, 49 NY2d 102, 107 [1979]; *see Barone v St. Joseph's Villa* [appeal No. 2], 255 AD2d 973, 974 [4th Dept 1998]). We conclude that the release here did not include unmistakable language that would insulate the County from liability for its own alleged negligence (*see Barone*, 255 AD2d at 974; *see generally Gross*, 49 NY2d at 107).

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

**654/24**

**KA 24-00235**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM SULLIVAN, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DAVID D. BASSETT OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered August 1, 2019. The judgment convicted defendant, upon his plea of guilty, of unlawful imprisonment in the second degree and criminal possession of a controlled substance in the first degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress all statements made after defendant invoked his right to remain silent is granted, and the matter is remitted to Onondaga County Court for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting him, upon a plea of guilty, of unlawful imprisonment in the second degree (Penal Law § 135.05) and criminal possession of a controlled substance in the first degree (§ 220.21 [1]), defendant contends that County Court erred in refusing to suppress statements he made following his arrest. We agree in part.

Defendant's arrest stemmed from an incident in which he allegedly attacked his wife, restrained her with duct tape, and enclosed her in a box. Following his arrest, defendant was placed in an interview room, where he was interviewed by a detective. Defendant and the detective spoke for over two minutes before the detective administered *Miranda* warnings, and during that time defendant made several incriminating statements (pre-*Miranda* statements). After administering the *Miranda* warnings, the detective asked defendant whether he was willing to answer questions; defendant initially responded "No, sir" but then stated that he was "willing to listen to [the detective's] questions." Defendant also signed a constitutional rights waiver form on which he wrote "No Sir" in response to the question on the form asking whether he was willing to answer the

detective's questions. The interview proceeded for another 15 minutes, during which time defendant made further statements (post-*Miranda* statements) regarding the attack on his wife. Defendant thereafter said that he no longer wanted to talk to the detective, and the detective moved defendant to a holding cell. After police officers executed search warrants at defendant's home and at his alleged stash house, resulting in the recovery of drugs, the detective spoke with defendant in the holding cell, allegedly for the purpose of obtaining further "pedigree" information. During that discussion, defendant made additional statements (holding cell statements), including that he had knowledge of an upcoming shipment of drugs.

Defendant's contention that his pre-*Miranda* statements should have been suppressed is not preserved for our review inasmuch as he did not seek suppression of those statements either in his omnibus motion or at the suppression hearing, both of which focused solely on the validity of defendant's invocation of his right to remain silent and whether the holding cell statements were spontaneous (see *People v Brown*, 89 AD3d 1473, 1475 [4th Dept 2011], *lv denied* 18 NY3d 955 [2012]; *People v Monroe*, 39 AD3d 1276, 1277 [4th Dept 2007], *lv denied* 9 NY3d 867 [2007]; *People v Caballero*, 23 AD3d 1031, 1032 [4th Dept 2005], *lv denied* 6 NY3d 846 [2006]). 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 [3] [c]).

Defendant contends that the court erred in refusing to suppress his post-*Miranda* statements inasmuch as they were made after he invoked his right to remain silent by answering "No, sir" when asked if he would be willing to answer questions after being advised of his *Miranda* rights. We agree. "[I]n order to terminate questioning, the assertion by a defendant of [the] right to remain silent must be unequivocal and unqualified" (*People v Zacher*, 97 AD3d 1101, 1101 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]). Whether a defendant's "request was 'unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request[,] including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant'" (*id.*, quoting *People v Glover*, 87 NY2d 838, 839 [1995]). Here, we conclude that defendant clearly communicated a desire to cease all questioning indefinitely when he responded "No, sir" to the verbal and written inquiries about whether he was willing to answer questions (see *People v Colon*, 185 AD3d 1510, 1512 [4th Dept 2020], *lv denied* 35 NY3d 1093 [2020]).

We further agree with defendant that the court erred in refusing to suppress the holding cell statements, which were also made after defendant unequivocally and unqualifiedly asserted his right to remain silent. Contrary to the People's assertion that the statements were made spontaneously at a time when the detective was seeking "pedigree information," we conclude that the People did not establish that the detective's questions "were reasonably related to the police's administrative concerns" rather than "a disguised attempt at investigatory interrogation" (*People v Wortham*, 37 NY3d 407, 415

[2021], *cert denied* – US –, 143 S Ct 122 [2022]).

We therefore reverse the judgment, vacate the plea, and grant that part of the omnibus motion seeking to suppress all statements made after defendant invoked his right to remain silent, and we remit the matter to County Court for further proceedings on the indictment (see *People v Corey*, 209 AD3d 1306, 1306-1307 [4th Dept 2022]; *People v Hughes*, 199 AD3d 1332, 1335 [4th Dept 2021]).

All concur except OGDEN, J., who dissents in part and votes to reverse in accordance with the following memorandum: I respectfully dissent in part because I believe that, although defendant failed to preserve the issue for our review, the statements defendant made to the detective in the interview room before defendant received *Miranda* warnings should have been suppressed. Those pre-*Miranda* questions to defendant constituted interrogation inasmuch as the inquiry was not limited to questions that were “similar to pedigree questions or those necessary for providing for defendant’s physical needs” (*cf. People v Santiago*, 41 AD3d 1172, 1174 [4th Dept 2007], *lv denied* 9 NY3d 964 [2007] [internal quotation marks omitted]) and the detective asking those questions should have known that his words were reasonably likely to elicit an incriminating response (*cf. People v Man Lee Lo*, 118 AD2d 225, 230 [4th Dept 1986], *lv denied* 68 NY2d 814 [1986]). I further conclude that because the “[c]ustodial interrogation of defendant was continuous, punctuated only by [the] administration of the warnings,” defendant remained under the influence of improper questioning during his post-*Miranda* interrogation (*People v Morton*, 174 AD2d 1019, 1019 [4th Dept 1991], *lv denied* 78 NY2d 1079 [1991]; see generally *People v Bethea*, 67 NY2d 364, 367-368 [1986]). As a result, I, unlike the majority, would suppress all statements made by defendant while he was in the interview room.

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

**667/24**

**CA 23-01999**

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

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MANUFACTURERS AND TRADERS TRUST COMPANY,  
PLAINTIFF,

V

ORDER

VAN DEWATER & VAN DEWATER, LLP, ET AL.,  
DEFENDANTS.

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VAN DEWATER & VAN DEWATER, LLP, JEFFREY S.  
BATTISTONI, ESQ., AND DANIELLE E. STRAUCH, ESQ.,  
THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

THE TOWNE LAW FIRM, P.C., AND JAMES T.  
TOWNE, JR., ESQ., THIRD-PARTY DEFENDANTS-APPELLANTS.  
(APPEAL NO. 1.)

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

GORDON REES SCULLY MANSUKHANI, LLP, NEW YORK CITY (MAXINE J. NICHOLAS  
OF COUNSEL), FOR DEFENDANTS AND THIRD-PARTY PLAINTIFFS-RESPONDENTS.

MACKENZIE HUGHES, LLP, SYRACUSE (RYAN EMERY OF COUNSEL), FOR  
PLAINTIFF.

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Appeal from an order of the Supreme Court, Erie County (Gerald J.  
Greenan, III, J.), entered October 12, 2023. The order denied the  
motion of third-party defendants to dismiss the third-party complaint.

Now, upon reading and filing the stipulation of discontinuance  
signed by the attorneys for the parties on April 23, 2025,

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**668/24**

**CA 24-00012**

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

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MANUFACTURERS AND TRADERS TRUST COMPANY,  
PLAINTIFF,

V

ORDER

VAN DEWATER & VAN DEWATER, LLP, ET AL.,  
DEFENDANTS.

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VAN DEWATER & VAN DEWATER, LLP, JEFFREY S.  
BATTISTONI, ESQ., AND DANIELLE E. STRAUCH, ESQ.,  
THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

THE TOWNE LAW FIRM, P.C., AND JAMES T.  
TOWNE, JR., ESQ., THIRD-PARTY DEFENDANTS-APPELLANTS.  
(APPEAL NO. 2.)

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

GORDON REES SCULLY MANSUKHANI, LLP, NEW YORK CITY (MAXINE J. NICHOLAS  
OF COUNSEL), FOR DEFENDANTS AND THIRD-PARTY PLAINTIFFS-RESPONDENTS.

MACKENZIE HUGHES, LLP, SYRACUSE (RYAN EMERY OF COUNSEL), FOR  
PLAINTIFF.

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Appeal from an order of the Supreme Court, Erie County (Gerald J.  
Greenan, III, J.), entered October 12, 2023. The order granted the  
motion of third-party plaintiffs to disqualify third-party defendants  
as counsel for plaintiff.

Now, upon reading and filing the stipulation of discontinuance  
signed by the attorneys for the parties on April 23, 2025,

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**837**

**KA 17-02095**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES BAILEY, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DAVID D. BASSETT OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered April 6, 2017. The judgment convicted defendant upon a jury verdict of course of sexual conduct against a child in the first degree and course of sexual conduct against a child in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [former (a)]) and course of sexual conduct against a child in the second degree (§ 130.80 [1] [b]).

Defendant failed to preserve for our review his contentions that County Court should have suppressed as involuntary the admissions he made to the police inasmuch as he made them in order to get food or drugs (*see People v Hildreth*, 199 AD3d 1366, 1368 [4th Dept 2021], *lv denied* 37 NY3d 1161 [2022]); that the court improperly admitted the testimony of an expert with respect to child sexual abuse accommodation syndrome (*see* CPL 470.05 [2]; *People v Goupil*, 104 AD3d 1215, 1216 [4th Dept 2013], *lv denied* 21 NY3d 943 [2013]; *see also People v LoMaglio*, 124 AD3d 1414, 1416 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]); and that the court erred in admitting improper bolstering testimony (*see* CPL 470.05 [2]; *People v Cotton*, 120 AD3d 1564, 1566 [4th Dept 2014], *lv denied* 27 NY3d 963 [2016]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see generally* CPL 470.15 [6] [a]).

We reject defendant's contention that the court erred in

permitting the People to introduce certain *Molineux* evidence. The court properly concluded that the evidence “provided necessary background information on the nature of the relationship and placed the charged conduct in context” (*People v Torres*, 217 AD3d 1585, 1585 [4th Dept 2023], *lv denied* 40 NY3d 999 [2023] [internal quotation marks omitted]; see *People v Washington*, 122 AD3d 1406, 1408 [4th Dept 2014], *lv denied* 25 NY3d 1173 [2015]) and that it was relevant to establish the frequency, ongoing nature, and escalation of the abuse (see *People v Workman*, 56 AD3d 1155, 1156-1157 [4th Dept 2008], *lv denied* 12 NY3d 789 [2009]). The probative value of the evidence was not outweighed by its prejudicial effect, and the court’s limiting instruction minimized any prejudice to defendant (see *Torres*, 217 AD3d at 1586; *Washington*, 122 AD3d at 1408).

By failing to object to the court’s instructions to the jury, defendant failed to preserve for our review his contention that the court improperly charged the jury with a theory not included in the bill of particulars (see *People v Abdullah*, 194 AD3d 1346, 1347 [4th Dept 2021], *lv denied* 37 NY3d 990 [2021]).

We reject defendant’s contention that the conviction is not supported by legally sufficient evidence establishing that defendant engaged in the statutory number of acts of sexual conduct against the child and that the sexual conduct occurred for a three-month period after November 2003 (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). To the extent that defendant on appeal also challenges the legal sufficiency of the evidence on grounds not raised in his motion to dismiss, those contentions are unpreserved (see *People v Gray*, 86 NY2d 10, 19 [1995]; see also *People v Riley*, 20 NY3d 980, 981 [2012]; see generally CPL 470.05 [2]), although we note that “we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant’s challenge regarding the weight of the evidence” (*People v Turner*, 197 AD3d 997, 998 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021] [internal quotation marks omitted]). Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that the jurors “failed to give the evidence the weight it should be accorded” (*People v Albert*, 129 AD3d 1652, 1653 [4th Dept 2015], *lv denied* 27 NY3d 990 [2016]). And any inconsistencies in the testimony of the witnesses merely presented credibility issues for the jury to resolve (see *People v Cerroni*, 225 AD3d 1117, 1120 [4th Dept 2024], *lv denied* 41 NY3d 1017 [2024]; *People v Watts*, 218 AD3d 1171, 1173-1174 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]; *People v Woolson*, 122 AD3d 1353, 1355 [4th Dept 2014], *lv denied* 25 NY3d 1078 [2015]).

Defendant’s contention that he was deprived of a fair trial by prosecutorial misconduct is not preserved for our review because defendant failed to object to any of the instances of alleged misconduct (see CPL 470.05 [2]; *People v Heverly*, 230 AD3d 1534, 1537

[4th Dept 2024], *lv denied* 42 NY3d 1053 [2024]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see generally CPL 470.15 [6] [a]).

We reject defendant's further contention that he was denied effective assistance of counsel. Defendant failed to demonstrate that defense counsel was ineffective in failing to seek suppression of defendant's admissions inasmuch as any such motion would have had little or no chance of success (see *People v Garcia*, 148 AD3d 1559, 1561 [4th Dept 2017], *lv denied* 30 NY3d 980 [2017]; see generally *People v Herman*, 217 AD3d 1469, 1470 [4th Dept 2023], *lv denied* 40 NY3d 997 [2023]). Defendant also failed to demonstrate the absence of a strategic or other legitimate explanation for defense counsel's decision to base the summation on the victim's written statement and her decision to not use the victim's prior inconsistent statements (see generally *People v Wragg*, 26 NY3d 403, 410-411 [2015]; *People v Evans*, 262 AD2d 1022, 1022 [4th Dept 1999], *lv denied* 94 NY2d 822 [1999]). We have examined defendant's remaining allegations of ineffective assistance of counsel and conclude that they lack merit. Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of representation, we conclude that defense counsel provided meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant failed to preserve for our review his contention that, in sentencing him, the court penalized him for exercising his right to a jury trial (see *People v Mohamed*, 224 AD3d 1271, 1271-1272 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]; *People v Ott*, 200 AD3d 1642, 1645 [4th Dept 2021], *lv denied* 38 NY3d 953 [2022], *cert denied* — US —, 143 S Ct 403 [2022]). We reject defendant's contention that the sentence is unduly harsh and severe.

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

**10**

**CA 23-01378**

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

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ECHO FORD, ALSO KNOWN AS HONG JU WANG, AND  
J. MARK FORD, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

FAYEZ CHAHFE, M.D., M.D. CHAHFE MEDICAL PROFESSIONAL  
RECRUITMENT, LLC, TANYA PERKINS-MWANTUALI, M.D.,  
EAST UTICA MEDICAL GROUP, ST. ELIZABETH MEDICAL CENTER,  
DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANTS.

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PORTER LAW GROUP, SYRACUSE (MICHAEL S. PORTER OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (CHARLES E.  
PATTON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS FAYEZ CHAHFE, M.D. AND  
M.D. CHAHFE MEDICAL PROFESSIONAL RECRUITMENT, LLC.

GALE GALE & HUNT, LLC, FAYETTEVILLE (ANDREW R. BORELLI OF COUNSEL),  
FOR DEFENDANTS-RESPONDENTS TANYA PERKINS-MWANTUALI, M.D., EAST UTICA  
MEDICAL GROUP, AND ST. ELIZABETH MEDICAL CENTER.

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Appeal from a judgment of the Supreme Court, Oneida County  
(Gregory R. Gilbert, J.), entered December 27, 2022. The judgment  
dismissed the complaint.

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

Memorandum: Plaintiffs commenced this medical malpractice action  
seeking damages for injuries sustained by plaintiff Echo Ford, also  
known as Hong Ju Wang, from the alleged failure of defendants to  
diagnose her tuberculosis. Plaintiffs appeal from a judgment entered  
upon a jury verdict in favor of defendants-respondents (defendants).  
We affirm.

Plaintiffs contend that Supreme Court erred in denying their  
posttrial motion to set aside the verdict pursuant to CPLR 4404  
because defense counsel engaged in misconduct during the trial,  
warranting a new trial in the interest of justice (see CPLR 4404 [a]).  
We reject that contention. In deciding whether the actions by counsel  
warrant a new trial, this Court has examined whether any improper  
remarks were isolated or " constitute[d] a pattern of behavior  
designed to divert the attention of the jurors from the issues at

hand' " (*Kmiotek v Chaba*, 60 AD3d 1295, 1296 [4th Dept 2009]; see *Stewart v Olean Med. Group, P.C.*, 17 AD3d 1094, 1097 [4th Dept 2005]), and whether the remarks "had any likely effect on the jury's verdict" (*Short v Daloia*, 70 AD3d 1384, 1385 [4th Dept 2010]; see *Shelp v Ratnik*, 218 AD3d 1209, 1210 [4th Dept 2023]; *Bhim v Platz*, 207 AD3d 511, 514 [2d Dept 2022]). Here, plaintiffs failed to object to the majority of the comments at issue and thus failed to preserve for our review their contention with respect to those comments (see *Dailey v Keith*, 306 AD2d 815, 816 [4th Dept 2003], *affd* 1 NY3d 586 [2004]; *Wiepert v Manchester*, 298 AD2d 947, 948 [4th Dept 2002]). With respect to the remaining comments to which plaintiffs objected, we conclude that most of those comments were not improper. However, even assuming, arguendo, that the remaining challenged comments were improper, we conclude that those comments cannot be said to have "divert[ed] the attention of the jurors from the issues at hand" (*Kmiotek*, 60 AD3d at 1296), nor can they be said to have had any likely effect on the jury's verdict (see *Golimowski v Town of Cheektowaga* [appeal No. 2], 184 AD3d 1195, 1197-1198 [4th Dept 2020]; *Wilson v City of New York*, 65 AD3d 906, 908-909 [1st Dept 2009]).

Plaintiffs also contend that the court should have granted their CPLR 4404 motion because it erred in denying plaintiffs' request to instruct the jury regarding defendants' alleged violation of the New York Public Health Law and New York Sanitary Code. However, the court determined that plaintiffs' request was untimely, and we therefore conclude that "by failing to address [a dispositive] basis for the court's decision, plaintiffs 'effectively abandoned' any challenge to the [denial of the motion as it relates to the jury charge]" (*Walton & Willet Stone Block, LLC v City of Oswego Community Dev. Off.*, 206 AD3d 1688, 1689 [4th Dept 2022]; see *Haher v Pelusio*, 156 AD3d 1381, 1382 [4th Dept 2017]; see generally *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

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

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**CAF 23-01395**

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

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IN THE MATTER OF MAXINE L. AND ISHMAEL L.

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ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TAJIONNA P., RESPONDENT-APPELLANT,  
AND ROMEL L., RESPONDENT.

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

MARYANGELA SCALZO, UTICA, FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered June 1, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, continued the placement of the subject children with petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of disposition that, inter alia, continued the subject children's placement with petitioner. The mother's appeal brings up for review the propriety of an earlier order of fact-finding, following a hearing, that, inter alia, adjudged that she neglected Ishmael L. (see CPLR 5501 [a] [1]; Family Ct Act § 1118; *Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1402-1403 [4th Dept 2016]). We affirm. Petitioner established by a preponderance of the evidence that the mental or emotional condition of Ishmael L. was in imminent danger of becoming impaired as a result of the mother's failure to exercise a minimum degree of care (see Family Ct Act §§ 1012 [f] [i]; 1046 [b] [i]). "An imminent danger to the child may result from a respondent's long-standing history of mental illness and noncompliance with treatment" (*Matter of Lyndon S. [Hillary S.]*, 163 AD3d 1432, 1433 [4th Dept 2018] [internal quotation marks omitted]; see *Matter of Jesse DD.*, 223 AD2d 929, 931-932 [3d Dept 1996], *lv denied* 88 NY2d 803 [1996]). "The evidence must establish a causal connection between the parent's condition, and actual or potential harm to the child[ ]" (*Matter of Jesus M. [Jamie M.]*, 118 AD3d 1436, 1437 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014]). "In reviewing a determination of neglect, [this Court] must accord great weight and deference to the determination of Family Court, including its drawing of inferences and assessment of credibility, and . . . should not disturb its determination unless

clearly unsupported by the record" (*Matter of Shaylee R.*, 13 AD3d 1106, 1106 [4th Dept 2004]; see *Matter of Bryan O. [Zabiullah O.]*, 153 AD3d 1641, 1642 [4th Dept 2017]; *Matter of Emily W. [Michael S.-Rebecca S.]*, 150 AD3d 1707, 1709 [4th Dept 2017]).

Here, the evidence at the hearing established that the mother had a history of suicidal thoughts that led to her being admitted to the hospital several times, had a history of failing to follow through on her treatment, and resisted taking her prescribed medication for depression and impulse control disorder (see *Matter of Jahkai S. [Shirley S.]*, 216 AD3d 1432, 1432 [4th Dept 2023]; *Matter of Majerae T. [Crystal T.]*, 74 AD3d 1784, 1785 [4th Dept 2010]). We further note that the evidence of the mother's cognitive disability, when coupled with other aspects of her mental health condition, supports the determination that the mother neglected Ishmael L. (see *Matter of Faith K. [Cindy R.]*, 194 AD3d 1402, 1403 [4th Dept 2021]; *Matter of Joseph MM. [Clifford MM.]*, 91 AD3d 1077, 1079 [3d Dept 2012], lv denied 18 NY3d 809 [2012]; see generally *Matter of Anthony TT. [Philip TT.]*, 80 AD3d 901, 902 [3d Dept 2011], lv denied 17 NY3d 704 [2011]). We do, however, agree with the mother that petitioner failed to establish by a preponderance of the evidence that Ishmael L.'s "physical, mental or emotional condition ha[d] been impaired or [was] in imminent danger of becoming impaired" as a result of the alleged incidents of domestic violence between his parents (*Nicholson v Scoppetta*, 3 NY3d 359, 368 [2004]).

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

**38**

**CA 24-01165**

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

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DAKOTA PREVOST, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ASSOCIATED MATERIALS, LLC, ET AL., DEFENDANTS,  
AND CREEKSIDE RENOVATIONS, LLC, DEFENDANT-RESPONDENT.  
(APPEAL NO. 1.)

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KENNY & KENNY, PLLC, SYRACUSE (HEIDI M.P. HYSELL OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JAMES J. GASCON OF  
COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County  
(Robert E. Antonacci, II, J.), entered January 26, 2024. The order  
granted the motion of defendant Creekside Renovations, LLC for summary  
judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law  
negligence action seeking damages for injuries he sustained when he  
fell from a homeowner's roof while working for C&M Renovations (C&M).  
Defendant Quad-Tech Home Solutions, Inc. (Quad-Tech) entered into a  
contract with the homeowner to construct and frame an addition to the  
home and to perform roofing on the addition and the rest of the home.  
Quad-Tech hired defendant Creekside Renovations, LLC (Creekside) to  
perform the new construction and hired C&M to perform the remaining  
roofing. In appeal No. 1, plaintiff appeals from an order that  
granted Creekside's motion for summary judgment dismissing plaintiff's  
complaint against it on the ground, *inter alia*, that Creekside was not  
a general contractor for the purposes of Labor Law §§ 240 (1) or 241  
(6) and thus could not be held liable for plaintiff's injury.

In appeal No. 2, plaintiff purports to appeal from a "letter  
decision and order" that denied plaintiff's motion for, *inter alia*,  
partial summary judgment on the issue of liability against Creekside  
with respect to Labor Law §§ 240 (1) and 241 (6). At the outset, we  
dismiss the appeal in appeal No. 2. "[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 *Pino v Harnischfeger*, 42 AD3d 980, 982

[4th Dept 2007]; *Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]). Although the letter contains the words "so ordered," it does not meet the essential elements of an order. In particular, it does not "recite the papers used on the motion" (CPLR 2219 [a]).

In appeal No. 1, plaintiff contends that Creekside was a general contractor for the purpose of liability under Labor Law §§ 240 (1) and 241 (6) and not only a prime contractor (see *Walsh v Sweet Assoc.*, 172 AD2d 111, 113 [3d Dept 1991], *lv denied* 79 NY2d 755 [1992]). We reject that contention and affirm. "There is a distinction between a general contractor and a prime contractor for general construction . . . A general contractor will be held liable under [Labor Law §§ 240 (1) and 241 (6)] if it was responsible for coordinating and supervising the entire construction project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors" (*Clifton v Collins*, 202 AD3d 1476, 1477 [4th Dept 2022] [internal quotation marks omitted]; see *Knab v Robertson*, 155 AD3d 1565, 1566 [4th Dept 2017]). A prime contractor, however, has no liability "under Labor Law §§ 240 or 241 for injuries caused to the employees of other contractors with whom they are not in privity of contract," as long as the prime contractor "has not been delegated the authority to oversee and control" those workers' activities (*Giovanniello v E.W. Howell, Co., LLC*, 104 AD3d 812, 813 [2d Dept 2013]; see *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Knab*, 155 AD3d at 1566). Critically, it is the actual authority and responsibility to coordinate, supervise, enforce, and hire that is dispositive - "[t]he mere status or designation of general contractor . . . does not establish liability" (*Kulaszewski v Clinton Disposal Servs.*, 272 AD2d 855, 856 [4th Dept 2000]).

Creekside met its initial burden on its motion by demonstrating that it was a prime contractor for general construction of the home addition, not a general contractor subject to liability pursuant to Labor Law §§ 240 (1) or 241 (6), and had not been delegated authority to oversee and control (see *Clifton*, 202 AD3d at 1477; *Knab*, 155 AD3d at 1566; see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The evidence submitted by Creekside established that it had no control over the work being done by plaintiff and no authority, delegated or otherwise, to coordinate and control the activities of C&M or its employees. Plaintiff's opposing submissions failed to raise a triable issue of fact and instead plaintiff in his affidavit conceded that C&M alone supervised and directed his work.

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

**39**

**CA 24-01166**

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

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DAKOTA PREVOST, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ASSOCIATED MATERIALS, LLC, ET AL., DEFENDANTS,  
AND CREEKSIDE RENOVATIONS, LLC, DEFENDANT-RESPONDENT.  
(APPEAL NO. 2.)

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KENNY & KENNY, PLLC, SYRACUSE (HEIDI M.P. HYSELL OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JAMES J. GASCON OF  
COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from a "letter decision and order" of the Supreme Court,  
Onondaga County (Robert E. Antonacci, II, J.), entered January 26,  
2024. The "letter decision and order" denied plaintiff's motion for,  
inter alia, partial summary judgment.

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

Same memorandum as in *Prevost v Associated Materials, LLC*  
([appeal No. 1] - AD3d - [June 6, 2025] [4th Dept 2025]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**42**

**CA 23-01366**

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

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DENEB PIRRONE, INDIVIDUALLY, ON BEHALF OF  
HIMSELF AND DERIVATIVELY ON BEHALF OF  
NOMINAL DEFENDANT, SERVOTRONICS, INC.,  
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

SERVOTRONICS, INC., SERVOTRONICS BOARD OF DIRECTORS,  
THE ONTARIO KNIFE COMPANY, KENNETH D. TRBOVICH,  
DEFENDANTS-RESPONDENTS,  
AND SERVOTRONICS, INC., NOMINAL DEFENDANT.

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RUPP PFALZGRAF LLC, BUFFALO (ALYSHA M. NAIK OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (ANDREW M. DEBBINS OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS SERVOTRONICS, INC., SERVOTRONICS BOARD OF  
DIRECTORS, AND THE ONTARIO KNIFE COMPANY.

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Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered July 20, 2023. The order denied plaintiff's motion to compel.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and compelling disclosure of Document Nos. 11-22, 29-33, 38-42, 48, 57-59 and 63-65, as numbered in the in camera exhibits, and as modified the order is affirmed without costs.

Memorandum: Supreme Court abused its discretion in denying plaintiff's motion to compel discovery of documents in its entirety. Upon reviewing each of the documents that were in camera exhibits, we conclude that the following documents do not qualify for protection from discovery under the attorney-client privilege, the work product doctrine, or as material prepared in anticipation of litigation: Document Nos. 11-22, 29-33, 38-42, 48, 57-59, and 63-65. We therefore modify the order by granting plaintiff's motion insofar as it seeks disclosure of those items. We have reviewed plaintiff's remaining contention and conclude that it does not warrant further modification or reversal of the order.

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

85

**CA 23-01182**

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

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WT STANLEY HOLDINGS CORPORATION, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

PIAZZA CARPET, LLC, DEFENDANT-RESPONDENT.

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ARTHUR N. BAILEY & ASSOCIATES, JAMESTOWN (KYLE C. DIDONE OF COUNSEL),  
FOR PLAINTIFF-APPELLANT.

WRIGHT CALIMERI, PLLC, JAMESTOWN (JOSEPH M. CALIMERI OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered June 28, 2023. The judgment granted defendant's motion to dismiss the second cause of action and for a declaration.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the second cause of action is reinstated and the declaration is vacated.

Memorandum: Plaintiff commenced this action seeking, inter alia, specific performance of an option to purchase real property pursuant to the parties' lease agreement, and declaratory relief. Defendant filed a pre-answer motion seeking to dismiss the specific performance cause of action based on documentary evidence pursuant to CPLR 3211 (a) (1) and, in effect, judgment in its favor pursuant to CPLR 3211 (a) (7) with respect to the declaratory judgment cause of action. Plaintiff now appeals from a judgment granting defendant's motion and declaring that plaintiff's rights concerning the real property are limited to those as a tenant only. We reverse.

Initially, we agree with plaintiff that Supreme Court erred to the extent that it determined that the second cause of action, for specific performance, should be dismissed pursuant to CPLR 3211 (a) (1). On a motion to dismiss pursuant to CPLR 3211, the court must "liberally construe the complaint . . . , and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion . . . [The court must] also accord plaintiff[ ] the benefit of every possible inference . . . Dismissal under CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144,

152 [2002] [internal quotation marks omitted]). Here, defendant asserted on its motion that it had notified plaintiff that time was of the essence and that, inasmuch as plaintiff failed to timely respond to such notice, it lawfully terminated plaintiff's option to purchase (see generally *Zev v Merman*, 134 AD2d 555, 557 [2d Dept 1987], *affd* 73 NY2d 781 [1988]; *Oregon Mtn. v Soules*, 6 AD3d 1193, 1193 [4th Dept 2004]). However, even assuming, arguendo, that defendant's submissions established that defendant properly notified plaintiff that time was of the essence (see generally *Oregon Mtn.*, 6 AD3d at 1193), we conclude that the documentary evidence failed to "utterly refute[ ]" plaintiff's allegations that, inter alia, it was ready, willing, and able to close on the purchase of the premises, and thus did not "conclusively establish[ ] a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see generally *Ornstein Leyton Realty, LLC v Central Islip Assoc., LLC*, 165 AD3d 683, 685 [2d Dept 2018]; *Liberty Affordable Hous., Inc. v Maple Ct. Apts.*, 125 AD3d 85, 92 [4th Dept 2015]).

We likewise conclude that the declaratory relief requested by defendant should have been denied. On a motion pursuant to CPLR 3211 (a) (7), a court may, where "no questions of fact are presented, . . . reach the merits of a properly pleaded cause of action for a declaratory judgment" and, where appropriate, make a "declaration in the defendant's favor" (*Plaza Dr. Group of CNY, LLC v Town of Sennett*, 115 AD3d 1165, 1166 [4th Dept 2014] [internal quotation marks omitted]; see *Matter of Kerri W.S. v Zucker*, 202 AD3d 143, 153 [4th Dept 2021]). However, where, as here, "factual issues preclude a summary determination of the parties' rights," no declaration should be made, and the case should "continue[ ] on its ordinary course" (*Kerri W.S.*, 202 AD3d at 154-155).

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

**86**

**TP 24-01338**

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

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IN THE MATTER OF SHARON ZAJDEL, PETITIONER,

V

MEMORANDUM AND ORDER

ERIE COUNTY WATER AUTHORITY, JEROME D. SCHAD,  
MICHELLE IANNELLO AND PEGGY LAGREE, RESPONDENTS.

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SHARON ZAJDEL, PETITIONER PRO SE.

BARCLAY DAMON LLP, BUFFALO (JAMES P. DOMAGALSKI OF COUNSEL), FOR  
RESPONDENTS.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Paula L. Feroletto, J.], entered August 14, 2024) to review a determination of respondents. The determination terminated the employment of petitioner.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a hearing pursuant to Civil Service Law § 75, finding her guilty of disciplinary charges and terminating her employment as a confidential legal secretary of respondent Erie County Water Authority (ECWA). She contends, *inter alia*, that the determination is not supported by substantial evidence and that the penalty of termination is disproportionately harsh in light of her years of service at ECWA during which she was not the subject of any discipline.

It is well established that, “[i]n CPLR article 78 proceedings to review determinations of administrative tribunals, the standard of review for the Appellate Divisions . . . is whether there was substantial evidence to support the Hearing Officer’s decision” (*Matter of Wilson v City of White Plains*, 95 NY2d 783, 784-785 [2000]; see CPLR 7803 [4]; *Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001], *rearg denied* 96 NY2d 854 [2001]). Contrary to petitioner’s contention, we conclude that the determination here, which found her guilty of three charges, is supported by substantial evidence (see CPLR 7803 [4]; see generally *Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45

NY2d 176, 179-180 [1978]). Petitioner's admission during the hearing that she emailed the personnel records of her coworkers to her personal email address established that she violated the two ECWA policies at issue with respect to charges two and three. The admission also constitutes substantial evidence supporting the determination with respect to charge one, alleging that petitioner "was found to be using the [ECWA's] electronic records, email and [I]nternet services to transmit the confidential employee files of other [ECWA] employees to [petitioner's] own personal email address."

Next, we conclude that the penalty of termination is not shocking to one's sense of fairness. The evidence at the hearing established that petitioner compromised confidential personnel files of ECWA employees, which included, inter alia, Social Security numbers and health information. Under these circumstances, petitioner's termination "was not so disproportionate to the offenses as to be shocking to one's sense of fairness" (*Matter of Gray v LaFountain*, 38 NY3d 932, 933 [2022]; see *Matter of Oliver v D'Amico*, 151 AD3d 1614, 1617 [4th Dept 2017], lv denied 30 NY3d 913 [2018], rearg denied 31 NY3d 1066 [2018]).

Finally, petitioner contends that she was deprived of due process for several reasons. Initially, petitioner's contention that the Hearing Officer was not impartial is unpreserved for our review (see *Matter of Wales v City of Saratoga Springs*, 200 AD3d 1262, 1263 [3d Dept 2021]; *Matter of Wilson v Fischer*, 124 AD3d 1384, 1385 [4th Dept 2015]). Contrary to petitioner's further contention, we conclude that "[v]alid reasons" supported the decision to close the hearing (*Matter of Birch v County of Madison*, 123 AD3d 1324, 1327 [3d Dept 2014]). We have considered and rejected petitioner's remaining due process challenges.

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

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**CA 24-00251**

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

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KO BAR & GRILL, LLC, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MIDSTATE MUTUAL INSURANCE COMPANY,  
DEFENDANT-APPELLANT.

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RUPP PFALZGRAF LLC, BUFFALO (MATTHEW F. WITHIAM-LEITCH OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

BECKER LAW, BUFFALO (PAUL B. BECKER OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered January 23, 2024. The order, insofar as appealed from, denied the motion of defendant for summary judgment.

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

Memorandum: In this action for breach of contract, plaintiff seeks to recover proceeds under a property insurance policy issued by defendant. Plaintiff alleges that, while the policy was in effect, the property in question—i.e., a building in which plaintiff leased space on the first floor for the operation of a bar—sustained significant damage, and defendant disclaimed coverage. Defendant now appeals from an order that, inter alia, denied its motion for summary judgment dismissing the complaint. We affirm.

Defendant contends, initially, that Supreme Court should have granted its motion because plaintiff did not have an insurable interest in the property. We reject that contention. “[T]o prevent fraud and crime and to prohibit wagering contracts on property in which the insured possesses no interest, the lack of an insurable interest in the property insured renders the property insurance void and unenforceable” (*Etterle v Excelsior Ins. Co. of N.Y.*, 74 AD2d 436, 438 [4th Dept 1980]; see generally *Scarola v Insurance Co. of N. Am.*, 31 NY2d 411, 413 [1972]). An insurable interest in property includes “any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage” (Insurance Law § 3401). “[A] legal or equitable interest in the property insured is not necessary to support an insurable interest . . . Rather, a person has an insurable interest in a property whenever [the person] would profit by or gain some advantage from the

property's continued existence or suffer some loss or disadvantage by its destruction" (*Azzato v Allstate Ins. Co.*, 99 AD3d 643, 649 [2d Dept 2012] [internal quotation marks omitted]; see *Weissman v Galway Constr. Corp.*, 239 AD2d 410, 411 [2d Dept 1997]). Tenants are not excluded from having an insurable interest in leased property and, indeed, "[i]t has been recognized that a lessee or tenant of a premises," such as plaintiff here, "may have an insurable interest in the premises leased, especially where [the lessee or tenant] has agreed to return the premises to the lessor in good condition, or has agreed to keep the premises insured" (*Sigola Mfg. v Dairyland Ins. Co.*, 124 AD2d 654, 654 [2d Dept 1986]; see *Rosalie Estates v Colonia Ins. Co.*, 227 AD2d 335, 336 [1st Dept 1996]). "Great liberality is indulged in determining whether a person has anything at hazard in the subject matter of the insurance, and any interest which would be recognized by a court of law or equity is an insurable interest" (*Scarola*, 31 NY2d at 413 [internal quotation marks omitted]).

Here, we conclude that defendant failed to establish on its motion that plaintiff would not suffer pecuniary or economic loss if the property in question were destroyed (see *Sabharwal v Hyundai Mar. & Fire Ins. Co., Ltd.*, 216 AD3d 1015, 1017 [2d Dept 2023]), and thus it failed to establish, as a matter of law, that plaintiff did not have an insurable interest in the property (see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Contrary to defendant's contention, its assertion that the damage to the property did not affect plaintiff because the bar's interior operations were closed due to the COVID-19 pandemic at the time of the loss is insufficient to establish that plaintiff did not have an insurable interest in the property (see generally *Azzato*, 99 AD3d at 649).

Defendant further contends that, even if plaintiff had an insurable interest in the property, the court should have granted its motion because the insurance policy does not cover the damage to the property. We reject that contention as well. Even assuming, arguendo, that defendant met its initial burden on its motion through the submission of an expert affidavit in which the expert opined that the damage was caused by severe wear and tear that was not a covered loss under the policy (see generally *S & J Props. of Watertown, LLC v Main St. Am. Group*, 206 AD3d 1704, 1705 [4th Dept 2022]), we conclude that plaintiff raised triable issues of fact regarding the cause of damage through the submission of its own expert affidavit (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Plaintiff's expert opined that the damage was the direct result of frozen pipes and water leakage from those pipes, as opposed to simple wear and tear. Thus, the expert opinions conflict on whether the damage was covered under the insurance policy. "[C]onflicting expert opinions may not be resolved on a motion for summary judgment" (*Crutchfield v Jones*, 132 AD3d 1311, 1311 [4th Dept 2015] [internal quotation marks omitted]; see *Lawrence v McClary*, 125 AD3d 1502, 1503 [4th Dept 2015]), and "a classic battle of the experts [should be] left to a jury for resolution" (*Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018] [internal quotation marks omitted]).

Finally, we note that defendant's contention that the court improperly considered plaintiff's surreply is raised for the first time on appeal and thus is not properly before us (see generally *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**125**

**CAF 23-01572**

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

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IN THE MATTER OF SA'RIAH C.-J., CORNELL C.-J.,  
AND CATALAYA J.

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MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,  
PETITIONER-RESPONDENT;

ORDER

JUANDREA C., RESPONDENT.

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TONYA J., INTERVENOR-RESPONDENT-APPELLANT.

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LAW OFFICES OF RANDALL S. CARMEL, JERICHO (RANDALL S. CARMEL OF  
COUNSEL), FOR INTERVENOR-RESPONDENT-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (MARY WHITESIDE OF  
COUNSEL), FOR PETITIONER-RESPONDENT.

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILDREN.

MICHAEL J. CAPUTO, ROCHESTER, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Monroe County (Stacey  
Romeo, J.), entered January 23, 2023, in a proceeding pursuant to  
Social Services Law § 384-b. The order, inter alia, transferred the  
guardianship and custody of the subject children to petitioner.

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

130

**CA 24-00596**

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

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DAVID G. BELLAVIA, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

DEANNA M. KING, FORMERLY KNOWN AS DEANNA M. BELLAVIA,  
DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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HARTER SECREST & EMERY LLP, ROCHESTER (MICHELE R. DIFRANCO OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

J. ADAMS & ASSOCIATES, PLLC, WILLIAMSVILLE (JOAN CASILIO ADAMS OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Genesee County (Diane Y. Devlin, J.), entered October 20, 2023. The order, inter alia, held defendant in contempt.

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

Memorandum: Defendant appeals, in appeal No. 1, from an order that, inter alia, granted those parts of plaintiff's motion by order to show cause seeking to hold defendant in contempt for her willful failure to abide by the terms of, among other things, the parties' judgment of divorce and the parties' written custody, support and property settlement agreement (settlement agreement), which was incorporated but not merged into the judgment of divorce. In appeal No. 2, defendant appeals from an order and judgment that, inter alia, fined her for contempt and awarded counsel fees and costs.

In appeal No. 1, we reject defendant's contention that Supreme Court erred in finding her in contempt for violating the parties' judgment of divorce, the settlement agreement, and certain prior orders of the court. "A finding of civil contempt must be supported by four elements: (1) a lawful court order expressing an unequivocal mandate; (2) reasonable certainty that the order was disobeyed; (3) knowledge of the court's order by the party in contempt; and (4) prejudice to the right of a party to the litigation" (*McCurty v Roberts*, 227 AD3d 1469, 1470 [4th Dept 2024] [internal quotation marks omitted]; see *El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]). The party seeking an order of contempt must establish those elements by clear and convincing evidence (see *McCurty*, 227 AD3d at 1470). The motion is addressed to the sound discretion of the court (see *Matter*

of *Jeanty v Utica Police Dept.*, 217 AD3d 1545, 1546 [4th Dept 2023]; *Burns v Grandjean*, 210 AD3d 1467, 1474 [4th Dept 2022]), and the court's determination thereon should not be disturbed absent an abuse of discretion (see *Matter of McRae v Brown*, 211 AD3d 1523, 1523 [4th Dept 2022]).

Here, there is no dispute that defendant was aware of the provisions in the relevant orders, the judgment of divorce, and the settlement agreement, and that such documents were lawfully issued. We reject defendant's contention that none of her conduct shows that she disobeyed any court order with reasonable certainty and, even if she did, plaintiff suffered no prejudice. Plaintiff established by clear and convincing evidence that defendant violated, inter alia, provisions in the settlement agreement and the relevant orders that prohibited the parties from making disparaging remarks that would have "a reasonable likelihood to prejudice a child towards . . . the other party," restrained defendant from contacting plaintiff's business associates, and prohibited the parties and their attorneys from making public any information or material obtained during discovery in the divorce action and any filings in the action. Plaintiff also established by clear and convincing evidence that he was prejudiced by defendant's contempt inasmuch as her conduct damaged his personal and professional reputation in the community and his relationship with his children (see generally *Matter of Moreno v Elliott*, 155 AD3d 1561, 1562 [4th Dept 2017], *lv dismissed in part & denied in part* 30 NY3d 1098 [2018]). Thus, we conclude that the court did not abuse its discretion in finding defendant in contempt.

We also reject defendant's contention that the finding of contempt against her was precluded by the doctrine of unclean hands. Contrary to defendant's contention, the record evidence does not establish that plaintiff was "guilty of immoral or unconscionable conduct" (*214 Lafayette House LLC v Akasa Holdings, LLC*, 227 AD3d 75, 81 [1st Dept 2024] [internal quotation marks omitted]).

Finally, in appeal No. 2, we see no reason to disturb the court's award of counsel fees and costs (see generally *Bushorr v Bushorr*, 129 AD2d 989, 989 [4th Dept 1987]).

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

**131**

**CA 24-00771**

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

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DAVID G. BELLAVIA, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

DEANNA M. KING, FORMERLY KNOWN AS DEANNA M. BELLAVIA,  
DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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HARTER SECREST & EMERY LLP, ROCHESTER (MICHELE R. DIFRANCO OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

J. ADAMS & ASSOCIATES, PLLC, WILLIAMSVILLE (JOAN CASILIO ADAMS OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order and judgment (one paper) of the Supreme Court, Genesee County (Diane Y. Devlin, J.), entered March 27, 2024. The order and judgment, inter alia, granted plaintiff a money judgment against defendant.

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

Same memorandum as in *Bellavia v King* ([appeal No. 1] – AD3d – [June 6, 2025] [4th Dept 2025]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**133**

**CA 24-00587**

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

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THE GENESEE COUNTY FISH AND GAME  
PROTECTIVE ASSOCIATION, INC.,  
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CAPRI SULLIVAN, ALSO KNOWN AS CAPRI DIX,  
WILLIAM DIX, DEFENDANTS-APPELLANTS,  
AND KAREN VANDENBURG, DEFENDANT.

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LACY KATZEN LLP, ROCHESTER (JOHN M. WELLS OF COUNSEL), FOR  
DEFENDANTS-APPELLANTS.

JOHN F. WHITING, LEROY, FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Genesee County (Diane Y. Devlin, J.), entered March 18, 2024. The order, *inter alia*, granted the motion of plaintiff insofar as it sought summary judgment on the first and third causes of action.

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

Memorandum: Plaintiff, The Genesee County Fish and Game Protective Association, Inc., commenced this action seeking, *inter alia*, a determination that it is the fee title owner of disputed land. Defendants-appellants, Capri Sullivan, also known as Capri Dix (Capri), and William Dix (William) (collectively, defendants), appeal from an order that, among other things, granted plaintiff's motion insofar as it sought summary judgment on its first and third causes of action, seeking relief based on adverse possession, and denied defendants' cross-motion for summary judgment on their first counterclaim, seeking to quiet title, and dismissing the complaint. We affirm.

Plaintiff is a private conservation club that was incorporated in 1909 as a not-for-profit corporation. In addition to its conservation efforts, plaintiff provides its members with recreational opportunities, such as hiking, fishing, camping, and swimming, on its property, which encompasses approximately 200 acres of land and includes a body of water known as Godfrey's Pond. Plaintiff has about 1,550 members, 21 of whom maintain primary, year-round residences on the property. Plaintiff took title to its property by warranty deed in 1932 and, at least as early as that time, a private road existed

leading to Godfrey's Pond. The road, known as Godfrey's Pond Road, has been used and maintained by plaintiff and its members since plaintiff took title to the property. Indeed, Godfrey's Pond Road is the sole roadway leading from the public road, i.e., Griswold Road, to plaintiff's property, and thus the private road provides the only access to the property for plaintiff's members, emergency service vehicles, and delivery services.

Defendants, a married couple, reside across Griswold Road just to the east of its intersection with Godfrey's Pond Road. In December 2015, Capri was granted a remainder interest from her grandmother, defendant Karen VanDenburg (grandmother), in an additional 45-acre parcel that is located south of Griswold Road and abuts the east side of plaintiff's property. Critically, according to the deeds, tax map, and surveys, the boundary line between Capri's parcel and plaintiff's property runs along the center of Godfrey's Pond Road, and therefore the eastern side of the road, i.e., the right-hand lane proceeding north, appears on Capri's side of the boundary line.

For reasons that remain somewhat vague but appear to stem from defendants' perception that some of plaintiff's members and their guests were improperly coming onto defendants' land, a dispute arose between defendants and plaintiff regarding the use and ownership of Godfrey's Pond Road. After further developments and several provocative actions primarily taken by defendants and members of their family, including blocking the eastern half of the road with tree trunks, plaintiff commenced the present action asserting, as relevant on appeal, causes of action for adverse possession and to quiet title by way of a judicial determination that plaintiff is the rightful and legal owner of the entire road. Defendants answered and, among other things, interposed a counterclaim to quiet title to the eastern half of the road (first counterclaim). Following discovery, plaintiff moved for, among other things, summary judgment on its adverse possession and quiet title causes of action. Defendants opposed the motion and cross-moved for, inter alia, summary judgment on their first counterclaim and dismissing the complaint.

Supreme Court issued a written decision in which it concluded that plaintiff met its initial burden on the motion of establishing the elements of adverse possession, as well as an applicable statutory requirement. The court determined that plaintiff had possessed the entirety of Godfrey's Pond Road for decades through its daily use and regular maintenance of the road. Furthermore, reasoning that there was no direct or documentary evidence that defendants or their predecessors in interest had granted permission to plaintiff to use the eastern half of the road, the court rejected defendants' contention that plaintiff had permission to occupy the disputed property. The court determined that defendants failed to raise a triable issue of fact.

As a preliminary matter, we note that the 2008 amendments to RPAPL article 5 do not apply here because, according to the allegations in the complaint and the supporting documentation submitted by plaintiff, title to the disputed property would have

vested in plaintiff before 2008 (see *Rote v Gibbs*, 195 AD3d 1521, 1523 [4th Dept 2021], appeal dismissed 37 NY3d 1106 [2021]; *Perry v Edwards*, 79 AD3d 1629, 1631 [4th Dept 2010]; *Franza v Olin*, 73 AD3d 44, 47 [4th Dept 2010]). The court thus properly applied the pre-amendment statutory requirements and, to the extent that the parties advocate that we apply post-amendment statutory definitions on appeal, we further note that "this Court is not bound by an erroneous concession of counsel or the parties with respect to a legal principle and such 'concession does not . . . relieve us from the performance of our judicial function and does not require us to adopt the proposal urged upon us' " (*Matter of Knavel v West Seneca Cent. Sch. Dist.*, 149 AD3d 1614, 1616 [4th Dept 2017 plurality], quoting *People v Berrios*, 28 NY2d 361, 366-367 [1971]; see *Bartel v Maersk Line, Ltd.*, 215 AD3d 533, 543-544 [1st Dept 2023]; see generally *Kamen v Kemper Fin. Servs., Inc.*, 500 US 90, 99 [1991]).

"Adverse possession, although not a favored method of procuring title, is a recognized one. It is a necessary means of clearing disputed titles and the courts adopt it and enforce it, because, when adverse possession is carefully and fully proven, it is a means of settling disputed titles and this is desirable" (*Belotti v Bickhardt*, 228 NY 296, 308 [1920]; see *Walling v Przybylo*, 7 NY3d 228, 233 [2006]). "Where there has been an actual continued occupation of premises under a claim of title, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely" (RPAPL former 521; see *Estate of Becker v Murtagh*, 19 NY3d 75, 80-81 [2012]). "To establish a claim of adverse possession under the pre-2008 version of the RPAPL, a plaintiff is required to show that possession of the disputed property was: '(1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period' " (*Slacer v Kearney*, 151 AD3d 1602, 1603-1604 [4th Dept 2017], lv denied 30 NY3d 909 [2018], quoting *Walling*, 7 NY3d at 232). "Reduced to its essentials, this means nothing more than that there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period" (*Brand v Prince*, 35 NY2d 634, 636 [1974]; see *Becker*, 19 NY3d at 81). "Because the acquisition of title by adverse possession is not favored under the law, the[ ] elements must be proven by clear and convincing evidence" (*Becker*, 19 NY3d at 81).

Here, we conclude for the following reasons that, contrary to defendants' contention and the dissent's conclusion, the court properly granted plaintiff's motion insofar as it sought summary judgment on the first and third causes of action for a determination that it is the fee title owner of the disputed land based on adverse possession (see *id.* at 77-84; *Slacer*, 151 AD3d at 1602-1605; *Reardon v Broadwell*, 121 AD3d 1546, 1546-1547 [4th Dept 2014]).

Defendants do not dispute on appeal that plaintiff met its burden of establishing by clear and convincing evidence that its use and occupation of the entirety of Godfrey's Pond Road was actual, open and notorious, and continuous for the required period.

Indeed, the record demonstrates that plaintiff has engaged in "acts of dominion and control over the premises that are indicative of . . . actual possession" of the whole road (*Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 161 [1996]; see *Rote*, 195 AD3d at 1524-1525). Plaintiff's submissions establish that, for the better part of a century, plaintiff has paved, widened, patched, repaired, plowed, and otherwise maintained the road on its own or at its expense or by arrangement with third parties. Plaintiff placed a sign at the entrance of the road indicating that plaintiff's property is private, and that sign had been in place for at least 20 years. Additionally, consistent with the affidavits submitted by two of plaintiff's members, Capri herself acknowledged that plaintiff had installed a speed sign on the east side of the road and that the speed sign had been present for decades.

Plaintiff also "satisfied the statutory requirements specifying those acts necessary to establish the common-law requirement of actual possession by demonstrating that the property had been 'usually cultivated or improved' " (*Franzen v Cassarino*, 159 AD2d 950, 951 [4th Dept 1990], quoting RPAPL former 522 [1]). "The requisite character of the acts of improvement sufficient to supply the record owner with notice of an adverse claim will vary with 'the nature and situation of the property and the uses to which it can be applied' . . . and must 'consist of acts such as are usual in the ordinary cultivation and improvement of similar lands by thrifty owners' " (*Ray*, 88 NY2d at 160). Here, not only did plaintiff pave and maintain the entirety of the road, it is undisputed that plaintiff also maintained the area to the east of the road by mowing the grass and trimming the trees and brush to prevent limbs from hanging over that side of the road (see *West Middlebury Baptist Church v Koester*, 50 AD3d 1494, 1495 [4th Dept 2008]; *Golden Hammer Auto Body Corp. v Consolidated Rail Corp.*, 151 AD2d 545, 546 [2d Dept 1989]).

Plaintiff satisfied the open and notorious element inasmuch as the aforementioned acts were "sufficiently visible such that a casual inspection by the owner of the property would reveal the adverse possessor's occupation and use thereof" (*Rote*, 195 AD3d at 1525 [internal quotation marks omitted]). Plaintiff likewise satisfied the continuous possession element inasmuch as its exercise of dominion and control over the entirety of the road during the requisite period was consistent with acts of possession that ordinary owners of like properties would undertake (see *Ray*, 88 NY2d at 159-160).

Consequently, by showing that it paved, repaired, plowed, and maintained the whole roadway for decades and also maintained a strip of land adjacent thereto to ensure clear travel along the road, plaintiff indisputably established by clear and convincing evidence that it had actual possession of the entirety of Godfrey's Pond Road in a manner that was open and notorious and continuous for well over the requisite period (see *Spiegel v Ferraro*, 73 NY2d 622, 627-628 [1989]; *Estate of Clanton v City of New York*, 153 AD3d 787, 788-789 [2d Dept 2017]; *Kappes v Ruscio*, 170 AD2d 743, 743-744 [3d Dept 1991]).

Defendants nonetheless contend, and the dissent agrees, that plaintiff failed to establish by clear and convincing evidence that its possession was exclusive. We reject that contention. "To establish the 'exclusivity' element, the adverse possessor must alone care for or improve the disputed property as if it were [their] own" (*Becker*, 19 NY3d at 83). "The focus is on whether the party claiming title by adverse possession exercised exclusive possession and control of the property. Thus, allowing others to use the property does not necessarily negate 'exclusivity.' When the party claiming adverse possession permits others to use the property, exclusivity exists where the claimant's use of the property is 'separate and exclusive from the general use' " (*id.*). "Indeed, exclusivity is not defeated even if the true owner makes occasional forays onto the property" (1 Warren's Weed New York Real Property § 5.33 [Apr. 2025]; see e.g. *Becker*, 19 NY3d at 83-84; *Robinson v Robinson*, 34 AD3d 975, 977 [3d Dept 2006], *lv denied* 8 NY3d 805 [2007]).

Here, the evidence plaintiff submitted in support of its motion established that plaintiff "alone care[d] for or improve[d] the disputed property as if it were [plaintiff's] own" (*Becker*, 19 NY3d at 83). Plaintiff's submissions showed that it was only plaintiff that had plowed, patched, paved, repaired, and otherwise maintained the entire road for decades, and even the assistance of governmental entities or private contractors was permitted or paid for by plaintiff (see *Rote*, 195 AD3d at 1525-1526). Capri herself acknowledged in her deposition, which was submitted by plaintiff, that she was unaware of any instances in which her predecessors in interest had maintained, paved, plowed, patched, or repaired the road, and that she had no documentation showing any such work. Plaintiff's submissions also established that its possession and use of Godfrey's Pond Road was to the exclusion of the general public (see *Becker*, 19 NY3d at 83). Plaintiff placed a private property sign at the entrance of the road and kept the sign there for at least 20 years; relatedly, one of plaintiff's members averred that, if any unusual individuals entered plaintiff's property, those people were asked to provide proof of membership and were asked to leave if they lacked membership (see 1 Warren's Weed New York Real Property § 5.33 [Apr. 2025]; see also *Children's Magical Garden, Inc. v Norfolk St. Dev., LLC*, 164 AD3d 73, 83 [1st Dept 2018]).

We conclude on this record that defendants' occasional and brief use of all-terrain vehicles (ATVs) on the northern part of Godfrey's Pond Road and their other recreational forays—references to which appear in both plaintiff's moving papers and defendants' opposition papers—are insufficient to raise a triable issue of fact with respect to the exclusivity element. Initially, to the extent that the use of ATVs along the road to enter or exit the 45-acre parcel represents activity engaged in by defendants in the period since Capri obtained an interest in that parcel in December 2015, we note that "evidence relating to defendant[s'] alleged use of the property and other events that occurred after the expiration of the statutory period is not relevant" (*Robinson*, 34 AD3d at 977). Regardless, defendants' brief operation of recreational vehicles on a portion of the road that was designed and paved by plaintiff for standard vehicular

traffic-occurrences that William described as few and far between—"constitutes nothing more than occasional recreational use that does not defeat a showing of exclusivity" (*Bergmann v Spallane*, 129 AD3d 1193, 1196 [3d Dept 2015]; see *Becker*, 19 NY3d at 83; *Robinson*, 34 AD3d at 977).

Oral reports that Capri's great-grandfather, i.e., a predecessor in interest, may have provided free gravel to plaintiff—references to which again appear in both plaintiff's moving papers and defendants' opposition papers—do not raise a material issue of fact regarding the exclusivity element under the circumstances of this case. Plaintiff's safety officer recounted in his deposition a conversation during which reference was made to the great-grandfather having provided gravel for Godfrey's Pond Road, and one of plaintiff's members clarified during his deposition testimony that the great-grandfather "at least twice" gave plaintiff gravel to "buil[d] up the shoulder" of the road, which occurred in the 1950s. Defendants submitted the deposition of a longtime resident on plaintiff's property who had previously served on the executive board, and he testified at one point that the great-grandfather allowed plaintiff to use gravel from his property, free-of-charge, for "patching [the road] here and there." As is evident from the testimony, the only time period provided by any of the witnesses for the great-grandfather's purported provision of gravel for plaintiff's maintenance activities on Godfrey's Pond Road was during the 1950s. Those contributions by the great-grandfather would thus be insufficient to interrupt plaintiff's exclusive maintenance of the road in the subsequent decades through at least 2008 (see *Robinson*, 34 AD3d at 977; *Boeheim v Vanarnum*, 207 AD2d 582, 583 [3d Dept 1994]). Even if the great-grandfather had provided free gravel for repair of the road "here and there" over a longer period of time, we conclude that such occasional contributions to the maintenance of the road are insufficient to raise an issue of fact with respect to the exclusivity of plaintiff's possession, particularly considering that only plaintiff had plowed, patched, paved, repaired, and otherwise maintained the entire road for decades and, in doing so, permitted or paid for assistance by a governmental entity or private contractor (see generally *Bergmann*, 129 AD3d at 1196). Stated differently, the great-grandfather's minor contribution to maintenance materials "was different in scope than [plaintiff's re]construction, maintenance and control of the [road]" over the course of several decades (*Becker*, 19 NY3d at 83).

Defendants further contend, and the dissent again agrees, that plaintiff failed to establish the hostility element. We reject that contention. "A party claiming title by adverse possession 'is not required to show enmity or specific acts of hostility in order to establish the element of hostility' " (*id.* at 81). Instead, that element "is satisfied where an individual asserts a right to the property that is 'adverse to the title owner and also in opposition to the rights of the true owner' " (*id.*, quoting *Walling*, 7 NY3d at 232; see *Golobe v Mielnicki*, — NY3d —, —, 2025 NY Slip Op 01670, \*3 [2025]). "A rebuttable presumption of hostility arises from possession accompanied by the usual acts of ownership, and this presumption continues until the possession is shown to be subservient

to the title of another" (*Becker*, 19 NY3d at 81-82). Indeed, "hostility may be presumed" where, as here, "all of the other elements of adverse possession have been established" (*Dekdebrun v Kane*, 82 AD3d 1644, 1646 [4th Dept 2011]; see e.g. *Becker*, 19 NY3d at 81-82; *Di Leo v Pecksto Holding Corp.*, 304 NY 505, 512 [1952]; *Barnes v Light*, 116 NY 34, 39-40 [1889]; *Rote*, 195 AD3d at 1524; *Slacer*, 151 AD3d at 1604; 1 Warren's *Weed New York Real Property* § 5.18 [Apr. 2025]). "However, hostility is negated by '[s]eeking permission for use from the record owner' " (*Becker*, 19 NY3d at 82). "Further, where there is a close and cooperative relationship between the record owner and the person claiming title through adverse possession, the presumption of hostility may not apply" (*id.*). Instead, a " 'neighborly relationship . . . create[s] an implication that the use of the disputed [property] was permissive' " (*id.*). "When the entry upon land has been by permission or under some right or authority derived from the owner, adverse possession does not commence until such permission or authority has been repudiated and renounced and the possessor thereafter has assumed the attitude of hostility to any right in the real owner" (*Hinkley v State of New York*, 234 NY 309, 316 [1922]; see *Meyers v Berl*, 213 AD3d 1233, 1235 [4th Dept 2023]; *Parklands E., LLC v Spangenberg*, 174 AD3d 1374, 1376 [4th Dept 2019]). "Thus, in order to establish the hostility element, the party asserting the adverse possession claim must come forward with affirmative facts to establish that the use [of the property] was under a claim of right and adverse to the interests of [the true owners]" (*Becker*, 19 NY3d at 82 [internal quotation marks omitted]). Additionally, under pre-amendment common law regarding the claim of right, "an adverse possessor's actual knowledge of the true owner is not fatal to an adverse possession claim" (*Walling*, 7 NY3d at 233; see also *Mau v Schusler*, 124 AD3d 1292, 1296 [4th Dept 2015]). "The issue is 'actual occupation,' not subjective knowledge" of ownership (*Walling*, 7 NY3d at 233; see *Rote*, 195 AD3d at 1524).

Defendants assert that the record establishes that plaintiff's use of the eastern half of the road was with the express permission of the great-grandfather or that there is at least a triable issue of fact in that regard. We cannot agree.

First, plaintiff's submissions show that no such permission was expressly granted. Plaintiff's members who submitted affidavits each averred that plaintiff never received "permission" from defendants' predecessors in interest or anyone else to use, maintain, or possess the road (see *Reardon*, 121 AD3d at 1547). Plaintiff's safety officer similarly testified that no one had ever told him that the great-grandfather gave plaintiff permission to use the 45-acre parcel. For her part, Capri testified that her allegation that her predecessors in interest had given express permission for plaintiff to use the road was based solely on verbal stories about common usage of the road that she had heard from the great-grandfather and the grandmother. Capri acknowledged, however, that the great-grandfather "never gave any specific time frame" and did not generally use the word "permission" in describing plaintiff's use of the road. Defendants' reliance on Capri's testimony that the great-grandfather gave permission to members of plaintiff to enter the 45-acre parcel

"[f]or specific reasons" is misplaced inasmuch as that testimony clearly refers to permission granted for discrete activities on the parcel then owned by the great-grandfather, not the ongoing and uninterrupted use of the entire road by plaintiff. Capri further testified that the grandmother never used the word "permission" or anything to that effect in describing plaintiff's use of the road. Capri had no written documentation to show an express grant of permission to plaintiff by her predecessors in interest. Capri likewise was never told by the great-grandfather or the grandmother that a member of plaintiff had sought permission to use, maintain, pave, plow, or repair Godfrey's Pond Road. Plaintiff therefore established that "[t]here was never any indication that [its] possession [of the entire road] was with defendants' predecessors' consent or permission" (*Becker*, 19 NY3d at 82; see *Reardon*, 121 AD3d at 1547).

Second, defendants' submissions failed to raise a triable issue of fact with respect to express permission. In deposition testimony submitted by defendants, one of plaintiff's members reiterated that he was not aware of any instance in which the great-grandfather gave plaintiff permission to use his land to access plaintiff's property on Godfrey's Pond Road. Indeed, that member explained that everyone, including the great-grandfather, had operated under the assumption that plaintiff owned the entire road because no one ever questioned that plaintiff had such ownership. The member testified that there was no dispute that plaintiff owned the entire road because it maintained, plowed, and repaired the road. Another member of plaintiff similarly testified that no one from plaintiff had ever told him that the great-grandfather gave plaintiff permission to use the eastern half of the road. During his deposition, the longtime resident testified that he did not know whether anyone gave plaintiff permission to use the land for the road, and the longtime resident confirmed that plaintiff plowed the road and mowed the grass on the eastern side thereof without express permission of the owners of the 45-acre parcel (see *Reardon*, 121 AD3d at 1547).

Plaintiff's recent property caretaker, who served in that role from January 2021 to September 2022, recounted an out-of-court statement made by his predecessor—who served in the 2010s and was recounting an out-of-court statement made to him by someone else about events that occurred decades earlier—that the great-grandfather and members of plaintiff had built the road together and shared a few beers while the road was being put in and that the great-grandfather had permitted plaintiff to have total access to use the road. We conclude that the recent property caretaker's "double hearsay account[ ] . . . [was] insufficient to raise a triable issue of fact" regarding express permission (*Brown & Brown, Inc. v Johnson*, 158 AD3d 1148, 1150 [4th Dept 2018]; see *Hamilton v Picardo*, 118 AD3d 1260, 1261 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014]).

With respect to the historical permission ostensibly granted to plaintiff, William merely testified that he "assumed" that plaintiff had permission to build and use the road. "Such unsubstantiated assertions or speculations are, of course, insufficient to create a

triable issue of fact" (*Lynn G. v Hugo*, 96 NY2d 306, 310 [2001]; see e.g. *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 501 [1st Dept 2008]). To the extent that William asserted that plaintiff, through the recent property caretaker, had sought permission to maintain or keep the roadway open, that testimony is likewise insufficient to raise a material issue of fact inasmuch as the recent property caretaker did not take on that role until January 2021, and thus any such request would have been made long after plaintiff had already established title to the road by adverse possession (see e.g. *Robinson*, 34 AD3d at 977; *Boenheim*, 207 AD2d at 583).

Defendants nonetheless assert that their submissions in opposition to the motion established as a matter of law, or at least raised an issue of fact, that the parties enjoyed a neighborly relationship of cooperation and accommodation, thereby giving rise to an inference of permissive use and negating the hostility element of an adverse possession claim. We reject that assertion.

While there is certainly some evidence of cordial historical relations between plaintiff and Capri's predecessors in interest, Capri herself testified that she and her predecessors in interest had been having issues or altercations with plaintiff for the last 60 years about its members and guests coming onto defendants' property. Moreover, even if the presumption of hostility is rendered inapplicable here by neighborly relations, we conclude that "the evidence submitted by the parties in support of their respective summary judgment motions firmly establishes that [plaintiff's] possession and use of the disputed property was under a claim of right and adverse to [the] interests" of Capri and her predecessors in interest (*Becker*, 19 NY3d at 82). In that regard, to the extent that defendants rely on the record evidence that there were no affirmative "acts of hostility" between the parties, that reliance is misplaced because "the element of 'hostility' need not be supported by proof of enmity or literally hostile acts" (*Kappes*, 170 AD2d at 744; see *Golobe*, — NY3d at —, 2025 NY Slip Op 01670, \*4; *Becker*, 19 NY3d at 81; *Sinicropi v Town of Indian Lake*, 148 AD2d 799, 800 [3d Dept 1989]). Rather, "[a]ll that is required is a showing that the possession actually infringes upon the [title] owner's rights" (*Kappes*, 170 AD2d at 744; see *Becker*, 19 NY3d at 81).

Here, the record establishes that, for the better part of a century, plaintiff had paved, widened, patched, repaired, plowed, and otherwise maintained the road, along with a strip of land along the eastern edge thereof, on its own or at its expense or by arrangement with third parties (see *Becker*, 19 NY3d at 82). Plaintiff treated the entirety of Godfrey's Pond Road as its own private property, to the exclusion of the general public (see *id.*). All of plaintiff's acts of improvement, occupation, maintenance, and use of the entirety of the roadway were hostile to the property interests of Capri and her predecessors in interest (see *Spiegel*, 73 NY2d at 627-628; *Clanton*, 153 AD3d at 788-789; *Kappes*, 170 AD2d at 743-744). Contrary to defendants' related assertion that the claim of right and hostility element is undermined by plaintiff's purported knowledge of the

boundary line, we reiterate that, under pre-amendment common law regarding the claim of right, "an adverse possessor's actual knowledge of the true owner is not fatal to an adverse possession claim" (*Walling*, 7 NY3d at 233; see *Mau*, 124 AD3d at 1296). "The issue is 'actual occupation,' not subjective knowledge" of ownership (*Walling*, 7 NY3d at 233; see *Rote*, 195 AD3d at 1524).

In sum, "[t]he ultimate element in the rise of a title through adverse possession is the acquiescence of the real owner in the exercise of an obvious adverse or hostile ownership through the statutory period" (*Becker*, 19 NY3d at 81, quoting *Monnot v Murphy*, 207 NY 240, 245 [1913]), and that is what occurred here. Capri's predecessors in interest engaged in decades-long acquiescence in plaintiff's possession, use, control, and maintenance of the entirety of Godfrey's Pond Road as plaintiff openly and increasingly took actions to privatize the road for exclusive use by its members to access plaintiff's property and the residences thereon. Similar to other cases in which paving and other related activities have established adverse possession, plaintiff here paved and re-paved the road, marked the entire road as private, placed a speed sign along the east side of the road, and generally maintained the whole road along with a strip of land on the eastern side thereof (see *Spiegel*, 73 NY2d at 627-628; *Clanton*, 153 AD3d at 788-789; *Kappes*, 170 AD2d at 743-744). We thus conclude on that basis that the court properly granted plaintiff's motion insofar as it sought summary judgment in its favor on its adverse possession and quiet title causes of action (see *Becker*, 19 NY3d at 77-84; *Slacer*, 151 AD3d at 1602-1605; *Reardon*, 121 AD3d at 1546-1547).

Finally, we do not address any provisions of the order that defendants may have agreed to and have not challenged on appeal in any event (see *Misicki v Caradonna*, 12 NY3d 511, 519 [2009]; *Krause v Industry Matrix, LLC*, 227 AD3d 1560, 1562 [4th Dept 2024]).

All concur except DELCONTE and HANNAH, JJ., who dissent and vote to modify in accordance with the following memorandum: We respectfully dissent. We agree with the majority's reasoned recitation of the law as it relates to adverse possession under RPAPL former § 521, but we disagree with their ultimate conclusion that plaintiff established its entitlement to judgment as a matter of law in light of the motion record and the long-settled principles that "the acquisition of title to land by adverse possession is not favored under the law" (*Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 159 [1996], citing *Belotti v Bickhardt*, 228 NY 296, 308 [1920]) and that "[i]ssue-finding, rather than issue-determination, is the key to the procedure" on a motion for summary judgment (*Cooke v Corning Hosp.*, 198 AD3d 1382, 1383 [4th Dept 2021] [internal quotation marks omitted]; see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]). Specifically, we conclude that the motion record—when "viewed in the light most favorable to the non-moving party" and with "every available inference . . . drawn in the [non-moving party's] favor," as it must be (*Omar v Moore*, 196 AD3d 1182, 1183 [4th Dept 2021] [internal quotation marks omitted]; see *William J. Jenack Estate*

*Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013])—presents triable issues of fact with respect to the elements of hostility and exclusivity. We would, therefore, modify the order by denying plaintiff's motion in its entirety.

With respect to the element of hostility, although the majority is correct that "hostility may be presumed if all of the other elements of adverse possession have been established, if it can be shown that the initial use was permissive, then adverse possession does not commence until such permission or authority has been repudiated and renounced and the possessor thereafter has assumed the attitude of hostility to any right in the real owner" (*Dekdebrun v Kane*, 82 AD3d 1644, 1646 [4th Dept 2011] [internal quotation marks omitted]; see also *Di Leo v Pecksto Holding Corp.*, 304 NY 505, 512 [1952]). In other words, the element of "hostility is negated by '[s]eeking permission for use from the record owner' " (*Estate of Becker v Murtagh*, 19 NY3d 75, 82 [2012]). Thus, "where there is a close and cooperative relationship between the record owner and the person claiming title through adverse possession, the presumption of hostility may not apply" inasmuch as " 'the neighborly relationship . . . create[s] an implication that the use of the disputed [property] was permissive' " (*id.*; see *Hassinger v Kline*, 91 AD2d 988, 989 [2d Dept 1983]).

In our view, the evidence in the motion record presents a triable issue of fact whether there was a close and cooperative relationship between plaintiff and the great-grandfather and predecessor in interest (great-grandfather) of defendant Capri Sullivan, also known as Capri Dix (Capri), including whether the great-grandfather helped construct the road and gave plaintiff permission to use the portion of Godfrey's Pond Road running over what was then his, and is now Capri's, property. In particular, plaintiff's property caretaker testified during his deposition that he was told by plaintiff's former grounds chairman that the great-grandfather and plaintiff had built Godfrey's Pond Road together and that the great-grandfather thereafter stated that plaintiff's members had "total access" to use the road. When read in the light most favorable to the non-movant, this testimony was simple hearsay—i.e. testimony by plaintiff's property caretaker as to what plaintiff's former grounds chairman and board member told him that he had directly observed, namely the cooperative construction of Godfrey's Pond Road and the great-grandfather granting plaintiff permission to use the portion of that road running across his property—and, thus, properly considered along with the other non-hearsay evidence submitted in opposition to plaintiff's motion (see *Thygesen v North Bailey Volunteer Fire Co., Inc.*, 151 AD3d 1708, 1710 [4th Dept 2017]; *Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246, 247 [1st Dept 2002]; see generally *Phillips v Kantor & Co.*, 31 NY2d 307, 312 [1972]). Non-hearsay evidence of historical cooperation between plaintiff and the great-grandfather includes deposition testimony from plaintiff's current safety officer that the great-grandfather provided free gravel to plaintiff to build up and structurally support the road, as well as deposition testimony from two longtime members of plaintiff—one of whom had served on its board for more than 60 years—that the great-grandfather had provided free

gravel to build up the road on at least two occasions back in the 1950s and for patching the road over the years. The deposition testimony raises a triable issue of fact whether "[t]he use of the disputed roadway, arising from a cordial and co-operative relationship, connoted not a hostile user but, rather, a permissive one" (*Hassinger*, 91 AD2d at 989; see generally *Becker*, 19 NY3d at 82).

With respect to the element of exclusivity, "[t]he focus is on whether the party claiming title by adverse possession exercised exclusive possession and control of the property" (*Rote v Gibbs*, 195 AD3d 1521, 1525 [4th Dept 2021], appeal dismissed 37 NY3d 1106 [2021] [internal quotation marks omitted]). While "allowing others to use the property does not necessarily negate 'exclusivity[,]'. . . 'exclusivity' is not established 'where [a claimant's] use is in connection with the use of the owner and the general public' " (*Becker*, 19 NY3d at 83, quoting *Pirman v Confer*, 273 NY 357, 363 [1937], rearg denied 274 NY 570 [1937]). Here, Godfrey's Pond Road provides access to both plaintiff's and defendants' properties and was described by Capri in her deposition as "an old farm lane, [which] everybody used." Consistent with that description, defendants testified that they operated all-terrain vehicles on Godfrey's Pond Road to access their abutting parcel, and a non-party witness testified that the great-grandfather's wife and daughters historically would "ride their horses" on the road and that the road was also used by the farmer who leased the abutting parcel from the great-grandfather to access that parcel. Although plaintiff placed a sign at the entrance to Godfrey's Pond Road stating, inter alia, "Warning Private Property" and "members and guests only," plaintiff's financial secretary testified during his deposition that plaintiff never attempted to prevent defendants from using the road (see *Penn Hgts. Beach Club, Inc. v Myers*, 42 AD3d 602, 606 [3d Dept 2007], lv dismissed 10 NY3d 746 [2008]). We conclude that the deposition testimony raises a triable issue of fact whether plaintiff exercised "exclusive possession and control" over Godfrey's Pond Road " 'separate and exclusive from the general use' " of others, including defendants (*Rote*, 195 AD3d at 1525). Indeed, plaintiff's demonstration of exclusivity is particularly lacking here inasmuch as plaintiff's motion for summary judgment does not seek a prescriptive easement allowing it to use the portion of the road running across defendants' property (cf. *Lyon v Melino*, 214 AD2d 992, 992 [4th Dept 1995]) but, rather, fee title to defendants' underlying property, which would allow it to prohibit defendants and anyone else from using Godfrey's Pond Road.

Finally, we note that the order appealed from contains language that improperly orders defendants to "indemnify and hold [p]laintiff harmless for any and all liabilities arising on, due to, or because of [d]efendants' use, maintenance, and/or control of [d]efendants' land located to the east of [p]laintiff's land arising hereinafter" inasmuch as that relief is not authorized by RPAPL 1521 (1) and was

not requested by plaintiff in its motion (see *Hurd v Hurd*, 66 AD3d 1492, 1493 [4th Dept 2009]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**136**

**CA 24-00173**

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

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BRYAN GORMAN, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MOONEY'S 9, 1537 UNION ROAD WEST SENECA, INC.,  
AND MOONEY'S SPORTS BAR AND GRILL,  
DEFENDANTS-APPELLANTS.

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COOKE DOYLE LLC, BUFFALO (RODGER P. DOYLE, JR., OF COUNSEL), FOR  
DEFENDANTS-APPELLANTS.

CELLINO LAW LLP, BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered January 11, 2024. The order denied the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint insofar as the complaint, as amplified by the bill of particulars, alleges that defendants were negligent in failing to warn plaintiff of the alleged dangerous condition, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries he sustained when, while riding his bicycle, he veered off the sidewalk and onto defendants' property, where he struck an advertisement sign that was over 8 feet wide and 88 inches tall. Defendants appeal from an order denying their motion for summary judgment dismissing the complaint, and we now modify.

We agree with defendants that Supreme Court erred in denying that part of their motion with respect to plaintiff's allegation that defendants were negligent in failing to warn of dangerous and defective conditions. Defendants met their initial burden on the motion of establishing that the alleged dangerous or defective condition was open and obvious, and plaintiff failed to raise a triable issue of fact in opposition (see *DelRosario v Liverpool Lodging, LLC*, 170 AD3d 1595, 1596 [4th Dept 2019]; *Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316, 1318-1319 [4th Dept 2012]; *Williams v Chenango County Agric. Socy.*, 272 AD2d 906, 906-907 [4th Dept 2000]). We therefore modify the order accordingly.

Contrary to defendants' further contention, however, they failed to meet their initial burden of establishing that they maintained their property in a reasonably safe condition (see *Di Ponzio v Riordan*, 89 NY2d 578, 582 [1997]; *Basso v Miller*, 40 NY2d 233, 241 [1976]). The fact that a condition is open and obvious does not negate defendants' duty to maintain their property in a reasonably safe condition (see *Pelow v Tri-Main Dev.*, 303 AD2d 940, 941 [4th Dept 2003]; *Holl v Holl*, 270 AD2d 864, 864 [4th Dept 2000]; see also *Bax v Allstate Health Care, Inc.*, 26 AD3d 861, 863 [4th Dept 2006]); the open and obvious nature of the condition "bears only on the injured person's comparative fault" (*Krutulis v Daiker's, Inc.*, 229 AD3d 1115, 1116 [4th Dept 2024] [internal quotation marks omitted]). Here, defendants relied on conclusory statements in an expert affidavit that failed to demonstrate as a matter of law that defendants' property was in a reasonably safe condition and failed to eliminate triable questions of fact about whether the placement of the sign created an unsafe condition. In light of defendants' failure to satisfy their initial burden of establishing that the property was in a reasonably safe condition, the remainder of their motion must be denied, regardless of the sufficiency of the opposing papers (see *Schneider v Corporate Place, LLC*, 149 AD3d 1503, 1505 [4th Dept 2017]). In light of our determination, we do not address defendants' remaining contentions.

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

**160**

**KA 24-00086**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

NATHAN BUNDSCHO, DEFENDANT-APPELLANT.

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ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

NATHAN BUNDSCHO, DEFENDANT-APPELLANT PRO SE.

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

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Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered September 12, 2023. The judgment convicted defendant upon a plea of guilty of criminal contempt in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal contempt in the second degree (Penal Law § 215.50 [3]). We conclude on this record that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (see *People v Simpson*, 232 AD3d 1266, 1266 [4th Dept 2024], lv denied 42 NY3d 1082 [2025]; *People v Foumakoye*, 229 AD3d 1380, 1380 [4th Dept 2024], lv denied 42 NY3d 970 [2024]; *People v Roberto*, 224 AD3d 1367, 1367-1368 [4th Dept 2024]). Contrary to defendant's contention in his main and pro se supplemental briefs, defendant's valid waiver of the right to appeal precludes our review of his challenge to the severity of his sentence (see *People v Lopez*, 6 NY3d 248, 255-256 [2006]; cf. *People v Adams*, 93 AD3d 1082, 1082-1083 [3d Dept 2012]).

We have considered the remaining contentions in defendant's pro se supplemental brief, and we conclude that none warrants modification or reversal of the judgment.

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**165**

**KA 15-00996**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEVIN A. RITCHIE, DEFENDANT-APPELLANT.

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

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered June 3, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the third degree (two counts), assault in the second degree, obstructing governmental administration in the second degree and tampering with physical evidence.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]), two counts of criminal possession of a weapon in the third degree (§ 265.02 [1]), and one count each of assault in the second degree (§ 120.05 [2]), obstructing governmental administration in the second degree (§ 195.05), and tampering with physical evidence (§ 215.40 [2]). The conviction arises from incidents that took place at a house party, during which defendant fatally stabbed one victim and assaulted another with a knife.

Defendant contends that County Court erred in denying his for-cause challenges to three prospective jurors. Defendant failed to preserve for our review his contention that one of the prospective jurors did not have the ability to be impartial because he had relatives in law enforcement (*see People v Smith*, 200 AD3d 1689, 1691 [4th Dept 2021], *lv denied* 38 NY3d 954 [2022]; *People v Stepney*, 93 AD3d 1297, 1297-1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]; *People v Chatman*, 281 AD2d 964, 964-965 [4th Dept 2001], *lv denied* 96 NY2d 899 [2001]). We reject defendant's contention insofar as it relates to two other prospective jurors, each of whom allegedly had "a state of mind that [was] likely to preclude [them] from rendering an impartial verdict based upon the evidence adduced at trial" (CPL 270.20 [1] [b]). The court obtained "the requisite unequivocal

assurance of [the prospective jurors'] ability to be impartial," and the court thus properly denied those for-cause challenges (*People v Williams*, 128 AD3d 1522, 1523 [4th Dept 2015], *lv denied* 25 NY3d 1209 [2015]; see *People v Strong*, 172 AD3d 1927, 1928 [4th Dept 2019], *lv denied* 33 NY3d 1109 [2019]; *People v Garcia*, 148 AD3d 1559, 1560 [4th Dept 2017], *lv denied* 30 NY3d 980 [2017]).

Defendant's contention that reversal is required based on the failure of the People to produce *Brady* and *Rosario* material is not preserved for our review because defense counsel failed to make appropriate timely objections when the alleged violation came to his attention (see *People v Samuel*, 152 AD3d 1202, 1205 [4th Dept 2017], *lv denied* 30 NY3d 983 [2017]; *People v Benton*, 78 AD3d 1545, 1546 [4th Dept 2010], *lv denied* 16 NY3d 828 [2011]). In any event, defendant's contention lacks merit inasmuch as defendant "knew of, or should reasonably have known of, the evidence and its exculpatory nature" (*People v LaValle*, 3 NY3d 88, 110 [2004] [internal quotation marks omitted]), i.e., that he had received an injection of Haldol shortly after he was apprehended and just before he made certain incriminating statements (see generally *People v Caruso*, 219 AD3d 1682, 1683 [4th Dept 2023]).

Defendant contends that the court erred in denying his request to charge the defense of justification. We reject that contention inasmuch as no "reasonable view of the evidence would permit the factfinder to conclude that the defendant's conduct was justified" (*People v Johnson*, 136 AD3d 1417, 1417 [4th Dept 2016], *lv denied* 27 NY3d 1134 [2016] [internal quotation marks omitted]). There was no evidence that the victim was armed with or threatened to use a weapon, that he verbally threatened defendant's life, or that he engaged in any acts that could cause defendant "reasonably to believe that [he was] facing the imminent threat of deadly force" (*People v Swanton*, 216 AD3d 1441, 1442 [4th Dept 2023] [internal quotation marks omitted]; see generally *People v Brown*, 33 NY3d 316, 320, 322 [2019]).

Defendant contends that the conviction of murder in the second degree is not supported by legally sufficient evidence with respect to the issue of his intent. Viewing the evidence in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction of murder in the second degree inasmuch as there is a " '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 Simpson*, 173 AD3d 1617, 1618 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019], quoting *People v Bleakley*, 69 NY2d 490, 495 [1987]). Here, defendant's intent could be inferred from evidence that the victim suffered multiple stab wounds to his torso, each of which was at least four inches deep and two of which punctured vital organs, specifically the victim's heart and liver (see *People v Fitzrandolph*, 162 AD3d 1537, 1537 [4th Dept 2018], *lv denied* 32 NY3d 937 [2018], *reconsideration denied* 32 NY3d 1111 [2018]; *People v Tigner*, 51 AD3d 1045, 1045 [2d Dept 2008], *lv denied* 13 NY3d 863 [2009], *reconsideration denied* 14 NY3d 806 [2010];

see generally *People v Lozada*, 164 AD3d 1626, 1627 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]).

We further conclude that defendant received effective assistance of counsel. "Where, as here, a defendant contends that they received ineffective assistance of counsel under both the Federal and New York State Constitutions, [this Court] evaluate[s] the claim using the state standard, which affords greater protection than its federal counterpart" (*People v Mastin*, 232 AD3d 1268, 1269 [4th Dept 2024], *lv denied* 42 NY3d 1053 [2024] [internal quotation marks omitted]; see *People v Stultz*, 2 NY3d 277, 282 [2004], *rearg denied* 3 NY3d 702 [2004]; *People v Conway*, 148 AD3d 1739, 1741 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]). Under the state standard, if "the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met" (*People v Baldi*, 54 NY2d 137, 147 [1981]). " '[A] simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after trial, does not suffice' " to demonstrate that a defendant was deprived of a fair trial by less than meaningful representation (*Mastin*, 232 AD3d at 1269, quoting *People v Flores*, 84 NY2d 184, 187 [1994]). "The defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*People v Johnson*, 208 AD3d 1649, 1650 [4th Dept 2022], *lv denied* 39 NY3d 963 [2022] [internal quotation marks omitted]). "As long as a defense is based on a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance" (*People v Singleton*, 203 AD3d 1671, 1672-1673 [4th Dept 2022], *lv denied* 38 NY3d 1074 [2022] [internal quotation marks omitted]).

Here, defendant contends that defense counsel was ineffective for failing to obtain blood testing results to show whether defendant was intoxicated by drugs or alcohol, which defendant contends would have allowed defense counsel to seek suppression of defendant's statements and to challenge his intent. That contention is based on matters outside the record on appeal and therefore must be raised by way of a motion pursuant to CPL 440.10 (see *People v Nicholson*, 118 AD3d 1423, 1425 [4th Dept 2014], *affd* 26 NY3d 813 [2016]; *People v Nesmith*, 235 AD3d 1239, 1240 [4th Dept 2025], *lv denied* — NY3d — [2025]; *People v Morse*, 233 AD3d 1470, 1471 [4th Dept 2024]). With respect to defendant's claim that defense counsel was ineffective in calling witnesses, cross-examining the People's witnesses, and addressing the weaknesses of the People's case, we conclude that defendant failed to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings (see *People v Henry*, 207 AD3d 1062, 1064-1065 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]; *People v Finch*, 180 AD3d 1362, 1363 [4th Dept 2020], *lv denied* 35 NY3d 993 [2020]; see generally *People v Jones*, 193 AD3d 1410, 1412 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]). We note that defense counsel pursued a strategy of arguing that defendant was intoxicated and lacked intent, in support of which he elicited testimony that

defendant drank alcohol and was drunk. Although that strategy was unsuccessful, it was "reasonable and legitimate . . . under the circumstances and evidence presented" (*Singleton*, 203 AD3d at 1672 [internal quotation marks omitted]). In light of our determination that the evidence did not support a defense of justification, we reject defendant's assertion that defense counsel was ineffective in failing to develop a justification defense and obtain a justification charge (see *People v Lane*, 218 AD3d 1152, 1153 [4th Dept 2023], *lv denied* 40 NY3d 1093 [2024]). We have considered defendant's remaining claims of ineffective assistance and conclude that they are without merit.

Finally, the sentence is not unduly harsh or severe.

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

175

**CA 23-02059**

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

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HAMILTON EQUITY GROUP, LLC, AS ASSIGNEE  
OF HSBC BANK USA, NATIONAL ASSOCIATION,  
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MARIA BENETATOS, ALSO KNOWN AS MARIA VALVI,  
DEFENDANT-APPELLANT,  
ET AL., DEFENDANTS.

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GOMBERG LEGAL, P.C., OSSINING (STANISLAV GOMBERG OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

RUPP PFALZGRAF LLC, BUFFALO (ADAM M. BRASKY OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered February 9, 2023. The order denied the motion of defendant Maria Benetatos, also known as Maria Valvi, to vacate a default judgment.

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

Memorandum: In this action to recover damages for breach of a guaranty of payment for a line of credit agreement, Maria Benetatos, also known as Maria Valvi (defendant), appeals from an order that denied her motion seeking to vacate the default judgment entered against her based on lack of personal jurisdiction (see CPLR 5015 [a] [4]). We affirm.

Defendant contends that Supreme Court erred in denying her motion inasmuch as plaintiff failed to establish that defendant was properly served pursuant to CPLR 308 (2). We reject that contention. As relevant here, CPLR 308 (2) permits personal service on a party "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by . . . mailing the summons to the person to be served at his or her last known residence." " 'Ordinarily, the affidavit of a process server constitutes prima facie evidence that the defendant was validly served' " (*Cach, LLC v Ryan*, 158 AD3d 1193, 1194 [4th Dept 2018]; see *Estate of Essig v Essig*, 227 AD3d 1379, 1380 [4th Dept 2024]). Here, however, defendant's submissions in support of her motion were

sufficient to rebut that presumption of service, necessitating a traverse hearing (see *Garvey v Global Asset Mgt. Solutions, Inc.*, 192 AD3d 1597, 1598 [4th Dept 2021]; *Fabian v Mullen*, 20 AD3d 896, 897 [4th Dept 2005]).

The court conducted the hearing and made its determination after reviewing the affidavit of service, the testimony of the process server, and the testimony of defendant and her two witnesses. According due deference to the court's credibility assessments (see generally *Cupoli v Nationwide Ins. Co.* [appeal No. 2], 283 AD2d 961, 961 [4th Dept 2001]), we conclude that the court properly determined that plaintiff met its burden of proving by a preponderance of the evidence that jurisdiction over defendant was obtained by proper service of process (see generally *Hallston Manor Farm, LLC v Andrew*, 60 AD3d 1330, 1331 [4th Dept 2009]).

Defendant failed to preserve for our review her contention that the court erred in admitting the affidavit of service in evidence under the business records exception to the hearsay rule (see *Dirschberger v Lawson*, 187 AD3d 1562, 1562-1563 [4th Dept 2020]; *Cooper v Nestoros*, 159 AD3d 1365, 1367 [4th Dept 2018]; *Davis v Vallie*, 93 AD3d 1232, 1232 [4th Dept 2012]; see generally CPLR 5501 [a] [3]). We have considered defendant's remaining contentions and conclude that none warrants modification or reversal of the order.

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

**179**

**CA 23-02138**

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

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PETER T. BLISS AND ANDREA BLISS,  
PLAINTIFFS-RESPONDENTS,

V

ORDER

HENRY SCHEIN, INC., DEFENDANT,  
AND MIDMARK CORPORATION, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (CHRISTOPHER M. MILITELLO OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

KILEY, KILEY & KILEY, PLLC, LAKE SUCCESS (JAMES D. KILEY OF COUNSEL),  
FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Cattaraugus County  
(Terrence M. Parker, A.J.), entered November 9, 2023. The order,  
insofar as appealed from, denied the motion of defendant Midmark  
Corporation for summary judgment dismissing the complaint against it.

Now, upon reading and filing the stipulation of discontinuance  
signed by the attorneys for the parties on February 4, 2025,

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**180**

**CA 24-00727**

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

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PETER T. BLISS AND ANDREA BLISS,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

HENRY SCHEIN, INC., DEFENDANT-APPELLANT,  
AND MIDMARK CORPORATION, DEFENDANT.  
(APPEAL NO. 2.)

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GOLDBERG SEGALLA, LLP, WHITE PLAINS (WILLIAM T. O'CONNELL OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

KILEY, KILEY & KILEY, PLLC, LAKE SUCCESS (JAMES D. KILEY OF COUNSEL),  
FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Cattaraugus County (Terrence M. Parker, A.J.), entered December 6, 2023. The order, among other things, denied the motion of defendant Henry Schein, Inc. for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant Henry Schein, Inc. in part, dismissing the second cause of action against that defendant, and dismissing the first cause of action against that defendant insofar as it is premised on the same allegations as the second cause of action, and as modified the order is affirmed without costs.

Memorandum: Peter T. Bliss (plaintiff) was injured when a wall-mounted cabinet in his workplace detached from the wall and fell on him. The cabinet was manufactured by defendant Midmark Corporation and distributed and installed by Henry Schein, Inc. (defendant), who mounted the cabinet by hanging it on a bracket that defendant screwed into the wall. Plaintiffs asserted causes of action against defendant sounding in, among other things, negligence and strict products liability. Defendant now appeals from an order that, inter alia, denied its motion for summary judgment dismissing the complaint against it.

We agree with defendant that Supreme Court erred in denying that part of the motion with respect to plaintiffs' second cause of action, for strict products liability, and we therefore modify the order accordingly. Defendant met its initial burden on the motion of establishing that the product was not defective (*see Menear v Kwik*

*Fill*, 174 AD3d 1354, 1355-1356 [4th Dept 2019]; *Cassatt v Zimmer, Inc.*, 161 AD3d 1549, 1550 [4th Dept 2018]; see generally *Finerty v Abex Corp.*, 27 NY3d 236, 241 [2016]) and that it was reasonably safe for its intended use (see generally *Denny v Ford Motor Co.*, 87 NY2d 248, 257 [1995], *rearg denied* 87 NY2d 969 [1996]). The burden then shifted to plaintiffs to raise an issue of fact by submitting evidence of a specific flaw in the product or circumstantial evidence that the product did not perform as intended, excluding all causes for the product's failure not attributable to defendant (see *Menear*, 174 AD3d at 1356). In opposition, however, plaintiffs did not identify any particular design or manufacturing defect in the cabinet or bracket and instead asserted that the cabinet had been improperly installed because defendant failed either to secure the bracket into a stud or stud-mounted backing or to secure the cabinet directly into the wall.

To the extent that plaintiffs' first cause of action, for negligence, against defendant is based on the same allegations as their strict products liability cause of action, it must also be dismissed (see *Mancuso v Reebok Intl., Ltd.*, 207 AD3d 1240, 1241-1242 [4th Dept 2022]; *Menear*, 174 AD3d at 1357), and we further modify the order accordingly. To the extent that the negligence cause of action against defendant is based on allegations that defendant negligently installed the cabinet and bracket, however, we conclude that defendant failed to meet its initial burden and that the court thus correctly denied the motion with respect to that part of the first cause of action. Although defendant's expert opined that the cabinet had been properly installed, that opinion was based on the expert's conclusion that the accident occurred when plaintiff, who was attempting to reach something at the top of the cabinet, grabbed the cabinet doors as he fell, thereby overloading the bracket with the leveraged force of his body weight. Although that sequence of events was supported by the deposition testimony of one witness, plaintiff testified that he did not pull on the cabinet as suggested by defendant's expert. Under these circumstances, we conclude that defendant's own submissions raised an issue of fact with respect to the manner in which the accident occurred, rendering summary judgment inappropriate (see *Abramo v Pepsi-Cola Buffalo Bottling Co.*, 224 AD2d 980, 981 [4th Dept 1996]; see generally *Wasson v Szafarski*, 6 AD3d 1182, 1183 [4th Dept 2004]; *Burlingame v Hefti*, 181 AD2d 986, 986 [4th Dept 1992]).

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

**189**

**KA 22-01002**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTON KELLEY, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CASEY S. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DAVID D. BASSETT OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered June 15, 2022. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), stemming from the shooting death of the victim. We affirm.

Contrary to defendant's contention, the record establishes that he validly waived his right to appeal (*see People v Lollie*, 204 AD3d 1430, 1430-1431 [4th Dept 2022], *lv denied* 38 NY3d 1134 [2022]). That valid waiver forecloses appellate review of defendant's challenges to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]) and to Supreme Court's suppression ruling (*see People v Sanders*, 25 NY3d 337, 342 [2015]; *People v Edmonds*, 229 AD3d 1275, 1278 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]).

Defendant further contends that the court erred in failing to make an appropriate inquiry into his requests for new counsel. Defendant's contention "is encompassed by the plea and the waiver of the right to appeal except to the extent that the contention implicates the voluntariness of the plea" (*People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012] [internal quotation marks omitted]; *see People v Seymore*, 188 AD3d 1767, 1769 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]; *People v Holley*, 162 AD3d 1669, 1669 [4th Dept 2018], *lv denied* 32 NY3d 938 [2018]). To the extent that defendant's contention implicates the voluntariness of

the plea, we conclude that defendant abandoned his requests when he decided to plead guilty while still being represented by the same attorneys (see *People v Williams*, 210 AD3d 1507, 1507 [4th Dept 2022], *lv denied* 39 NY3d 1081 [2023]; *People v Clemons*, 201 AD3d 1355, 1355 [4th Dept 2022], *lv denied* 38 NY3d 1032 [2022]). During the plea proceeding, defendant did not express dissatisfaction with defense counsel (see *Williams*, 210 AD3d at 1507; *People v Turner*, 197 AD3d 997, 1000 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021]).

Defendant additionally contends that he did not receive effective assistance of counsel. That contention, however, “does not survive his guilty plea or his waiver of the right to appeal because there was no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney[s’] allegedly poor performance” (*People v O’Connor*, 184 AD3d 1137, 1137 [4th Dept 2020], *lv denied* 35 NY3d 1068 [2020] [internal quotation marks omitted]).

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

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

**191**

**CA 24-00793**

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

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IN THE MATTER OF THE WILL OF  
ALEJANDRO RODRIGUEZ, DECEASED,

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MAYRA RODRIGUEZ, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ELIZABETH RODRIGUEZ, ALEX RODRIGUEZ,  
MARIBEL RODRIGUEZ, ALEJANDRO RODRIGUEZ, JR.,  
AND JUAN RODRIGUEZ, OBJECTANTS-APPELLANTS.

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BRENNA BOYCE, PLLC, HONEOYE FALLS (DAVID C. SIELING OF COUNSEL), FOR  
OBJECTANTS-APPELLANTS.

PULLANO & FARROW, PLLC, EAST ROCHESTER (CHRISTIAN VALENTINO OF  
COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order and decree (one paper) of the Surrogate's Court, Monroe County (Christopher S. Ciaccio, S.), entered November 1, 2023. The order and decree granted the motion of petitioner for summary judgment dismissing the objections of objectants and admitted to probate the will of decedent.

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

Memorandum: In this probate proceeding, objectants appeal from an order and decree that granted petitioner's motion for summary judgment on the petition and admitted to probate the will of Alejandro Rodriguez (decedent). We reverse.

We agree with objectants that Surrogate's Court erred in granting the motion inasmuch as petitioner failed to meet her initial burden on the motion. "Summary judgment is rare in a contested probate proceeding" (*Matter of Linich*, 213 AD3d 1, 3-4 [3d Dept 2023] [internal quotation marks omitted]), and "is inappropriate in any case where there are material issues of fact" (*Matter of Pollock*, 64 NY2d 1156, 1158 [1985]). Here, viewing the evidence in the light most favorable to the non-moving party, as we are required to do (see *Jacobson v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]), we conclude that the evidence submitted by petitioner in support of her motion raises triable issues of fact with respect to decedent's testamentary capacity, his testamentary intent, and whether the will was the product of fraud or undue influence, without regard to the sufficiency of the opposing papers.

With respect to decedent's testamentary capacity and intent, the Surrogate correctly noted that "[a] will is presumed to have been properly executed where . . . the execution was supervised by the attorney who drafted the will" (*Matter of Pilon*, 9 AD3d 771, 772 [3d Dept 2004]). Nevertheless, other evidence submitted by petitioner—including sworn testimony and medical records—raised triable issues of fact with respect to both decedent's intent and his testamentary capacity, requiring denial of the motion without regard to the sufficiency of the opposing papers (see generally *Matter of Imperato*, 149 AD3d 1072, 1073 [2d Dept 2017]). The Surrogate erred in resolving those inconsistencies by crediting the testimony of the attorneys who prepared and supervised the execution of the will (see generally *Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

With respect to whether the will was the product of fraud or undue influence, on this motion, petitioner bore the burden of establishing the absence of any material fact requiring trial (see *Matter of Rozof*, 219 AD3d 1428, 1429 [2d Dept 2023]; *Imperato*, 149 AD3d at 1073) and, as we have repeatedly stated in other contexts "a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof" (*Brady v City of N. Tonawanda*, 161 AD3d 1526, 1527 [4th Dept 2018] [internal quotation marks omitted]; see *George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615 [4th Dept 1992]). Inasmuch as petitioner merely pointed to gaps in objectants' potential proof at trial, petitioner failed to meet her initial burden.

Even assuming, *arguendo*, that petitioner met her initial burden on the motion, we conclude that objectants' submissions in opposition to the motion raised triable issues of fact precluding summary judgment.

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

**193**

**CA 23-01586**

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

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LEW WRIGHT, AS EXECUTOR OF THE ESTATE OF  
SANDRA RAMSEY, DECEASED, AND JAMES A. RAMSEY,  
AS EXECUTOR OF THE ESTATE OF ERNEST H.  
RAMSEY, DECEASED, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

VICKY K. STEPHENS, P.A., DELPHI HEALTHCARE, PLLC,  
DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANTS.  
(APPEAL NO. 1.)

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BLACK, LYLE & HABBERFIELD, LLP, OLEAN (KEVIN M. HABBERFIELD OF  
COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HIRSCH & TUBIOLO, P.C., PITTSFORD (BRYAN S. KORNFELD OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

THE TARANTINO LAW FIRM, LLP, BUFFALO (MARYLOU K. ROSHIA), FOR  
DEFENDANTS JANET K. REISMAN, R.N., JONES MEMORIAL HOSPITAL, AND THE  
MEMORIAL HOSPITAL OF WILLIAM F. AND GERTRUDE F. JONES, INC., DOING  
BUSINESS AS JONES MEMORIAL HOSPITAL.

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Appeal from a judgment of the Supreme Court, Allegany County  
(Thomas P. Brown, A.J.), entered March 3, 2023. The judgment, insofar  
as appealed from, dismissed the amended complaint, upon a jury  
verdict, against defendants Vicky K. Stephens, P.A., and Delphi  
Healthcare, PLLC.

It is hereby ORDERED that said appeal insofar as taken by  
plaintiff Lew Wright, as executor of the estate of Sandra Ramsey,  
deceased, is dismissed, and the judgment insofar as appealed from is  
reversed on the law without costs, the amended complaint as asserted  
by plaintiff James A. Ramsey, as executor of the estate of Ernest H.  
Ramsey, deceased, is reinstated against defendants Vicky K. Stephens,  
P.A., and Delphi Healthcare, PLLC, and a new trial is granted.

Memorandum: In this medical malpractice and wrongful death  
action, plaintiffs appeal or purport to appeal, in appeal No. 1, from  
a judgment dismissing the amended complaint against defendants Vicky  
K. Stephens, P.A., and Delphi Healthcare, PLLC (Delphi) (collectively,  
Delphi defendants) and, in appeal No. 2, from a judgment dismissing  
the amended complaint against defendants Janet K. Reisman, R.N., Jones  
Memorial Hospital, and the Memorial Hospital of William F. and

Gertrude F. Jones, Inc., doing business as Jones Memorial Hospital (JMH) (collectively, JMH defendants).

Sometime between 8:00 p.m. and 9:41 p.m. on July 17, 2013, Ernest H. Ramsey (decedent) and his wife, Sandra Ramsey (wife), presented to the emergency room at JMH for decedent to be treated. A few hours later, at 11:26 p.m., decedent coded and was pronounced dead. The official cause of death was listed as cardiomyopathy, with morbid obesity as a contributing factor.

The wife and James A. Ramsey (plaintiff), as executor of decedent's estate, commenced this action against defendants. The Delphi defendants and the JMH defendants moved separately for summary judgment dismissing the amended complaint against them. Supreme Court denied the Delphi defendants' motion and denied in part the JMH defendants' motion. The Delphi defendants and the JMH defendants appealed from the order denying those motions, and we affirmed that order for reasons stated in the court's decision (*Ramsey v Stephens*, 191 AD3d 1242, 1243 [4th Dept 2021]).

The matter proceeded to trial, with a first trial ending in a mistrial for reasons unrelated to the merits, and a second trial resulting in dismissal of the amended complaint. Following the verdict, but before the judgments on appeal were entered, the wife passed away. The attorney who jointly represented the wife and plaintiff filed notices of appeal from both judgments on their behalf.

As a preliminary matter, we note that there are procedural issues relating to the wife's death that affect our subject matter jurisdiction, and those issues cannot be waived and may be addressed sua sponte (see *Henry v New Jersey Tr. Corp.*, 39 NY3d 361, 371 [2023]; *Davis v State of New York*, 64 AD3d 1197, 1197 [4th Dept 2009], *lv denied* 13 NY3d 717 [2010]). Although the wife died before the judgments on appeal were entered, i.e., in March 2023 and May 2023, respectively, no party was substituted for her until the court issued an order of substitution in August 2024, thereby amending the caption to substitute in the wife's place plaintiff Lew Wright, as executor of the wife's estate, which order was filed *after* the notices of appeal and briefs in these appeals were filed. No new briefs or notices of appeal were filed after the order of substitution was filed.

It is well established that the death of a party divests a court of jurisdiction until a proper substitution is made (see *Vapnersh v Tabak*, 131 AD3d 472, 473-474 [2d Dept 2015]; *Wood v Dolloff*, 52 AD3d 1190, 1190 [4th Dept 2008]), and "[t]he death of a party terminates the authority of the attorney for that person to act on [their] behalf" (*Aurora Bank FSB v Albright*, 137 AD3d 1177, 1178 [2d Dept 2016] [internal quotation marks omitted]; see *Vapnersh*, 131 AD3d at 474). While the order of substitution provided us with jurisdiction to preside over these appeals, it did not change the fact that, at the time the notices of appeal were filed on behalf of the deceased wife, they were filed without any authority by the attorney to act on her behalf. Under these circumstances, the wife's attorney "lacked the authority to act for the deceased [wife], and [any] purported appeal

taken on behalf of the deceased [wife] must be dismissed" (*Aurora Bank FSB*, 137 AD3d at 1178 [emphasis added]). Even after substitution was made, no amended notices of appeal were ever filed. It is well settled that "[t]he filing of a notice of appeal confers jurisdiction upon an appellate court" (*Matter of Espinoza v Berbary*, 288 AD2d 934, 934 [4th Dept 2001]). Inasmuch as the notices of appeal filed on behalf of the deceased wife are nullities and no notices of appeal have ever been filed on behalf of Wright, as executor of her estate, we conclude that this Court lacks jurisdiction to hear any appeal purportedly taken on behalf of Wright, as executor of the deceased wife's estate (see *Aurora Bank FSB*, 137 AD3d at 1178-1179; see e.g. *Warran v Cole*, 29 AD2d 988, 988 [2d Dept 1968], *affd* 26 NY2d 803 [1970]; *Constable v Staten Is. Univ. Hosp.*, 221 AD3d 952, 953 [2d Dept 2023]; see generally *Vicari v Kleinwaks*, 157 AD3d 975, 976-977 [2d Dept 2018]). We therefore dismiss the appeals in appeal Nos. 1 and 2 insofar as they purport to be taken by Wright, as executor of the wife's estate.

We nevertheless address the appeals from plaintiff on the merits inasmuch as the notices of appeal in appeal Nos. 1 and 2 were also filed on his behalf and are not affected by the jurisdictional issues related to the wife's estate (see *Green v Maimonides Med. Ctr.*, 172 AD3d 824, 825 [2d Dept 2019]; *Neuman v Neumann*, 85 AD3d 1138, 1139 [2d Dept 2011]; *Arena v Manganello*, 31 AD2d 540, 540 [2d Dept 1968]), and we conclude that, contrary to defendants' assertions, plaintiff's contentions in these appeals are properly before us regardless of the court's determination of the CPLR 4404 (a) motion made on behalf of the wife and plaintiff seeking to set aside the verdict (see CPLR 5501 [a] [1], [3]; cf. *Knapp v Finger Lakes NY, Inc.*, 184 AD3d 335, 336-337 [4th Dept 2020], *lv dismissed* 36 NY3d 963 [2021]), and the fact that plaintiff did not appeal from the court's prior nonfinal order disposing of defendants' motions for summary judgment (see CPLR 5501 [a] [1]; *Zaepfel v Town of Tonawanda*, 227 AD3d 1387, 1389 [4th Dept 2024]; see generally *Bonczar v American Multi-Cinema, Inc.*, 38 NY3d 1023, 1025-1026 [2022], *rearg denied* 38 NY3d 1170 [2022]).

Plaintiff contends with respect to both appeals that the court erred in limiting his proof regarding the vicarious liability of JMH to only the named individual defendants (see generally *Braxton v Erie County Med. Ctr. Corp.*, 208 AD3d 1038, 1042 [4th Dept 2022]). We agree. Based on the authority of *Braxton*, we conclude that the court erred in precluding plaintiff from introducing evidence of negligence by unnamed or unidentified employees or contractors of JMH (see *id.*; see generally *Matter of Elsa R. [Gloria R.]*, 101 AD3d 1688, 1688-1689 [4th Dept 2012], *lv denied* 20 NY3d 862 [2013]).

Plaintiff further contends with respect to both appeals that the court erred in precluding him from calling an expert in electronic medical records in order to explain the audit trail regarding decedent's medical records. We again agree. Initially, audit trails are software-generated documents that "generally show[ ] the sequence of events related to the use of a patient's electronic medical records; i.e., who accessed the records, when and where the records

were accessed, and changes made to the records" (*Vargas v Lee*, 170 AD3d 1073, 1076 [2d Dept 2019]). Such audit trails are subject to discovery where, as here, a plaintiff establishes legitimate questions regarding whether medical records have been withheld or altered (see *id.* at 1077; cf. *Harms v TLC Health Network*, 215 AD3d 1295, 1296 [4th Dept 2023]; *Punter v New York City Health & Hosps. Corp.*, 2019 NY Slip Op 34239[U], \*2-3 [Sup Ct, NY County 2019], *affd* 191 AD3d 563 [1st Dept 2021]).

Even assuming, arguendo, that the court properly determined that the expert testimony would have been inadmissible insofar as it pertained to an unpleaded fraud claim (see generally *Campos v Beth Israel Med. Ctr.*, 80 AD3d 642, 642-643 [2d Dept 2011]) or was not supported by the records (see *Zammiello v Senpike Mall Co.*, 5 AD3d 1001, 1002 [4th Dept 2004]), we conclude that the expert testimony would have been relevant and admissible to the extent that it established the time at which decedent initially presented to JMH's emergency room and whether there was a significant delay in treatment that violated JMH's own protocols.

Generally, "[t]he determination whether to permit expert testimony is a mixed question of law and fact addressed primarily to the discretion of the trial court . . . , and the court's determination should not be disturbed absent an abuse of discretion" (*Curtin v J.B. Hunt Transp., Inc.* [appeal No. 2], 79 AD3d 1608, 1610 [4th Dept 2010] [internal quotation marks omitted]; see *Maggio v Dougherty*, 130 AD3d 1446, 1446-1447 [4th Dept 2015]). Given the relevance of such information to the critical allegation concerning the delay in treatment and its effect of such a delay on decedent's medical outcome, we conclude that the court abused its discretion in precluding such testimony (see *Byrnes v Satterly*, 85 AD3d 1711, 1712 [4th Dept 2011]). " 'Because the court precluded plaintiff from introducing any evidence [related to] a theory that might have resulted in a different verdict,' " we conclude that such testimony should not be precluded in a new trial (*id.*).

We further agree with plaintiff in both appeals that the court's "loss of chance" instruction was erroneous and warrants reversal. As this Court has held since at least 2011, a "loss of chance instruction" is "entirely appropriate for . . . omission theories" in medical malpractice actions (*Wild v Catholic Health Sys.*, 85 AD3d 1715, 1717 [4th Dept 2011], *affd* 21 NY3d 951 [2013]). Although the Pattern Jury Instructions did not include a loss of chance pattern charge until 2023, i.e., after the second trial in this matter took place in December 2022, this Court had already issued numerous decisions prior to December 2022 indicating that "the loss of chance theory of causation . . . requires only that a plaintiff 'present evidence from which a rational jury could infer that there was a "substantial possibility" that the patient was denied a chance of the better outcome as a result of the defendant's deviation from the standard of care' " (*Leberman v Glick*, 207 AD3d 1203, 1206 [4th Dept 2022] [emphasis added], quoting *Clune v Moore*, 142 AD3d 1330, 1331-1332 [4th Dept 2016]; see *Wolf v Persaud*, 130 AD3d 1523, 1525 [4th

Dept 2015]; *cf. Mi Jung Kim v Lewin*, 175 AD3d 1286, 1288 [2d Dept 2019]).

Here, the court instructed the jury that, in order for plaintiff to recover under a loss of chance theory, it was plaintiff's burden to establish that the act or omission alleged was a "substantial factor in bringing about the death." The court also instructed the jury that, if it should find that "there was a substantial probability that the decedent . . . would have survived . . . if he had received proper treatment," then it could find that defendants' alleged negligence was a "substantial factor" in causing his death (emphasis added).

We agree with plaintiff that the charge, as given, did not "adequately convey[ ] the sum and substance of the applicable law" to the jury (*Gumas v Niagara Frontier Tr. Metro Sys., Inc.*, 189 AD3d 2095, 2096 [4th Dept 2020]; see *Rakoff v New York City Dept. of Educ.*, 110 AD3d 780, 780-781 [2d Dept 2013]). The primary issue at trial was whether defendants deviated from accepted standards of care in failing to timely treat decedent. Inasmuch as the "court did not adequately charge the jury concerning" the appropriate standard to determine that issue, we conclude that "the court's failure to define [the correct] standard for the jury" cannot be considered harmless under the circumstances of this case (*McAndrews v City of New York*, 100 NY2d 603, 605 [2003]; see *Cannizzo v Wijeyasekaran*, 259 AD2d 960, 961 [4th Dept 1999]). We therefore reverse the judgments in appeal Nos. 1 and 2 insofar as appealed from by plaintiff, reinstate the amended complaint as asserted by him against all defendants, and grant a new trial with respect to plaintiff only.

Plaintiff further contends that the court erred in granting a directed verdict dismissing their claim under the Emergency Medical Treatment and Active Labor Act ([EMTALA] 42 USC § 1395dd) against JMH, which was premised upon the hospital failing to follow its triage policy by registering decedent prior to triage. We reject that contention. The purpose of the statute is to "combat 'patient dumping' by hospitals based on a patient's financial condition or lack of health insurance," i.e., it prevents hospitals from refusing to provide any initial screening or refusing to stabilize a patient presenting to an emergency room (*Lear v Genesee Mem. Hosp.*, 254 AD2d 707, 708 [4th Dept 1998], *lv dismissed* 92 NY2d 1045 [1999]; see *Hardy v New York City Health & Hosps. Corp.*, 164 F3d 789, 792 [2d Cir 1999]; *Brenord v Catholic Med. Ctr. of Brooklyn & Queens, Inc.*, 133 F Supp 2d 179, 184 [ED NY 2001]). Consistent with its limited purpose to prevent patient dumping, "EMTALA is not a federal malpractice statute" and "claims of misdiagnosis or inadequate treatment are left to the state malpractice arena" (*Lear*, 254 AD2d at 708 [internal quotation marks omitted]; see *Hardy*, 164 F3d at 792-793). In other words, "EMTALA does not protect a patient from improper diagnosis or treatment," but instead creates a cause of action for a complete "failure to treat" (*Lear*, 254 AD2d at 708 [internal quotation marks omitted]; see *Lidge v Niagara Falls Mem. Med. Ctr.*, 17 AD3d 1033, 1035 [4th Dept 2005]). Here, the evidence at trial established that decedent was, in fact, treated by JMH and, as a result, the EMTALA claim against JMH was properly dismissed.

Based on our determination, we do not address plaintiff's remaining contentions.

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**194**

**CA 23-01587**

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

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LEW WRIGHT, AS EXECUTOR OF THE ESTATE OF  
SANDRA RAMSEY, DECEASED, AND JAMES A. RAMSEY,  
AS EXECUTOR OF THE ESTATE OF ERNEST H.  
RAMSEY, DECEASED, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

VICKY K. STEPHENS, P.A., DELPHI HEALTHCARE, PLLC,  
DEFENDANTS,  
JANET K. REISMAN, R.N., JONES MEMORIAL HOSPITAL,  
AND THE MEMORIAL HOSPITAL OF WILLIAM F. AND  
GERTRUDE F. JONES, INC., DOING BUSINESS AS  
JONES MEMORIAL HOSPITAL, DEFENDANTS-RESPONDENTS.  
(APPEAL NO. 2.)

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BLACK, LYLE & HABBERFIELD, LLP, OLEAN (KEVIN M. HABBERFIELD OF  
COUNSEL), FOR PLAINTIFFS-APPELLANTS.

THE TARANTINO LAW FIRM, LLP, BUFFALO (MARYLOU K. ROSHIA OF COUNSEL),  
FOR DEFENDANTS-RESPONDENTS JANET K. REISMAN, R.N., JONES MEMORIAL  
HOSPITAL, AND THE MEMORIAL HOSPITAL OF WILLIAM F. AND GERTRUDE F.  
JONES, INC., DOING BUSINESS AS JONES MEMORIAL HOSPITAL.

HIRSCH & TUBIOLO, P.C., PITTSFORD (BRYAN S. KORNFIELD OF COUNSEL), FOR  
DEFENDANTS VICKY K. STEPHENS, P.A. AND DELPHI HEALTHCARE, PLLC.

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Appeal from a judgment of the Supreme Court, Allegany County  
(Thomas P. Brown, A.J.), entered May 11, 2023. The judgment, insofar  
as appealed from, dismissed the amended complaint, upon a jury  
verdict, against defendants Janet K. Reisman, R.N., Jones Memorial  
Hospital and The Memorial Hospital of William F. and Gertrude F.  
Jones, Inc., doing business as Jones Memorial Hospital.

It is hereby ORDERED that said appeal insofar as taken by  
plaintiff Lew Wright, as executor of the estate of Sandra Ramsey,  
deceased, is dismissed, and the judgment insofar as appealed from is  
reversed on the law without costs, the amended complaint as asserted  
by plaintiff James A. Ramsey, as executor of the estate of Ernest H.  
Ramsey, deceased, is reinstated against defendants Janet K. Reisman,  
R.N., Jones Memorial Hospital, and the Memorial Hospital of William F.  
and Gertrude F. Jones, Inc., doing business as Jones Memorial  
Hospital, and a new trial is granted.

Same memorandum as in *Wright v Stephens* ([appeal No. 1] – AD3d – [June 6, 2025] [4th Dept 2025]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

197

**CA 24-00257**

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

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IN THE MATTER OF DANIEL T. WARREN,  
PETITIONER-PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

GARY A. DICKSON, INDIVIDUALLY AND IN HIS  
CAPACITY AS SUPERVISOR OF TOWN OF WEST SENECA,  
TOWN OF WEST SENECA, DANIEL MEYER, IN HIS  
CAPACITY AS FOIL APPEALS OFFICER OF ERIE COUNTY,  
BRIAN BRAY, IN HIS CAPACITY AS ERIE COUNTY  
COMMISSIONER OF PERSONNEL AND JUDITH KINDRON,  
RESPONDENTS-DEFENDANTS-RESPONDENTS.

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DANIEL T. WARREN, PETITIONER-PLAINTIFF-APPELLANT PRO SE.

GRECO TRAPP PLLC, BUFFALO (CHRIS G. TRAPP OF COUNSEL), FOR  
RESPONDENTS-DEFENDANTS-RESPONDENTS.

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Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 6, 2024, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, inter alia, dismissed the petition-complaint.

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

Memorandum: Petitioner-plaintiff (petitioner) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul the determination appointing respondent-defendant Judith Kindron to the position of Director of Finance for respondent-defendant Town of West Seneca (Town). Petitioner alleged, among other things, that Kindron should not have received the appointment inasmuch as she was not a Town resident. Kindron, the Town, and respondent-defendant Gary A. Dickson, individually and in his capacity as Supervisor of the Town of West Seneca, thereafter filed a cross-motion seeking to dismiss the petition-complaint against them. Petitioner now appeals from a judgment that, among other things, granted the cross-motion and dismissed the petition-complaint against all respondents-defendants based upon Supreme Court's determination that petitioner lacked standing to challenge Kindron's appointment. We affirm.

Petitioner contends that the court should have determined that he

has standing based on General Municipal Law § 51 and Civil Service Law § 102, and that he has common-law taxpayer standing. We reject petitioner's contentions.

First, "[a] taxpayer suit under General Municipal Law § 51 lies only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009] [internal quotation marks omitted]; see *Mesivta of Forest Hills Inst. v City of New York*, 58 NY2d 1014, 1016 [1983]). Contrary to petitioner's contention, the mere failure to observe a statutory provision, such as a residency requirement, does not constitute the type of fraud or illegality necessary to support a taxpayer action under General Municipal Law § 51 (see *Mesivta*, 58 NY2d at 1016; *Matter of Aklog v Town of Harrison*, 219 AD3d 605, 607 [2d Dept 2023]; *Matter of Urbanski v City of Rochester*, 66 AD3d 1412, 1413-1414 [4th Dept 2009], *lv denied* 14 NY3d 702 [2010]). For the same reason, we conclude that there is no merit to petitioner's contention that he has standing under Civil Service Law § 102 (see *Holton v Board of Supervisors of County of Monroe*, 245 App Div 144, 145 [4th Dept 1935]).

Finally, with respect to common-law taxpayer standing, that is "a remedy for taxpayers to challenge important governmental actions, despite such parties being otherwise insufficiently interested for standing purposes, when 'the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action' " (*Matter of Colella v Board of Assessors of County of Nassau*, 95 NY2d 401, 410 [2000]). However, the doctrine should not be applied to allow challenges, such as the one here, to "determinations of local governmental officials having no appreciable public significance beyond the immediately affected parties, by persons having only the remotest legitimate interest in the matter" (*id.* at 410-411; see *Aklog*, 219 AD3d at 606-607; *Matter of Davidson v Village of Penn Yan*, 107 AD3d 1423, 1423 [4th Dept 2013]; *cf. Matter of Ricket v Mahan*, 97 AD3d 1062, 1063-1064 [3d Dept 2012]).

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

**204**

**KA 23-01689**

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

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

JAMIEN HARRIS, DEFENDANT-RESPONDENT.

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MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (HARMONY A. HEALY OF COUNSEL), FOR APPELLANT.

TEXIDO LAW, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Erie County Court (Kenneth F. Case, J.), dated September 20, 2023. The order granted defendant's motion to dismiss the indictment.

It is hereby ORDERED that the order so appealed from is reversed on the law, the motion is denied, the indictment is reinstated, and the matter is remitted to Erie County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting defendant's motion to dismiss the indictment charging her with murder in the second degree, pursuant to CPL 40.40 (2). The issue raised on this appeal is whether County Court improperly determined that prosecution of the indictment is barred because the conduct underlying previous charges of firearm possession and the conduct underlying the charge of murder were part of the same criminal transaction. For the reasons that follow, we conclude that the court improperly dismissed the indictment, and thus we reverse the order, deny the motion, and reinstate the indictment.

By way of background, on or about November 20, 2021, the 90-year-old victim was shot and killed in her home. When police officers arrived at the scene, defendant, the victim's granddaughter, was found in the house and appeared to be in distress. Defendant gave the officers conflicting accounts of what had happened to her grandmother but consistently stated that there were guns in the house that defendant had been playing with. A pistol and a revolver were recovered from the home. The People presented evidence to a grand jury relating to the two firearms. The evidence included witness testimony from various police officers about the crime scene, including that the victim appeared to have suffered a gunshot wound to the chest and about statements made to them by defendant. Defendant

was indicted on two counts of criminal possession of a firearm (Penal Law § 265.01-b [1]), and she pleaded guilty to both counts.

Several months later, the People presented evidence to another grand jury relating to the murder. The People presented similar testimony from the police officers who had testified to the first grand jury as well as additional statements made by defendant. Defendant was indicted on one count of murder in the second degree (Penal Law § 125.25 [1]). Thereafter, defendant filed a motion pursuant to CPL 40.40 (2) to dismiss that indictment. The court granted defendant's motion and dismissed the indictment on the ground that the conduct underlying the charges of firearm possession and underlying the charge of murder were part of the same criminal transaction and the People had legally sufficient evidence at the time of defendant's guilty plea to convict defendant of murder. On appeal, the People first contend that the conduct underlying the charges of firearm possession was not part of the same criminal transaction as the conduct underlying the murder charge. We agree with the People.

"CPL 40.40 prohibits a separate prosecution of joinable offenses that arise out of the same transaction and involve different and distinct elements under circumstances wherein no violation of the double jeopardy principle can validly be maintained but the equities nevertheless seem to preclude separate prosecutions" (*People v DeProspero*, 91 AD3d 39, 43 [4th Dept 2011], *affd* 20 NY3d 527 [2013]). Under CPL 40.40 (1), "[w]here two or more offenses are joinable in a single accusatory instrument against a person by reason of being based upon the same criminal transaction, . . . such person may not, under circumstances prescribed in this section, be separately prosecuted for such offenses." A "criminal transaction" is defined as "conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture" (CPL 40.10 [2]). "When (a) one of two or more joinable offenses [that are joinable in a single accusatory instrument against a person by reason of being based upon the same criminal transaction] is charged in an accusatory instrument, and (b) another is not charged therein, or in any other accusatory instrument filed in the same court, despite possession by the [P]eople of evidence legally sufficient to support a conviction of the defendant for such uncharged offense, and (c) either a trial of the existing accusatory instrument is commenced or the action thereon is disposed of by a plea of guilty, any subsequent prosecution for the uncharged offense is thereby barred" (CPL 40.40 [2]; *see People v Tabor*, 87 AD3d 829, 831 [4th Dept 2011]). Under the facts and circumstances of this case, we conclude that the conduct related to possession of the firearms and that related to the murder involved separate and distinct criminal acts that were not part of the same criminal transaction (*see generally People v Brown*, 21 NY3d 739, 751 [2013]; *People v Clinton*, 222 AD3d 1427, 1428-1429 [4th Dept 2023], *lv denied* 41 NY3d 1017 [2024]; *People v Batista*, 282 AD2d 825, 826 [3d Dept 2001], *lv denied* 96 NY2d 825 [2001]). Thus, the murder count was properly charged on a separate

accusatory instrument and the People did not violate CPL 40.40.

In light of our determination, the People's remaining contentions are academic.

All concur except LINDLEY, J.P., who dissents and votes to affirm in the following memorandum: I respectfully dissent. In my view, County Court properly granted defendant's motion to dismiss the indictment charging murder in the second degree pursuant to CPL 40.40 (2), which "prohibits separate prosecutions for offenses arising out of the same criminal transaction, if they are joinable in one accusatory instrument" (*People v Ruzas*, 54 AD2d 1083, 1084 [4th Dept 1976]) and "involve different and distinct elements under circumstances wherein no violation of the double jeopardy principle can validly be maintained but the equities nevertheless seem to preclude separate prosecutions" (*People v DeProspero*, 91 AD3d 39, 43 [4th Dept 2011], *affd* 20 NY3d 527 [2013] [internal quotation marks omitted]).

As the court determined, prosecution of the murder charge is barred by CPL 40.40 (2) because it is joinable under CPL 200.20 (2) (a) with the criminal possession of a firearm offenses charged in the prior indictment, and the People possessed legally sufficient evidence to support a murder conviction against defendant when she pleaded guilty to the firearm offenses. Where, as here, "the evidence against a person is in the prosecutor's hands, [they] may not—as a player in a game of chance—deal out indictments one at a time" (*Matter of Auer v Smith*, 77 AD2d 172, 189 [4th Dept 1980], *lv dismissed* 52 NY2d 1070 [1981]; see *People v Tabor*, 87 AD3d 829, 831 [4th Dept 2011]; *People v Lindsly*, 99 AD2d 99, 102 [2d Dept 1984]).

The majority accurately sets forth the relevant statutory authority. CPL 40.40 (2) reads: "When (a) one of two or more joinable offenses of the kind specified in [CPL 40.40 (1)] is charged in an accusatory instrument, and (b) another is not charged therein, or in any other accusatory instrument filed in the same court, despite possession by the people of evidence legally sufficient to support a conviction of the defendant for such uncharged offense, and (c) either a trial of the existing accusatory instrument is commenced or the action thereon is disposed of by a plea of guilty, any subsequent prosecution for the uncharged offense is thereby barred."

CPL 40.40 (1) refers to joinder under CPL 200.20 (2) (a), which, as relevant here, provides that offenses are joinable when "[t]hey are based upon the same act or upon the same criminal transaction, as that term is defined in [CPL 40.10 (2)]." CPL 40.10 (2), in turn, defines a criminal transaction as "conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture." In a nutshell, CPL 40.40 "applies only to offenses that are joinable on the ground that they arise from a single criminal

transaction" (*DeProspero*, 91 AD3d at 43) and only where the People had legally sufficient evidence to support a conviction of the defendant for the second offense when a trial began on the first offense or the defendant pleaded guilty to the first offense (see *Tabor*, 87 AD3d at 831).

Here, the People possessed legally sufficient evidence to support a conviction of murder in the second degree against defendant at the time she pleaded guilty to criminal possession of a firearm as charged in the initial indictment. Indeed, defendant was alone in the house when her grandmother's body was found in the living room next to a revolver. The forensic evidence showed that the victim had been shot once in the chest with a bullet from that revolver, and defendant admitted to the police that she fired a shot in the direction of the victim and may have hit her. Defendant also said, "I think the gun that killed grandma is the gun that I played with." Accepted as true, this evidence "would establish every element of [murder in the second degree] and the defendant's commission thereof" (CPL 70.10 [1]; see *People v Danielson*, 9 NY3d 342, 349 [2007]).

The only evidence obtained by the People after defendant's guilty plea was the results of tests showing that the major DNA profile obtained from a swab of the revolver matches defendant's DNA profile. Although the DNA evidence no doubt incriminated defendant in the homicide, it was equally incriminating with respect to the count of the prior indictment charging her with possessing the revolver. Regardless, with or without the DNA test results, the evidence was legally sufficient to support a conviction for both murder and possession of the revolver even without the DNA evidence. The fact that defendant gave conflicting statements to the police regarding her involvement in the homicide does not affect the sufficiency of the evidence, which must be viewed in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621 [1983]).

Defendant's statutory double jeopardy claim therefore turns on whether the offenses of murder and possession of a firearm were joinable in a single accusatory instrument under CPL 200.20 (2) (a). Stated otherwise, the question presented is whether the two offenses are based on "the same criminal transaction" (CPL 200.20 [2] [a]; see CPL 40.10 [2]). The relevant inquiry is whether, based on the evidence presented to the grand jury that issued the initial indictment, defendant's possession of the revolver arose from the same criminal transaction as the homicide.

In opposition to defendant's motion, the People asserted in County Court that "defendant's possession of the firearm had continuously occurred for months prior to the homicide, and defendant used at least one of the firearms the evening before her arrest when she shot through the window" (emphasis added). The People argued that defendant's simple possession of the firearm and her shooting of the victim "constituted acts that had occurred at different times and could have inflicted different harms ([i.e.,] the destruction of the windows as opposed to defendant shooting her grandmother)."

During oral argument on appeal, however, the People conceded, as they must, that defendant's possession of the revolver, as charged in the initial indictment, occurred *after* the murder, even though she may have made statements to the police indicating that she possessed the revolver prior to the murder. This is so because the initial indictment, consistent with the evidence presented to the grand jury, alleges that defendant possessed the revolver on November 21, 2021, while the second indictment alleges that she committed the murder on November 20, 2021.

I note in any event that there was no evidence presented to the first grand jury that defendant possessed the revolver before November 21, 2021, when the police arrived at the house late in the morning and found defendant alone with her grandmother's body and the revolver in the living room. Nor was any evidence presented that defendant used the revolver to shoot out the windows of the house either before or after the homicide. The only evidence presented to the grand jury of defendant's physical possession of the revolver consisted of statements she made to a homicide detective. Specifically, the detective testified that defendant said that she had been playing with a gun and added, "I think the gun that killed grandma was the gun that I played with."

Again, however, we are concerned here only with defendant's post-shooting possession, and the People presented no evidence to either grand jury that defendant physically possessed the revolver after using it to shoot her grandmother. Thus, defendant's post-shooting possession of the revolver must be based on a theory of constructive possession, which was charged to the initial grand jury. Because defendant remained in the house with the revolver after the shooting, she no doubt constructively possessed the weapon up until the time the police arrived and removed her from the premises. But defendant's constructive possession of the revolver was a continuous crime that began when she last entered the house (*see generally Matter of Johnson v Morgenthau*, 69 NY2d 148, 151-152 [1987]; *People v Hills*, 234 AD3d 1311, 1312 [4th Dept 2025], *lv denied* - NY3d - [2025]).

In the absence of evidence that defendant left the house after shooting her grandmother, it necessarily follows that her possession of the revolver with intent to use it unlawfully against her grandmother overlapped with her constructive possession of the weapon. Under the circumstances, I conclude that defendant's possession of the revolver and her alleged use of it to kill her grandmother are "so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident" (CPL 40.10 [2] [a]).

In their post-argument submission, the People contend that the criminal possession of a firearm charges were based on evidence of observations of defendant made by the police in the residence on November 21, 2021, when the guns were discovered, while the "act of homicide occurred on November 20, 2021 and was completed the day before defendant was caught in possession of the weapon." However, there was no evidence presented to the initial grand jury as to when

the homicide was committed. Due to the manner in which the case was presented to the grand jurors, we have no way of knowing the basis of their finding that defendant possessed the revolver. We do know, however, that there was no evidence presented to the first grand jury that the victim was killed the day before the police arrived at the house.

Both the People and the majority rely on *People v Brown* (21 NY3d 739, 751 [2013]), where the Court of Appeals held that consecutive sentences are lawful for "simple" knowing, unlawful possession of a loaded firearm (i.e., without any intent to use) and another crime committed with the same weapon, if "a defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon." The Court's focus in *Brown* was on "the separateness of acts" (*id.* at 750). The Court reasoned that, because each defendant's possession of a firearm and his subsequent use of that weapon to commit a crime were separate acts, consecutive sentencing did not run afoul of Penal Law § 70.25 (2), which mandates concurrent sentences "[w]hen more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which itself constituted one of the offenses and was also a material element of the other."

Although *Brown* may allow for consecutive sentencing here if defendant were convicted of murder and criminal possession of the firearm used in the homicide, as those two crimes were based on separate acts, the "separate acts" analysis for sentencing purposes does not illuminate the question whether the two offenses are separate acts based on the *same criminal transaction* and thus joinable under CPL 200.20 (2) (a). In other words, while consecutive sentencing was permitted in *Brown*, it does not necessarily follow from that holding that defendant could have been prosecuted separately for the two offenses. The People cite no reported cases where a defendant has been prosecuted separately with possessing a firearm and using the same firearm to commit a crime.

As the court below determined, to allow separate prosecutions in this case "would permit prosecutors to always pursue and conclude weapons possession charges in advance of murder charges, creating the piece-meal prosecutions CPL [ ] 40.40 expressly forbids." I would go a step further. Allowing separate prosecutions for murder and criminal possession of a firearm in this case will allow separate prosecutions for a defendant's simple possession of a weapon and their possession of the same weapon with intent to commit a crime with it. In fact, under the People's theory, they could have prosecuted defendant separately for three counts of criminal possession of a firearm with respect to the revolver: one arising from defendant's possession of the revolver in the house before she allegedly used it to shoot her grandmother, a second arising from her possession of the revolver to shoot her grandmother, and the third arising from her possession of the revolver in the house following the shooting. Successive prosecutions of that kind are simply incompatible with the

statutory double jeopardy provisions of CPL 40.40. I would thus affirm.

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**210**

**CA 23-02111**

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

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WILMINGTON SAVINGS FUND SOCIETY, FSB,  
DOING BUSINESS AS CHRISTIANA TRUST,  
NOT INDIVIDUALLY BUT AS TRUSTEE FOR  
PRETIUM MORTGAGE ACQUISITION TRUST,  
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

STEVEN E. GUSTAFSON, PAM L. GUSTAFSON,  
DEFENDANTS-APPELLANTS,  
RILEY GUSTAFSON AND GRETA GUSTAFSON, DEFENDANTS.

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ARTHUR N. BAILEY & ASSOCIATES, JAMESTOWN (KYLE C. DIDONE OF COUNSEL),  
FOR DEFENDANTS-APPELLANTS.

KNUCKLES & MANFRO, LLP, TARRYTOWN (MANIK J. SAINI OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered September 29, 2023. The order, among other things, granted plaintiff's motion for, inter alia, a judgment of foreclosure and sale.

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

Memorandum: Plaintiff commenced this mortgage foreclosure action in April 2016, alleging that Steven E. Gustafson and Pam L. Gustafson (defendants) defaulted in the payment on their residential mortgage in May 2009 and in each subsequent month thereafter. Plaintiff moved for, inter alia, amendment of the caption to include as defendants Riley Gustafson and Greta Gustafson (default defendants), a default judgment against default defendants, a judgment of foreclosure and sale, and an order directing the distribution of the sale proceeds. Defendants cross-moved to compel plaintiff to accept their answer and affirmative defense that plaintiff lacks standing in this foreclosure action and to dismiss plaintiff's complaint based on expiration of the six-year statute of limitations. Supreme Court granted plaintiff's motion and in effect denied defendants' cross-motion and supplemental cross-motion. Defendants appeal. We affirm.

We note at the outset that defendants do not contend on appeal that plaintiff lacks standing, and defendants are therefore deemed to have abandoned that contention (*see Ciesinski v Town of Aurora*, 202

AD2d 984, 984 [4th Dept 1994]).

An action to foreclose a mortgage is governed by a six-year statute of limitations (see CPLR 213 [4]). Once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt (see *Freedom Mtge. Corp. v Engel*, 37 NY3d 1, 21-22 [2021], *rearg denied* 37 NY3d 926 [2021]; *Business Loan Ctr., Inc. v Wagner*, 31 AD3d 1122, 1123 [4th Dept 2006]). Defendants contend that plaintiff's foreclosure action is barred by the six-year statute of limitations because plaintiff's predecessor in interest validly accelerated the mortgage in February 2010. We agree with plaintiff that defendants' contention was previously raised by defendants during the litigation of plaintiff's prior appeal, where defendants contended that the action is barred by the six-year statute of limitations. We rejected that contention based on our determination that the entity that purported to accelerate defendants' entire debt in 2010 and in 2012 was not the holder or assignee of the mortgage and did not hold or own the note (*Wilmington Sav. Fund Socy., FSB v Gustafson*, 160 AD3d 1409, 1410 [4th Dept 2018]). "Thus, the entity's purported attempts to accelerate the entire debt were a nullity, and the six-year statute of limitations did not begin to run on the entire debt" (*id.*). Our resolution of that issue on a prior appeal constitutes the law of the case and is binding (see *Matter of Foreclosure of Tax Liens [Neal-Fedder Lofts, LLC]*, 211 AD3d 1508, 1509 [4th Dept 2022]; *Juhasz v Juhasz*, 101 AD3d 1690, 1690 [4th Dept 2012]; *Mobil Oil Corp. v City of Syracuse Indus. Dev. Agency*, 224 AD2d 15, 19 [4th Dept 1996], *appeal dismissed* 89 NY2d 860 [1996], *lv denied* 89 NY2d 811 [1997]). Thus, contrary to defendants' contention, the court properly granted plaintiff's motion and denied their supplemental cross-motion.

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**224**

**CA 23-02147**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, AND NOWAK, JJ.

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IN THE MATTER OF CAYUGA NATION, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

WARREN JOHN, RESPONDENT-RESPONDENT.

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BARLCAY DAMON LLP, SYRACUSE (MICHAEL E. NICHOLSON OF COUNSEL), FOR  
PETITIONER-APPELLANT.

JOSEPH J. HEATH, SYRACUSE, AND LAW OFFICES OF MICHAEL D. SLIGER, NEW  
YORK CITY, FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Supreme Court, Seneca County (Barry L. Porsch, A.J.), entered November 30, 2023. The order granted the motion of respondent to vacate a default judgment.

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

Memorandum: Petitioner appeals from an order that granted respondent's motion to vacate a default judgment entered by Supreme Court (Odorisi, J.) which domesticated a judgment of the Cayuga Nation Civil Court (Nation Court) against respondent.

We affirm. Contrary to petitioner's contention, no appeal lies from the judgment entered upon default (*see* CPLR 5511; *see generally* *Estate of Essig v Essig*, 227 AD3d 1379, 1380 [4th Dept 2024]), and thus respondent's proper remedy was to move in Supreme Court to vacate the default judgment (*see* *Britt v Buffalo Mun. Hous. Auth.*, 109 AD3d 1195, 1196 [4th Dept 2013]).

Petitioner further contends that the court (Porsch, A.J.) erred in vacating the default judgment because the grounds for vacatur enumerated in CPLR 5015 (a) (5) are not applicable here. We reject that contention. CPLR 5015 (a) (5) allows a court to vacate a judgment or order "upon the ground of . . . reversal, modification or vacatur of a prior judgment or order upon which it is based." Petitioner is correct that respondent moved to vacate the default judgment pursuant to CPLR 5015 (a) (5) and that the relief here was not granted upon the ground of reversal, modification or vacatur of a prior judgment or order. Nevertheless, "section 5015 (a) does not provide an exhaustive list as to when a default judgment may be vacated," and courts have "inherent discretionary power [to vacate default judgments] in situations that warrant[ ] vacatur but which the

drafters [of CPLR 5015 (a)] could not easily foresee" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). Thus, "in addition to the grounds set forth in section 5015 (a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice," which "will be reviewed on appeal for an abuse of discretion" (*id.*; see generally *Wilczak v City of Niagara Falls*, 174 AD3d 1446, 1449 [4th Dept 2019]). In our view, the court did not abuse its discretion in vacating the default judgment.

Petitioner contends that the court erred in determining that the Nation Court judgment is not enforceable in New York and that the court therefore abused its discretion in vacating the default judgment on that ground. We reject that contention. "A party seeking recognition of a foreign country judgment has the burden of establishing that [CPLR article 53] applies to the foreign country judgment" (CPLR 5302 [c]; see *Matter of Cayuga Nation v Parker*, 229 AD3d 1066, 1068 [4th Dept 2024]). The provisions of CPLR article 53 apply to a foreign country judgment to the extent that such judgment is "final, conclusive and enforceable" under the law of the foreign country where it was rendered (CPLR 5302 [a] [2]), and is not, *inter alia*, "a fine or penalty" (CPLR 5302 [b] [2]; see *Parker*, 229 AD3d at 1068).

Here, the record on appeal does not establish that CPLR article 53 applies to the Nation Court judgment. Although petitioner contends that the Nation Court judgment awarded monetary damages for unpaid rent, the petition seeking to domesticate the Nation Court judgment does not include such an allegation, and the Nation Court order upon which the Nation Court judgment is based provides that the judgment "represent[s] the reasonable value of Respondent's continued occupation of the Premises." Further, the petition in the underlying Nation Court proceeding is not included in the record on appeal, nor is there any lease provision between petitioner and respondent or any attorney affidavit in support of the petition in the Nation Court proceeding. Thus, the record does not establish that the Nation Court judgment was not imposed as a fine based upon the continued occupation of the premises (see *Parker*, 229 AD3d at 1068-1069). Inasmuch as the evidence in the record does not establish that the Nation Court judgment was not "a fine or penalty" (CPLR 5302 [b] [2]), the record does not establish that article 53 applies to the Nation Court judgment (see CPLR 5302 [c]), and there is no abuse of discretion in vacating the default judgment on that ground in the interests of substantial justice (see generally *Woodson*, 100 NY2d at 68).

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

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

**225**

**CA 23-02148**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, AND NOWAK, JJ.

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IN THE MATTER OF CAYUGA NATION, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

ELIJAH JIMERSON, RESPONDENT-RESPONDENT.

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BARLCAY DAMON LLP, SYRACUSE (MICHAEL E. NICHOLSON OF COUNSEL), FOR  
PETITIONER-APPELLANT.

JOSEPH J. HEATH, SYRACUSE, AND LAW OFFICES OF MICHAEL D. SLIGER, NEW  
YORK CITY, FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Supreme Court, Seneca County (Barry  
L. Porsch, A.J.), entered November 30, 2023. The order granted the  
motion of respondent to vacate a default judgment.

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

Memorandum: Petitioner appeals from an order that granted  
respondent's motion to vacate a default judgment, which domesticated a  
judgment of the Cayuga Nation Civil Court against respondent. We  
affirm for the reasons stated in *Matter of Cayuga Nation v John* (-  
AD3d - [June 6, 2025] [4th Dept 2025]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**226**

**CA 23-02149**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, AND NOWAK, JJ.

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IN THE MATTER OF CAYUGA NATION, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MICHELLE SENECA, RESPONDENT-RESPONDENT.

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BARLCAY DAMON LLP, SYRACUSE (MICHAEL E. NICHOLSON OF COUNSEL), FOR  
PETITIONER-APPELLANT.

JOSEPH J. HEATH, SYRACUSE, AND LAW OFFICES OF MICHAEL D. SLIGER, NEW  
YORK CITY, FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Supreme Court, Seneca County (Barry  
L. Porsch, A.J.), entered November 30, 2023. The order granted the  
motion of respondent to vacate a default judgment.

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

Memorandum: Petitioner appeals from an order that granted  
respondent's motion to vacate a default judgment, which domesticated a  
judgment of the Cayuga Nation Civil Court against respondent. We  
affirm for the reasons stated in *Matter of Cayuga Nation v John* (-  
AD3d - [June 6, 2025] [4th Dept 2025]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**227**

**CA 23-02150**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, AND NOWAK, JJ.

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IN THE MATTER OF CAYUGA NATION, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

DANIEL JIMERSON, RESPONDENT-RESPONDENT.

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BARLCAY DAMON LLP, SYRACUSE (MICHAEL E. NICHOLSON OF COUNSEL), FOR  
PETITIONER-APPELLANT.

JOSEPH J. HEATH, SYRACUSE, AND LAW OFFICES OF MICHAEL D. SLIGER, NEW  
YORK CITY, FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Supreme Court, Seneca County (Barry L. Porsch, A.J.), entered November 30, 2023. The order granted the motion of respondent to vacate a default judgment.

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

Memorandum: Petitioner appeals from an order that granted respondent's motion to vacate a default judgment, which domesticated a judgment of the Cayuga Nation Civil Court against respondent. We affirm for the reasons stated in *Matter of Cayuga Nation v John* (-AD3d - [June 6, 2025] [4th Dept 2025]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**228**

**CA 24-00985**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, NOWAK, AND DELCONTE, JJ.

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RAFAEL PASTRANA-ORTIZ, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JENNIFER WEMPLE, DEFENDANT-RESPONDENT.

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

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (BRIANNA D. CARROLL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered June 25, 2024. The order granted defendant's motion to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained when the vehicle he was driving was rear-ended by a vehicle operated by defendant. Supreme Court granted defendant's motion to dismiss the complaint on the ground that the action is barred by a release signed by plaintiff after the motor vehicle accident. Plaintiff contends on appeal that the court erred in granting the motion because there is a triable issue of fact whether the release was the result of fraud or mutual mistake, or whether he fairly and knowingly entered into the release. We agree with plaintiff that there are triable issues of fact with respect to mutual mistake and whether he fairly and knowingly entered into the release.

Generally, so long as the language used is clear and unambiguous, "a valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011] [internal quotation marks omitted]). Nonetheless, as a contractual agreement, a release "may be invalidated . . . for any of 'the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake' " (*id.*, quoting *Mangini v McClurg*, 24 NY2d 556, 563 [1969]). In addition, a release may also be set aside on the ground that it was not " 'fairly and knowingly made' " (*Wei Qiang Huang v Llerena-Salazar*, 222 AD3d 1033, 1033 [2d Dept 2023]; see

generally *Mangini*, 24 NY2d at 567-568; *Putnam v Kibler*, 210 AD3d 1458, 1462-1463 [4th Dept 2022]), such as where, " 'because the releasor has had little time for investigation or deliberation, or because of the existence of overreaching or unfair circumstances, it was deemed inequitable to allow the release to serve as a bar to the claim of an injured party' " (*Haynes v Garez*, 304 AD2d 714, 715 [2d Dept 2003], quoting *Mangini*, 24 NY2d at 567).

"Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release 'shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release' " (*Centro Empresarial Cempresa S.A.*, 17 NY3d at 276, quoting *Fleming v Ponziani*, 24 NY2d 105, 111 [1969]). "In resolving a motion for dismissal pursuant to CPLR 3211 (a) (5), the plaintiff's allegations are to be treated as true, all inferences that reasonably flow therefrom are to be resolved in his or her favor, and where, as here, the plaintiff has submitted an affidavit in opposition to the motion, it is to be construed in the same favorable light" (*Sacchetti-Virga v Bonilla*, 158 AD3d 783, 784 [2d Dept 2018] [internal quotation marks omitted]; see *Divito v Fiandach*, 160 AD3d 1356, 1357 [4th Dept 2018]).

Here, defendant moved to dismiss the complaint pursuant to CPLR 3211 (a) (5) on the ground of release and submitted the written release, which contained clear and unambiguous language, thereby shifting the burden to plaintiff to show that there has been fraud, duress or some other fact that will be sufficient to void the release.

"A plaintiff seeking to invalidate a release due to fraud must establish the basic elements of fraud, namely a representation of a material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury" (*Powell v Adler*, 128 AD3d 1039, 1040 [2d Dept 2015] [internal quotation marks omitted]). Inasmuch as plaintiff did not submit in opposition to the motion any evidence that, inter alia, the statements made by representatives of defendant's insurance carrier were false or that he justifiably relied upon such statements in deciding to sign the release, he failed to show that the release was voidable based on fraud (*cf. Cain-Henry v Shot*, 194 AD3d 1465, 1466-1467 [4th Dept 2021]; see generally *Gray v Miller*, 248 AD2d 1000, 1001 [4th Dept 1998]).

A plaintiff seeking to invalidate a release on the ground that there was a mutual mistake with respect to the extent of the injuries that the plaintiff sustained must establish that, at the time the release was executed, "the parties were under '[a] mistaken belief as to the nonexistence of [a] presently existing injury' " (*DiDomenico v McWhorter*, 227 AD3d 1529, 1532 [4th Dept 2024], quoting *Mangini*, 24 NY2d at 564). "[I]n resolving claims of mutual mistake as to injury at the time of release, there has been delineated a sharp distinction between injuries unknown to the parties and mistake as to the consequence of a known injury" (*Mangini*, 24 NY2d at 564; see *Schroeder*

*v Connelly*, 46 AD3d 1439, 1440 [4th Dept 2007]). "A mistaken belief as to the nonexistence of presently existing injury is a prerequisite to avoidance of a release" (*Mangini*, 24 NY2d at 564; see *Schroeder*, 46 AD3d at 1440), whereas "[i]f the injury is known, and the mistake . . . is merely as to the consequence, future course, or sequelae of [the] known injury, then the release will stand" (*Mangini*, 24 NY2d at 564). "Even where a releasor has knowledge of the causative trauma, . . . there must be actual knowledge of the injury. Knowledge of injury to an area of the body cannot cover injury of a different type and gravity" (*id.* at 565). Accepting the facts as alleged in the complaint as true and according plaintiff the benefit of every possible favorable inference (see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Sacchetti-Virga*, 158 AD3d at 784; see generally *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]), we agree with plaintiff that he sufficiently alleged facts on which to invalidate the release on the ground of mutual mistake inasmuch as, despite the fact that at the time the release was signed plaintiff had pain in the cervical spine and left hip and a diagnosis of a cervical strain, plaintiff alleged that neither party was aware of plaintiff's lumbar disc injuries or left hip degenerative joint disease at that time (see *Finbel v Vasquez*, 163 AD3d 1120, 1122 [3d Dept 2018]; *Ford v Phillips*, 121 AD3d 1232, 1235 [3d Dept 2014]; see generally *Mangini*, 24 NY2d at 565-566).

A plaintiff seeking to invalidate a release on the ground that it was not fairly and knowingly entered into must establish that "the release was signed by the plaintiff under circumstances that indicate unfairness, [or that] it was not 'fairly and knowingly' made" (*Wei Qiang Huang*, 222 AD3d at 1034). Again accepting the facts as alleged in the complaint as true and according plaintiff the benefit of every possible favorable inference (see *Leon*, 84 NY2d at 87-88; *Sacchetti-Virga*, 158 AD3d at 783), we agree with plaintiff that, in the complaint and his affidavit in opposition to the motion, he sufficiently alleged facts on which to invalidate the release on the ground of whether the release was fairly and knowingly entered into inasmuch as plaintiff averred in his affidavit in opposition to the motion that, inter alia, he signed the release a short time after the accident occurred, he is unable to fluently read, understand or speak English, he did not understand the release, at the time he signed the release he did not have an attorney, he was not provided with an interpretation of the release, and he needed money for a vehicle in order to attend medical appointments (see *Applewhite v 112 Liberty Assoc., LLC*, 233 AD3d 834, 835-836 [2d Dept 2024]; *Wei Qiang Huang*, 222 AD3d at 1034).

We therefore reverse the order, deny the motion, and reinstate the complaint.

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

**229**

**CA 24-00034**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, AND NOWAK, JJ.

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MANLIUS CENTER ROAD ASSOCIATES, LLC,  
PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

GURNAKE SINGH, ALSO KNOWN AS SONNY SINGH,  
INDIVIDUALLY AND DOING BUSINESS AS LIQUOR WORLD,  
LLC, LIQUOR WORLD OF SYRACUSE, INC., DOING  
BUSINESS AS LIQUOR WORLD, LLC, KIRANDEEP NAFRI,  
INDIVIDUALLY AND DOING BUSINESS AS LIQUOR  
WORLD, LLC, AND LIQUOR WORLD 315, INC.,  
DEFENDANTS-RESPONDENTS-APPELLANTS.

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COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ELIZABETH A. HOFFMAN OF  
COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

BOND, SCHOENECK & KING PLLC, SYRACUSE (JAMES P. WRIGHT OF COUNSEL),  
FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

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Appeal and cross-appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered December 21, 2023. The order denied defendants' motion for summary judgment and denied plaintiff's cross-motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of plaintiff's cross-motion for partial summary judgment on the issue of liability on the cause of action for breach of contract against defendant Liquor World of Syracuse, Inc., doing business as Liquor World, LLC, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this action, plaintiff seeks, inter alia, to recover from defendants, Gurnake Singh, also known as Sonny Singh, individually and doing business as Liquor World, LLC, Liquor World of Syracuse, Inc., doing business as Liquor World, LLC (Liquor World), Kirandeep Nafri, individually and doing business as Liquor World, LLC, and Liquor World 315, Inc., amounts owed under a commercial lease agreement. Plaintiff leased a portion of a commercial building to Liquor World for the purpose of operating a liquor store. The lease stated that Liquor World had inspected the premises and had taken the property " 'as-is' . . . , except as to latent defects." At the time the lease was executed, plaintiff knew that Liquor World planned to remove, inter alia, an interior wall in order to create one large open space and, after the lease was

executed, Liquor World entered the premises and began removing the interior wall. Liquor World, however, discovered that the wall was load-bearing and that removal of the wall would take more effort and money than had been anticipated. Thereafter, Liquor World put a stop payment to the security deposit and first-month rent check tendered to plaintiff and executed a new lease agreement with a different landlord for a different premises.

Defendants moved for summary judgment dismissing the second amended complaint, on the grounds of, *inter alia*, mutual mistake, unilateral mistake, fraudulent inducement, and frustration of purpose. They further sought summary judgment dismissing the second amended complaint against Singh, Nafri, and Liquor World 315, Inc. on the ground that they had no connection to the lease agreement. Plaintiff cross-moved for, *inter alia*, partial summary judgment on the breach of contract cause of action against Liquor World. Supreme Court denied both the motion and cross-motion, and plaintiff appeals and defendants cross-appeal.

We agree with plaintiff on its appeal that the court erred in denying that part of plaintiff's cross-motion seeking partial summary judgment on the issue of Liquor World's liability under the breach of contract cause of action, and we therefore modify the order accordingly. "It is well settled that the elements of a breach of contract cause of action are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages" (*Arista Dev., LLC v Clearmind Holdings, LLC*, 207 AD3d 1127, 1127 [4th Dept 2022] [internal quotation marks omitted]; see *Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]). Here, plaintiff met its initial burden on the cross-motion by submitting the underlying lease agreement and evidence that plaintiff performed under the lease, that Liquor World did not pay rent, and that plaintiff thus did not receive rent pursuant to the rental rate under the lease (see *Medlock Crossing Shopping Ctr. Duluth, GA. LP v Kitchen & Bath Studio, Inc.*, 126 AD3d 1463, 1464-1465 [4th Dept 2015]).

The burden shifted to defendants to "demonstrate by admissible evidence the existence of a factual issue" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Defendants contend that plaintiff failed to perform under the lease agreement because plaintiff failed to deliver a space where the interior wall could be torn down. We disagree. The lease agreement by its terms did not require plaintiff to provide an open space, and defendants' argument is contradicted by the " 'as-is' " clause in the lease agreement (see generally *228 W 72 LLC v 228A W. 72 LLC*, 213 AD3d 608, 609 [1st Dept 2023]; *Rivietz v Wolohojian*, 38 AD3d 301, 301 [1st Dept 2007]). Defendants contend that the " 'as-is' " clause cannot be relied upon by plaintiff because the load-bearing wall constituted a latent defect, which is an exception of the " 'as-is' " clause. We reject that contention because defendants failed to provide any evidence that the load-bearing nature of the wall is "defective." While defendants submitted an affidavit from an expert who conclusorily described the wall as an

"unforeseen and latent condition," the expert did not identify any defect with the wall. Thus, defendants failed to raise a triable issue of fact (see generally *Zuckerman*, 49 NY2d at 562).

Defendants contend on their cross-appeal that the court erred in denying defendants' motion for summary judgment dismissing the second amended complaint based on the defenses of mutual mistake, unilateral mistake or fraudulent inducement. We reject that contention. In order for a contract to be voidable based on a mutual mistake of fact, the "mutual mistake must exist at the time the contract is entered into and must be substantial" (*Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 453 [1993]). Here, defendants failed to establish that there was a mutual mistake with respect to the load-bearing wall inasmuch as they submitted the deposition testimony of plaintiff's owner, who testified that he knew that the wall was load-bearing and that he offered defendants the opportunity to inspect the property prior to entering the lease (see generally *id.*).

In order for defendants to establish plaintiff's alleged fraud or fraudulent inducement, they must establish the existence of " 'a material representation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies, consequently sustaining a detriment' " (*Trahwen, LLC v Ming 99 Cent City #7, Inc.*, 106 AD3d 1467, 1467 [4th Dept 2013], *lv dismissed* 21 NY3d 1066 [2013]). With respect to the alleged misrepresentations or omissions regarding the load-bearing wall, the lease agreement's " 'as-is' " clause is sufficiently specific to raise a triable issue of fact on the issue whether defendants were fraudulently induced into entering the contract (see *S.R. Leon Co. v The Towers*, 194 AD2d 600, 601 [2d Dept 1993]). Further, defendants did not submit any evidence that plaintiff informed defendants that the wall was not load-bearing or that plaintiff made any representations regarding the cost of removing the wall.

Similarly, defendants are not entitled to summary judgment on the issue of unilateral mistake of contract. A party "cannot obtain relief for unilateral mistake of contract absent a showing of fraud, duress or similar inequitable conduct" (*Village of Waterford v Camproni*, 200 AD2d 930, 932 [3d Dept 1994]), and here defendants failed to establish that there was fraud. Additionally, "a contract may be voided for unilateral mistake of fact only where enforcement of the contract would be unconscionable, the mistake is material and [the mistake] was made despite the exercise of ordinary care" (*Long v Fitzgerald*, 240 AD2d 971, 974 [3d Dept 1997]). Inasmuch as defendants are sophisticated parties to an arm's-length commercial agreement, plaintiff presented the property for lease " 'as-is,' " and plaintiff's owner testified that he offered defendants the opportunity to inspect the property before they entered into the lease agreement, defendants failed to establish as a matter of law that they exercised due diligence to ascertain all factors relating to the demolition of the wall (see *Long*, 240 AD2d at 974; see also *International Dev. Inst., Inc. v Westchester Plaza, LLC*, 194 AD3d 411, 412 [1st Dept

2021])).

We have considered defendants' contentions on their cross-appeal regarding frustration of purpose and we conclude that they are without merit. Finally, the court did not rule on those parts of defendants' motion seeking summary judgment dismissing the second amended complaint against Singh, Nafri and Liquor World 315, Inc., and we therefore remit the matter to Supreme Court to determine those parts of defendants' motion.

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**232**

**CA 23-02143**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, AND NOWAK, JJ.

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IN THE MATTER OF CAYUGA NATION, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

BRAD KETTLE, RESPONDENT-RESPONDENT.

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BARLCAY DAMON LLP, ROCHESTER (MICHAEL E. NICHOLSON OF COUNSEL), FOR  
PETITIONER-APPELLANT.

JOSEPH J. HEATH, SYRACUSE, AND LAW OFFICES OF MICHAEL D. SLIGER, NEW  
YORK CITY, FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Supreme Court, Seneca County (Barry  
L. Porsch, A.J.), entered November 30, 2023. The order granted the  
motion of respondent to vacate a default judgment.

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

Memorandum: Petitioner appeals from an order that granted  
respondent's motion to vacate a default judgment, which domesticated a  
judgment of the Cayuga Nation Civil Court against respondent. We  
affirm for the reasons stated in *Matter of Cayuga Nation v John* (-  
AD3d - [June 6, 2025] [4th Dept 2025]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**233**

**CA 23-02144**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, AND NOWAK, JJ.

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IN THE MATTER OF CAYUGA NATION,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

ANNETTE MILLER AND DAKOTA MILLER,  
RESPONDENTS-RESPONDENTS.

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BARLCAY DAMON LLP, ROCHESTER (MICHAEL E. NICHOLSON OF COUNSEL), FOR  
PETITIONER-APPELLANT.

JOSEPH J. HEATH, SYRACUSE, AND LAW OFFICES OF MICHAEL D. SLIGER, NEW  
YORK CITY, FOR RESPONDENTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Seneca County (Barry L. Porsch, A.J.), entered November 30, 2023. The order granted the motion of respondents to vacate a default judgment.

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

Memorandum: Petitioner appeals from an order that granted respondents' motion to vacate a default judgment, which domesticated a judgment of the Cayuga Nation Civil Court against respondents. We affirm for the reasons stated in *Matter of Cayuga Nation v John* (-AD3d - [June 6, 2025] [4th Dept 2025]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**234**

**CA 23-02145**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, AND NOWAK, JJ.

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IN THE MATTER OF CAYUGA NATION, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

DYLAN SENECA, RESPONDENT-RESPONDENT.

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BARLCAY DAMON LLP, ROCHESTER (MICHAEL E. NICHOLSON OF COUNSEL), FOR  
PETITIONER-APPELLANT.

JOSEPH J. HEATH, SYRACUSE, AND LAW OFFICES OF MICHAEL D. SLIGER, NEW  
YORK CITY, FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Supreme Court, Seneca County (Barry  
L. Porsch, A.J.), entered November 30, 2023. The order granted the  
motion of respondent to vacate a default judgment.

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

Memorandum: Petitioner appeals from an order that granted  
respondent's motion to vacate a default judgment, which domesticated a  
judgment of the Cayuga Nation Civil Court against respondent. We  
affirm for the reasons stated in *Matter of Cayuga Nation v John* (-  
AD3d - [June 6, 2025] [4th Dept 2025]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**235**

**CA 23-02146**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, AND NOWAK, JJ.

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IN THE MATTER OF CAYUGA NATION, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

LEANNA KETTLE, RESPONDENT-RESPONDENT.

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BARLCAY DAMON LLP, ROCHESTER (MICHAEL E. NICHOLSON OF COUNSEL), FOR  
PETITIONER-APPELLANT.

JOSEPH J. HEATH, SYRACUSE, AND LAW OFFICES OF MICHAEL D. SLIGER, NEW  
YORK CITY, FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Supreme Court, Seneca County (Barry  
L. Porsch, A.J.), entered November 30, 2023. The order granted the  
motion of respondent to vacate a default judgment.

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

Memorandum: Petitioner appeals from an order that granted  
respondent's motion to vacate a default judgment, which domesticated a  
judgment of the Cayuga Nation Civil Court against respondent. We  
affirm for the reasons stated in *Matter of Cayuga Nation v John* (-  
AD3d - [June 6, 2025] [4th Dept 2025]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**245**

**CA 23-02094**

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

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IN THE MATTER OF SEAN SOCHA AND CHRISTA SOCHA,  
PETITIONERS-PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

TOWN OF STARKEY, TOWN OF STARKEY ZONING  
BOARD OF APPEALS, TOWN OF STARKEY OFFICE OF  
ZONING ENFORCEMENT OFFICER, TOWN  
OF STARKEY ZONING ENFORCEMENT OFFICER,  
RESPONDENTS-DEFENDANTS-RESPONDENTS,  
ET AL., RESPONDENTS-DEFENDANTS.

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

CHALIFOUX LAW, P.C., PITTSFORD (SHEILA M. CHALIFOUX OF COUNSEL), FOR  
RESPONDENTS-DEFENDANTS-RESPONDENTS.

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Appeal from a judgment (denominated order) of the Supreme Court, Yates County (Barry L. Porsch, A.J.), entered November 9, 2023, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment dismissed the petition-complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the decretal paragraph and granting judgment in favor of respondents as follows:

It is ADJUDGED and DECLARED that the variance issued in 2021 and building permit issued in 2022 are illegal and void and therefore provide no vested property rights to petitioners, and

It is ADJUDGED and DECLARED that, to the extent that petitioners-plaintiffs have vested property rights arising from the variance issued in 2004, building permit issued in 2004, or certificate of zoning compliance issued in 2004, such rights do not apply to a building of the size and character of the shed constructed in 2022, and as modified the judgment is affirmed without costs.

Memorandum: In 2021, petitioners-plaintiffs (petitioners), who own property on Lakeview Road in respondent-defendant Town of Starkey, applied for a use variance to construct a shed that exceeded the square footage limit set by the town code (Lakeview shed). The

Lakeview shed would replace a "deteriorating" 10-by-14-foot shed built in 2004 after the prior property owners sought and received a use variance, building permit, and certificate of zoning compliance. In petitioners' 2021 variance application for the Lakeview shed, they sought permission to construct a 14-by-18-foot structure, 14 or 15 feet high, on a two-foot-high platform. Respondent-defendant Town of Starkey Zoning Board of Appeals (ZBA) scheduled a public hearing on petitioners' 2021 variance application and published a notice in a local newspaper. However, petitioners' variance application listed the incorrect tax identification number for the Lakeview Road property and did not include its location or address, and the ZBA mailed the notice to property owners within 1,000 feet of the mailing address provided by petitioners, which differed from the Lakeview Road property location, with the result that property owners within 1,000 feet of that property did not receive notice of the hearing. Following a hearing, the ZBA granted the variance and, in 2022, petitioners were granted a building permit. Petitioners completed construction of the Lakeview shed in October 2022.

In November 2022, the ZBA advised petitioners that notice of the administrative hearing for the 2021 variance application was defective and, that month, on instruction from the ZBA, petitioners submitted a new variance application listing the correct tax identification number for the Lakeview Road property. A hearing was scheduled, and notice was again published and mailed, this time to landowners within 1,000 feet of the Lakeview Road property. Prior to the hearing, ZBA members visited the Lakeview Road property and viewed the completed Lakeview shed. During the hearing, they considered comments and written submissions from affected property owners expressing their concerns, including that the larger structure "affect[ed] the turn around area" on the access road and created drainage issues. Citing those concerns, the ZBA denied the 2022 variance application and ordered that the Lakeview shed be removed.

Petitioners then commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, a declaration that the zoning variance issued in 2021 and associated 2022 building permit were validly issued and remained in full force and effect, and that petitioners' vested rights in those documents, as well as in the prior variance, permit, and certificate of zoning compliance issued in 2004, provided a legal basis for the erection of the Lakeview shed. Respondents-defendants answered, requesting that the petition-complaint be dismissed, and Supreme Court effectively dismissed the petition-complaint. Petitioners appeal.

We note at the outset that the court erred in dismissing the petition-complaint, rather than declaring the rights of the parties, and we therefore modify the judgment accordingly (*see Restuccio v City of Oswego*, 114 AD3d 1191, 1191 [4th Dept 2014]; *Schlossin v Town of Marilla*, 48 AD3d 1118, 1119 [4th Dept 2008]; *see generally Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

We reject petitioners' contention that the 2021 variance was properly noticed. To the contrary, the errors and inconsistencies

throughout the 2021 variance application wholly defeated the purpose of notice in an administrative proceeding, resulting in a failure to inform interested parties by published notice, as required by statute (see Town Law § 267-a [7]), or to notify all owners "within one thousand . . . feet" of the property, as required by town regulations (see Town of Starkey Zoning Regulations § 7.72). Instead, due to those comprehensive errors, "no public notice [was] given of intention to ask for a variance" at the Lakeview Road property (*Matter of Retoske v Boettger*, 249 AD 624, 625 [2d Dept 1936]). Under these circumstances, the court properly concluded that the failure to properly notice nearby property owners deprived the ZBA of jurisdiction to act and rendered the 2021 variance and subsequent building permit void ab initio because the ZBA "was without power to grant a variance where" no public notice was given as required by the local zoning law (*id.*). Indeed, because they failed to comply with relevant statutes and regulations, the actions taken here were "illegal and void" (*Matter of Buffalo Cremation Co., Ltd. v March*, 222 App Div 447, 448 [4th Dept 1928], *affd* 249 NY 531 [1928]; see *Matter of Jones v Zoning Bd. of Appeals of Town of Oneonta*, 61 AD3d 1299, 1300-1301 [3d Dept 2009]; see generally *Matter of Wehr v Crowley*, 6 AD2d 214, 220 [4th Dept 1958]).

We further reject petitioners' contention that they have established a vested property interest that would allow them to keep the Lakeview shed. "To establish a claim for violation of substantive due process, a party 'must establish a cognizable . . . vested property interest' . . . and 'that the governmental action was wholly without legal justification' " (*Matter of Raynor v Landmark Chrysler*, 18 NY3d 48, 59 [2011]; see *Jones v Town of Carroll*, 177 AD3d 1297, 1298 [4th Dept 2019]). Assuming, arguendo, that petitioners have vested property rights in the 2004 variance, 2004 building permit, and 2004 certificate of zoning compliance (see *Matter of Waterways Dev. Corp. v Town of Brookhaven Zoning Bd. of Appeals*, 126 AD3d 708, 712 [2d Dept 2015], *lv denied* 25 NY3d 909 [2015]), we conclude that their issuance does not authorize construction of a structure of the size and character of the Lakeview shed. Further, because the 2021 variance was void, the 2022 building permit was not legally issued, and thus no vested rights could accrue (see *Town of Orangetown v Magee*, 88 NY2d 41, 47 [1996]; *Matter of Rejman v Welch*, 112 AD2d 795, 795 [4th Dept 1985], *appeal dismissed* 66 NY2d 916 [1985]; see also *Matter of Natchev v Klein*, 41 NY2d 833, 834 [1977]).

With respect to petitioners' challenge to the ZBA's denial of the 2022 variance application, we conclude that it is without merit. The ZBA is afforded broad discretion in determining whether to grant or deny variances, and our review is limited to whether its determination was illegal, arbitrary, or an abuse of discretion (see *Matter of Conway v Town of Irondequoit Zoning Bd. of Appeals*, 38 AD3d 1279, 1280 [4th Dept 2007]). Where there is substantial evidence in the record to support the rationality of the ZBA's determination, the determination should be affirmed upon judicial review (see *Matter of Ifrah v Utschig*, 98 NY2d 304, 308 [2002]; *Matter of Sasso v Osgood*, 86 NY2d 374, 384 n 2 [1995]; *Matter of Expressview Dev., Inc. v Town of*

*Gates Zoning Bd. of Appeals*, 147 AD3d 1427, 1428-1429 [4th Dept 2017]). Pursuant to Town Law § 267-b (3), the ZBA must weigh "the benefit of [granting a variance] to the applicant against the detriment to the health, safety and welfare of the neighborhood community if the variance is granted" (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 612 [2004]). Here, although the ZBA did not articulate its findings, the record indicates that the ZBA's determination was rationally based on the five factors set out in Town Law § 267-b (3) (b) (see *Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 93 [2001]). The record also establishes that the ZBA's denial of the 2022 variance was founded upon, inter alia, new facts of which it was not aware at the previous hearing because of the insufficient notice. We conclude that its determination is not illegal, arbitrary, or an abuse of discretion (see *Conway*, 38 AD3d at 1280). Although there may be substantial evidence in the record to support the rationality of a contrary determination, we note that we may not substitute our own judgment for that of the ZBA (see *id.*).

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

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

**253**

**KA 19-01854**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALONZO ROSS, DEFENDANT-APPELLANT.

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ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

ALONZO ROSS, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered July 15, 2019. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree and 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 jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the second degree (§ 120.05 [12]). Contrary to defendant's contention in his main brief, Supreme Court's *Molineux* ruling did not permit the People to present on their direct case evidence of prior crimes that were "remarkably similar" to those charged herein. Rather, the court's *Sandoval* ruling allowed the People to impeach defendant by questioning him about some of his prior crimes. Inasmuch as the court also precluded the People from questioning defendant about seven prior crimes and limited their questioning with respect to several others, it cannot be said that the court's *Sandoval* ruling constituted an abuse of discretion (see *People v Vanwuyckhuysse*, 224 AD3d 1315, 1316-1317 [4th Dept 2024], *lv denied* 41 NY3d 967 [2024]; see also *People v Micolò*, 171 AD3d 1484, 1485 [4th Dept 2019], *lv denied* 35 NY3d 1096 [2020]).

In his pro se supplemental brief, defendant contends that the court erred in refusing to suppress letters that he mailed to the victim, which were retrieved from the victim's mailbox by the victim's daughter. Contrary to defendant's contention, the court placed its findings of fact and conclusions of law on the record as required by CPL 710.60 (6), and the court properly determined that he lacked

standing to challenge the retrieval of mail from the victim's mailbox. " 'A defendant seeking suppression of evidence has the burden of establishing standing by demonstrating a legitimate expectation of privacy in the premises or object searched' " (*People v Santiago*, 229 AD3d 1383, 1383 [4th Dept 2024], quoting *People v Ramirez-Portoreal*, 88 NY2d 99, 108 [1996]). The record from the suppression hearing is devoid of evidence that would suggest that defendant had either a subjective or an objective expectation of privacy in the victim's mailbox (*cf. People v Lilly*, 211 AD2d 428, 428 [1st Dept 1995]).

Moreover, the record from the hearing establishes that the letters were retrieved by a private person without any involvement by the government, and " 'an unauthorized search or seizure by private individuals . . . does not render the evidence inadmissible at subsequent civil or criminal proceedings' " (*People v Mendoza*, 82 NY2d 415, 433 [1993]; see *People v Alexander*, 197 AD3d 1013, 1015 [4th Dept 2021], *lv denied* 37 NY3d 1094 [2021]).

We reject defendant's contention in his main brief that the court erred in refusing to allow defendant to represent himself. Prior to the suppression hearing, defendant, who had expressed displeasure with multiple assigned attorneys and had received several substitutions of counsel, requested that he be allowed to represent himself. The court initially reserved its ruling on that request. Ultimately, the court denied that request, explaining that the denial was due to defendant's "extremely disruptive behavior" and citing multiple examples of that behavior.

"A defendant in a criminal case may invoke the right to defend *pro se* provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) *the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues*" (*People v McIntyre*, 36 NY2d 10, 17 [1974] [emphasis added]; see *People v Williams*, 203 AD3d 1571, 1571-1572 [4th Dept 2022], *lv denied* 38 NY3d 1075 [2022]). Here, the court properly denied defendant's request inasmuch as the record establishes that defendant "engaged in a pattern of disruptive conduct meant to undermine orderly determination of the issues" (*Williams*, 203 AD3d at 1572; see *People v Battle*, 200 AD3d 1712, 1715 [4th Dept 2021], *lv denied* 38 NY3d 1132 [2022]).

Defendant's contention in his main brief that the prosecutor violated his right of confrontation by using the victim's statement to police as a basis for questioning defendant is not preserved for our review. After defendant's initial objection to the questions, the court instructed the prosecutor to be more "general" in questioning defendant. Defendant lodged no further objections, and thus "no error of law was preserved for appellate review" (*People v Medina*, 53 NY2d 951, 953 [1981]; see *People v Tolbert*, 283 AD2d 930, 931 [4th Dept 2001], *lv denied* 96 NY2d 908 [2001]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

We reject defendant's contentions in his main brief that the

conviction with respect to attempted murder in the second degree is not supported by legally sufficient evidence that he intended to kill the victim and that the verdict is against the weight of the evidence on that issue. Viewing the evidence in the light most favorable to the People, as we must (see *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish that defendant intended to kill the victim (see *People v Bleakley*, 69 NY2d 490, 495 [1987]). Intent, which is "rarely proved by an explicit expression of culpability by the perpetrator" (*People v Hatton*, 26 NY3d 364, 370 [2015] [internal quotation marks omitted]; see *People v Bueno*, 18 NY3d 160, 169 [2011]), may be inferred from a "defendant's conduct as well as the circumstances surrounding the crime" (*People v Torres*, 136 AD3d 1329, 1330 [4th Dept 2016], *lv denied* 28 NY3d 937 [2016], *cert denied* 580 US 1068 [2017] [internal quotation marks omitted]; see *People v Steinberg*, 79 NY2d 673, 682 [1992]; *People v Forsythe*, 230 AD3d 1544, 1545 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]). Given the nature and severity of the injuries sustained by the victim (see *People v Ali*, 192 AD3d 1132, 1133 [2d Dept 2021], *lv denied* 37 NY3d 962 [2021]; *People v Spina*, 275 AD2d 902, 904 [4th Dept 2000], *lv denied* 95 NY2d 969 [2000]), as well as defendant's own admissions that he thought he killed her and needed to "put her out," there is a " 'valid line of reasoning and permissible inferences' " from which a rational jury could have concluded that defendant committed the offense of attempted murder in the second degree (*People v Chourb*, 232 AD3d 1272, 1273 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025], quoting *Bleakley*, 69 NY2d at 495). Viewing the evidence in light of the elements of that crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, even if a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (see generally *Bleakley*, 69 NY2d at 495).

In both his main and pro se supplemental briefs, defendant contends that he was denied effective assistance of counsel. We conclude that none of defendant's allegations warrants reversal. With respect to defendant's contention that trial counsel was ineffective in failing to pursue a defense based on extreme emotional disturbance (Penal Law § 125.25 [1] [a] [i]) or mental disease or defect (§ 40.15), the record supports a determination that defense counsel logically pursued a defense based on intent, and "defendant failed to meet his burden of establishing that defense counsel's failure [to pursue the extreme emotional disturbance defense] was other than an acceptable all-or-nothing defense strategy" (*Forsythe*, 230 AD3d at 1546 [internal quotation marks omitted]). Moreover, the record refutes defendant's contentions that a defense based on mental disease or defect was viable (see generally *People v Gilbert*, 199 AD3d 1048, 1055-1056 [3d Dept 2021]).

To the extent that defendant relies on matters outside the record on appeal in contending that defense counsel was ineffective in failing to investigate those defenses, the appropriate vehicle for defendant's contention is a motion pursuant to CPL 440.10 (see *People v Parnell*, 221 AD3d 1437, 1438 [4th Dept 2023], *lv denied* 40 NY3d 1094

[2024]; *People v Russell*, 83 AD3d 1463, 1465 [4th Dept 2011], *lv denied* 17 NY3d 800 [2011]).

With respect to the allegations of ineffectiveness raised by defendant in his pro se supplemental brief, we conclude, upon viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, that defendant was afforded meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147 [1981]).

We have reviewed defendant's remaining contention in his pro se supplemental brief and conclude that it lacks merit.

Finally, we conclude, contrary to defendant's contention in his main brief, that the sentence is not unduly harsh or severe.

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

**255**

**KA 21-01122**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANDRE T. MCCANTS, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered January 29, 2021. The judgment convicted defendant, upon a jury verdict as modified by County Court on defendant's motion pursuant to CPL 330.30 (1), of criminal contempt in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict as modified by County Court on defendant's motion pursuant to CPL 330.30 (1), of criminal contempt in the second degree (Penal Law § 215.50 [3]). The prosecution arose from allegations that defendant, in violation of a stay-away order of protection in favor of his former girlfriend, broke into the former girlfriend's residence and subjected her to physical contact. We affirm.

Preliminarily, we note that defendant's notice of appeal does not correctly identify the date on which the judgment was rendered. Nevertheless, inasmuch as the notice of appeal is otherwise accurate, we exercise our discretion, in the interest of justice, and treat the notice of appeal as valid (see CPL 460.10 [6]; *People v Austin*, 199 AD3d 1383, 1384 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022]; *People v Mitchell*, 93 AD3d 1173, 1173 [4th Dept 2012], *lv denied* 19 NY3d 999 [2012]).

Defendant contends that the court erred by imposing an inadequate sanction pursuant to CPL 245.80 (1) (a) for the People's belated disclosure of body-worn camera (BWC) footage that showed a police officer serving the order of protection on defendant approximately one week prior to the subject incident. Initially, we note that the Court of Appeals has left open the question whether the disclosure

requirements of CPL article 245 apply to cases that, like this case, were commenced before the effective date of the new discovery rules (see *People v King*, 42 NY3d 424, 428 n 2 [2024]). We likewise have no occasion to address that issue inasmuch as the People did not dispute the court's application of CPL article 245 following the effective date thereof and do not contest that application on appeal (see *People v Graham*, 233 AD3d 1361, 1365 [3d Dept 2024], *lv denied* 43 NY3d 944 [2025]). With respect to the merits, we conclude that the court did not abuse its discretion in fashioning an appropriate remedy by excluding the BWC footage and precluding any reference thereto (see CPL 245.80 [2]; *People v Bookman*, 224 AD3d 1269, 1270 [4th Dept 2024]; see generally *People v Jenkins*, 98 NY2d 280, 284 [2002]).

We reject defendant's further contention that the court erred in giving a jury instruction on consciousness of guilt. We conclude that the court "properly delivered a consciousness of guilt charge concerning defendant's statement, made [in the presence of] the arresting officer," suggesting that he knew he had an order of protection against him, and we note that "any ambiguity [in the statement] was for the jury to consider" (*People v Smith*, 8 AD3d 113, 113 [1st Dept 2004], *lv denied* 3 NY3d 712 [2004]; see generally *People v Yazum*, 13 NY2d 302, 304-305 [1963], *rearg denied* 15 NY2d 679 [1964]). We also note that the instruction given by the court was consistent with the instruction set forth in the Criminal Jury Instructions (see *People v Taylor*, 140 AD3d 1738, 1739-1740 [4th Dept 2016]).

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

**258**

**KA 20-01350**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DELVERN DURAN, DEFENDANT-APPELLANT.

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SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered May 16, 2019. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a joint jury trial with a codefendant, of robbery in the first degree (Penal Law § 160.15 [4]). The conviction arises from allegations regarding defendant's participation in the forcible stealing of property from the victim during an incident in which the codefendant shot the victim.

Defendant contends, initially, that the evidence is legally insufficient to establish his liability as an accessory. We reject that contention. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences to support the conclusion that defendant had "a shared intent, or 'community of purpose' with the principal," in carrying out the crime of robbery in the first degree, and that defendant " 'intentionally aided the principal in bringing forth the result' " (*People v Carpenter*, 138 AD3d 1130, 1131 [2d Dept 2016], *lv denied* 28 NY3d 928 [2016]; *see People v Gause*, 230 AD3d 1573, 1574-1575 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]; *see generally* Penal Law §§ 20.00, 160.15 [4]). Here, it is reasonable to infer, based on the witness testimony and video evidence admitted at trial, that defendant was acting as a lookout for the codefendant and that, while the codefendant was going through the victim's pockets, defendant attempted to obstruct the view of a passing police vehicle (*see People v Carr-El*, 287 AD2d 731, 733

[2d Dept 2001], *affd* 99 NY2d 546 [2002]; *People v Coulter*, 240 AD2d 756, 757 [2d Dept 1997], *lv denied* 91 NY2d 871 [1997]; *People v Wooten*, 214 AD2d 596, 596 [2d Dept 1995]). Additionally, after the codefendant went through the victim's pockets, both defendant and the codefendant walked away from the victim together, which "is further evidence of [defendant's] complicity in the crime" (*People v McDonald*, 257 AD2d 695, 696 [3d Dept 1999], *lv denied* 93 NY2d 876 [1999]; see *People v Bacote*, 107 AD3d 641, 642 [1st Dept 2013], *lv denied* 21 NY3d 1072 [2013]; see generally *People v Roldan*, 88 NY2d 826, 827 [1996]).

Defendant further contends that there is legally insufficient evidence establishing that property was stolen from the victim. We reject that contention. The video evidence showed the codefendant rifling through the victim's pockets, after which the codefendant placed something in his own back pocket and then threw an object near defendant from the direction of the victim, and police testimony established that the victim's wallet was found in the location of the object thrown by the codefendant. Contrary to defendant's contention, we conclude that there is legally sufficient evidence establishing that the codefendant took personal property from the victim (see *People v Clark*, 159 AD2d 629, 629-630 [2d Dept 1990], *lv denied* 76 NY2d 732 [1990]; see generally *People v Griffin*, 203 AD3d 1608, 1610 [4th Dept 2022], *lv denied* 38 NY3d 1008 [2022]).

Contrary to defendant's further contention, upon viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (see *People v Griffin*, 145 AD3d 1551, 1552 [4th Dept 2016]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant next contends that the prosecutor's exercise of peremptory challenges with respect to three prospective jurors of color constituted a *Batson* violation because the People failed to offer race-neutral explanations for those challenges. Initially, the issue whether defendant established a prima facie case of discrimination at step one of the *Batson* inquiry was rendered moot by County Court's ruling "on the ultimate question of intentional discrimination" (*People v Payne*, 88 NY2d 172, 182 [1996] [internal quotation marks omitted]; see *People v Douglas*, 203 AD3d 1682, 1683 [4th Dept 2022]). Defendant's contention on appeal is limited to step two of the *Batson* inquiry, which requires the nonmoving party "to offer a facially neutral explanation for each suspect challenge" (*People v Hecker*, 15 NY3d 625, 634 [2010], *cert denied* 563 US 947 [2011]; see *People v Allen*, 86 NY2d 101, 109 [1995]). That burden "is minimal, and the explanation must be upheld if it is based on something other than the juror's race, gender, or other protected characteristic" (*People v Bullock*, 213 AD3d 1351, 1352 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023] [internal quotation marks omitted]; see *People v Smouse*, 160 AD3d 1353, 1355 [4th Dept 2018]). Here, with respect to the challenges to the prospective jurors in question who were on the first and third panels, the People's explanations were based on the demeanor of those prospective jurors.

Those explanations were thus "facially race-neutral" (*People v Cruz*, 228 AD3d 1019, 1023 [3d Dept 2024]; see *People v Wells*, 7 NY3d 51, 58 [2006]; *People v Acevedo*, 141 AD3d 843, 846 [3d Dept 2016]). Furthermore, the challenge to the prospective juror in question on the second panel also had a race-neutral explanation; the prosecutor explained that the challenge was based on the prospective juror's vision problems, which the People were concerned would affect her ability to watch the video evidence that was a critical part of the People's case (see *People v Page*, 105 AD3d 1380, 1381 [4th Dept 2013], *lv denied* 23 NY3d 1023 [2014]).

Finally, the sentence is not unduly harsh or severe.

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

**260**

**CA 23-01580**

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

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PB-57 DOE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

THE LUTHERAN CHURCH MISSOURI SYNOD,  
DEFENDANT-RESPONDENT,  
ET AL., DEFENDANTS.  
(APPEAL NO. 1.)

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PHILLIPS & PAOLICELLI, LLP, NEW YORK CITY (VICTORIA E. PHILLIPS OF COUNSEL), AND COONEY & CONWAY, CHICAGO, ILLINOIS, FOR PLAINTIFF-APPELLANT.

WALSH, ROBERTS & GRACE LLP, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered August 24, 2023. The order granted the motion of defendant The Lutheran Church Missouri Synod for summary judgment.

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

Memorandum: Plaintiff commenced this action pursuant to the Child Victims Act (see CPLR 214-g), alleging that she was sexually abused by a teacher while attending defendant St. Peter Lutheran Church and School (St. Peter's). St. Peter's was one of over 5,000 member congregations within defendant The Lutheran Church Missouri Synod (LCMS), which itself was divided into a number of districts, including defendant The Lutheran Church-Missouri Synod Eastern District (District), which encompassed St. Peter's. In appeal No. 1, plaintiff appeals from an order that, inter alia, granted the motion of LCMS for summary judgment dismissing the complaint against it. In appeal No. 2, plaintiff appeals from an order that, inter alia, granted the motion of the District for summary judgment dismissing the complaint against it.

Plaintiff contends in both appeals that Supreme Court erred in granting the motions because LCMS and the District failed to establish their entitlement to judgment as a matter of law. We reject those contentions. "The 'threshold question' in any negligence action is whether a defendant owes a 'legally recognized duty of care to [a] plaintiff' " (*Stephanie L. v House of the Good Shepherd*, 186 AD3d 1009, 1011 [4th Dept 2020], quoting *Hamilton v Beretta U.S.A. Corp.*,

96 NY2d 222, 232 [2001]). As relevant on appeal, plaintiff's first cause of action alleged negligent retention, supervision, and direction, a claim that "is based upon the defendant's status as an employer" (*PB-20 Doe v St. Nicodemus Lutheran Church*, 228 AD3d 1233, 1234 [4th Dept 2024] [internal quotation marks omitted]). "[I]t is essential, at the very least, that the person for whose negligent conduct the [defendant] is sought to be charged be engaged in its service" (*id.*, quoting *Rosenweig v State of New York*, 5 NY2d 404, 409 [1959]). In determining whether an employment relationship exists, courts consider, inter alia, who hired the actor, who controls the performance of the actor's work, who compensates the actor, and who has authority to fire the actor (see *Griffin v Sirva, Inc.*, 29 NY3d 174, 186 [2017]; see also *PB-20 Doe*, 228 AD3d at 1234).

Contrary to plaintiff's contentions, LCMS and the District each met their initial burden with respect to plaintiff's first cause of action by establishing that they had no employment relationship with the teacher and thus did not owe plaintiff a duty of care. In support of their motions, LCMS and the District each submitted evidence that St. Peter's hired the teacher, paid his salary, supervised his daily activities, and had the sole authority to terminate his employment. Further, each submitted the constitution and by-laws of LCMS in effect at the time of the alleged abuse, which provided that member congregations were autonomous and self-governing and that LCMS was merely an advisory body. Although LCMS, through its districts, created "rosters" of teachers who possessed the requisite teaching credentials and although LCMS possessed the ability to expel an LCMS member from its ranks, LCMS and the District also presented evidence that member congregations were not required to hire teachers from a roster and that removal from a roster did not directly impact the employment status of the removed teacher. Indeed the LCMS constitution contemplated that a congregation might continue to employ a teacher who had been expelled. The record reflects that neither LCMS nor the District had a direct role in the hiring or firing of congregation employees, that neither placed teachers at congregational schools, and that neither could prevent a congregation from employing, firing, or retaining a teacher in the congregation's employment (*cf. PB-20 Doe*, 228 AD3d at 1235-1236). We further conclude that plaintiff failed to raise an issue of fact in opposition. Although plaintiff submitted evidence that LCMS and the District were monitoring the teachers within their member congregations generally and were monitoring plaintiff's alleged abuser specifically, plaintiff failed to raise a material issue of fact regarding either defendant's ability to hire, fire, supervise, or otherwise control the performance of teachers at congregational schools.

Contrary to plaintiff's contention regarding her second cause of action, sounding in, inter alia, ordinary negligence, neither LCMS nor the District assumed a duty of care to protect students at congregational schools or to supervise congregation-employed teachers. "Foreseeability, alone, does not define duty" (*Hamilton*, 96 NY2d at 232), and "[a] defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where, as a practical matter defendant can exercise such control" (*id.*

at 233; see *Stephanie L.*, 186 AD3d at 1012). A duty to a plaintiff injured by a third party may arise where there is a "relationship either between defendant and a third-person tortfeasor that encompasses defendant's actual control of the third person's actions, or between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others" (*Hamilton*, 96 NY2d at 233). Whether the duty arises from the relationship between the defendant and the tortfeasor or from the relationship between the defendant and the plaintiff, the "key in each [situation] is that the defendant's relationship with the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm" (*id.*).

For the reasons stated above, we conclude that LCMS and the District established that neither had a relationship with congregational teachers that encompassed actual control over those teachers. The record likewise establishes that LCMS and the District lacked the requisite relationship with plaintiff. Among other things, the relationship that LCMS and its districts had with the students at schools founded and run by independent and autonomous congregations did not place either defendant in the best position to protect against the risk of harm inasmuch as the record reflects that they lacked the authority to remove an alleged abuser from congregational employment (see *id.*).

In light of our determination, we do not reach plaintiff's remaining contentions.

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

**265**

**CA 24-00555**

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

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IN THE MATTER OF THE ESTATE OF  
LINDA F. SAWKINS, DECEASED.

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DANIEL SAWKINS, JR., CHARLES SAWKINS,  
KRISTINE L. CLARKE AND KIM MACKEY,  
PETITIONERS-RESPONDENTS;

MEMORANDUM AND ORDER

DANIELLE SAWKINS, RESPONDENT-APPELLANT.

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YANG-PATYI LAW FIRM, PLLC, SYRACUSE (JOSEPHINE YANG-PATYI OF COUNSEL),  
FOR RESPONDENT-APPELLANT.

MELVIN & MELVIN, PLLC, SYRACUSE (MICHAEL R. VACCARO OF COUNSEL), FOR  
PETITIONERS-RESPONDENTS.

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Appeal from an order of the Surrogate's Court, Oswego County (Spencer J. Ludington, S.), entered March 19, 2024. The order, among other things, granted the petition insofar as it sought to compel respondent to account for her tenure as decedent's power of attorney.

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

Memorandum: Petitioners commenced this proceeding seeking an order pursuant to General Obligations Law § 5-1510 (2) and (3) directing respondent, their sister, to "produce all records, documents, statements and receipts" relating to transactions and disbursements that respondent made while acting as agent for the parties' mother (decedent) under a durable power of attorney. Respondent filed objections to the petition in which she asserted that, to the extent that petitioners sought an accounting of her tenure as decedent's agent under the power of attorney, such relief is authorized only under subdivision (1) of section 5-1510, not subdivisions (2) and (3), and petitioners lack standing to seek such relief under subdivision (1). Surrogate's Court granted the petition in part and ordered respondent to "file an accounting" of her tenure as decedent's agent. We now affirm.

Powers of attorney are governed by title 15 of the General Obligations Law, which defines a "principal" as a person 18 years of age or older who executes a power of attorney authorizing another person, i.e., an "agent," "to act as attorney-in-fact for the principal" (General Obligations Law § 5-1501 [2] [a], [k]). Section 5-1505 (2) (a) provides that "[a]n agent acting under a power of

attorney has a fiduciary relationship with the principal." In fulfilling those fiduciary duties, the agent must, among other things, "keep a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal" (§ 5-1505 [2] [a] [3]).

Respondent contends that petitioners lack standing to seek an accounting with respect to respondent's tenure as decedent's power of attorney and that they are not entitled to a copy of the record that respondent was required to keep pursuant to General Obligations Law § 1505 (2) (a) (3). In so contending, respondent notes that section 5-1505 (2) (a) (3) identifies the people who may request from the agent "a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal." Section 5-1510 (1) provides that, if an agent has failed to provide a record of receipts, transactions and disbursements "to a person who may request such record" under section 5-1505 (2) (a) (3), then the person who is entitled to the record "may commence a special proceeding to compel the agent to produce a copy of the power of attorney and such record." As respondent correctly contends, a principal's child is not one of the persons identified in section 5-1505 (2) (a) (3) who may request the agent's record.

Here, however, petitioners seek to compel an accounting pursuant to General Obligations Law § 5-1510 (2) and (3). Section 5-1510 (3) provides that a child of the principal, among other people, may commence a special proceeding under subdivision (2) of that section "to approve the record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal" (§ 5-1510 [2] [e]). The statute thereby contemplates *judicial* approval of the agent's record and, of course, the court in which the special proceeding is commenced cannot determine whether the record should be approved unless and until the agent produces a copy of the record.

By ordering respondent here to "file an accounting," the Surrogate simply directed her to produce the record she was required to maintain under section 5-1505 (2) (a) (3) with respect to the financial transactions and disbursements she made on her mother's behalf as power of attorney. Because petitioners have standing to commence a special proceeding to approve the record under section 5-1510 (2) and (3), we conclude that, contrary to respondent's contention, the Surrogate properly refused to dismiss the petition, on standing grounds, insofar as it sought an accounting of respondent's tenure as decedent's agent under the power of attorney (*see generally Matter of Jewish Home of Rochester v Dworkin*, 151 AD3d 1934, 1934-1935 [4th Dept 2017]; *Matter of Boncyk v Williams*, 119 AD3d 1124, 1125 [3d Dept 2014]).

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

**266**

**CA 23-01581**

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

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PB-57 DOE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

THE LUTHERAN CHURCH MISSOURI SYNOD,  
ET AL., DEFENDANTS,  
AND THE LUTHERAN CHURCH-MISSOURI SYNOD  
EASTERN DISTRICT, DEFENDANT-RESPONDENT.  
(APPEAL NO. 2.)

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PHILLIPS & PAOLICELLI, LLP, NEW YORK CITY (VICTORIA E. PHILLIPS OF  
COUNSEL), AND COONEY & CONWAY, CHICAGO, ILLINOIS, FOR  
PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (JULIA M. HILLIKER OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered August 24, 2023. The order granted the motion of defendant The Lutheran Church-Missouri Synod Eastern District for summary judgment.

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

Same memorandum as in *PB-57 Doe v The Lutheran Church Missouri Synod* ([appeal No. 1] – AD3d – [June 6, 2025] [4th Dept 2025]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

270

**CA 24-01080**

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

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VLADIMIR NESTERENKO, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

BURR W. HALL, M.D., DEFENDANT-RESPONDENT.

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VLADIMIR NESTERENKO, PLAINTIFF-APPELLANT PRO SE.

BROWN, GRUTTADARO & PRATO, LLC, ROCHESTER (MICHAEL E. HOUCK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Kevin M. Nasca, J.), entered December 12, 2023. The order and judgment granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: In this medical malpractice action, plaintiff, pro se, appeals from an order and judgment that granted defendant's motion for summary judgment dismissing the complaint. We affirm.

Plaintiff contends that Supreme Court erred in granting the motion with respect to his cause of action for the allegedly negligent monitoring of an implantable cardioverter-defibrillator (ICD) unit. We reject that contention. Defendant met his initial burden of establishing his entitlement to judgment as a matter of law on both deviation and causation by submitting his own expert affidavit, which was detailed, specific and factual in nature, opining that he did not deviate from good and accepted medical practice and that his care and treatment of plaintiff did not proximately cause any injury (*see Wicks v Virk*, 198 AD3d 1315, 1315 [4th Dept 2021]; *Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015]; *see also Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755 [3d Dept 2001]). The burden then shifted to plaintiff " 'to raise triable issues of fact by submitting an expert's affidavit both attesting to a departure from the accepted standard of care and that defendant['s] departure from that standard of care was a proximate cause of the [alleged] injur[ies]' " (*Ziemendorf v Chi*, 207 AD3d 1157, 1157-1158 [4th Dept 2022]; *see Webb*, 133 AD3d at 1387). By not "submit[ting] the requisite expert medical response in opposition to the motion . . . [plaintiff failed] to raise a triable issue of fact" (*Webb*, 133 AD3d at 1387; *see Maust v Arseneau*, 116 AD2d 1012, 1012 [4th Dept 1986]).

Plaintiff further contends that the court erred in granting the motion with respect to his cause of action for failure to obtain informed consent. We reject that contention. Defendant met his initial burden of establishing his entitlement to judgment as a matter of law by submitting his own expert affidavit, demonstrating that he informed plaintiff of the risks associated with the implantation and use of the ICD device in question, as well as plaintiff's signed written consent form, which confirmed plaintiff's understanding of those risks (see *Thompson v Hall*, 191 AD3d 1265, 1266 [4th Dept 2021]; *Gray v Williams*, 108 AD3d 1085, 1086 [4th Dept 2013]). In opposition, plaintiff, by not submitting an expert opinion as to the qualitative insufficiency of the written consent, failed to raise a triable issue of fact (see *Thompson*, 191 AD3d at 1266-1267; cf. *Gray*, 108 AD3d at 1087; see generally CPLR 4401-a; *Evans v Holleran*, 198 AD2d 472, 474 [2d Dept 1993]).

We reject plaintiff's contention that the court should have denied the motion, or granted a continuance, to permit additional discovery pursuant to CPLR 3212 (f). Plaintiff's "mere hope or speculation that further discovery will lead to evidence sufficient to defeat defendant['s] . . . motion is insufficient to warrant denial thereof" (*Austin v CDGA Natl. Bank Trust & Canandaigua Natl. Corp.*, 114 AD3d 1298, 1301 [4th Dept 2014] [internal quotation marks omitted]).

Plaintiff's contentions that the court was biased against him and that defendant or defense counsel committed fraud upon the court are belied by the record (see *Sang Seok Na v Pulvers, Pulvers & Thompson, LLP*, 224 AD3d 599, 600 [1st Dept 2024]; *Matter of Brooks v Greene*, 153 AD3d 1621, 1622 [4th Dept 2017]).

We have reviewed plaintiff's remaining contentions and conclude that they are either without merit or not preserved for our review.

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

**271**

**CA 24-01026**

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

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IN THE MATTER OF HEATHER M. CLARIDGE,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

TIMOTHY HULL, RESPONDENT-RESPONDENT.

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LOCKHART LAW OFFICE, P.C., NORTH SYRACUSE (BETH A. LOCKHART OF  
COUNSEL), FOR PETITIONER-APPELLANT.

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Appeal from an order of the Supreme Court, Oswego County (Gregory R. Gilbert, J.), entered December 27, 2022, in proceedings pursuant to Family Court Act articles 6 and 8. The order, among other things, denied the petitions insofar as they sought attorney's fees.

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

Memorandum: In these proceedings pursuant to Family Court Act articles 6 and 8, petitioner appeals from an order that, inter alia, granted her petitions insofar as they sought to enforce an order of protection and to enforce and modify a prior order of custody, but denied her requests for attorney's fees. We affirm.

"Under the general rule, attorneys' fees . . . are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule" (*Ritchie v Ritchie*, 184 AD3d 1113, 1117 [4th Dept 2020] [internal quotation marks omitted]; see *The Wharton Assoc., Inc. v Continental Indus. Capital LLC*, 137 AD3d 1753, 1755 [4th Dept 2016]). Initially, we reject petitioner's contention that Supreme Court abused its discretion in failing to award her attorney's fees pursuant to Domestic Relations Law § 237 (b) or Family Court Act § 842 (f) (see *Lisowski v Lisowski*, 218 AD3d 1214, 1221 [4th Dept 2023]; *Iannazzo v Iannazzo* [appeal No. 2], 197 AD3d 959, 960-961 [4th Dept 2021]; *Weinheimer v Weinheimer*, 100 AD3d 1565, 1566 [4th Dept 2012]). Petitioner further contends that the court should have awarded her attorney's fees pursuant to Judiciary Law § 773 inasmuch as respondent willfully violated the prior custody order. We reject that contention as well. "Judiciary Law § 773 permits recovery of attorney's fees from the offending party by a party aggrieved by . . . contemptuous conduct" (*Data-Track Account Servs., Inc. v Lee*, 15 AD3d 962, 962-963 [4th Dept 2005] [internal quotation marks omitted]). However, a party seeking a finding of civil contempt must establish,

by clear and convincing evidence, the following four elements: "(1) a lawful court order expressing an unequivocal mandate; (2) reasonable certainty that the order was disobeyed; (3) knowledge of the court's order by the party in contempt; and (4) prejudice to the right of a party to the litigation" (*McCurty v Roberts*, 227 AD3d 1469, 1470 [4th Dept 2024] [internal quotation marks omitted]; see *Dotzler v Buono*, 144 AD3d 1512, 1513-1514 [4th Dept 2016]). Petitioner failed to meet that burden here (see generally *Matter of Mundell v New York State Dept. of Transp.*, 185 AD3d 1470, 1471 [4th Dept 2020]).

Finally, to the extent that petitioner contends that she should be awarded attorney's fees in connection with this appeal, we conclude that the contention is not properly before us inasmuch as no such application "[was] made to the court of original instance" (*Matter of Ebright v Ward*, 39 AD2d 1013, 1013 [4th Dept 1972], *lv denied* 31 NY2d 641 [1972]; see also *Hayes v Ontario Plastics*, 6 AD3d 1122, 1123 [4th Dept 2004]; *Starke v Starke*, 127 AD2d 969, 970 [4th Dept 1987]).

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

**288**

**CA 24-01017**

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

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IN THE MATTER OF KEVIN STUART, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

DANIEL F. MARTUSCELLO, III, ACTING COMMISSIONER,  
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND  
COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF  
COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Melissa Lightcap Cianfrini, A.J.), entered June 21, 2024, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his CPLR article 78 petition seeking to annul the determination of the Board of Parole (Board) denying his request for release to parole supervision following a hearing in April 2023. The Attorney General has advised this Court that, subsequent to that denial and during the pendency of this appeal, petitioner reappeared before the Board in April 2025 and was again denied release. Consequently, this appeal must be dismissed as moot (see *Matter of Romano v Annucci*, 196 AD3d 1176, 1176 [4th Dept 2021]; *Matter of Colon v Annucci*, 177 AD3d 1393, 1394 [4th Dept 2019]; see generally *Matter of Moissett v Travis*, 97 NY2d 673, 674 [2001]). We conclude that this case does not fall within the exception to the mootness doctrine (see *Romano*, 196 AD3d at 1176; *Colon*, 177 AD3d at 1394; *Matter of Brunner v Speckard*, 214 AD2d 1040, 1040-1041 [4th Dept 1995], lv denied 86 NY2d 707 [1995]; see generally *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**289**

**CA 24-00412**

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

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C. G., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ERIE COUNTY, ET AL., DEFENDANTS,  
AND CHILD AND FAMILY SERVICES, FORMERLY KNOWN  
AS CHILDREN'S AID SOCIETY, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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GOLDBERG SEGALLA LLP, BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

HERMAN LAW, NEW YORK CITY (STUART MERMELSTEIN OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered March 1, 2024. The order denied the motion of defendant Child and Family Services, formerly known as Children's Aid Society, to dismiss the amended complaint against it.

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

Memorandum: On May 25, 2021, plaintiff commenced this personal injury action pursuant to the Child Victims Act (CVA) (see CPLR 214-g) alleging that she was sexually abused by her foster father and sexually assaulted by others while she was placed in a foster home. Plaintiff named as defendants Erie County (County) and "Doe 1-10," alleging that the County provided child welfare and protective services and contracted with the Doe defendants to provide foster care services. On July 5, 2023, plaintiff and the County stipulated to amend the complaint to add defendant Children and Family Services, formerly known as Children's Aid Society (CFS), as a defendant. Plaintiff served an amended complaint substituting CFS for the first "Doe" defendant, and CFS moved to dismiss the amended complaint pursuant to CPLR 3211 (a) (5).

In appeal No. 1, CFS appeals from an order that denied its motion to dismiss. In appeal No. 2, CFS appeals from an order that denied its motion seeking leave to renew and reargue the motion to dismiss.

Contrary to its contention in appeal No. 1, CFS was properly substituted for one of the Doe defendants pursuant to CPLR 1024. Initially, CFS argues that plaintiff cannot invoke CPLR 1024 because

she did not move for leave to extend the time to serve CFS with the amended complaint pursuant to CPLR 306-b. However, CFS failed to raise plaintiff's failure to move pursuant to CPLR 306-b below and thus waived that contention (see *Vanyo v Buffalo Police Benevolent Assn.*, 34 NY3d 1104, 1105 [2019]).

Pursuant to CPLR 1024, "[a] party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of [the unknown party's] name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly." "Under CPLR 1024, the description of the unknown party must be sufficiently complete to fairly apprise that entity that it is the intended defendant" (*Olmstead v Pizza Hut of Am., Inc.*, 28 AD3d 855, 856 [3d Dept 2006]; see *Thas v Dayrick Trading, Inc.*, 78 AD3d 1163, 1165 [2d Dept 2010]; *Carmer v Odd Fellows*, 66 AD3d 1435, 1436 [4th Dept 2009]). In addition, the plaintiff "must show that [they] made 'timely efforts to identify the correct party before the statute of limitations expired' " (*Justin v Orshan*, 14 AD3d 492, 492-493 [2d Dept 2005]). We conclude that plaintiff satisfied both prongs here, and thus Supreme Court properly denied CFS's motion to dismiss.

First, we conclude that the original complaint adequately describes CFS such that, from the description, it would have known that it was a defendant. Indeed, the description of the Doe defendants here is virtually identical to the one we deemed sufficient in *A.S. v Erie County* (219 AD3d 1694, 1695 [4th Dept 2023]). In this case, plaintiff alleged in the complaint that in approximately 1972, at the age of seven, she was placed in foster care with a family in Erie County. The complaint further alleged that, while living with that family, plaintiff was sexually abused by her foster father from the time she was 7 until she was 17 years old, and it described the Doe defendants as entities that contracted with the County to provide foster care services.

Second, plaintiff made a diligent inquiry and genuine efforts to ascertain the identity of CFS prior to the expiration of the statute of limitations (see *id.*). Prior to the expiration of the statute of limitations, plaintiff requested that the County produce plaintiff's foster care records, including medical records, educational records, progress notes, and placement information. Plaintiff provided the County with her name and date of birth, and an authorization, but the County responded that it did not maintain any records responsive to plaintiff's request. The County also indicated that it did not possess any responsive documents with respect to plaintiff's initial discovery demands. Through her own efforts, plaintiff ultimately discovered that she was placed by Children's Aid Society, now CFS, and as soon as plaintiff became aware of CFS's involvement in her placement, she sought, and the County stipulated, to amend the complaint to add CFS as a party defendant.

In light of our conclusion, we need not reach CFS's alternative contention in appeal No. 1 that the amended complaint does not relate back pursuant to CPLR 203.

With respect to appeal No. 2, we note that no appeal lies from that part of the order that denied CFS's motion to the extent that it sought leave to reargue (see *Matter of Kleinbach v Cullerton*, 151 AD3d 1686, 1687 [4th Dept 2017]; *Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]; see generally CPLR 5701 [a] [2] [viii]). With respect to the remainder of the order denying the motion to the extent that it sought leave to renew, we note that CFS "failed to address in its brief any issues concerning [that part of the order], and we therefore deem any such issues abandoned" (*Verizon N.Y., Inc. v LaBarge Bros. Co., Inc.*, 81 AD3d 1294, 1295 [4th Dept 2011]; see *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). Thus, we dismiss the appeal from the order in appeal No. 2.

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

**290**

**CA 24-00413**

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

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C. G., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ERIE COUNTY, ET AL., DEFENDANTS,  
AND CHILD AND FAMILY SERVICES, FORMERLY KNOWN  
AS CHILDREN'S AID SOCIETY, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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GOLDBERG SEGALLA LLP, BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

HERMAN LAW, NEW YORK CITY (STUART MERMELSTEIN OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered March 1, 2024. The order denied the motion of defendant Child and Family Services, formerly known as Children's Aid Society, seeking leave to renew and reargue its motion to dismiss the amended complaint against it.

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

Same memorandum as in *C. G. v Erie County* ([appeal No. 1] - AD3d - [June 6, 2025] [4th Dept 2025]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**292**

**CA 24-00830**

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

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UNION SPRINGS CENTRAL SCHOOL DISTRICT,  
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

NORBUT SOLAR FARMS, LLC, NSF AURELIUS SITE 1, LLC,  
NSF AURELIUS SITE 2, LLC, NSF AURELIUS SITE 3, LLC,  
NSF AURELIUS SITE 4, LLC, AND NSF ENERGY ONE, LLC,  
DEFENDANTS-RESPONDENTS.

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COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (STACY A. MARRIS OF  
COUNSEL), FOR PLAINTIFF-APPELLANT.

NIXON PEABODY LLP, ROCHESTER (ERIC M. FERRANTE OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Cayuga County (Jon E. Budelmann, A.J.), entered May 21, 2024, in a declaratory judgment action. The order, insofar as appealed from, granted the motion of defendants insofar as it sought to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reinstating the complaint to the extent that it seeks a declaration and granting judgment in favor of defendants as follows:

It is ADJUDGED AND DECLARED that defendants' letter dated February 3, 2022 constituted valid written notification to the highest-ranking official of the taxing jurisdiction pursuant to RPTL 487 (9) (a), and

It is further ADJUDGED AND DECLARED that no agreement with plaintiff for payment in lieu of taxes is required for defendants' construction of the Aurelius Site 1, LLC; Aurelius Site 2, LLC; Aurelius Site 3, LLC; and Aurelius Site 4, LLC solar energy projects in the Town of Aurelius, New York,

and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking a judgment declaring, inter alia, that defendants' letter dated February 3, 2022 did not constitute valid written notification pursuant to RPTL 487 (9) (a). Plaintiff alleged that the letter failed to comply with the

statutory requirement that written notification be "sent to the highest-ranking official of the taxing jurisdiction" because plaintiff's highest-ranking official was Superintendent Dr. Jarrett S. Powers, and defendants' letter was addressed to "Superintendent Dennis." Defendants moved to dismiss the complaint or for a declaration in their favor that no agreement with plaintiff for payment in lieu of taxes is required for construction of the solar energy projects because plaintiff failed to respond to their valid written notification within 60 days as required by the statute (see *id.*). Plaintiff appeals from an order granting the motion insofar as it sought to dismiss the complaint.

Although a tax exemption statute such as section 487 "is to be construed strictly against the taxpayer, the interpretation should not be so narrow and literal as to defeat its settled purpose" (*Engle v Talarico*, 33 NY2d 237, 240 [1973]; see *People ex rel. Watchtower Bible & Tract Socy. v Haring*, 8 NY2d 350, 358 [1960], *rearg denied* 9 NY2d 688 [1961]). Here, the only inaccuracy identified by plaintiff in the letter is the incorrect surname. Given that there is no dispute that plaintiff has only one superintendent, a surname would not be necessary to identify the relevant official. Thus, Supreme Court properly determined that the notice was valid because, although it contained a factual inaccuracy, that inaccuracy "did not involve information required under" the statute (*Citibank, N.A. v Crick*, 176 AD3d 776, 778 [2d Dept 2019]; see generally Real Property Tax Law § 487 [9] [a]).

The court, however, erred in dismissing the complaint and in failing to declare the rights of the parties in this declaratory judgment action (see *Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]; *Leo v New York Cent. Mut. Fire Ins. Co.*, 136 AD3d 1333, 1333 [4th Dept 2016], *lv denied* 28 NY3d 902 [2016]). We therefore modify the order accordingly.

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

**312**

**CA 24-00553**

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

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MIKAYLA H. MANNER, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

STEVEN A. YANCEY AND WHITE'S FARM SUPPLY, INC.,  
DEFENDANTS-APPELLANTS.  
(APPEAL NO. 1.)

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CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (NICHOLAS HRICZKO OF  
COUNSEL), FOR DEFENDANTS-APPELLANTS.

GOLDBLATT & ASSOCIATES, P.C., MOHEGAN LAKE (KENNETH B. GOLDBLATT OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT.

---

Appeal from an order of the Supreme Court, Oneida County (Julie G. Denton, J.), entered March 6, 2024. The order, inter alia, directed defendants to provide certain materials to plaintiff's counsel and denied defendants' cross-motion for a protective order.

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

Same memorandum as in *Manner v Yancey* ([appeal No. 2] – AD3d – [June 6, 2025] [4th Dept 2025]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**313**

**CA 24-01233**

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

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MIKAYLA H. MANNER, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

STEVEN A. YANCEY AND WHITE'S FARM SUPPLY, INC.,  
DEFENDANTS-APPELLANTS.  
(APPEAL NO. 2.)

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CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (NICHOLAS HRICZKO OF  
COUNSEL), FOR DEFENDANTS-APPELLANTS.

GOLDBLATT & ASSOCIATES, P.C., MOHEGAN LAKE (KENNETH B. GOLDBLATT OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT.

---

Appeal from an order of the Supreme Court, Oneida County (Julie G. Denton, J.), entered July 8, 2024. The order, inter alia, directed defendants to provide certain materials to plaintiff's counsel and denied the motion of defendants for leave to renew their cross-motion for a protective order.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle that she was driving was struck by a truck operated by defendant Steven A. Yancey and owned by defendant White's Farm Supply, Inc. Plaintiff alleged, inter alia, that she suffered a concussion, post-concussion syndrome, and a traumatic brain injury as a result of the accident. In response to notice that defendants would be requesting an independent neuropsychological evaluation, plaintiff's counsel indicated that plaintiff would be produced once the parties entered into a stipulation requiring that the evaluating neuropsychologist provide directly to plaintiff's counsel the testing materials used during the examination and the raw data generated, with the restriction, among other things, that such materials and data would not be released to any third party other than a licensed psychologist or neuropsychologist. Defendants previously appealed from an order that, inter alia, compelled plaintiff to submit to the evaluation and ordered defendants to disclose the testing materials and raw data directly to plaintiff's counsel. Noting defendants' apparent inability to retain an evaluator under that condition of disclosure, we modified the order by vacating that part of the order directing defendants to provide the testing materials and raw data directly to

plaintiff's counsel, and by vacating that part of the order granting that part of defendants' motion for a protective order (*Manner v Yancey*, 218 AD3d 1196, 1198 [4th Dept 2023]). In addition, we explicitly noted that "nothing in our decision preclude[d] plaintiff from moving, after having appeared for examination, to compel the disclosure of the testing materials and raw data directly to her counsel" (*id.*). Following our decision, plaintiff appeared for an evaluation by defendants' expert, and plaintiff subsequently moved, inter alia, to compel disclosure of the testing materials and raw data, as contemplated in our prior decision. In appeal No. 1, Supreme Court, inter alia, granted that part of plaintiff's motion seeking to compel disclosure, with specified prohibitions against sharing the testing materials and raw data with a third party, and denied defendants' cross-motion for a protective order. In appeal No. 2, the court, inter alia, modified the order in appeal No. 1 by clarifying that defendants were compelled to produce copies, as opposed to the originals, of the relevant test materials and raw data, and denied defendants' motion for leave to renew their cross-motion. Defendants appeal, and we affirm.

As an initial matter, the appeal from the order in appeal No. 1 must be dismissed inasmuch as that order was superceded by the order in appeal No. 2 (see *Matter of Johnson v Johnson* [appeal No. 2], 209 AD3d 1314, 1314-1315 [4th Dept 2022]; *Merchant Funding Servs., LLC v Volunteer Pharm., Inc.*, 179 AD3d 1051, 1051 [2d Dept 2020]).

With respect to appeal No. 2, it is well settled that "[a] trial court has broad discretion in supervising the discovery process, and its determinations will not be disturbed absent an abuse of that discretion" (*Manner*, 218 AD3d at 1197 [internal quotation marks omitted]; see *Crysler v Erk* [appeal No. 2], 227 AD3d 1410, 1412 [4th Dept 2024]). Under the circumstances of this case, we perceive no abuse of discretion either in granting that part of plaintiff's motion seeking to compel disclosure or in denying defendants' cross-motion for a protective order (see *Marable v Hughes*, 38 AD3d 1344, 1345 [4th Dept 2007]; see generally *M.A. v Spring*, 221 AD3d 433, 433 [1st Dept 2023]; *Flores v Vescera*, 105 AD3d 1340, 1340-1341 [4th Dept 2013]).

We have reviewed defendants' remaining contentions, and conclude that they do not warrant modification or reversal of the order.

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

**317**

**CA 24-01704**

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

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IKA KLAPAN, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TULLY CENTRAL SCHOOL DISTRICT, DEFENDANT-APPELLANT.

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

BOUSQUET HOLSTEIN PLLC, SYRACUSE (NATHAN M. JERAULD OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (Danielle M. Fogel, J.), entered April 12, 2024. The order, insofar as appealed from, denied in part defendant's motion for summary judgment.

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

Memorandum: Plaintiff commenced this action alleging employment discrimination by defendant. Defendant moved for summary judgment dismissing the complaint. Supreme Court granted the motion in part and dismissed a disability discrimination claim and a retaliation cause of action, but denied that part of the motion seeking dismissal of a sex discrimination claim. Defendant appeals.

Plaintiffs alleging discrimination in violation of the New York State Human Rights Law must show "(1) [they] are a member of a protected class; (2) [they were] qualified to hold the position; (3) [they were] terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). A defendant moving for summary judgment dismissing a discrimination cause of action "must demonstrate either the plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for the challenged action, the absence of triable issue[s] of fact as to whether the explanations were pretextual" (*Lefort v Kingsbrook Jewish Med. Ctr.*, 203 AD3d 708, 710 [2d Dept 2022] [internal quotation marks omitted]; see *Thygesen v North Bailey Volunteer Fire Co., Inc.*, 151 AD3d 1708, 1709 [4th Dept 2017]).

Contrary to defendant's contention, the court properly determined that defendant did not meet its burden with respect to plaintiff's alleged failure to establish every element of intentional discrimination (see *Thygesen*, 151 AD3d at 1709). We note that plaintiff's burden of establishing a prima facie case is " 'de minimis' " (*Basso v Earthlink, Inc.*, 157 AD3d 428, 429 [1st Dept 2018]; see *Matter of Hirsch v New York State Div. of Human Rights*, 232 AD3d 1248, 1250-1251 [4th Dept 2024]). We agree with defendant, however, and the court properly determined, that defendant established that there were legitimate, non-discriminatory reasons for its employment determination, and plaintiff failed to raise an issue of fact (see *Thygesen*, 151 AD3d at 1709; *Clark v Morelli Ratner PC*, 73 AD3d 591, 591-592 [1st Dept 2010]). In particular, the evidence established that there were at least three incidents during plaintiff's one-year probationary term where plaintiff exercised poor judgment.

We further agree with defendant that it established "the absence of a material issue of fact as to whether [its] explanations were pretextual" (*Forrest*, 3 NY3d at 305), and plaintiff failed to raise a triable issue that defendant's reasons "were false and that [gender-] motivated discrimination was the real reason" for defendant's employment determination (*id.* at 308). We therefore reverse the order insofar as appealed from, grant the motion in its entirety and dismiss the complaint.

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

**320**

**KA 21-00936**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KWAME SPRATT, DEFENDANT-APPELLANT.

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TINA L. HARTWELL, PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (MICHAEL A. LABELLA OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered August 10, 2020. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Lyon*, 227 AD3d 1521, 1522 [4th Dept 2024], *lv denied* 42 NY3d 928 [2024]; *see generally People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to the severity of the sentence (*see People v Resto*, 222 AD3d 1425, 1425 [4th Dept 2023], *lv denied* 41 NY3d 966 [2024]; *People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]), we perceive no basis in the record to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [b]*).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**321**

**KA 24-01537**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MELIQ SIMMONDS, DEFENDANT-APPELLANT.

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FRANK POLICELLI, UTICA, FOR DEFENDANT-APPELLANT.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (DAWN CATERA LUPI OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered January 2, 2024. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a firearm.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a firearm (§ 265.01-b [1]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (see *People v Lyon*, 227 AD3d 1521, 1522 [4th Dept 2024], *lv denied* 42 NY3d 928 [2024]; *People v Tennant*, 217 AD3d 1564, 1564 [4th Dept 2023]; see generally *People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to the severity of the sentence (see *People v Mendoza*, 37 NY3d 1075, 1076 [2021]), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**340**

**KA 23-00854**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KIMARA PLUVIOSE, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MERIDETH H. SMITH OF COUNSEL), FOR RESPONDENT.

---

Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered January 12, 2023. The judgment convicted defendant upon her plea of guilty of burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]). The record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (see generally *People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses her challenge to the severity of the sentence (see *People v Smalls*, 128 AD3d 1229, 1230 [3d Dept 2015], *lv denied* 27 NY3d 1006 [2016], *reconsideration denied* 27 NY3d 1155 [2016], *cert denied* 580 US 1002 [2016]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**341**

**KA 24-00424**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DAKOTA S. PIELOW, DEFENDANT-APPELLANT.

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

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

---

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered October 30, 2023. The judgment convicted defendant, upon a plea of guilty, of criminal sexual act in the first degree.

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**342**

**KA 18-00225**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSE E. LOPEZ-NUNEZ, ALSO KNOWN AS  
ALEX O. GONZALEZ, DEFENDANT-APPELLANT.

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (GUY A. TALIA OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Monroe County  
(Charles A. Schiano, Jr., J.), rendered November 29, 2017. The  
judgment convicted defendant upon his plea of guilty of attempted  
criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him  
upon his plea of guilty of attempted criminal possession of a weapon  
in the second degree (Penal Law §§ 110.00, 265.03 [3]) and sentencing  
him as a persistent violent felony offender. We agree with defendant,  
and the People correctly concede, that the waiver of the right to  
appeal is invalid. Supreme Court's "oral waiver colloquy and the  
written waiver signed by defendant together 'mischaracterized the  
nature of the right that defendant was being asked to cede, portraying  
the waiver as an absolute bar to defendant taking an appeal and the  
attendant rights to counsel and poor person relief, as well as a bar  
to all postconviction relief, and there is no clarifying language in  
either the oral or written waiver indicating that appellate review  
remained available for certain issues' " (*People v Johnson*, 192 AD3d  
1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; see *People v  
Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* – US –, 140 S Ct 2634  
[2020]; *People v Benjamin-Foster*, 215 AD3d 1277, 1277 [4th Dept 2023],  
*lv denied* 40 NY3d 927 [2023]).

At sentencing, defendant admitted his prior convictions and did  
not dispute the periods of incarceration listed in the persistent  
violent felony offender statement. On appeal, relying on *Erlinger v  
United States* (602 US 821 [2024]), defendant contends that the  
sentencing procedure pursuant to which he was adjudicated a persistent

violent felony offender is unconstitutional, requiring remittal for resentencing as a first-time felony offender. Defendant failed to preserve his contention for our review (see *People v Hernandez*, – NY3d –, 2025 NY Slip Op 00904, \*3 [2025]). Defendant also failed to preserve for our review his contention that the People failed to comply with CPL 400.15 (2) because they did not list the actual correctional facilities where defendant was imprisoned (see *People v Pellegrino*, 60 NY2d 636, 637 [1983]; *People v Hernandez*, 188 AD3d 1357, 1359 [3d Dept 2020], *lv denied* 36 NY3d 1057 [2021]; *People v Camp*, 134 AD3d 1470, 1471 [4th Dept 2015], *lv denied* 27 NY3d 1066 [2016]). We decline to exercise our power to review defendant's contentions as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]).

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

**352**

**CAF 23-02169**

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

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IN THE MATTER OF TIANNA THOMAS,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

JOSEPH OSINSKI, RESPONDENT-RESPONDENT.

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IN THE MATTER OF JOSEPH OSINSKI,  
PETITIONER-RESPONDENT,

V

TIANNA THOMAS, RESPONDENT-APPELLANT.

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

LAURA ESTELA CARDONA, EAST SYRACUSE, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Cayuga County (Shannon J. Pero, R.), entered December 8, 2023, in proceedings pursuant to Family Court Act article 6. The order, inter alia, granted respondent-petitioner sole legal and physical custody of the subject child.

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

Memorandum: In these proceedings pursuant to article 6 of the Family Court Act, petitioner-respondent mother appeals from an order that, inter alia, awarded sole legal and physical custody of the subject child to respondent-petitioner father.

We reject the mother's contention that Family Court erred in granting sole legal and physical custody to the father. Initially, we agree with the mother that the court erred to the extent it held that an award of sole custody was required simply because the matter proceeded to trial. Nevertheless, the record supports the determination that the parties have an acrimonious relationship and are not able to communicate effectively with respect to the needs of their child, and thus joint custody would be inappropriate (*see Matter of Williams v Grau*, 230 AD3d 1539, 1540 [4th Dept 2024]; *Matter of Castle v Barnes*, 221 AD3d 1562, 1563 [4th Dept 2023], lv denied 41 NY3d 901 [2024]).

Further, we conclude that there is a sound and substantial basis in the record for the court's determination that an award of sole legal and physical custody to the father with parenting time to the mother was in the child's best interests, and we therefore decline to disturb that determination (*see Matter of Schram v Nine*, 193 AD3d 1361, 1361-1362 [4th Dept 2021], *lv denied* 37 NY3d 905 [2021]). "In making a custody determination, the court must consider all factors that could impact the best interests of the child, including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of [the parties] to provide for the child's emotional and intellectual development and the wishes of the child . . . No one factor is determinative because the court must review the totality of the circumstances" (*Sheridan v Sheridan*, 129 AD3d 1567, 1568 [4th Dept 2015] [internal quotation marks omitted]; *see Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]). While most of the factors did not favor one parent over the other, we conclude that the record establishes that the father was better able to provide for the child's emotional and intellectual development inasmuch as the mother had an inability to foster the child's relationship with the father.

The mother contends that the parenting time granted to her does not provide her with sufficient and meaningful time with the child. The court ordered the mother to have visitation with the child on alternate weekends and "any other times as can be agreed between the parties." A court "may order visitation as the parties may mutually agree so long as such an arrangement is not untenable under the circumstances" (*Matter of Kelley v Fifield*, 159 AD3d 1612, 1613 [4th Dept 2018]). We conclude that the arrangement here, where the court did not specify additional visitation on holidays and school breaks when the child starts school and instead left it to the parties to agree upon such visitation, was not " 'untenable under the circumstances' " (*Matter of D.T. v C.T.*, 215 AD3d 1232, 1234 [4th Dept 2023]; *see Matter of Pierce v Pierce*, 151 AD3d 1610, 1611 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]; *cf. Matter of Shonyo v Shonyo*, 151 AD3d 1595, 1597-1598 [4th Dept 2017], *lv denied* 30 NY3d 901 [2017]). If the mother is unable to obtain such other visitation as the parties may agree, she may file a petition to enforce or modify the order (*see Pierce*, 151 AD3d at 1611; *Matter of Moore v Kazacos*, 89 AD3d 1546, 1547 [4th Dept 2011], *lv denied* 18 NY3d 806 [2012]).

All concur except OGDEN, J., who dissents and votes to modify in accordance with the following memorandum: I dissent inasmuch as I believe that the parenting time awarded to petitioner-respondent mother is inadequate. I agree with the majority that there is a sound and substantial basis in the record for Family Court's determination to award respondent-petitioner father sole legal and physical custody of the subject child, with parenting time to the mother, but, in my view, the court should have set forth specific, additional periods of visitation for the mother, including, for example, a visitation schedule for school breaks and holidays. Contrary to the position taken by my colleagues, I conclude that the court's determination to award such other visitation "as can be agreed between the parties" was " 'untenable under the circumstances' " (*Matter of D.T. v C.T.*, 215

AD3d 1232, 1234 [4th Dept 2023]; *cf. Matter of Pierce v Pierce*, 151 AD3d 1610, 1611 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]).  
"Given the acrimonious nature of the parties' relationship, . . . a more definitive schedule of visitation . . . is in the [child's] best interests" (*Matter of Shonyo v Shonyo*, 151 AD3d 1595, 1597-1598 [4th Dept 2017], *lv denied* 30 NY3d 901 [2017]). I would therefore modify the order by vacating the determination providing for visitation "as can be agreed between the parties" and remit the matter to Family Court for it to set forth specific, additional visitation for the mother (*see id.*; *see generally Matter of Sturnick v Hobbs*, 191 AD3d 1375, 1376 [4th Dept 2021]).

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

**361**

**KA 24-00344**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

FRANKLIN RICHARDS, DEFENDANT-APPELLANT.

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NICHOLAS T. TEXIDO, BUFFALO, FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL),  
FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered May 8, 2023. The judgment convicted defendant upon a plea of guilty of criminal possession of a controlled substance 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 controlled substance in the second degree (Penal Law § 220.18 [1]). Defendant contends that County Court erred in denying his motion to unseal the transcript of the in camera testimony of a confidential informant taken in support of an otherwise disclosed search warrant application. Even assuming, arguendo, that defendant's contention falls within the parties' agreed-upon exception for discovery issues to defendant's otherwise valid waiver of appeal (see *People v Malcolm*, 231 AD3d 1503, 1504 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]), such contention is without merit to the extent that it is reviewable on this record (see generally *People v Darden*, 34 NY2d 177, 180-182 [1974], *rearg denied* 34 NY2d 995 [1974]). Further, defendant's related contention that the existing in camera procedure for reviewing search warrants issued on the information of confidential informants constitutes "a suppression procedure conducted without [a defendant's] participation [that] violates [the] constitutional right to due process of law and the effective assistance of counsel" has already been considered and rejected by the Court of Appeals (*People v Castillo*, 80 NY2d 578, 580 [1992], *cert denied* 507 US 1033 [1993]).

Defendant's further contention that he was denied effective assistance of counsel survives his plea and valid waiver of the right to appeal only insofar as defendant "contends that the plea bargaining process was infected by [the] allegedly ineffective assistance or that

[he] entered the plea because of [his] attorney[’s] allegedly poor performance” (*People v Molski*, 179 AD3d 1540, 1540-1541 [4th Dept 2020], *lv denied* 35 NY3d 972 [2020] [internal quotation marks omitted]; see *People v Wood*, 217 AD3d 1407, 1409 [4th Dept 2023], *lv denied* 40 NY3d 1000 [2023]). To the extent that defendant contends that defense counsel misadvised defendant to take the pre-indictment plea offer in lieu of pursuing a suppression motion, such contention involves matters outside the record on appeal and must be raised in a motion pursuant to CPL 440.10 (see *People v Dunn*, 229 AD3d 1220, 1223 [4th Dept 2024]).

We reject defendant’s further contention that, in order to comply with their discovery obligations under CPL 245.20 (1) and 245.25 (1), the People were obligated to move to unseal the transcript of the in camera testimony of the confidential informant taken in support of the search warrant application (see CPL 245.20 [1] [n]; [2]). Although the People have a statutory obligation to “make a diligent, good faith effort to ascertain the existence of material or information discoverable under [CPL 245.20 (1)] and to cause such material or information to be made available for discovery where it exists but is not within the prosecutor’s possession, custody or control” (CPL 245.20 [2]), the statutory language also makes clear that due diligence does not require the People to “obtain by subpoena duces tecum material or information which the defendant may thereby obtain” (*id.*). It therefore follows that the People are not obligated to move to unseal in camera testimony where, as here, that avenue is equally available to defendant.

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

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

**364**

**KA 23-00459**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CORDELL SMITH, DEFENDANT-APPELLANT.

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (SABRINA A. BREMER OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GRAZINA HARPER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered February 9, 2022. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a controlled substance in the seventh degree (two counts) and criminally using drug paraphernalia in the second degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the facts, the indictment against defendant is dismissed and the matter is remitted to Monroe County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him, following a nonjury trial, of two counts of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03) and three counts of criminally using drug paraphernalia in the second degree (§ 220.50 [1], [2], [3]). Drugs and drug paraphernalia were found during a search of defendant's girlfriend's apartment.

Viewing the evidence in the light most favorable to the People (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that there is legally insufficient evidence of his constructive possession of the drugs and drug paraphernalia (*see People v Mattison*, 41 AD3d 1224, 1225 [4th Dept 2007], *lv denied* 9 NY3d 924 [2007]).

Defendant further contends that the verdict is against the weight of the evidence. To determine whether a verdict is supported by the weight of the evidence, this Court must first determine whether an acquittal would have been unreasonable (*see Danielson*, 9 NY3d at 348; *People v Bleakley*, 69 NY2d 490, 495 [1987]). If we determine that an acquittal would not have been unreasonable, then we "must weigh conflicting testimony, review any rational inferences that may be

drawn from the evidence and evaluate the strength of such conclusions" (*Danielson*, 9 NY3d at 348; see *People v Jones*, 206 AD3d 1566, 1567 [4th Dept 2022]). Here, we conclude that an acquittal would not have been unreasonable and, viewing the evidence in light of the elements of the crimes in this nonjury trial (see *Danielson*, 9 NY3d at 349), we further conclude that the verdict is against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495).

As relevant here, "[w]here there is no evidence that the defendant actually possessed the controlled substance or drug paraphernalia, the People are required to establish that the defendant exercised dominion or control over the property by a sufficient level of control over the area in which the contraband is found" (*People v Ponder*, 191 AD3d 1409, 1410 [4th Dept 2021] [internal quotation marks omitted]; see Penal Law § 10.00 [8]). The People may establish such constructive possession by circumstantial evidence (see *People v Torres*, 68 NY2d 677, 678-679 [1986]; *Ponder*, 191 AD3d at 1410), "but a defendant's mere presence in the area in which the contraband is discovered is insufficient to establish constructive possession" (*Ponder*, 191 AD3d at 1410).

Here, while the People adduced evidence establishing that defendant had a key to the apartment and stayed there "from time to time," defendant was not a party to the lease and a search of the premises did not reveal anything to "specifically connect[ ] defendant to the places where the contraband was ultimately found" (*People v Mighty*, 203 AD3d 1687, 1688 [4th Dept 2022]; see generally *People v Ayala*, 154 AD3d 1293, 1294 [4th Dept 2017]). Moreover, none of the contraband was in plain view (*cf. People v Nevins*, 196 AD3d 1110, 1111-1112 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021]) and, thus, no statutory presumption of defendant's knowing possession applied (see Penal Law § 220.25 [2]; *People v Orta*, 184 AD2d 1052, 1053 [4th Dept 1992]).

We conclude that the weight of the evidence does not support a finding that defendant "exercised dominion or control over the [contraband] by a sufficient level of control over the area in which [it was] found" (*Ponder*, 191 AD3d at 1411) and therefore that County Court was not justified in finding beyond a reasonable doubt that defendant possessed the drugs and drug paraphernalia in question. We thus reverse the judgment and dismiss the indictment against defendant.

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

**366**

**KA 24-01028**

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

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

DAREIOUS AKBAR, DEFENDANT-RESPONDENT.

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

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN E. MARKARIAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Erie County Court (Kenneth F. Case, J.), dated June 6, 2024. The order, insofar as appealed from, granted that part of the omnibus motion of defendant seeking to dismiss counts 1 through 3 of the indictment.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: The People appeal from an order that, inter alia, granted that part of defendant's omnibus motion seeking to dismiss counts 1 through 3 of the indictment based on the alleged legal insufficiency of the evidence before the grand jury. During the pendency of this appeal, defendant pleaded guilty to the remaining counts in the indictment. Defendant correctly contends, and the People correctly concede, that the appeal is moot (*see People v Moquin*, 77 NY2d 449, 455 [1991], *rearg denied* 78 NY2d 952 [1991]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]), and the parties do not contend that this case falls within an exception to the mootness doctrine (*see generally Hearst Corp.*, 50 NY2d at 714-715).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**370**

**CA 24-00332**

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

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JAMAL K. BENNETT, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

LUIS A. GARCIA-RAMOS AND HAMBURG OVERHEAD  
DOOR, INC., DEFENDANTS.

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LUIS A. GARCIA-RAMOS AND HAMBURG OVERHEAD DOOR, INC.,  
THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

JENNIFER MARIE STEELE AND MICHELLE M. STEELE,  
THIRD-PARTY DEFENDANTS-RESPONDENTS.

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LAW OFFICES OF GERARD E. O'CONNOR, BUFFALO (ROBERT H. FLYNN OF  
COUNSEL), FOR THIRD-PARTY PLAINTIFFS-APPELLANTS.

RIVKIN RADLER LLP, NEW YORK CITY (HENRY MASCIA OF COUNSEL), FOR  
THIRD-PARTY DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Joseph C. Lorigo, J.), entered February 7, 2024. The order granted the motion of third-party defendants for summary judgment and dismissed the amended third-party complaint.

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

Memorandum: On August 28, 2018, plaintiff allegedly sustained injuries in a motor vehicle collision in which defendant-third-party plaintiff Luis A. Garcia-Ramos was driving a vehicle owned by defendant-third-party plaintiff Hamburg Overhead Door, Inc. (collectively, defendants). On September 21, 2018, plaintiff was involved in a second motor vehicle collision in which third-party defendant Jennifer Marie Steele was driving a vehicle owned by third-party defendant Michelle M. Steele. In June 2020, plaintiff commenced this action against defendants, seeking damages for injuries he allegedly sustained in the August 2018 accident, which, according to plaintiff, required him, inter alia, to undergo a lumbar laminectomy in December 2021. According to plaintiff's bill of particulars, "[p]laintiff did not suffer any injuries in the motor vehicle collision of September 21, 2018." In December 2022, defendants

commenced a third-party action against third-party defendants alleging that third-party defendants' negligence "caused and/or aggravated" plaintiff's injuries and therefore they are entitled to contribution or indemnification from third-party defendants. Defendants now appeal from an order granting third-party defendants' motion for summary judgment dismissing the amended third-party complaint. We reverse the order, deny the motion, and reinstate the amended third-party complaint.

We agree with defendants that third-party defendants failed to meet their initial burden on the motion. "[T]he issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts" (*Smart v Rivet*, 126 AD3d 1474, 1475 [4th Dept 2015] [internal quotation marks omitted]). Here, in support of the motion, third-party defendants submitted, inter alia, plaintiff's deposition testimony wherein he admitted that he had told the police that he suffered a neck injury in the second accident but then later testified that the pain was "the exact same pain that [he] was in from the first accident." Thus, third-party defendants' own submissions raise issues of fact whether plaintiff's injuries were caused or exacerbated by the second collision (see *Manna v Riccelli Enters., Inc.*, 188 AD3d 1582, 1583-1584 [4th Dept 2020]; *Mays v Green*, 165 AD3d 1619, 1620 [4th Dept 2018]).

Even assuming, arguendo, that third-party defendants satisfied their initial burden, we conclude that defendants raised a triable issue of fact by submitting medical evidence establishing that plaintiff presented to the hospital on the day after the second accident and told hospital staff that he had hit his head on the steering wheel when his vehicle was rear-ended and was experiencing neck and back pain, which he described as 10 out of 10 on the pain scale, as well as mild tingling in his hands, which required a number of diagnostic tests. Defendants also submitted a police accident report from the second accident, which stated that plaintiff had suffered a neck injury. Viewing the facts in the light most favorable to the non-moving party, and drawing every available inference in the non-moving party's favor, as we must (see *Palumbo v Bristol-Myers Squibb Co.*, 158 AD3d 1182, 1183-1184 [4th Dept 2018]; *Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that there are issues of fact that preclude summary judgment.

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

**374**

**CA 24-00258**

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

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JAMES VERMILLION, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

THE ROOFING GUYS, INC., DEFENDANT-RESPONDENT.

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GALLI LAW, PLLC, SYRACUSE (ANTHONY C. GALLI OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered January 26, 2024. The order granted the motion of defendant insofar as it sought to preclude testimony or evidence of consequential damages.

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

Memorandum: In this action for breach of contract, plaintiff homeowner appeals, as limited by his brief, from that part of an order that granted defendant's motion insofar as it sought to preclude plaintiff from offering testimony or proof regarding consequential damages.

Plaintiff purchased a residence in Syracuse with the intention of renovating it, obtaining a certificate of occupancy, and making it his primary residence. To that end, plaintiff entered into a contract with defendant to reroof the residence. Defendant subcontracted the project to another contractor. During the course of the work, there was a severe storm—including heavy rain and high winds—which caused water damage to the property, including the attic.

Plaintiff commenced this action against defendant and, after the completion of discovery, served an expert disclosure seeking to introduce testimony regarding "damages resulting from [defendant's] project delays and the increase in mortgage interest rates, material and construction costs" including "project damages caused by [defendant's] disruption to project financing." Defendant moved to, inter alia, preclude plaintiff from adducing proof at trial regarding consequential damages, and Supreme Court granted the motion insofar as it sought that relief. We affirm.

Contrary to plaintiff's contention, consequential damages were not contemplated by the parties when the contract was executed. It is well settled that "damages which may be recovered by a party for breach of contract are restricted to those damages which were reasonably foreseen or contemplated by the parties during their negotiations or at the time the contract was executed" (*Kenford Co. v County of Erie*, 73 NY2d 312, 321 [1989]). "[I]n an action seeking damages for breach of contract, a party's recovery is ordinarily limited to general damages which are the natural and probable consequence of the breach" and "any additional recovery must be premised upon a showing that the unusual or extraordinary damages sought were within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting" (*Lauricella v LC Apts., LLC*, 173 AD3d 1821, 1821-1822 [4th Dept 2019] [internal quotation marks omitted]).

"To determine whether consequential damages were reasonably contemplated by the parties, courts must look to the nature, purpose and particular circumstances of the contract known by the parties . . . as well as what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made" (*Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 193 [2008] [internal quotation marks omitted]; see *Kenford*, 73 NY2d at 319). Here, plaintiff entered into a "bare bones" contract with defendant to tear off the roof of the residence, replace all rotted plywood, re-lay architectural shingles, and remove all roofing debris. Inasmuch as the contract makes no mention of consequential damages and contains nothing that could be interpreted as contemplating consequential damages, and no party testified that consequential damages were contemplated when the contract was entered, the court properly precluded testimony or proof of consequential damages.

Plaintiff's contention regarding defendant's subcontract is not preserved for appellate review because plaintiff failed to raise that issue before the motion court (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

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

**375**

**CA 24-01183**

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

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RACHEL L. FINNEGAN, INDIVIDUALLY AND AS  
EXECUTOR OF THE ESTATE OF DANIEL J. FINNEGAN,  
JR., DECEASED, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MARK H. KASOWITZ, M.D., SEKOU R. RAWLINS, M.D.,  
AND SYRACUSE GASTROENTEROLOGICAL ASSOCIATES, P.C.,  
DEFENDANTS-APPELLANTS.

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MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (CHARLES E.  
PATTON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PORTER LAW GROUP, SYRACUSE (MARY E. LANGAN OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County  
(Gerard J. Neri, J.), entered June 5, 2024. The order denied  
defendants' motion for partial summary judgment.

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

Memorandum: Plaintiff commenced this medical malpractice, lack  
of informed consent, and wrongful death action seeking damages for  
decedent's injuries and death as a result of the alleged negligent  
treatment provided to decedent at defendant Syracuse  
Gastroenterological Associates, P.C. (SGA) by defendants Mark H.  
Kasowitz, M.D., and Sekou R. Rawlins, M.D. Plaintiff's complaint, as  
amplified by the bill of particulars, alleges that Rawlins failed to  
properly and adequately advise decedent of the importance of  
undergoing surveillance colonoscopies, in light of his medical history  
and his increased risk of colorectal cancer. According to plaintiff,  
had decedent undergone an earlier colonoscopy, the cancer diagnosis  
would have occurred at a time when curative treatments would have been  
available. Defendants moved for, inter alia, summary judgment  
dismissing the complaint against Rawlins and partial summary judgment  
dismissing claims of vicarious liability against SGA for care rendered  
by Rawlins. Defendants now appeal from an order denying their motion.  
We affirm.

Defendants contend that Supreme Court erred in denying their  
motion because plaintiff failed to raise a triable issue of fact  
whether Rawlins' failure to advise decedent regarding the importance

of undergoing colonoscopies proximately caused decedent's death. We reject that contention. Assuming, arguendo, that defendants met their initial burden on their motion (see generally *Thomas v Eckhert*, 229 AD3d 1237, 1239 [4th Dept 2024]), we conclude that plaintiff raised a triable issue of fact regarding proximate causation when she submitted expert affidavits from a gastroenterologist and an oncologist, both of whom opined that if decedent's cancer had been discovered several months earlier, decedent would have had a greater chance of survival (see *Wiater v Lewis*, 197 AD3d 782, 784 [2d Dept 2021]; *Clune v Moore*, 142 AD3d 1330, 1331-1332 [4th Dept 2016]; *Schaub v Cooper*, 34 AD3d 268, 271 [1st Dept 2006]). We also reject defendants' contention that plaintiff's experts' opinions were conclusory and speculative. Instead, the opinions present "a classic battle of the experts," with regard to both deviation and causation, "which should be determined by the trier of fact" (*Grammatico v Lamar*, 224 AD3d 1376, 1378 [4th Dept 2024] [internal quotation marks omitted]; see *Clark v Rachfal*, 207 AD3d 1173, 1176 [4th Dept 2022], amended on rearg 210 AD3d 1456 [4th Dept 2022]; *Fargnoli v Warfel*, 186 AD3d 1004, 1005 [4th Dept 2020]).

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

**376**

**KA 23-01670**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SEQUAN LEWIS, DEFENDANT-APPELLANT.

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ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

VINCENT A. HEMMING, DISTRICT ATTORNEY, WARSAW (MATTHEW J. DILLON OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered October 4, 2023. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05). Inasmuch as defendant does not contest the validity of his waiver of the right to appeal, defendant's challenge to the severity of his sentence "is foreclosed by his unchallenged waiver of the right to appeal" (*People v Rosado-Thomas*, 181 AD3d 1166, 1167 [4th Dept 2020], *lv denied* 35 NY3d 1048 [2020]; see *People v Allen*, 203 AD3d 1574, 1574 [4th Dept 2022], *lv denied* 38 NY3d 1031 [2022]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**388**

**CA 24-00568**

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

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DONALD SCOTT AND GLENDA SCOTT,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

THERESA MELLAS, P.A., AND MEDFIRST URGENT  
CARE, PLLC, DOING BUSINESS AS MASH URGENT CARE,  
DEFENDANTS-APPELLANTS.

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GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (AMANDA C. ROSSI OF COUNSEL),  
FOR DEFENDANTS-APPELLANTS.

CAMPBELL & ASSOCIATES, HAMBURG (JASON M. TELAAK OF COUNSEL), FOR  
PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Cattaraugus County (Ronald D. Ploetz, A.J.), entered March 8, 2024. The order denied in part defendants' motion for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries that Donald Scott (plaintiff) allegedly sustained as a result of the failure of defendants, Theresa Mellas, P.A. and MedFirst Urgent Care, PLLC, doing business as MASH Urgent Care (MASH Urgent Care), to timely diagnose and treat plaintiff's diabetes. In their bill of particulars and supplemental bill of particulars, plaintiffs also alleged that MASH Urgent Care failed to properly train and supervise its staff at the facility. Following discovery, defendants moved for summary judgment dismissing the amended complaint. Supreme Court granted the motion with respect to the failure to properly train and supervise claims, but otherwise denied the motion. Defendants appeal, and we now affirm.

On a motion seeking summary judgment dismissing a medical malpractice cause of action, " 'a defendant has the burden of establishing, prima facie, that [they] did not deviate from [the] good and accepted standard[ ] of . . . care, or that any such deviation was not a proximate cause of the plaintiff's injuries' " (*Culver v Simko*, 170 AD3d 1599, 1600 [4th Dept 2019]; see *Simko v Rochester Gen. Hosp.*, 199 AD3d 1408, 1409 [4th Dept 2021]). Once the defendant meets that initial burden, "[t]he burden shifts to the plaintiff to demonstrate

the existence of a triable issue of fact . . . only as to the elements on which the defendant met the prima facie burden" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; see *Carroll v Niagara Falls Mem. Med. Ctr.*, 218 AD3d 1373, 1374 [4th Dept 2023]).

Here, even assuming, arguendo, that defendants met their initial burden on the motion with respect to both the alleged deviations from the accepted standard of medical care and proximate causation (see generally *Simko*, 199 AD3d at 1409; *Bubar*, 177 AD3d at 1360), we conclude that plaintiffs raised triable issues of fact with respect to both elements sufficient to defeat the motion with respect to the medical malpractice cause of action by submitting the affidavit of their medical expert (see *Cully v Ricottone*, 228 AD3d 1240, 1240 [4th Dept 2024]; see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Plaintiffs' expert affidavit 'squarely oppose[d]' the affidavit of [defendants' expert], resulting in 'a classic battle of the experts that is properly left to a jury for resolution' " (*Cully*, 228 AD3d at 1240; see *Zappia v Cai*, 236 AD3d 1394, 1395 [4th Dept 2025]).

Although the opinion of plaintiffs' expert is based in large part on underlying factual assertions made by plaintiff in his affidavit—namely, plaintiff's assertion that he told Mellas that he "had excessive thirst" and was "urinating much more frequently than usual," both of which are symptoms of diabetes—defendants contend for the first time on appeal that plaintiff's affidavit contradicts his deposition testimony and therefore constitutes "an attempt to raise feigned issues of fact where none truly exists" (*Mann v AutoZone Northeast, Inc.*, 148 AD3d 1646, 1646 [4th Dept 2017] [internal quotation marks omitted]; see *Alati v Divin Bldrs., Inc.*, 137 AD3d 1577, 1579 [4th Dept 2016]). Even assuming, arguendo, that defendants' contention is properly before us, we conclude that it lacks merit. Plaintiff testified during his deposition that he told the attending medical provider at the urgent care facility that he was "extremely thirsty" and had been "[d]rinking milk constantly" because he was hungry. That testimony does not "flatly contradict" plaintiff's claim in his affidavit that he told the provider that he was thirsty (*Red Zone LLC v Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048, 1049 [2016]; see *Schwartz v Vukson*, 67 AD3d 1398, 1400 [4th Dept 2009]). Although the affidavit offers a different reason for plaintiff's excessive consumption of milk (thirst rather than hunger), an inconsistency of that nature merely presents a credibility issue for trial. The same is true for the fact that plaintiff did not testify at his deposition that he told the provider about experiencing excessive urination and could not recall anything else he said about his symptoms other than experiencing thirst and fatigue.

Contrary to their contention, defendants failed to establish as a matter of law that plaintiff's failure to seek treatment for weeks following his visit to MASH Urgent Care constitutes a superseding, intervening event that severed any causal connection to defendants' alleged malpractice. Defendants failed to meet their initial burden

on the motion of establishing that plaintiff's delay in following up for treatment was an intervening act that was "extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from [defendants'] conduct" such that it could constitute "superseding act[s] which break[ ] the causal nexus" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]; see *Hain v Jamison*, 28 NY3d 524, 529 [2016]; *Carroll*, 218 AD3d at 1374).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**391**

**CA 24-00292**

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

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MARY PATRICIA ALLMAN, INDIVIDUALLY AND AS  
EXECUTOR OF THE ESTATE OF MICHAEL X. ALLMAN,  
DECEASED, CLAIMANT-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

ROSWELL PARK CANCER INSTITUTE CORPORATION,  
DEFENDANT-APPELLANT-RESPONDENT.  
(CLAIM NO. 136387.)

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CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR  
DEFENDANT-APPELLANT-RESPONDENT.

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

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Appeal and cross-appeal from an order of the Court of Claims (J. David Sampson, J.), entered February 2, 2024. The order granted in part and denied in part the motion of defendant for summary judgment dismissing the claim.

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

Memorandum: Claimant Mary Patricia Allman, individually and as executor of the estate of Michael X. Allman (decedent), commenced this medical malpractice and wrongful death action alleging that decedent's treating physician, employed by defendant Roswell Park Cancer Institute Corporation, failed to timely detect decedent's lung cancer. Defendant appeals from that part of an order denying in part its motion for summary judgment dismissing the claim. Claimant cross-appeals from that part of the order granting in part defendant's motion for summary judgment dismissing the claim. We modify the order by denying the motion in its entirety and reinstating the claim in its entirety.

"[A] defendant moving for summary judgment in a medical malpractice action has the [initial] burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; see *Campbell v Bell-Thomson*, 189 AD3d 2149, 2150 [4th Dept 2020]).

" "[T]he burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact only after the defendant . . . meets the initial burden . . . , and only as to the elements on which the defendant met the prima facie burden' " (*Bubar*, 177 AD3d at 1359).

Here, contrary to claimant's contention on her cross-appeal, we conclude that defendant met its initial burden on the motion through the submission of decedent's treating physician's expert affidavit, which was "detailed, specific and factual in nature" and addressed each negligence claim raised in claimant's bill of particulars (*Stradtman v Cavaretta*, 179 AD3d 1468, 1469 [4th Dept 2020]). Inasmuch as defendant met its prima facie burden on its motion with respect to deviation from the accepted standard of care and proximate causation, the burden shifted to claimant "to raise triable issues of fact by submitting an expert's affidavit both attesting to a departure from the accepted standard of care and that defendant['s] departure from that standard of care was a proximate cause of the [alleged] injur[ies]" (*Ziemendorf v Chi*, 207 AD3d 1157, 1157-1158 [4th Dept 2022]; see *Bubar*, 177 AD3d at 1359).

We further conclude that, in opposition to defendant's motion, claimant raised a triable issue of fact with respect to both deviation and proximate causation. We note that claimant's "expert affirmation is sufficient to raise an issue of fact, inasmuch as . . . it does not misstate[ ] the facts in the record and it is not vague, conclusory, [or] speculative" (*Fagnoli v Warfel*, 186 AD3d 1004, 1005 [4th Dept 2020] [internal quotation marks omitted]; cf. *Bubar*, 177 AD3d at 1362). Contrary to defendant's contention on its appeal, claimant's expert, a board-certified general medical oncologist, laid a sufficient foundation to opine as to the standards of care applicable to both diagnostic pulmonary biopsies and the frequency of nodule surveillance (see *Goldschmidt v Cortland Regional Med. Ctr., Inc.*, 190 AD3d 1212, 1215 [3d Dept 2021]; *Williams-Simmons v Golden*, 71 AD3d 413, 413 [1st Dept 2010]). Contrary to defendant's further contention on its appeal, the affidavit of claimant's expert raised triable issues of fact with respect to causation inasmuch as it "squarely oppose[d]" the treating physician's expert affidavit with respect to the significance of the target nodule, resulting in "a classic battle of the experts that is properly left to a jury for resolution" (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1258 [4th Dept 2019] [internal quotation marks omitted]; see *Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]).

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

**409**

**CAF 24-00223**

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

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IN THE MATTER OF SKY F.-M.J.

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MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ANGELICA J., RESPONDENT-APPELLANT.

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AMANDA L. DARBY, ESQ., ATTORNEY FOR THE CHILD, APPELLANT.

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

AMANDA L. DARBY, ROCHESTER, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (MARY WHITESIDE OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeals from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered January 9, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, *inter alia*, revoked a suspended judgment and terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother and the Attorney for the Child (AFC) appeal from an order by which Family Court, *inter alia*, revoked a suspended judgment, entered upon, *inter alia*, the admission of the mother that she had permanently neglected the subject child, and terminated the mother's parental rights with respect to that child. We affirm.

The mother and the AFC contend that the court erred in refusing to extend the suspended judgment (*see* Family Ct Act § 633 [b]). We reject that contention because we conclude that the mother "failed to demonstrate that 'exceptional circumstances' required extension of the suspended judgment" (*Matter of Cornelius L.N. [Cornelius N.]*, 117 AD3d 1487, 1487 [4th Dept 2014], *lv denied* 24 NY3d 901 [2014]; *see* Family Ct Act § 633 [b]; *Matter of Lestariyah A. [Demetrious L.]*, 89 AD3d 1420, 1420-1421 [4th Dept 2011]; *see generally* *Matter of Emily A. [Gina A.]*, 129 AD3d 1473, 1475 [4th Dept 2015]).

We also reject the contention of the mother and the AFC that

there is not a sound and substantial basis in the record for the court's determination that termination of the mother's parental rights is in the best interests of the subject child. Here, the mother concedes that the record supports the finding that she failed to comply with the terms of the suspended judgment. Although it is not dispositive, "a parent's noncompliance with the terms of [a] suspended judgment constitutes strong evidence that termination of parental rights is in a child's best interests" (*Matter of James D. [Leslie S.]*, 199 AD3d 1375, 1376 [4th Dept 2021] [internal quotation marks omitted]). Moreover, additional factors also support the conclusion that the court's determination is in the best interests of the child. Here, the court considered that the child had been in the same preadoptive foster care placement for the majority of her life, that the mother had repeatedly canceled visits due to a perceived lack of safety in her home, that the mother had not been able to hold steady employment or housing, and that the mother had not made significant progress in her mental health treatment. Additionally, the child's foster mother had already been facilitating sibling visits at her home and she testified that those visits would continue. Thus, a preponderance of the evidence supports the court's determination that it is in the child's best interests to terminate the mother's parental rights (see *Matter of Jenna D. [Paula D.]*, 165 AD3d 1617, 1619 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]; *Matter of Mikel B. [Carlos B.]*, 115 AD3d 1348, 1349 [4th Dept 2014]).

Further, contrary to the contention of the mother and the AFC, this is not a case in which new facts and allegations warrant remittal for a new dispositional hearing. "We may consider . . . new facts and allegations 'to the extent [that] they indicate that the record before us is no longer sufficient' to determine" the child's best interests (*Matter of Gena S. [Karen M.]*, 101 AD3d 1593, 1595 [4th Dept 2012], *lv dismissed in part & denied in part* 21 NY3d 975 [2013]; see also *Matter of Noah C. [Greg C.]*, 225 AD3d 1178, 1179-1180 [4th Dept 2024]). Here, the mother and the AFC contend that reports after the entry of the order on appeal call into question whether the child's foster mother will adopt the child. However, the most recent permanency report indicates that the child's placement remains preadoptive. Thus, we conclude that the record remains sufficient to determine that termination of the mother's parental rights is in the child's best interests (*cf. Noah C.*, 225 AD3d at 1179; *Matter of Shad S. [Amy C.Y.]*, 67 AD3d 1359, 1360 [4th Dept 2009]).

We next reject the contention of the mother and the AFC that the court abused its discretion when it denied the AFC's request for an adjournment to review discovery. "The granting of an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*James D.*, 199 AD3d at 1376-1377 [internal quotation marks omitted]). It is generally not an abuse of discretion for a court to deny an adjournment request if the party requesting the adjournment "fail[s] to demonstrate that the need for the adjournment . . . was not based on a lack of due diligence on the part of [that party] or [their] attorney" (*Matter of Latonia W. [Anthony W.]*, 144 AD3d 1692, 1693 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]). Here,

the AFC did not demonstrate that the basis for her adjournment request was not based on a lack of due diligence, inasmuch as the ongoing obligation of the prior Family Court Act § 1038 (b) demand had long expired and the AFC failed to make a new demand.

The contention of the mother and the AFC that the mother's right to a hearing before an impartial factfinder was violated because the court displayed bias by predetermining the outcome of her case is unpreserved for our review inasmuch as no party filed a motion for the court to recuse (see *Matter of Anthony J. [Siobvan M.]*, 224 AD3d 1319, 1319 [4th Dept 2024]; *Matter of Tartaglia v Tartaglia*, 188 AD3d 1754, 1756 [4th Dept 2020]; *Matter of Chromczak v Salek*, 173 AD3d 1750, 1750 [4th Dept 2019]).

The AFC's contention that the court violated the child's Fourteenth Amendment rights when it terminated the mother's parental rights with respect to the subject child but allowed one of her siblings to remain in the mother's care is also unpreserved for our review inasmuch as the contention is raised for the first time on appeal (see *Matter of Alexander G.R. [Kristin G.P.]*, 192 AD3d 1501, 1501 [4th Dept 2021]; see generally *Matter of Mary R.F. [Angela I.]*, 144 AD3d 1493, 1494 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]).

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

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

**410**

**CA 24-00180**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, AND HANNAH, JJ.

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JOHN BYRNE AND DEBRA BYRNE, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

DANA FINCH, D.O., AND OSWEGO HOSPITAL,  
DEFENDANTS-APPELLANTS.

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CONNORS LLP, BUFFALO (BRYAN P. KROETSCH OF COUNSEL), FOR  
DEFENDANT-APPELLANT DANA FINCH, D.O.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (GABRIELLE L.  
BULL OF COUNSEL), FOR DEFENDANT-APPELLANT OSWEGO HOSPITAL.

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

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Appeals from an order of the Supreme Court, Oswego County  
(Gregory R. Gilbert, J.), entered January 2, 2024. The order, among  
other things, denied in part defendants' motions for summary judgment.

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

Memorandum: Plaintiffs commenced this medical malpractice action  
against defendants, Oswego Hospital (Hospital) and Dana Finch, D.O.,  
seeking damages for injuries allegedly sustained by John Byrne  
(plaintiff) after he presented to the Hospital's emergency department  
with complaints of severe chest pain. Plaintiff was attended to by  
Finch, the physician in charge of the Hospital's emergency room at  
that time. Plaintiff was eventually transferred to another hospital  
that was equipped with a catheterization lab used for treating  
patients having a heart attack. He survived but sustained permanent  
damage to his heart. Plaintiffs allege, inter alia, that defendants  
failed to timely diagnose plaintiff's condition and failed to timely  
transfer him. Defendants separately moved for summary judgment  
dismissing the complaint. Supreme Court granted the motions with  
respect to plaintiffs' claims of negligent supervision and training  
and otherwise denied the motions. Defendants separately appeal from  
the order to the extent that it denied their respective motions. We  
affirm.

In moving for summary judgment in a medical malpractice action, a  
defendant has "the initial burden of establishing either that there  
was no deviation or departure from the applicable standard of care or

that any alleged departure did not proximately cause the plaintiff's injuries" (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017] [internal quotation marks omitted]). We conclude that defendants met their initial burden on their respective motions with respect to both issues and, thus, "the burden shifted to plaintiffs to raise triable issues of fact by submitting an expert's affidavit both attesting to a departure from the accepted standard of care and that defendants' departure from that standard of care was a proximate cause of the injur[ies]" (*Isensee v Upstate Orthopedics, LLP*, 174 AD3d 1520, 1522 [4th Dept 2019]; see *Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]).

Contrary to defendants' contentions, we conclude that plaintiffs raised triable issues of fact sufficient to defeat the motions by submitting, inter alia, an expert affidavit from an emergency room physician establishing that Finch "deviated from the applicable standard of care and that such deviation was a proximate cause of [plaintiff's injury]" (*Heinrich v Serens*, 217 AD3d 1320, 1322 [4th Dept 2023] [internal quotation marks omitted]; see *Leberman v Glick*, 207 AD3d 1203, 1205 [4th Dept 2022]). Plaintiffs' expert explained that, given plaintiff's symptoms at the time he presented to the emergency department, there was a high probability that he was suffering from myocardial infarction, also known as a heart attack. Plaintiffs' expert opined that, inter alia, Finch breached the standard of care in failing to recognize the significance of those symptoms which, in turn, delayed transfer to the other hospital and "diminished [plaintiff's] chance of a better outcome" (*Clune v Moore*, 142 AD3d 1330, 1331 [4th Dept 2016] [internal quotation marks omitted]; see *Leberman*, 207 AD3d at 1206; *Jeannette S. v Williot*, 179 AD3d 1479, 1481 [4th Dept 2020]).

Defendants specifically contend that the court erred inasmuch as plaintiffs failed to raise a triable issue of fact on negligence because their expert introduced a new theory of liability that Finch should have ordered serial EKGs. We reject that contention because, even assuming, arguendo, that the court relied on plaintiffs' expert's opinion with respect to serial EKGs, such opinion did not assert a new theory of liability for negligence (see generally *Flynn v Haddad*, 109 AD3d 1209, 1210 [4th Dept 2013]). In the complaint, plaintiffs alleged that defendants were negligent in "failing to more timely order medical and/or diagnostic tests," which was sufficient to encompass the expert's opinion identifying the specific tests that were required to meet the standard of care. We conclude that the conflicting expert opinions submitted by plaintiffs and defendants "presented a 'classic battle of the experts' precluding summary judgment" (*Jeannette S.*, 179 AD3d at 1481; see *Leberman*, 207 AD3d at 1206).

We have considered defendants' remaining contentions and conclude that they lack merit.

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**420**

**KA 23-00888**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

RODNEY CLYBURN, DEFENDANT-APPELLANT.

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NATHANIEL L. BARONE, PUBLIC DEFENDER, MAYVILLE (LYNN S. SCHAFFER OF COUNSEL), FOR DEFENDANT-APPELLANT.

JASON L. SCHMIDT, DISTRICT ATTORNEY, MAYVILLE (MICHAEL J. PISKO OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Chautauqua County Court (David W. Foley, J.), rendered May 5, 2023. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**421**

**KA 24-00759**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PAUL J. DURINKO, DEFENDANT-APPELLANT.

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NICHOLAS T. TEXIDO, BUFFALO, FOR DEFENDANT-APPELLANT.

VINCENT A. HEMMING, DISTRICT ATTORNEY, WARSAW (MATTHEW J. DILLON OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered March 6, 2023. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [7]) and assault in the second degree (§ 120.05 [3]), defendant contends that the enhanced sentence imposed following his violation of the terms of the plea agreement is unduly harsh and severe. Defendant, however, knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]; *People v Brown*, 229 AD3d 1150, 1150-1151 [4th Dept 2024]) and, because County Court advised defendant of the maximum sentence that could be imposed if he violated the plea agreement, that waiver encompasses his challenge to the severity of the enhanced sentence (*see People v Ney*, 229 AD3d 1251, 1252-1253 [4th Dept 2024], *lv denied* 42 NY3d 1021 [2024]; *People v Roberto*, 224 AD3d 1367, 1368 [4th Dept 2024]; *People v VanDeViver*, 56 AD3d 1118, 1119 [4th Dept 2008], *lv denied* 11 NY3d 931 [2009], *reconsideration denied* 12 NY3d 788 [2009]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**422**

**KA 24-00093**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

WILLIAM L. NEWTON, DEFENDANT-APPELLANT.

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ADAM AMIRAULT, BUFFALO, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Steuben County Court (Chauncey J. Watches, J.), rendered October 19, 2023. The judgment convicted defendant, upon a plea of guilty, of attempted rape in the first degree.

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**430**

**CA 24-01311**

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

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RICK NASH, PLAINTIFF-APPELLANT,

V

ORDER

JOSEPH S. COTE, III, ESQ., COTE & VAN DYKE, LLP,  
DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANTS.

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AARON ZIMMERMAN, SYRACUSE, FOR PLAINTIFF-APPELLANT.

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Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered March 14, 2024. The order dismissed the complaint against defendants Joseph S. Cote, III, Esq., and Cote & Van Dyke, LLP.

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**439**

**KA 23-00563**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ATREYU BOYKINS, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (LEO DRAWS, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered July 28, 2022. The judgment convicted defendant upon his plea of guilty of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that the waiver of the right to appeal is invalid and therefore does not preclude our review of defendant's challenge to the severity of his sentence (*see People v Wilson*, 201 AD3d 1354, 1354 [4th Dept 2022]), we perceive no basis in the record to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [b]*). We note that defendant's plea satisfied charges arising from multiple shooting incidents over a three-month period, including two counts of attempted murder in the second degree.

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**440**

**KA 22-01760**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DENISSE CRUZ, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CASEY S. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered December 23, 2021. The judgment convicted defendant, upon her plea of guilty, of sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a plea of guilty, of sexual abuse in the first degree (Penal Law § 130.65 [4]). We agree with defendant that her "purported waiver of the right to appeal is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant 'understood the nature of the appellate rights being waived' " (*People v Youngs*, 183 AD3d 1228, 1228 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020], quoting *People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; see *People v Kratz*, 231 AD3d 1529, 1529 [4th Dept 2024], *lv denied* 42 NY3d 1053 [2024]). We are therefore not precluded from reviewing defendant's challenge to the severity of her sentence. Nevertheless, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**442**

**KA 24-00052**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GLASTON GAINES, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered December 6, 2023. The judgment convicted defendant upon his plea of guilty of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]). Contrary to defendant's contention, we conclude on this record that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Bailey*, 230 AD3d 1543, 1543-1544 [4th Dept 2024], *lv denied* 42 NY3d 1034 [2024]; *People v Hudson*, 229 AD3d 1354, 1354 [4th Dept 2024], *lv denied* 42 NY3d 1020 [2024]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]). Defendant, relying on *People v Sutton* (184 AD3d 236, 244-245 [2d Dept 2020], *lv denied* 35 NY3d 1070 [2020]), contends that the waiver is invalid because it was included as part of the plea agreement as demanded by County Court rather than by the People, and the court failed to sufficiently articulate the reasons for its demand. This Court, however, has not adopted the rule created by the Second Department (*see People v Figueroa*, 230 AD3d 1581, 1583 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]). In any event, "the court here, unlike the court in *Sutton*, included the appeal waiver as a condition of the plea offer prior to accepting defendant's plea and articulated on the record that the appeal waiver was required in order for defendant to secure the benefit of the sentencing limitation promised by the court" (*id.*). We have considered defendant's remaining contentions regarding the waiver of the right to appeal and conclude that they are without merit.

Defendant next contends that the plea was involuntary because

remarks that he made at sentencing raised the affirmative defense of duress, requiring the court to conduct a further inquiry. Although defendant's valid waiver of the right to appeal does not preclude his contention that the plea was involuntarily made, he failed to preserve that contention for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction (see *People v Council*, 234 AD3d 1361, 1362 [4th Dept 2025]; *People v Edmonds*, 229 AD3d 1275, 1276 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]). The narrow exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply here because nothing that defendant said during the plea colloquy itself required the court to inquire further before accepting the plea (see *Council*, 234 AD3d at 1362; *Edmonds*, 229 AD3d at 1276). Contrary to defendant's assertion, "a trial court has no duty, in the absence of a motion to withdraw a guilty plea, to conduct a further inquiry concerning the plea's voluntariness 'based upon comments made by [the] defendant during . . . sentencing' " (*People v Brown*, 204 AD3d 1519, 1519 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]; see *Council*, 234 AD3d at 1362-1363; *Edmonds*, 229 AD3d at 1276). 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 [3] [c]; *Council*, 234 AD3d at 1363; *Edmonds*, 229 AD3d at 1276).

Defendant's valid waiver of the right to appeal precludes our review of his challenge to the severity of the sentence (see *People v Lopez*, 6 NY3d 248, 255-256 [2006]). Finally, defendant contends that the court failed to set forth its reasons for issuing a final order of protection pursuant to CPL 530.13 (4). Even assuming, arguendo, that defendant's contention survives the plea (see *People v Konieczny*, 2 NY3d 569, 574 [2004]) and the valid waiver of the right to appeal (see *People v Nicometo*, 137 AD3d 1619, 1620 [4th Dept 2016]), we conclude, and defendant correctly concedes, that he failed to preserve his contention for our review (see *People v Kulyeshie*, 71 AD3d 1478, 1479 [4th Dept 2010], *lv denied* 14 NY3d 889 [2010]; see generally *People v Nieves*, 2 NY3d 310, 315-317 [2004]; *People v Warren*, 222 AD3d 1423, 1423 [4th Dept 2023]). We decline to exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]; *Kulyeshie*, 71 AD3d at 1479).

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

**445**

**KA 21-01152**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRANDON CLARK, DEFENDANT-APPELLANT.

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PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (MICHAEL A. LABELLA OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered March 16, 2021. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's contention, County Court did not abuse its discretion in denying his motion to withdraw his plea of guilty after a hearing (see CPL 220.60 [3]). Defendant asserts that his plea was rendered involuntary by certain advice provided by defense counsel. However, both the hearing testimony from defendant's former defense counsel and defendant's own statements during the plea colloquy belie that allegation (see *People v Henderson*, 169 AD3d 1521, 1522 [4th Dept 2019], *lv denied* 33 NY3d 977 [2019]; see also *People v Parish*, 220 AD3d 1159, 1160 [4th Dept 2023], *lv denied* 40 NY3d 1040 [2023]). To the extent that defendant's hearing testimony conflicted with that of his former defense counsel, the court likewise did not abuse its discretion in resolving any credibility issues that were created (see *Henderson*, 169 AD3d at 1522; *People v Colon*, 122 AD3d 1309, 1310 [4th Dept 2014], *lv denied* 25 NY3d 1200 [2015]).

Assuming, arguendo, that defendant's waiver of the right to appeal does not encompass his present challenge to his sentence (see generally *People v Odle*, 233 AD3d 1502, 1503 [4th Dept 2024], *lv denied* 43 NY3d 965 [2025]), we conclude that the sentence is not unduly harsh or severe.

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**449**

**CAF 24-01170**

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

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IN THE MATTER OF FRED JACOBS, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

ANNABELLE RANDALL, RESPONDENT-RESPONDENT.

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

CHRISTINE G. KRUPA, NEW YORK MILLS, FOR RESPONDENT-RESPONDENT.

KACIE M. CROUSE, UTICA, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Herkimer County (Robert E. Pronteau, R.), dated April 30, 2024, in proceedings pursuant to Family Court Act article 6. The order, inter alia, dismissed the petitions for a modification of custody.

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

Memorandum: Petitioner father commenced this proceeding in January 2023 seeking to modify a custody order entered upon the parties' consent in September 2022 by granting him sole custody. The consent order granted the parties joint custody of their then-three-year-old son, with "primary residential custody" of the child to respondent mother. Following an evidentiary hearing, Family Court dismissed the father's modification petition on the ground that he failed to establish a change of circumstances warranting an inquiry into the best interests of the child, which was consistent with the position taken by the Attorney for the Child. We affirm.

"Where an order of custody and visitation is entered on stipulation, a court cannot modify that order unless a sufficient change in circumstances—since the time of the stipulation—has been established, and then only where a modification would be in the best interests of the child[ ]" (*Matter of McKenzie v Polk*, 166 AD3d 1529, 1529 [4th Dept 2018] [internal quotation marks omitted]; see *Matter of Berg v Stoufer-Quinn*, 179 AD3d 1544, 1544 [4th Dept 2020]). To warrant an inquiry into whether a change in custody is in the child's best interests, the change in circumstances must be significant (see *Matter of Aronica v Aronica*, 151 AD3d 1605, 1605 [4th Dept 2017]).

Here, the father alleged in his modification petition that a sufficient change in circumstances arose from the fact that the child,

who wore a diaper, was found to have a rash in his genital area at school on a day that he came from the mother's house. The petition further alleged that the child had been slapped by the mother's daughter, causing red marks on his cheeks. Even assuming, arguendo, that the father established those allegations at the hearing, we agree with the court that the alleged changes in circumstances were not significant enough "to warrant an inquiry into the child's best interests" (*Matter of Luce v Buehlman*, 218 AD3d 1243, 1244 [4th Dept 2023], *lv denied* 40 NY3d 908 [2023]).

Additionally, the father did not otherwise establish a change in circumstances. Although the father testified that the child occasionally had dirty hands, fingernails and feet while in the mother's care, the evidence at the hearing further demonstrated that the child's alleged hygiene problems existed before the father agreed to give the mother primary physical custody and thus did not constitute a change in circumstances (*see generally Matter of Williams v Reid*, 187 AD3d 1593, 1594 [4th Dept 2020]). Finally, while a deterioration of the relationship between parents may constitute a significant change in circumstances (*see Matter of Nowlan v Cunningham*, 211 AD3d 1524, 1525 [4th Dept 2022]), we note that the child has by all accounts thrived under the existing custodial arrangement notwithstanding the parties' hostility toward each other, and there is no indication in the record that the relationship is worse than it was before the prior order was entered (*see Matter of Brookover v Harris*, 217 AD3d 1411, 1412 [4th Dept 2023]).

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

**450**

**CAF 24-00567**

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

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IN THE MATTER OF CINDY A. NAAS, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

GARY P. WURTH, RESPONDENT-RESPONDENT.

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MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-APPELLANT.

JUST CAUSE, ROCHESTER (HENRY W. JONES, IV, OF COUNSEL), FOR  
RESPONDENT-RESPONDENT.

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Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered February 22, 2024, in a proceeding pursuant to Family Court Act article 4. The order denied the objections of petitioner to an order of a support magistrate.

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

Memorandum: Petitioner appeals from an order denying her objections to the order of the Support Magistrate, which had dismissed her petition seeking child support arrears. We affirm. Although petitioner submitted an order requiring respondent to, inter alia, pay weekly child support, petitioner's claim that respondent had failed to make the payments required by the support order was primarily based upon her own testimony regarding respondent's alleged nonpayment. Respondent, on the other hand, testified that he had complied with the support order by making payments in excess of what was required, including payments for the mortgage on the home that petitioner, respondent, and their children shared during the entire period that arrears allegedly accrued; weekly childcare; major home repairs; utilities, telephone, and internet; and certain educational expenses for the children. After a hearing, the Support Magistrate determined that petitioner's testimony regarding the arrears was not credible and thus concluded that petitioner "did not meet her burden of proving that [respondent] 'failed to pay support as ordered' " (*Matter of Bow v Bow*, 117 AD3d 1542, 1544 [4th Dept 2014]). Contrary to petitioner's contention, Family Court properly gave the credibility findings of the Support Magistrate "great deference" when denying petitioner's objections to the support order (*Matter of Gibson v Murtaugh*, 141 AD3d

1104, 1104 [4th Dept 2016]; see *Matter of Bashir v Brunner*, 169 AD3d 1382, 1383 [4th Dept 2019]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**452**

**CA 23-01919**

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

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HERNANDEZ TECHNOLOGY, INC., DOING BUSINESS AS FIRST  
CAPITAL, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BERNABE RIVERA, DEFENDANT-APPELLANT.

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RUPP PFALZGRAF LLC, ROCHESTER (KEVIN J. FEDERATION OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

BOND SCHOENECK & KING, PLLC, ROCHESTER (LAURA A. MYERS OF COUNSEL),  
FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered October 24, 2023. The order granted in part the motion of plaintiff for summary judgment and denied the cross-motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by striking from the thirteenth ordering paragraph the date of August 28, 2014, and substituting therefor the date of March 20, 2014, and as modified the order is affirmed without costs.

Memorandum: Defendant was employed by plaintiff, Hernandez Technology, Inc., doing business as First Capital (First Capital), as a sales representative from October 2010 until he was terminated in June 2018. In February 2020, First Capital commenced this action alleging breach of contract, tortious interference with business relationships, and defamation, and seeking damages and a permanent injunction. In August 2020, defendant answered and asserted counterclaims for, inter alia, breach of contract and violations of various Labor Law provisions governing the payment of wages. First Capital moved for summary judgment on its causes of action for defamation and tortious interference and for summary judgment dismissing defendant's counterclaims. Defendant cross-moved for, inter alia, summary judgment dismissing certain causes of action and First Capital's statute of limitations affirmative defense and for summary judgment on certain counterclaims.

In appeal No. 1, defendant appeals from an order granting in part First Capital's motion and denying defendant's cross-motion. Supreme Court also agreed with First Capital that, should defendant establish a breach of contract or Labor Law violation, he was limited to the

period between August 28, 2014 and May 13, 2015 for affirmative relief on those counterclaims. In appeal No. 2, First Capital appeals from an order granting its motion for leave to reargue its motion for summary judgment and, upon reargument, adhering to its prior determination and granting defendant leave to amend his answer.

Defendant entered into an employment agreement when he was hired by First Capital. The employment agreement contained non-compete, non-interference, and non-solicitation provisions. First Capital and defendant also entered into Compensation Agreements during defendant's employment. Under the 2013 Compensation Agreement, First Capital agreed to pay defendant monthly residuals "at a rate of 15% of the net income earned on each merchant account in agent's portfolio" and, in the 2015 Compensation Agreement, First Capital agreed to pay defendant "15% [r]esidual [i]ncome earned on existing portfolio." On May 13, 2015, a First Capital employee gave defendant an internal spreadsheet (spreadsheet), which defendant referred to as a "smoking gun," showing that First Capital reduced the revenue received from customers by 30% before calculating defendant's commission.

We reject defendant's contention in appeal No. 1 that the court erred in denying that part of his cross-motion seeking summary judgment on his counterclaims for breach of contract and violations of Labor Law §§ 193 and 198. Defendant contends that he submitted evidence establishing that First Capital took a "30% keep" of his commissions and therefore breached the Compensation Agreements and violated Labor Law §§ 193 and 198. Labor Law § 193 (1) prohibits employers from making any deductions from the wages of an employee except in limited circumstances. Where the employee succeeds on a Labor Law wage claim, the employee is entitled to an award of attorney's fees and possible liquidated damages, as defendant sought in his counterclaim under Labor Law § 198 (see § 198 [1-a]). Although we agree with defendant that he established as a matter of law that First Capital retained 30% of income from the merchants in defendant's portfolio before paying defendant's commission, there is an issue of fact whether First Capital violated the Compensation Agreements, and therefore the Labor Law provisions, by doing so. In particular, "net income" and "[r]esidual [i]ncome" are not defined in the Compensation Agreements, and defendant failed to establish that his construction "is the only one that can be fairly placed upon" the agreements (*Dan's Hauling & Demo, Inc. v GMMM Hickling, LLC*, 193 AD3d 1404, 1407 [4th Dept 2021]).

Likewise, we reject First Capital's contention in appeal No. 2 that the court erred in denying that part of its motion seeking summary judgment dismissing the Labor Law § 193 counterclaim. Although not entirely clear, First Capital appears to argue that, because there is a dispute whether it owed defendant any additional commissions or whether the commissions were improperly calculated, there is no actionable claim under Labor Law § 193. As noted above, Labor Law § 193 (1) prohibits employers from making any deductions from the wages of an employee except in limited circumstances, and wages are defined as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is

determined on a time, piece, *commission* or other basis" (§ 190 [1] [emphasis added]). As First Capital concedes, there is no dispute that defendant is entitled to commissions for sales he generated for First Capital. Such commissions were " 'vested and mandatory as opposed to discretionary and forfeitable' " (*Zinno v Frank J. Schlehr, M.D., P.C.*, 175 AD3d 843, 844 [4th Dept 2019]; see *Wachter v Kim*, 82 AD3d 658, 663 [1st Dept 2011]), and thus such commissions are considered wages under section 190 (see *Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 616-617 [2008], *rearg denied* 11 NY3d 751 [2008]; see generally *Ryan v Kellogg Partners Inst. Servs.*, 19 NY3d 1, 16 [2012]). First Capital failed to meet its burden of establishing that it did not make improper deductions from the commissions. While First Capital is correct that parties may agree "that the computation of a commission will include certain downward adjustments from gross sales, billings or receivables" (*Pachter*, 10 NY3d at 617), First Capital failed to establish as a matter of law that the parties agreed that defendant's commissions would be calculated after a 30% keep.

We further reject First Capital's contention in appeal No. 2 that the court erred in denying that part of its motion seeking summary judgment dismissing the Labor Law § 198 counterclaim. In 2021, the legislature enacted the No Wage Theft Loophole Act (Act), which amended Labor Law §§ 193 and 198 by including provisions that "[t]here is no exception to liability under [those] section[s] for the unauthorized failure to pay wages, benefits or wage supplements" (§ 193 [5]; § 198 [3]). Prior to the enactment of the Act, courts had held that Labor Law § 198 was not a substantive provision but merely provided the remedies available to a prevailing employee (see *Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d 457, 464 [1993], *rearg denied* 83 NY2d 801 [1994]; *Salahuddin v Craver*, 163 AD3d 1508, 1510-1511 [4th Dept 2018]). There is no dispute by the parties that section 198 now allows for a standalone cause of action to employees seeking relief. Inasmuch as the conduct alleged in defendant's counterclaims occurred before the effective date of the Act, the question is whether the Act should be applied retroactively. We conclude that it should be applied retroactively consistent with the legislature's intent, and we therefore depart from the First Department, which has held otherwise (see *Frances v Klein*, 231 AD3d 535, 536 [1st Dept 2024]; *Kanthan v Tagstone Tech., LLC*, 224 AD3d 593, 593 [1st Dept 2024]; *Raparathi v Clark*, 214 AD3d 613, 613-614 [1st Dept 2023]).

"Statutes are generally applied prospectively in the absence of express or necessarily implied language allowing retroactive effect" (*Dorfman v Leidner*, 76 NY2d 956, 959 [1990]; see *Matter of Gleason [Michael Vee, Ltd.]*, 96 NY2d 117, 122 [2001]). "[R]etroactive operation is not favored by the courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 584 [1998]; see *Gottwald v Sebert*, 40 NY3d 240, 258 [2023]). "However, remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose" (*Gleason*, 96 NY2d at 122). Factors to consider in determining whether a statute should be applied retroactively include "whether the [l]egislature had made a specific pronouncement about retroactive

effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be" (*id.*; see *Brothers v Florence*, 95 NY2d 290, 299 [2000]).

The legislature stated that the Act "shall take effect immediately" (L 2021, ch 397, § 5), which, although "not alone determinative, . . . does evince[ ] a sense of urgency" (*Brothers*, 95 NY2d at 299 [internal quotation marks omitted]). In addition, the legislature specifically characterized the Act as a "remedial amendment" (L 2021, ch 397, § 1), and the stated purpose of the Act was to "clarify that Article 6 of New York's Labor Law completely and without exception prohibits lack of distribution of earned wages" (Senate Introducer's Mem in Support of 2021 NY Senate Bill S858). The legislature stated that "the statute [has been] often interpreted extremely narrowly by courts who misconstrue or overlook its rights-affirming language" (*id.*). The legislature noted in particular the decision in *Gottlieb* that held that Labor Law § 198 was not a "substantive" provision and stated that it passed the Act "to clarify that wage theft is, and has always been, completely prohibited" (Senate Introducer's Mem in Support of 2021 NY Senate Bill S858). Thus, the legislative history shows that the purpose of the Act was to "clarify what the law was always meant to say and do" (*Majewski*, 91 NY2d at 585), which, in this case, was for section 198 to be a substantive provision aimed at preventing improper deductions from employee's wages and to "remediate the impact of [the] Court's decision[ ]" in *Gottlieb* (*Brothers*, 95 NY2d at 300). We therefore conclude that the remedial legislation "should be given retroactive effect in order to effectuate its beneficial purpose" (*Gleason*, 96 NY2d at 122; see *People ex rel. Forshey v John*, 75 AD3d 1100, 1101 [4th Dept 2019]).

Addressing next defendant's contention with respect to appeal No. 1 that the court erred in denying that part of his cross-motion seeking summary judgment on his Labor Law § 195 counterclaim, we reject that contention. That statute requires employers to provide employees with a statement with every payment of wages setting forth, inter alia, the "rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; [and] deductions" (§ 195 [3]). It further provides that, upon the request of an employee, "an employer shall furnish an explanation in writing of how such wages were computed" (*id.*). Defendant contends that the monthly reports he received from First Capital did not state the basis of the commissions and were therefore in violation of section 195. Those statements, however, showed that First Capital paid defendant a commission, and thus First Capital complied with the statute. Contrary to defendant's contention, First Capital was not required to include all the information needed for defendant to personally calculate his commission. Regarding defendant's contention that First Capital should have listed the 30% keep as a deduction, there is a triable issue of fact whether the 30% keep constituted a deduction.

Defendant next contends in appeal No. 1 that the court erred in limiting the time period from which he could recover unpaid wages. We agree in part. The court denied that part of defendant's cross-motion seeking summary judgment dismissing First Capital's affirmative defense of the statute of limitations and agreed with First Capital that defendant could recover affirmative damages for any breach of contract or Labor Law violation that occurred only between August 28, 2014 to May 13, 2015. We reject defendant's contention that the six-year statute of limitations for breach of contract (see CPLR 213 [2]) did not accrue until after he received the May 13, 2015 spreadsheet and discovered the 30% keep. That cause of action accrued upon the alleged breach by First Capital (see *Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]), regardless of whether defendant was unaware of the breach at the time it occurred (see *Marrow v Brighthouse Life Ins. Co. of NY*, 200 AD3d 1622, 1623 [4th Dept 2021]; *Brooks v AXA Advisors, LLC* [appeal No. 2], 104 AD3d 1178, 1180 [4th Dept 2013], *lv denied* 21 NY3d 858 [2013]). Defendant's reliance on CPLR 203 (g) (1) is misplaced inasmuch as it applies only "where the time within which an action must be commenced is computed from the time when facts were discovered or . . . could with reasonable diligence have been discovered," neither of which applies here. Defendant's "[k]nowledge of the occurrence of the wrong . . . is not necessary to start the [s]tatute of [l]imitations running in [a] contract [action]" (*Ely-Cruikshank Co.*, 81 NY2d at 403).

Here, defendant filed his answer with the counterclaims on August 27, 2020, meaning that, pursuant to the six-year statute of limitations for the breach of contract (see CPLR 213 [2]) and Labor Law counterclaims (see Labor Law § 198 [3]), any counterclaims that accrued prior to August 27, 2014 would be time-barred. We agree with defendant, however, that the court failed to account for the fact that the statute of limitations was tolled pursuant to executive orders issued during the COVID-19 pandemic (see generally *State of New York v Williams*, 224 AD3d 1356, 1357 [4th Dept 2024]; *Harden v Weinraub*, 221 AD3d 1460, 1461-1462 [4th Dept 2023]). We therefore conclude that defendant may recover affirmative damages for any breach that occurred dating back to March 20, 2014, and we therefore modify the order in appeal No. 1 accordingly.

We reject defendant's further contention that the court erred in determining that First Capital's alleged liability for the breach of contract and Labor Law causes of action ended on May 13, 2015, the day defendant obtained the spreadsheet. Where, as here, defendant was an employee at will, First Capital was entitled to prospectively change the terms of an employment agreement (see *Gertler v Davidoff Hutcher & Citron LLP*, 186 AD3d 801, 805-806 [2d Dept 2020]; *Gebhardt v Time Warner Entertainment-Advance/Newhouse*, 284 AD2d 978, 979 [4th Dept 2001]). Even if First Capital did not "change" the terms of the Compensation Agreements, when defendant remained in First Capital's employment after being notified of the way commissions were calculated, he was deemed to have agreed to that method of calculating commissions (see *Gertler*, 186 AD3d at 806-807; *Gebhardt*, 284 AD2d at 979; *Bottini v Lewis & Judge Co.*, 211 AD2d 1006, 1007-1008 [3d Dept 1995]).

Defendant further contends in appeal No. 1 that the court erred in denying that part of his cross-motion seeking summary judgment dismissing plaintiff's causes of action for breach of contract. We reject that contention. After finding that the covenant not to compete was invalid because it was overbroad, the court held that the non-interference and non-solicitation provisions were severable and partially enforceable as to those customers of First Capital developed by defendant while he was employed by First Capital. A restrictive covenant is enforceable if it "(1) is no greater than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public" (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388-389 [1999]). "Protection of customer relationships the employee *acquired* in the course of employment may indeed be a legitimate interest" (*id.* at 391; see generally *Gundermann & Gundermann Ins. v Brassill*, 46 AD3d 615, 616 [2d Dept 2007]). A restrictive covenant that is overly broad may be partially enforced to the extent necessary to protect the employer's legitimate interest (see *BDO Seidman*, 93 NY2d at 394; *Perella Weinberg Partners LLC v Kramer*, 230 AD3d 451, 452 [1st Dept 2024]; *Malcolm Pirnie, Inc. v Werthman*, 280 AD2d 934, 935 [4th Dept 2001]). Here, the court weighed the appropriate factors (see *BDO Seidman*, 93 NY2d at 394), and we conclude that it did not err in determining that paragraphs six and seven of the employment agreement were partially enforceable.

We have considered the parties' remaining contentions in appeal Nos. 1 and 2 and conclude that they are without merit.

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

**453**

**CA 24-01437**

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

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AUBREY L. COOK AND KATELYN J. MELLEN,  
INDIVIDUALLY AND IN THEIR CAPACITIES AS  
CO-ADMINISTRATORS OF THE ESTATE OF  
CECIL E. MELLEN, DECEASED, PLAINTIFFS-RESPONDENTS,

V

ORDER

DARRY R. CAIN, ET AL., DEFENDANTS,  
ANTONIO CASOLA AND KIM CASOLA, DEFENDANTS-APPELLANTS.

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BARCLAY DAMON LLP, SYRACUSE (KAYLA A. ARIAS OF COUNSEL), FOR  
DEFENDANTS-APPELLANTS.

MELVIN & MELVIN, PLLC, SYRACUSE (SUSAN E. OTTO OF COUNSEL), FOR  
PLAINTIFFS-RESPONDENTS.

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Appeal from a judgment of the Supreme Court, Jefferson County (Gregory R. Gilbert, J.), entered April 25, 2024. The judgment, *inter alia*, determined that plaintiffs are the lawful owners of the subject property.

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**455**

**CA 24-00716**

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

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IN THE MATTER OF DANIELLE TOPE, EXECUTIVE DIRECTOR OF  
SECURE TREATMENT AND REHABILITATION CENTER (STARC),  
PETITIONER-RESPONDENT,

V

ORDER

SHAQWAN R., RESPONDENT-APPELLANT.

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ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, SYRACUSE  
(JOSEPH M. BETAR OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF  
COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Oneida County (Charles  
C. Merrell, J.), entered March 19, 2024. The order granted the  
application of petitioner to administer medication to respondent.

Now, upon reading and filing the stipulation of discontinuance  
signed by the attorneys for the parties on April 24, 2025,

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**457**

**CA 24-01548**

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

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HERNANDEZ TECHNOLOGY, INC., DOING BUSINESS AS FIRST  
CAPITAL, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

BERNABE RIVERA, DEFENDANT-RESPONDENT.

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BOND SCHOENECK & KING PLLC, ROCHESTER (LAURA A. MYERS OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

RUPP PFALZGRAF LLC, ROCHESTER (KEVIN J. FEDERATION OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered June 7, 2024. The order granted plaintiff's motion for leave to reargue its motion for summary judgment, and upon reargument adhered to its previous determination, and granted defendant leave to amend his answer.

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

Same memorandum as in *Hernandez Tech., Inc. v Rivera* ([appeal No. 1] - AD3d - [June 6, 2025] [4th Dept 2025]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**460**

**KA 23-01444**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STEVEN P. KNORR, DEFENDANT-APPELLANT.

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KELIANN M. ARGY, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MERIDETH H. SMITH OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Vincent M. Dinolfo, J.), dated August 1, 2023. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining, *inter alia*, that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We affirm.

Initially, to the extent that defendant contends that he was not afforded due process because Supreme Court did not allow him to speak on his own behalf during the SORA hearing, we conclude that his contention is unpreserved for our review because he did not assert at the hearing that his due process rights were being violated (see *People v Jackson*, 203 AD3d 1680, 1682 [4th Dept 2022]; *People v Akinpelu*, 126 AD3d 1451, 1452 [4th Dept 2015], *lv denied* 25 NY3d 912 [2015]; see also *People v Mejia*, 189 AD3d 900, 901 [2d Dept 2020], *lv denied* 37 NY3d 910 [2021]).

Defendant further contends that the court erred in granting an upward departure from his presumptive classification as a level one risk. We reject that contention. It is well settled that a court may grant an upward departure from a sex offender's presumptive risk level when the People establish, by clear and convincing evidence (see Correction Law § 168-n [3]; *People v Gillotti*, 23 NY3d 841, 861-862 [2014]), the existence of "an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [risk assessment] guidelines" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]). An appropriate aggravating factor must "tend[ ] to establish a higher likelihood of

reoffense or danger to the community" (*People v Wyatt*, 89 AD3d 112, 121 [2d Dept 2011], *lv denied* 18 NY3d 803 [2012]; see *People v Norris*, 223 AD3d 1060, 1061 [3d Dept 2024]; *People v Sczerbaniewicz*, 126 AD3d 1348, 1349 [4th Dept 2015]).

Here, the People presented undisputed evidence that, while defendant was serving a term of interim probation imposed in connection with his conviction of sexual abuse in the first degree (Penal Law § 130.65 [3]), he was seen at a children's play area with another young child, the child and her mother moved in with defendant, and photographs were recovered from defendant's phone showing him and the child, in a bed together, partially undressed. In short, those facts, essentially establishing grooming behaviors, constituted an aggravating factor not adequately accounted for by the risk assessment instrument and "provide[ ] the basis for an upward departure inasmuch [they are] indicative that the offender poses an increased risk to public safety" (*People v Mangan*, 174 AD3d 1337, 1338 [4th Dept 2019], *lv denied* 34 NY3d 905 [2019] [internal quotation marks omitted]; see generally *People v Walker*, 208 AD3d 1190, 1192 [2d Dept 2022], *lv denied* 39 NY3d 906 [2023]; *People v May*, 77 AD3d 1388, 1388 [4th Dept 2010]).

In addition, contrary to defendant's contention, the court did not fail to weigh the aggravating and mitigating factors to determine whether the totality of the circumstances warranted an upward departure (see generally *Gillotti*, 23 NY3d at 861). We conclude that "[a]lthough the court did not explicitly set forth in its decision the alleged mitigating factors raised by defendant, there is nothing in the record . . . to suggest that the . . . court did not exercise [its] discretion in that respect" (*People v Morin*, 232 AD3d 1241, 1242 [4th Dept 2024], *lv denied* 43 NY3d 903 [2025] [internal quotation marks omitted]). Indeed, the court specifically concluded that a level one risk classification "does not—but [r]isk [l]evel [two] does—accurately convey the risk this [d]efendant presents in terms of dangerousness and risk of sexual recidivism" (see generally *Gillotti*, 23 NY3d at 861; *Morin*, 232 AD3d at 1242-1243).

Regardless, to the extent that defendant established the existence of valid mitigating factors not taken into account by the risk assessment instrument, we conclude that they were plainly outweighed by the aggravating factors (see *Mangan*, 174 AD3d at 1339; *Sczerbaniewicz*, 126 AD3d at 1349-1350).

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

**461**

**KA 23-01858**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALISSA L. REYNOLDS, DEFENDANT-APPELLANT.

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LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T.  
VALDINA OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 26, 2023. The judgment convicted defendant upon her plea of guilty of robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting her upon her guilty plea of robbery in the second degree (Penal Law § 160.10 [1]), defendant contends that she was deprived of effective assistance of counsel by defense counsel's failure to move to strike the People's certificate of compliance and failure to move to dismiss the indictment on speedy trial grounds. We reject that contention.

"In the context of a guilty plea, a defendant has been afforded meaningful representation when [the defendant] receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Moore*, 229 AD3d 1279, 1279-1280 [4th Dept 2024] [internal quotation marks omitted]). Here, the record establishes that defendant received a favorable plea and that defendant received meaningful representation (see *People v Brown*, 305 AD2d 1068, 1069 [4th Dept 2003], *lv denied* 100 NY2d 579 [2003]). We note that "[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]; see *People v Little*, 229 AD3d 1156, 1157-1158 [4th Dept 2024], *lv denied* 42 NY3d 971 [2024]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**466**

**KA 23-01760**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

B.N., DEFENDANT-APPELLANT.

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BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), dated May 4, 2023. The order denied the motion of defendant for resentencing pursuant to CPL 440.47.

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at Supreme Court.

Ann Dillon Flynn

Entered: June 6, 2025

Clerk of the Court

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

**471**

**CAF 24-00333**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND HANNAH, JJ.

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IN THE MATTER OF RAVEN A. SMITH,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

RICHARD P. LUCIVERO, RESPONDENT-APPELLANT.

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

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILDREN.

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Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered February 9, 2024, in a proceeding pursuant to Family Court Act article 8. The order committed respondent to a jail term of six months and stayed that commitment for two years on the condition that respondent not violate an order of protection.

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

Memorandum: In this proceeding pursuant to Family Court Act article 8, respondent father appeals from an order committing him to a jail term of six months upon Family Court's prior finding that he willfully violated a temporary order of protection in favor of petitioner mother. The commitment was stayed for a period of two years on the condition that the father not violate a subsequent order of protection. According the requisite deference to the court's credibility determinations at the fact-finding hearing (*see Matter of Schoenl v Schoenl*, 136 AD3d 1361, 1362 [4th Dept 2016]), we conclude that the court properly determined that the mother established by clear and convincing evidence that the father violated the terms of the temporary order of protection (*see Matter of Tristyn R. [Joshua R.]*, 145 AD3d 1611, 1611-1612 [4th Dept 2016]; *cf. Matter of Lanzafame v Jones*, 121 AD3d 1598, 1598 [4th Dept 2014], *lv denied* 24 NY3d 913 [2015]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**472**

**CAF 24-00849**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND HANNAH, JJ.

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IN THE MATTER OF AXEL S.

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WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

KRESHA S., RESPONDENT-APPELLANT.

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ORDER

TYSON BLUE, MACEDON, FOR RESPONDENT-APPELLANT.

ROY G. FRANKS, LYONS, FOR PETITIONER-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Wayne County (Richard M. Healy, J.), entered April 23, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**477**

**CA 24-01964**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND HANNAH, JJ.

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IN THE MATTER OF WILLIAM VASEY, PETITIONER-APPELLANT,

V

ORDER

LAKE SHORE FIRE DISTRICT, RESPONDENT-RESPONDENT.

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THOMAS J. JORDAN, ALBANY, FOR PETITIONER-APPELLANT.

COUGHLIN & GERHART LLP, BINGHAMTON (LARS P. MEAD OF COUNSEL), FOR  
RESPONDENT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County  
(Joseph D. Waldorf, J.), entered May 24, 2024, in a proceeding  
pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**478**

**CA 24-00823**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND HANNAH, JJ.

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IN THE MATTER OF PAUL F., PETITIONER-APPELLANT,

V

ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

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ADAM AMIRAULT, BUFFALO, FOR PETITIONER-APPELLANT.

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

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Appeal from an order of the Supreme Court, Oneida County (Gregory R. Gilbert, J.), entered April 2, 2024, in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued the commitment of petitioner to a secure treatment facility.

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**489**

**CAF 23-01396**

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

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IN THE MATTER OF JA'MOURE D.S.

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

MEMORANDUM AND ORDER

JASMINE M., AND ALEJANDRO D.S.,  
RESPONDENTS-APPELLANTS.  
(APPEAL NO. 1.)

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LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL),  
FOR RESPONDENT-APPELLANT JASMINE M.

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-APPELLANT ALEJANDRO D.S.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (LISA S. CUOMO OF COUNSEL),  
FOR PETITIONER-RESPONDENT.

STUART J. LAROSE, SYRACUSE, ATTORNEY FOR THE CHILD.

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Appeals from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered July 7, 2023, in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject child in the custody of petitioner.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent mother and Alejandro D.S. (respondent) each appeal in appeal No. 3 from an order determining that they abused their oldest child (child) and derivatively neglected two of the mother's other children, and they appeal in appeal Nos. 1 and 2 from orders determining that they derivatively neglected their two younger children. These abuse and neglect proceedings were commenced after the child, who was six months old at the time, sustained a critical head injury at the mother's home.

Respondent contends in appeal No. 3 that, although he is the child's biological father, he was not a person legally responsible for the care of the child inasmuch as he was not living with the child or spending substantial time in her residence at the time of her injury. We reject that contention. A respondent in an article 10 proceeding includes "any parent or other person legally responsible for a child's care who is alleged to have abused or neglected such child" (Family Ct

Act § 1012 [a]). A "[p]erson legally responsible" includes the child's custodian, guardian, [or] any other person responsible for the child's care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child" (Family Ct Act § 1012 [g]).

As the child's biological father, respondent "is a proper respondent without regard to whether he was also a person legally responsible for the child['s] care at the pertinent time" (*Matter of Nasir A. [Jamilla A.]*, 151 AD3d 959, 960 [2d Dept 2017]; see *Matter of Marcus JJ. [Robin JJ.]*, 135 AD3d 1002, 1003-1004 [3d Dept 2016]; *Matter of Erica B. [Quentin B.]*, 79 AD3d 415, 415 [1st Dept 2010], *lv denied* 16 NY3d 703 [2011]). Moreover, petitioner introduced evidence that respondent received mail at the apartment where the mother and child resided, that he kept clothing at the apartment, that he watched the child while the mother left the apartment to go shopping, and that one of the child's siblings stated that respondent lived with them. The evidence thus established that respondent was a person legally responsible for the child's care at the relevant time (see Family Ct Act § 1012 [g]; *Matter of Elijah AA. [Alexander AA.]*, 216 AD3d 1372, 1374 [3d Dept 2023]; *Matter of Grayson R.V. [Jessica D.]* [appeal No. 2], 200 AD3d 1646, 1647-1648 [4th Dept 2021], *lv denied* 38 NY3d 909 [2022]; see generally *Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]). Although the mother and respondent gave testimony to the contrary, Family Court rejected their testimony as incredible, and we accord great weight and deference to the court's credibility determinations inasmuch as they are supported by a sound and substantial basis in the record (see *Matter of Zakiyyah T. [Lamar R.]*, 221 AD3d 1443, 1445-1446 [4th Dept 2023], *lv denied* 41 NY3d 901 [2024]).

We reject respondent's alternative contention in appeal No. 3 that the court erred in finding that he abused the child. Family Court Act § 1046 (a) (ii) "provides that a prima facie case of child abuse or neglect may be established by evidence of (1) an injury to a child which would ordinarily not occur absent an act or omission of [the] respondents, and (2) that [the] respondents were the caretakers of the child at the timethe injury occurred" (*Matter of Philip M.*, 82 NY2d 238, 243 [1993]; see *Grayson R.V.*, 200 AD3d at 1648; *Matter of Nancy B.*, 207 AD2d 956, 957 [4th Dept 1994]). Section 1046 (a) (ii) "authorizes a method of proof which is closely analogous to the negligence rule of *res ipsa loquitur*" (*Philip M.*, 82 NY2d at 244).

We conclude that the court's finding that the child was abused by respondent is supported by a preponderance of the evidence in the record (see Family Ct Act § 1046 [b] [i]; *Matter of Jezekiah R.-A. [Edwin R.-E.]*, 78 AD3d 1550, 1551 [4th Dept 2010]). A pediatric surgeon testified that the child sustained non-accidental trauma to the head that required a craniectomy to relieve swelling and remove a blood clot. The surgeon testified that the child's injuries were inconsistent with a fall from a bed, as the mother had reported. Thus, petitioner established that the child suffered injuries that "would ordinarily not occur absent an act or omission of [the mother

and respondent]" (*Philip M.*, 82 NY2d at 243; see *Grayson R.V.*, 200 AD3d at 1648; *Matter of Damien S.*, 45 AD3d 1384, 1384 [4th Dept 2007], *lv denied* 10 NY3d 701 [2008]). Petitioner further established that the mother and respondent "were the caretakers of the child at the time the injur[ies] occurred" (*Philip M.*, 82 NY2d at 243), and the "presumption of culpability extends" to both of them (*Matter of Matthew O. [Kenneth O.]*, 103 AD3d 67, 74 [1st Dept 2012]). We conclude that respondent failed to rebut the presumption of culpability (see *Matter of Tyree B. [Christina H.]*, 160 AD3d 1389, 1389 [4th Dept 2018]; *Damien S.*, 45 AD3d at 1384).

We further reject respondent's contention in all three appeals that the court erred in finding that he derivatively neglected the child's siblings. Respondent was the father of two of the child's siblings, and petitioner established as a matter of law that respondent was a person legally responsible for the mother's other children (see Family Ct Act § 1012 [g]; *Matter of Paige K. [Jay J.B.]*, 81 AD3d 1284, 1284-1285 [4th Dept 2011]). The abuse of the child "is so closely connected with the care [of her siblings] as to indicate that [those children are] equally at risk" (*Matter of Marino S.*, 100 NY2d 361, 374 [2003], *cert denied* 540 US 1059 [2003]; see *Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849 [4th Dept 2010]). The abuse of the child further "demonstrates such an impaired level of judgment by [respondent] as to create a substantial risk of harm for any child in [his] care" (*Matter of Aaron McC.*, 65 AD3d 1149, 1150 [2d Dept 2009]; see *Matter of Wyquanza J. [Lisa J.]*, 93 AD3d 1360, 1361 [4th Dept 2012]). The court's finding of derivative neglect based on the evidence that respondent abused the child is supported by a preponderance of the evidence in the record (see Family Ct Act § 1046 [a] [i]; [b] [i]; *Matter of Deseante L.R. [Femi R.]*, 159 AD3d 1534, 1536 [4th Dept 2018]).

The mother contends in all three appeals that she was denied meaningful representation by her attorney's failure to retain and call a medical witness to rebut the evidence establishing the cause of the child's injuries. That contention "is impermissibly based on speculation, i.e., that favorable evidence could and should have been offered on [her] behalf'" (*Matter of Amoda D. [Jason D.]*, 112 AD3d 1367, 1368 [4th Dept 2013]). In particular, the mother failed to "demonstrate[ ] that there were 'relevant experts who would have been willing to testify in a manner helpful [and favorable] to [her] case[ ]' . . . , and her speculation that [her attorney] could have found an expert with a contrary, exculpatory medical opinion is insufficient to establish deficient representation" (*Matter of Julian P. [Colleen Q.]*, 129 AD3d 1222, 1224-1225 [3d Dept 2015]; see *Matter of Brooke T. [Justin T.]*, 156 AD3d 1410, 1412 [4th Dept 2017]). We have examined the mother's remaining allegations of ineffective assistance and conclude that the record establishes that " 'viewed in the totality of the proceedings, [the mother] received meaningful representation'" (*Matter of Bentleigh O. [Jacqueline O.]*, 125 AD3d 1402, 1404 [4th Dept 2015], *lv denied* 25 NY3d 907 [2015]; see *Matter*

*of Aubree R. [Natasha B.]*, 217 AD3d 1565, 1566-1567 [4th Dept 2023],  
*lv denied* 40 NY3d 905 [2023]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**490**

**CAF 23-01397**

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

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IN THE MATTER OF YASIR D.S.

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

MEMORANDUM AND ORDER

JASMINE M., AND ALEJANDRO D.S.,  
RESPONDENTS-APPELLANTS.  
(APPEAL NO. 2.)

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LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL),  
FOR RESPONDENT-APPELLANT JASMINE M.

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-APPELLANT ALEJANDRO D.S.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (LISA S. CUOMO OF COUNSEL),  
FOR PETITIONER-RESPONDENT.

STUART J. LAROSE, SYRACUSE, ATTORNEY FOR THE CHILD.

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Appeals from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered July 7, 2023, in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject child in the custody of petitioner.

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

Same memorandum as in *Matter of Ja'Moure D.S. (Jasmine M.)* ([appeal No. 1] - AD3d - [June 6, 2025] [4th Dept 2025]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**491**

**CAF 23-01400**

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

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IN THE MATTER OF ANTHONY M., JR., ZEMOURA M.,  
AND ZHAIRYN H.

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

MEMORANDUM AND ORDER

JASMINE M., AND ALEJANDRO D.S.,  
RESPONDENTS-APPELLANTS.  
(APPEAL NO. 3.)

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LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL),  
FOR RESPONDENT-APPELLANT JASMINE M.

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-APPELLANT ALEJANDRO D.S.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (LISA S. CUOMO OF COUNSEL),  
FOR PETITIONER-RESPONDENT.

STUART J. LAROSE, SYRACUSE, ATTORNEY FOR THE CHILDREN.

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Appeals from an order of the Family Court, Onondaga County  
(Christina F. DeJoseph, J.), entered July 7, 2023, in a proceeding  
pursuant to Family Court Act article 10. The order, among other  
things, placed the child Zemoura M. in the custody of petitioner.

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

Same memorandum as in *Matter of Ja'Moure D.S. (Jasmine M.)*  
([appeal No. 1] - AD3d - [June 6, 2025] [4th Dept 2025]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**493**

**CA 24-00540**

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

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PAUL WILLIAM BELTZ, PC, AND PAUL WILLIAM  
BELTZ, LLC, PLAINTIFFS-APPELLANTS,

V

ORDER

STEPHEN R. FOLEY AND STEVE FOLEY LAW FIRM,  
DEFENDANTS-RESPONDENTS.

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CATHERINE BELTZ FOLEY, NONPARTY RESPONDENT.  
(APPEAL NO. 1.)

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SCHRODER, JOSEPH & ASSOCIATES, LLP, BUFFALO (LINDA H. JOSEPH OF  
COUNSEL), FOR PLAINTIFFS-APPELLANTS.

PHILLIPS LYTTLE LLP, BUFFALO (SEAN C. MCPHEE OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

WOODS OVIATT, LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR NONPARTY  
RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Raymond  
W. Walter, J.), entered March 8, 2024. The order, insofar as appealed  
from, denied in part the motion of plaintiffs to, inter alia, compel  
disclosure.

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

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**494**

**CA 24-00541**

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

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PAUL WILLIAM BELTZ, PC, AND PAUL WILLIAM  
BELTZ, LLC, PLAINTIFFS-APPELLANTS,

V

ORDER

STEPHEN R. FOLEY AND STEVE FOLEY LAW FIRM,  
DEFENDANTS-RESPONDENTS.

-----  
CATHERINE BELTZ FOLEY, NONPARTY RESPONDENT.  
(APPEAL NO. 2.)

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SCHRODER, JOSEPH & ASSOCIATES, LLP, BUFFALO (LINDA H. JOSEPH OF  
COUNSEL), FOR PLAINTIFFS-APPELLANTS.

PHILLIPS LYTTLE LLP, BUFFALO (SEAN C. MCPHEE OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

WOODS OVIATT, LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR NONPARTY  
RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Raymond  
W. Walter, J.), entered March 11, 2024. The order granted the motion  
of nonparty Catherine Beltz Foley for a protective order vacating a  
notice of deposition.

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

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**502**

**KA 23-00779**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRYNDYN L. NEEL, DEFENDANT-APPELLANT.

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

JOHN NABINGER, DISTRICT ATTORNEY, WATERLOO (KEVIN URBAITIS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Seneca County Court (Barry L. Porsch, J.), rendered April 26, 2023. 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.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of endangering the welfare of a child (Penal Law § 260.10 [1]). Viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's sole contention on appeal that the verdict is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Sanderson*, 68 AD3d 1716, 1717 [4th Dept 2009], *lv denied* 14 NY3d 844 [2010]).

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**565**

**CA 24-00238**

PRESENT: BANNISTER, J.P., MONTOUR, OGDEN, AND KEANE, JJ.

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PAUL BARRETT, AS EXECUTOR OF THE ESTATE OF  
J. PATRICK BARRETT, DECEASED, PLAINTIFF-RESPONDENT,

V

ORDER

PEG ENTERPRISES, LLC, ED WEIBRECHT, INDIVIDUALLY  
AND AS A MEMBER OF PEG ENTERPRISES, LLC,  
DEFENDANTS-APPELLANTS,  
ET AL., DEFENDANT.

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LAW OFFICE OF JAMES M. BROOKS, LAKE PLACID (JAMES M. BROOKS OF  
COUNSEL), FOR DEFENDANT-APPELLANT PEG ENTERPRISES, LLC.

YOUNG/SOMMER LLC, ALBANY (J. MICHAEL NAUGHTON OF COUNSEL), FOR  
DEFENDANT-APPELLANT ED WEIBRECHT, INDIVIDUALLY AND AS A MEMBER OF PEG  
ENTERPRISES, LLC.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KEVIN E. HULSLANDER  
OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

GOLDBERG SEGALLA LLP, SYRACUSE (WILLIAM H. HYTHON OF COUNSEL), FOR  
DEFENDANT GREGORY PEACOCK, INDIVIDUALLY AND AS A MEMBER OF PEG  
ENTERPRISES, LLC.

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Appeals from an order of the Supreme Court, Onondaga County  
(Danielle M. Fogel, J.), entered January 11, 2024. The order granted  
the motion of plaintiff for leave to amend the complaint and denied  
the cross-motion of defendants for a change of venue.

Now, upon reading and filing the stipulation of discontinuance  
signed by the attorneys for the parties on March 12, 2025,

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**569**

**CA 24-00852**

PRESENT: BANNISTER, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

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RUPERT PAGE, PLAINTIFF-RESPONDENT,

V

ORDER

CLARK L. RITTERSBACH, DOING BUSINESS AS  
PLATINUM CLASSIC MOTORCARS, DEFENDANT-APPELLANT,  
ET AL., DEFENDANTS.

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PAUL M. ALOI, ROCHESTER, FOR DEFENDANT-APPELLANT.

ADAMS LECLAIR LLP, ROCHESTER (AASIYAH ALI OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Ontario County (Daniel J. Doyle, J.), entered March 22, 2024. The order, insofar as appealed from, granted in part the motion of plaintiff for, inter alia, partial summary judgment with respect to liability on his conversion cause of action and to preclude evidence on the ground of spoliation and denied the cross-motion of defendant Clark L. Rittersbach, doing business as Platinum Classic Motorcars, for summary judgment dismissing the complaint against him.

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court

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

**571**

**CA 24-00714**

PRESENT: BANNISTER, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

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ELISE V. HUNT AND CHRISTOPHER HUNT,  
PLAINTIFFS-RESPONDENTS,

V

ORDER

COUNTY OF ONTARIO, DEFENDANT-APPELLANT,  
ET AL., DEFENDANT.

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HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA (NATHAN J. THOMAS OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

THE BARNES FIRM, ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR  
PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Ontario County (Brian D. Dennis, A.J.), entered January 26, 2024. The order, insofar as appealed from, denied the motion of defendant County of Ontario to dismiss the amended complaint against it.

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

Entered: June 6, 2025

Ann Dillon Flynn  
Clerk of the Court